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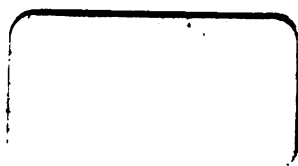
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AMERICAN AND ENGLISH

CONTAINING THE IMPORTANT CASES SELECTED FROM
THE CURRENT AMERICAN, CANADIAN,
AND ENGLISH REPORTS

THOROUGHLY ANNOTATED

EDITORS

WILLIAM M. MCKINNEY AND H. NOYES GREENE

ANN. CAS. 1917 B

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.
1917

BANCROFT-WHITNEY COMPANY
SAN FRANCISCO
1917

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1917 B.

McLELLAN

v.

FULLER.

Massachusetts Supreme Judicial Court—
March 11, 1915.

220 Mass. 494; 108 N. E. 180.

**Attorneys — Liability for Negligence —
Failure to Produce Available Wit-
nesses.**

Where, in tort for damages against an attorney for negligent conduct in the trial of an action brought by plaintiff, through the attorney, against his employer, the jury could find that there were available witnesses who would testify to facts to justify a finding that plaintiff was in the exercise of due care, and that the employer was negligent, and that the attorney failed to use the witnesses, the right to recover is for the jury, and a charge that there is not sufficient evidence to justify a verdict for plaintiff is properly refused.

[See note at end of this case.]

Same.

An instruction in an action against an attorney for negligent conduct in the trial of an action brought by him for plaintiff against a third person, as to the attorney's neglect to anticipate and provide against the death of a third person, is properly refused, where the attorney, though without fault in that regard, might have been lacking in due care in other respects.

[See note at end of this case.]

Same.

Where, in an action against an attorney for negligence in the trial of an action for plaintiff, suing his employer for a personal injury, the jury could find that the superintendent of the employer was negligent the defense of negligence of a fellow servant, or that without the concurring fault of a fellow servant the accident complained of would not have occurred, is not available to defeat the action.

[See note at end of this case.]

Ann. Cas. 1917B.—1.

**Appeal and Error — Questions Review-
able — Failure to Object or Except.**

A defendant requesting a directed verdict in his favor, may not have the accuracy of statements in the charge of the trial court and the legal effect adjudicated by the supreme judicial court, in the absence of failure to direct the attention of the trial court specifically to the complaint, and to allege exceptions.

Evidence — Deposition at Former Trial.

In an action against an attorney for negligence in the trial of an action for plaintiff, suing an employer for a personal injury, a deposition of a witness testifying at a former trial is admissible, where the witness in the deposition has more than merely corroborated the testimony at the trial.

**Depositions — Notice of Taking — Suf-
ficiency.**

A notice to take deposition of a witness about to go out of the commonwealth and not to return in time for trial, directed to "James C. McClellan," while the party's name was "James C. McLellan," and seasonably served, is sufficient, though subsequent notice, not seasonably served, correctly gave the name of the party.

Exceptions from Superior Court, Middlesex county: McLAUGHLIN, Judge.

Action by James C. McLellan, plaintiff, against Samuel A. Fuller, defendant. Judgment for plaintiff. Defendant alleges exceptions. MODIFIED.

The action was brought to recover damages for the negligence of the defendant in the conduct of an action brought by the plaintiff, through the defendant as an attorney, against the Moore Spinning Company.

R. W. Glogg and T. J. Clarke for plaintiff.
Robert Homans for defendant.

[499] *PIERCE, J.*—The jury rightly might have found that at the first trial there was available to the defendant, Fuller, as attorney for the plaintiff, the testimony of Deliz.

Lavalle, of Addie Puffer, of Margaret Frances Bean and of the plaintiff; that their testimony, if believed, established that the plaintiff was in the employ of the Moore Spinning Company; that one Ogley was an overseer exercising the duties of a superintendent; that the duty of the plaintiff required him to obey the reasonable orders of the overseer; that on March 29, 1905, he was directed by that officer to change over the gears on one of the spinning frames; that for that purpose the machine was stopped; that on receiving the order he took the gears to the end of the machine nearest the wall to adjust them to the spinning frame; that while he was thus engaged, with mind intent on his work, the machine started up without warning, or without any person's giving actual notice to him that it was to start; that he then received injuries; that the overseer, while standing by the side of the machine and observing the situation of the plaintiff, had ordered it to be started up; that there was a [500] rule of the mill that before starting a machine at rest for repairs notice should be given to those working on it; that notice was not given by the person directed to start the machine; and that when the overseer gave the order for starting up he knew the rule was not obeyed by the starter and also knew that the plaintiff was in a situation of danger against which without warning he could not guard or protect himself and at the same time do the allotted work.

Under such conditions the jury would have been justified in finding that the plaintiff was in the exercise of due care and that the defendant company was negligent. *Davis v. New York, New Haven, etc. R. Co.* 150 Mass. 532, 34 N. E. 1070. They might have found that the defendant Fuller was negligent in not putting before the jury at the first trial the testimony of the plaintiff; they also might have found him negligent in not giving the statutory notice, or, if they found that such notice was given, that he was negligent in not perpetuating testimony adequate to prove its service when proof thereof was required at the trial.

The rights of the defendant upon either hypothesis were carefully guarded in the judge's charge.

The defendant's first request, that "There is not sufficient evidence to justify a verdict for the plaintiff," for reasons stated could not have been given. The second request could not have been given because the question of the defendant's neglect to anticipate and provide against the death of his brother was not necessarily the only factor in the determination of the question of his due care. He might have been without fault in that regard and lacking in due care in other respects.

As the jury could have found the overseer superintendent negligent, the defence set up in the remaining requests is not open,—that a fellow servant was negligent, or that without the concurring fault of a fellow servant the accident would not have happened. *Myers v. Hudson Iron Co.* 150 Mass. 125, 137, 22 N. E. 631, 15 Am. St. Rep. 176. It follows that the judge rightly refused to give them.

The defendant in his brief states that the judge in his charge made assertions of fact not justified by testimony or agreement of parties, and argues that he is entitled as matter of law, because of his general request that a verdict be directed for the defendant, to have the accuracy of the statements determined and their [501] legal effect adjudicated by this court, notwithstanding his omission to direct the attention of the trial judge specifically to his complaint or to allege exceptions. This is not the rule of law. *Horrigan v. Clarksburg*, 150 Mass. 218, 22 N. E. 897, 5 L.R.A. 609. And the facts do not create a right within the exceptions to the rule as indicated in such cases as *Brightman v. Eddy*, 97 Mass. 478, 481; *Slater v. Rawson*, 1 Metc. (Mass.) 450; *Lyon v. Prouty*, 154 Mass. 488, 28 N. E. 908.

The defendant offered the deposition of Margaret Frances Bean, after having read to the jury the testimony given by this witness at the first trial. In that testimony, in connection with other statements not in conflict therewith, she said that at the moment of the accident she saw the overseer, Ogley, coming up the alley toward the place where the plaintiff was hurt. She made no statement as to who gave the order to start the machine, nor, except inferentially, as to Ogley's whereabouts at a time immediately preceding the accident. In her deposition she stated that she did not hear any one direct the machine to be started up, or call out that it was to be started; that she was beside the plaintiff and "in a position where she could have heard any one if they had hollered before starting up the machine."

She further deposed that she knew Ogley and did not hear him give any directions to any one to start the machine, and did not see him at the front of the machine.

This testimony contained in the deposition was of the greatest importance in that the jury, believing it, might accept it as a complete refutation of the charge that the overseer knowing the situation of the plaintiff ordered the machine to be started up without giving the customary warning.

A careful comparison of the testimony given at the trial with that set out in the proffered deposition shows the last to be more than merely corroborative of the first, and it should have been admitted in testimony unless rightly excluded on other

grounds than that it was merely corroborative.

The facts in connection with the taking of this deposition show that on November 15, 1912, the defendant Fuller applied to Harold A. Varnum, justice of the peace, to take the deposition of Margaret Bean (Margaret Frances Bean) about to go out of the Commonwealth and not to return in time for the trial; that the justice issued a notice, in the form directed, to James C. McClellan; [502] that this notice was duly and seasonably served in hand; that after service the officer found that the name of the defendant James C. McLellan, had been spelled in the notice McClellan rather than McLellan; that he notified counsel of the fact and thereafter on the same day the same justice of the peace issued another notice which was directed to James C. McLellan; that this last notice was left, but not seasonably, at the last and usual place of abode of the defendant; that on the next day, at the time and place appointed, the place being the office of the justice, all parties attended and participated in the taking of the deposition; that before the deposition was taken the plaintiff stated that he objected "for want of sufficient notice, in that the statutory allowance of time did not intervene between the giving of the notice and the time stated in the notice for the taking of the deposition; because of its being heard on Saturday and because of its being begun after four o'clock on Saturday afternoon." By an agreement "all informalities in form or manner of taking same" were waived except as above set out.

The original service was entirely good; the notice was delivered in hand to the defendant, and more than the statutory time intervened between the time of giving the notice and the time stated in the notice for the taking of the deposition; the fact that the officer, from an over abundance of caution, procured a new notice to issue did not make invalid the original service. All parties attended the hearing and an inspection of the deposition shows that they were fully heard. The objection taken to the taking of the deposition went to the limit of technical defence and should not be favored.

The exception to the refusal to admit in evidence the deposition must be sustained; all the others are overruled.

So ordered.

NOTE.

Liability of Attorney for Negligence or Breach of Duty.

I. Liability to Client Generally:

1. Degree of Care or Skill Required:
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- b. Attorney Not Insurer, 6.
- c. Ignorance of Law, 8.
- d. Negligence as Question of Law or Fact, 11.
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II. Negligence or Breach of Duty in Particular Matter:

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I. Liability to Client Generally.

1. DEGREE OF CARE OR SKILL REQUIRED.

a. In General.

An attorney is bound to use reasonable care and skill in the performance of his professional duties, and for a failure to do so he is liable to his client for any injury sustained by reason of his neglect.

England.—Godefroy v. Dalton, 6 Bing. 460, 19 E. C. L. 132; Shilcock v. Passman, 7 C. & P. 289, 32 E. C. L. 512; Parker v. Rolls, 14 C. B. 691, 78 E. C. L. 691; Hart v. Frame, 6 Cl. & F. 193, 3 Jur. 547.

United States.—Weimer v. Sloane, 6 McLean 259, 4 Am. L. Reg. 174, 29 Fed. Cas. No. 17,363; Marsh v. Whitmore, 21 Wall. 178, 22 U. S. (L. ed.) 482, *affirming* 1 Hask 391, 16 Fed. Cas. No. 9,122; National Sav. Bank v. Ward, 100 U. S. 195, 25 U. S. (L. ed.) 621; Spangler v. Sellers, 5 Fed. 332. See also Ex p. Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388.

Alabama.—Walker v. Goodman, 21 Ala. 647; Buckham v. Daniel, 56 Ala. 610; Teague v. Corbitt, 57 Ala. 543.

Arkansas.—Pennington v. Yell, 11 Ark. 227, 52 Am. Dec. 262.

California.—Gambert v. Hart, 44 Cal. 542.

Georgia.—Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; O'Barr v. Alexander, 37 Ga. 195.

Illinois.—Stevens v. Walker, 55 Ill. 151; Walker v. Stevens, 79 Ill. 193; Morrison v. Burnett, 56 Ill. App. 129; Sanitary Hair Goods Co. v. Elliott, 191 Ill. App. 563.

Indiana.—Reilly v. Cavanaugh, 29 Ind. 435; Jones v. White, 90 Ind. 255; Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826.

Kansas.—Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364.

Kentucky.—Humboldt Bldg. Assoc. v. Ducker, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073; Morehead v. Anderson, 125 Ky. 77, 100 S. W. 340.

Louisiana.—Thompson v. Lobdell, 7 Rob. 369.

Maine.—Wilson v. Russ, 20 Me. 421.

Maryland.—Cochrane v. Little, 71 Md. 328, 18 Atl. 698; Watson v. Calvert Bldg. etc. Assoc. 91 Md. 25, 45 Atl. 879.

Massachusetts.—Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Caverly v. McOwen, 123 Mass. 574.

Michigan.—Eggleston v. Boardman, 37 Mich. 14.

Mississippi.—Fitch v. Scott, 3 How. 314, 34 Am. Dec. 86; Grayson v. Wilkinson, 5 Smedes & M. 208; National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561.

Nebraska.—Reumping v. Wharton, 56 Neb. 536, 76 N. W. 1076.

New York.—Von Wallhoffen v. Newcombe, 10 Hun 240; Jaquiss v. Hagner, 72 N. Y. 605; Childs v. Comstock, 69 App. Div. 160, 74 N. Y. S. 643; Flynn v. Judge, 149 App. Div. 278, 133 N. Y. S. 794; Patterson v. Powell, 31 Misc. 250, 64 N. Y. S. 43, *affirmed* 68 N. Y. S. 1145; Rapuzzi v. Stetson, 160 App. Div. 150, 145 N. Y. S. 455.

Ohio.—Harter v. Morris, 18 Ohio St. 492.

Pennsylvania.—Riddle v. Poorman, 3 Pen. & W. 224; McWilliams v. Hopkins, 4 Rawle 382; Lynch v. Com. 16 Serg. & R. 368, 16 Am. Dec. 582; Cox v. Livingston, 2 Watts & S. 103, 37 Am. Dec. 486; Young v. Lindsay,

3 W. N. C. 169; Watson v. Muirhead, 57 Pa. St. 167, 98 Am. Dec. 213; Enterline v. Miller, 27 Pa. Super. Ct. 463.

Rhode Island.—Holmes v. Peck, 1 R. I. 242.

South Dakota.—Cranmer v. Brothers, 15 S. D. 234, 88 N. W. 105.

Tennessee.—Gaar v. Hughes, 35 S. W. 1092; Hill v. Mynatt, 59 S. W. 163.

Texas.—Fox v. Jones, 4 Wilson Civ. Cas. Ct. App. § 29, 14 S. W. 1007; Patterson v. Frazer, 100 Tex. 103, 94 S. W. 324, *reversing* 93 S. W. 146; Patterson v. Frazer, 79 S. W. 1077.

Washington.—Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

Wisconsin.—Malone v. Gerth, 100 Wis. 166, 76 N. W. 972.

The obligation extends to all services which the attorney assumes to perform in the course of his employment without regard to whether they are strictly included therein. Spangler v. Sellers, 5 Fed. 882. Attorneys are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. Citizens' Loan, etc. Assoc. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669. In Humboldt Bldg. Assoc. Co. v. Ducker, 111 Ky. 759, 64 S. W. 671, it was said: "While the rule in England seems to have been that an attorney is liable to his client only in case of gross incompetence, yet in this country a juster rule for the client, and one which the profession cannot reasonably find fault with, is that the attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment."

It has been said that an attorney is liable only for gross negligence or gross ignorance in the performance of his professional duties. Purves v. Landell, 12 Cl. & F. 91; Hill v. Finney, 4 F. & F. 616; Pitt v. Yalden, 4 Burr. 2060; Parker v. Rolls, 14 C. B. 691, 78 E. C. L. 691; Suydam v. Vance, 2 McLean 99, 23 Fed. Cas. No. 13,657; Evans v. Watrous, 2 Port. (Ala.) 205; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Wilson v. Russ, 20 Me. 421; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Hoover v. Shackelford, 23 Miss. 520; Morrill v. Graham, 27 Tex. 646; Stephens v. White, 2 Wash. (Va.) 203. While such seems to be the English rule with respect to the liability of a barrister (Swinfen v. Chelmsford, 5 H. & N. 890), with that exception it is probable that

the use of the expression "gross negligence" in that connection has been the result of verbal inaccuracy rather than that of a deliberate intention to question the rule that an attorney is liable for the want of ordinary care. Thus in *Goodman v. Walker*, 30 Ala. 497, 68 Am. Dec. 134, the court said: "Some law writers and some adjudged cases are guilty of inaccuracy in the employment of the phrase 'gross negligence.' Our own court fell into the error in the case of *Evans v. Watrous*, 2 Port. 205. It is there said that an attorney is not liable 'unless he has been guilty of gross negligence.' In the same paragraph it is asserted that he is 'bound to use reasonable care and skill,' and the meaning attributed by the writer of that opinion to the expression 'gross negligence' is the want or absence of 'reasonable care and skill.' Thus explained, that opinion defines the true measure of an attorney's duty and liability." In *Holmes v. Peck*, 1 R. I. 242, it was said: "We recognize the principle, which subjects an attorney for the want of ordinary skill and care in the management of the business intrusted to him, as anyone else, who professes any other art or mystery. The want of ordinary care and skill in such a person is gross negligence." In *Fox v. Jones*, 4 Wilson Civ. Cas. Ct. App. § 29, 14 S. W. 1007, it was said: "The attorney is held to the exercise of reasonable care and diligence, and the want of either constitutes gross negligence." In *Patterson v. Frazer* (Tex.) 79 S. W. 1077, after saying that "the rule which seems to hold an attorney liable only for gross negligence can hardly be reconciled with the more recent American authorities," the court continued: "Whether the want of such skill, prudence, and diligence as are possessed and commonly exercised by lawyers of ordinary skill and capacity, versed in the particular practice of the particular locality or subject, be regarded as gross negligence or not, it seems to us that the failure of a lawyer to possess and exercise them, when by such failure his client is damaged, by the great weight of modern authorities in America, renders the lawyer liable for such damages as proximately flow from such negligence."

Extraordinary care is not required in the absence of a special contract therefor, *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Strodtman v. Menard County*, 56 Ill. App. 120; *Morrison v. Burnett*, 56 Ill. App. 129; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. In *Humboldt Bldg. Assoc. Co. v. Ducker*, 111 Ky. 759, 64 S. W. 671, it was said that a bond executed by an attorney for the faithful performance of his duty as an examiner of titles "added nothing to the attorney's liability or undertaking." In *Babbitt v. Bumpus*, supra, it was

said: "A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract, when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract is made requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, the construction of statutes, and particularly those arising under our criminal and probate laws. Frequently we find the decisions of courts of last resort in the different states directly opposed to each other upon the same questions, and resting upon the same state of facts. These all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when employed under the usual implied contract."

The ordinary skill and ability which an attorney is bound to exercise have been defined as being those possessed by the average practitioner. *Spangler v. Sellers*, 5 Fed. 882; *Gambert v. Hart*, 44 Cal. 542; In re *Kruger*, 130 Cal. 621, 63 Pac. 31; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; *Gabbert v. Evans*, 184 Mo. App. 283, 166 S. W. 635. "Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. *Waugh v. Shunk*, 20 Pa. St. 130. The practice of law is not merely an art, it is a science which demands from all who engage in it, without detriment to the public, special qualifications which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science, there

is no attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. 'That part of the profession,' said Lord Mansfield, in *Pitt v. Yalden*, 4 Burr. (Eng.) 2060, 'which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected where they act to the best of their knowledge and skill. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client.' *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213; *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24 (34), 12 N. E. 88. An attorney who undertakes the management of business committed to his charge, thereby impliedly represents that he possesses the skill and that he will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession, in the conduct of business, such as he has undertaken." *Citizens' Loan, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 338, 8 L.R.A. 62.

There is no absolute standard of care or ability; and the learning, skill and ability required in any particular instance must have reference to the character of the business for which the attorney is retained. *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

The degree of care and skill required of an attorney is in no manner affected by the fact that his services are rendered gratuitously, *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662; *Stephens v. White*, 2 Wash. (Va.) 203; nor is it material that the attorney's fees have not been paid, *Eccles v. Stephenson*, 3 Bibb (Ky.) 517. Compare *Cavillaud v. Yale*, 3 Cal. 108, 58 Am. Dec. 388, wherein it was said: "In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained, without stating specially that a retaining fee was paid. But the averment here goes further, and shows that the employment or engagement of the defendant was in consideration of certain reasonable fees and rewards to be paid him. No future time is stated as having been agreed upon for the payment of the fee, and the inference must be, that it was to be paid before the services were rendered, because an attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. Therefore, the declaration averring that the fee was to be paid should also have averred the payment, as distinctly as the performance of

any other condition precedent is necessary to be stated."

Where a layman induces another to deal with him by falsely representing that he is a lawyer, he is held to just as strict a liability to the client as if he were in fact an attorney. *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Foulks v. Falls*, 91 Ind. 315. Compare *Wakeman v. Hazleton*, 3 Barb. Ch. (N. Y.) 148.

b. Attorney Not Insurer.

A lawyer is not an insurer. He undertakes only to avoid errors which no member of his profession of ordinary prudence, diligence and skill would commit, and is liable only where he fails to do so.

England.—*Lamphier v. Phipos*, 8 C. & P. 475, 34 E. C. L. 487; *Pitt v. Yalden*, 4 Burr. 2060.

United States.—*Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Equitable Trust Co. v. Smith*, 77 Fed. 677, 46 U. S. App. 561, 23 C. C. A. 394; *Eberhardt v. Harkless*, 115 Fed. 816.

Georgia.—*Cox v. Sullivan*, 7 Ga. 148, 50 Am. Dec. 386.

Illinois.—*Stevens v. Walker*, 55 Ill. 151; *Walker v. Stevens*, 79 Ill. 193.

Indiana.—*Nickless v. Pearson*, 81 Ind. 427; *Citizens' Loan, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826.

Kentucky.—*Humboldt Bldg. Ass'n v. Duckler*, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073.

Massachusetts.—*Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924.

Michigan.—*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Mississippi.—*Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86.

Nebraska.—*Reumping v. Wharton*, 56 Neb. 536, 76 N. W. 1076.

New York.—*Bowman v. Tallman*, 27 How. Pr. 212; *Hatch v. Fogerty*, 33 Super. Ct. 166; *Avery v. Jacob*, 59 Super. Ct. 585 mem. 15 N. Y. S. 564; *Harriman v. Baird*, 6 App. Div. 518, 39 N. Y. S. 592, affirmed without opinion 158 N. Y. 691, 53 N. E. 1126.

Ohio.—*Gallaher v. Thompson*, Wright 466.

Pennsylvania.—*Lynch v. Com.* 16 Serg. & R. 368, 16 Am. Dec. 582; *Stephens v. Downey*, 53 Pa. St. 424; *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213; *Youngman v. Miller*, 98 Pa. St. 196; *Harris v. Govett*, 3 W. N. C. 560; *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

Texas.—*Morgan v. Giddings*, 1 S. W. 369.

Virginia.—*Tuley v. Barton*, 79 Va. 387.

"If an attorney is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention, and with reasonable care, and to the best of his skill, he will not be responsible." *Malone v. Gerth*, 100 Wis. 166, 75 N. W. 972. In *Humboldt Bldg. Assoc. Co. v. Ducker*, 111 Ky. 759, 64 S. W. 671, it was said: "When one seeks and obtains admission to that profession dealing with so many important and involved affairs of men, and holds out his services to be engaged by those standing in need of such, he engages that he possesses to an ordinary extent the technical knowledge commonly possessed by those in the profession, and that he will give to the matters submitted to him such care and attention as is ordinarily given similar affairs by men of this profession. He does not agree, in the absence of special contract to that effect, that he will make no mistake of judgment. On the contrary, the law recognizes, in fixing this liability of the attorney, that human judgment is fallible. Courts, as well as lawyers, do disagree concerning the many matters about which each one may have a fairly fixed opinion. The law is a science, it is true, but an imperfect one, for the reason that it depends for exemplification and enforcement upon the imperfect judgments and consciences of men. Therefore when the attorney has used ordinary care in acquainting himself with the facts, his misjudgment as to the law thereon will not generally render him liable." Reviewing the English cases it was said in *O'Barr v. Alexander*, 37 Ga. 201: "Attorneys have intrusted to their management cases of difficulty and doubt, and it is not surprising that they commit mistakes of judgment in some instances. Such mistakes do not necessarily render them liable for the consequences. Says Lord Mansfield, in *Pitt v. Yalden*, 4 Burr. (Eng.) 2060: 'That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected, where they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it, by being charged with the debt which he was employed to recover for his client, from the person who stands indebted to him. Not only counsel but judges may differ or doubt, or take time to consider. Therefore, an attorney ought not to be liable in cases of reasonable doubt.' Again, 'An attorney is liable for the consequences of ignorance or nonobservance of the rules of practice of the court; for the want of care in the prepara-

tion of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction.' *Godefroy v. Dalton*, 6 Bing. 467, 19 E. C. L. R. 135. 'It seems too hard to say an attorney would be bound to construe the section as applicable when the judges of this court differ in opinion as to whether it is or not.' Per Coleridge, J., *Chapman v. Van Toll*, 8 El. & Bl. 407, 92 E. C. L. 407."

An attorney is not liable for a mistake or error of judgment where he acts honestly and in the exercise of ordinary care and reasonable skill and learning. *Pitt v. Yalden*, 4 Burr. (Eng.) 2060; *Jackson v. Clifton*, 66 Ala. 29; *Hinckley v. Krug* (Cal.) 34 Pac. 118; *Stevens v. Walker*, 55 Ill. 151; *Morrison v. Burnett*, 56 Ill. App. 129; *Hille-gass v. Bender*, 78 Ind. 225; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353; *Wilson v. Russ*, 20 Me. 421; In re *Shanley*, 57 Misc. 8, 107 N. Y. S. 913, *modified* 124 App. Div. 935, 109 N. Y. S. 434; *Lynch v. Com. 16 Serg. & R. (Pa.) 368*, 16 Am. Dec. 582; In re *Worrall*, 1 Del. Co. Rep. 377; *Meredith v. Woodward*, 16 W. N. C. (Pa.) 146; *Missouri, etc. R. Co. v. Ferris* (Tex.) 99 S. W. 896; *State v. North Shore Boom, etc. Co.* 55 Wash. 11, 107 Pac. 196, *modifying* 55 Wash. 1, 103 Pac. 426; *Malone v. Gerth*, 100 Wis. 166, 75 N. W. 972. "It must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill and with reasonable care and to the best of his knowledge, he will not be held responsible." *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621. In *Morrison v. Burnett*, 56 Ill. App. 129, it was said: "An attorney is required to use such skill and prudence as lawyers of ordinary ability and care would exercise, and for failing therein, he is liable to his client for any proximate loss thereby occasioned; but he is not answerable for an error of judgment upon nice or difficult points, nor for every mistake which may occur in practice." In *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134, it was said: "Law is certainly the most comprehensive of all the sciences; its mastery and practice the most intricate of all the professions. Change and progress, if not improvement, are observable at every epoch of its history. If, under these circumstances, members of the legal profes-

sion were held accountable for the consequences of each act which may be pronounced an error by the courts of the country, no one, I apprehend, would be found rash enough to incur such fearful risks. On the other hand, it surely cannot be successfully maintained, that lawyers are a privileged class, not responsible for any even the grossest want of skill. I hold that they, like all other professional men and artisans, impliedly stipulate that they will bring to the service of their clients ordinary and reasonable skill and diligence; and if they violate this implied stipulation, they are accountable to their clients for all injury traceable to such want of skill and diligence."

There is no implied agreement, in the relation of attorney and client, that the attorney will guarantee the success of a suit or other proceeding, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835. In the case first cited it was said: "There is no implied agreement in the relation of counsel and client, or in the employment of the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. (*Lanphier v. Phipos*, 8 C. & P. 475 [34 E. C. L. 475].) He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence and skill would commit. (*Montrion v. Jefferys*, Ky. and Mo. R. 317; S. C. 2 C. & P. 113 [12 E. C. L. 50].) It is not enough that doubts may be raised of the soundness of his opinion or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession, of ordinary skill, sagacity and prudence, caused by a decisiveness of reason and authority in its favor. (*Kemp v. Burt*, 4 B. & Ad. 424 [24 E. C. L. 93].) The practice of the law in reference to the right of compensation for professional exertions, although dependent on the exercise of intellect and study as its instruments, is subjected to the same rules as any other employment, even where the implements are of a more material kind, and not to any of either greater or less stringency. On the one hand, practitioners are bound to possess the skill and exercise the diligence and attention common to prudent members of their profession; and on the other, they are released from all liability as to consequences which, considering the fallibility of human reason, must necessarily be sometimes unforeseen. They are only chargeable with utter incompetency or want of ordinary care

in a particular case; therefore, when after using proper diligence, no member of the profession of ordinary skill and capacity could entertain a reasonable doubt of the propriety of a contrary view and conduct."

c. Ignorance of Law.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses, and will exercise, the skill and learning ordinarily possessed and employed by well-informed members of his profession in the conduct of the business which he has undertaken. *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669. And see the two preceding subdivisions of this note. Therefore, it is essential that he should know and apply those rules and principles of law which are well established and clearly defined in the elementary books, or which have been declared in judicial decisions in the jurisdiction wherein he practices, and duly reported and published for a sufficient length of time to have become known to those who exercise diligence in keeping pace with the literature of the profession. *Hillegass v. Bender*, 78 Ind. 225; *Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353; *Hatch v. Fogerty*, 33 Super. Ct. (N. Y.) 166; *Enterprise v. Miller*, 27 Pa. Super. Ct. 463. "An attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law. He must keep pace, so far as reasonable diligence and a fair amount of common sense will enable him to do so, with the literature of his profession and what the courts have decided." *Hill v. Mynatt* (Tenn.) 59 S. W. 163. For any loss resulting from the lack of this measure of professional duty and attainment the attorney is liable to his client.

England.—*Williams v. Gibbs*, 6 N. & M. 788, 2 Harr. & W. 241; *Hart v. Frame*, 6 Cl. & F. 193, 3 Jur. 547. See also *Cox v. Leech*, 1 C. B. N. S. 617, 87 E. C. L. 617, 3 Jur. N. S. 442.

Alabama.—*Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

California.—*Gambert v. Hart*, 44 Cal. 542.

Illinois.—*Stevens v. Walker*, 55 Ill. 151.

Indiana.—*Reilly v. Cavanaugh*, 29 Ind. 435; *Hillegass v. Bender*, 78 Ind. 225; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 145, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

Louisiana.—Breedlove v. Turner, 9 Mart. O. S. 353.

Massachusetts.—Varnum v. Martin, 15 Pick. 440.

New York.—A. B.'s Estate, Tuck. 247.

Pennsylvania.—McWilliams v. Hopkins, 4 Rawle 382; Enterline v. Miller, 27 Pa. Super. Ct. 463.

"Law is certainly the most comprehensive of all the sciences; its mastery and practice the most intricate of all the professions. Change and progress, if not improvement, are observable at every epoch of its history. If, under these circumstances, members of the legal profession were held accountable for the consequences of each act which may be pronounced an error by the courts of the country, no one, I apprehend, would be found rash enough to incur such fearful risks. On the other hand, it surely cannot be successfully maintained, that lawyers are a privileged class, not responsible for any even the grossest want of skill. I hold that they, like all other professional men and artisans, impliedly stipulate that they will bring to the service of their clients ordinary and reasonable skill and diligence; and, if they violate this implied stipulation, they are accountable to their clients for all injury traceable to such want of skill and diligence." Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134. "It is sufficient for the purposes of the case in hand to say that he must at least be familiar with the well-settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession." Enterline v. Miller, 27 Pa. Super. Ct. 463. In Citizens Loan, etc. Assoc. v. Friedley, 123 Ind. 145, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 160, it was said: "An attorney who undertakes the management of business committed to his charge, thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession, in the conduct of business, such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. . . . Thus it has been said: 'He is liable for the consequences of ignorance or nonobservance of the rules of practice of his court, for the want of care in the preparation of the cause for trial. Whilst, on the other hand, he is not answerable for error in judgment upon points

of new occurrence, or of nice or doubtful construction.' Godefroy v. Dalton, 6 Bing. 460, 19 E. C. L. 132; Chitty Con. 817; Dearborn v. Dearborn, 15 Mass. 316. It is his own fault, however, if he undertakes without knowing what he needs only to use diligence to find out, or applies less than the occasion requires. A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own state, but he is not to be charged with negligence where he accepts as a correct exposition of the law a decision of the supreme court of his own state, nor can he be held liable for a mistake in reference to a matter in which members of the profession, possessed of reasonable skill and knowledge, may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers." In Spangler v. Sellers, 5 Fed. 882, it was said: "This statute seems to be unambiguous in its terms, and it had been in existence for four years; and the knowledge of its provisions should ordinarily and reasonably have been possessed by one who undertook to conduct legal proceedings of that character; and the ignorance of or failure to apply such knowledge by the defendant was negligence."

"But attorneys do not profess to know all the law, or to be incapable of error or mistake in applying it to the facts of every case; even the most skilful of the profession would hardly be able to come up to that standard." National Sav. Bank v. Ward, 100 U. S. 195, 25 U. S. (L. ed.) 621; see also the preceding subdivision of this note.

In Montriou v. Jefferys, 2 C. & P. 113, 12 E. C. L. 50, the court said: "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." See also Shilcock v. Passman, 7 C. & P. 289, 32 E. C. L. 512; Lanphier v. Phipos, 8 C. & P. 475, 34 E. C. L. 487; Crosby v. Murphy, 8 Ir. C. L. (Eng.) 301; Ahlhauser v. Butler, 57 Fed. 121. The law does not require of an attorney "the possession of perfect legal knowledge." Spangler v. Sellers, 5 Fed. 882.

An attorney cannot be held liable for entertaining an action on an erroneous view of the law as to questions which are new or unsettled, or as to which the average well-informed members of his profession might fairly disagree in their application of the law.

England.—Godefroy v. Dalton, 6 Bing. 460, 19 E. C. L. 132; Kemp v. Burt, 1 N. & M. 262, 4 B. & Ad. 424, 24 E. C. L. 93.

United States.—Ahlhauser v. Butler, 57 Fed. 121; Eberhardt v. Harkless, 115 Fed. 816.

Illinois.—*Morrison v. Burnett*, 56 Ill. App. 129.

Indiana.—*Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

Kentucky.—*Humboldt Bldg. Assoc. v. Ducker*, 111 Ky. 759, 64 S. W. 671.

Louisiana.—*Breedlove v. Turner*, 9 Mart. O. S. 353.

Michigan.—*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

New York.—*Bowman v. Tallman*, 3 Abb. Dec. 182 note, 40 How. Pr. 1; *Poucher v. Blanchard*, 86 N. Y. 256; *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75; *Patterson v. Powell*, 31 Misc. 250, 64 N. Y. S. 43, *affirmed* 56 App. Div. 624, 68 N. Y. S. 1145.

Pennsylvania.—*Enterline v. Miller*, 27 Pa. Super. Ct. 463.

Tennessee.—*Hill v. Mynatt*, 59 S. W. 163.

Texas.—*Morrill v. Graham*, 27 Tex. 646.

"The fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, and the construction of statutes." *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585, wherein it was also said: "Frequently we find the decisions of courts of last resort in the different states directly opposed to each other upon the same questions, and resting upon the same state of facts. These all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when employed under the usual implied contract. Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of their performance under all the circumstances in the given case, before such responsibility attaches." In *Patterson v. Powell*, 31 Misc. 250, 64 N. Y. S. 43, *affirmed* 68 N. Y. S. 1145, wherein the negligence charged was the failure of an attorney to plead specially the statute of frauds, the court said: "Considering the state of the law and practice touching this subject at the time of the rendition of the services, it cannot be said that the

plaintiff was guilty of negligence. For more than half a century the courts of this state had consistently declared the statute available under a general denial. There were no authorities opposed to this view; for dicta, however much entitled to respectful consideration, are not recognized as authorities, will not be regarded by courts as adjudications, and are not binding on the tribunals that pronounce them. The plaintiff might well have reasoned that the court would not disturb what had been regarded by the profession for a long period as a well-settled principle of pleading. The plaintiff was called upon to pursue one of two courses. The one he followed had the support of authority, and his judgment cannot be impeached if he regarded the other as opposed to reason, principle, and authority. It does not follow that, because the court afterwards adopted a different view of the law, negligence must be imputed to the attorney. At most, it was but a mere misjudgment on a doubtful question of law, and an attorney cannot be held guilty of negligence in case of a reasonable doubt." In *Sellers v. Knight*, 185 Ala. 96, 64 So. 329, it was said: "Good faith and honest intention—complete exemption from selfish, fraudulent purpose—of attorneys in the attainment of opinions touching matters inviting their professional consideration are not impeached by mistakes or errors of judgment in premises. The ascertainment of the law or its application to concrete circumstances is not an exact science. To so impeach, something more must attend than an erroneous conclusion of law or of its application to the concrete matter under consideration. Even what would appear to some the plainest of cases may, without wrongful purpose so inspiring, appear to another to be the subject of serious doubt."

An attorney cannot be charged with negligence when he accepts, as a correct exposition of the law, a decision of the supreme court of his state. *Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482, *affirming* 1 Hask. 391, 16 Fed. Cas. No. 9,122; *Hastings v. Halleck*, 13 Cal. 203; *Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669. It has also been held that counsel cannot be convicted of negligence in yielding to the views of the judge presiding at the trial of the cause. "When a lawyer yields to the opinion of the presiding judge, and forbears to take an exception, he cannot be convicted of a want of professional skill, professional knowledge or professional diligence." *Pearson v. Darrington*, 32 Ala. 227. Nor, it seems, can want of professional skill be predicated on an attorney's proceeding to try a cause on a theory which is sustained by the court, even though it is contrary to

a principle of law. *Avery v. Jacob*, 59 Super. Ct. 585 mem. 15 N. Y. S. 564.

An attorney is not bound to possess knowledge of the laws of a foreign jurisdiction and will not be liable for error due to his ignorance thereof. *Fenaille v. Coudert*, 44 N. J. L. 286. In that case the court said: "In assuming the employment of plaintiffs, the skill and knowledge they professed must be considered with reference to the locality of their practice. In the absence of any express declaration on the subject, they will be presumed to have held themselves out as possessing such skill and knowledge as attorneys practicing [in the state of New York] might reasonably be supposed to possess, and no more. As attorneys of New York they are not to be presumed to know the laws of a foreign state. Nor did they impliedly undertake that they had such knowledge, by accepting an employment which . . . was in terms limited to drawing a contract in all respects binding between the parties."

d. Negligence as Question of Law or Fact.

Whether an attorney has been negligent in the performance of his professional duties is usually a question for the jury.

Alabama.—*Evans v. Watrous*, 2 Port. 205; *Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561.

Arkansas.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

California.—*Gambert v. Hart*, 44 Cal. 542.

Indiana.—*Walpole v. Carlisle*, 32 Ind. 415.

Maryland.—*Cochrane v. Little*, 71 Md. 323, 18 Atl. 693.

New York.—*Abeel v. Swann*, 21 Misc. 677, 47 N. Y. S. 1088; *O'Hara v. Brophy*, 24 How. Pr. 379; *Stein v. Kremer*, 112 N. Y. S. 1087; *Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. S. 475.

Pennsylvania.—*Hamsher v. Kline*, 57 Pa. St. 397.

South Carolina.—*Hogg v. Martin*, *Riley L.* 156.

Texas.—*Jinks v. Moppin*, 80 S. W. 390; *Patterson v. Frazer*, 100 Tex. 103, 94 S. W. 324, reversing 93 S. W. 146. And see the reported case. In *Cochrane v. Little*, 71 Md. 323, 18 Atl. 693, the rule was stated as follows: "In an action of this character against an attorney, it is the duty of the court to instruct the jury for what species or degree of negligence or want of skill the defendant is properly answerable, and what duty is imposed upon him by law, and leave them to determine, upon all the facts and circumstances of the case, whether the defendant has performed his duty, and if not, whether the neglect or want of skill was of a character or degree such as to render him liable, according to the definitions furnished by the instructions of the court. *Hunter v.*

Caldwell, 10 Q. B. 82, 59 E. C. L. 82; *Hatch v. Lewis*, 2 F. & F. (Eng.) 467." In *Pinkston v. Arrington*, supra, wherein the action was based on the alleged negligence of an attorney in examining a title it was said: "There is no evidence that he investigated the trial docket of the previous term, though less than six months had elapsed, for causes disposed of at that term. It is evident that an ordinary examination of this docket for the previous term either by reference to the index under exhibit 'W,' or of the cases then pending, or inquiry of the register, would have discovered to him that by a decree of that court, W. T. Williams had been deprived of all power to dispose of the land by sale or otherwise. Have the defendants given any satisfactory or reasonable excuse for this omission of duty? We think this question of facts should be left with the jury." In *Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. S. 475, it was held to be a question for the jury whether an attorney was guilty of negligence in advising his client to plead guilty when the indictment was insufficient and the offense had been compounded.

But where the facts are ascertained negligence becomes a question for the court. *Gambert v. Hart*, 44 Cal. 542. See also *Hastings v. Halleck*, 13 Cal. 203. In the case first cited it was said: "The negligence imputed to the defendant is, first, his failure to file and serve a proper notice of the motion for new trial; second, his submission of the motion before the statement in support of it had been settled or agreed to. At the trial the plaintiff called the witness, Benham, to prove that these acts amounted to negligence in the defendant, as an attorney. But the court excluded the evidence, and this ruling is assigned as error. The witness was not called to prove any fact in the case, and his evidence, if admitted, would have been only an expression of his opinion as an attorney, that the alleged acts or omissions of the defendant amounted to negligence in law. This was a question for the court, and not for the witness to decide. The facts being admitted or proved, it was a question of law for the court whether they establish negligence in the defendant. The evidence was properly excluded." So in *Castner v. Gray*, 54 Colo. 551, 131 Pac. 404, wherein it was alleged that an attorney was negligent in proceeding with a cause without procuring the service of process, it was held to be a question of law whether an appearance dispensed with the necessity of showing process.

2. LIABILITY FOR FRAUD OR UNFAIR DEALING.

The duty of an attorney to his client involves not only skill and care, but also the observance of the utmost good faith. Ex p.

Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388; Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364; In re Egan, 22 S. D. 355, 117 N. W. 874. See also Asher v. Beckner, 41 S. W. 35, 19 Ky. L. Rep. 521. National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561. That duty is subject always however to the qualification that the duty of fidelity to the client is never to be so interpreted as to involve an obligation to waive the fair operation of the law or to defeat the ends of justice. Ex p. Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388; Sprague v. Moore, 136 Mich. 426, 99 N. W. 377. "It would be deplorable, indeed, if a lawyer felt that he was under an obligation to his client to maintain positions which did not accord with his own notions of law and justice, simply because they tended to his client's advantage. The lawyer owes a duty to the court, to himself, and to society, as well as to his client." Sprague v. Moore, *supra*.

What constitutes a breach of the obligation of an attorney in respect to good faith and fair dealing toward his client is in the main so involved in the general duties arising out of the relation as to be outside the scope of present discussion. One illustration of the doctrine is to be found in the rule which forbids an attorney to purchase from the adverse party the subject-matter of litigation in which he is employed. See the note to Garceau v. McNamara, Ann. Cas. 1915C 951. On the same principle an attorney is precluded from acting adversely to a former client in the same general matter. See the note to Peirce v. Palmer, Ann. Cas. 1912B 181. Likewise in all dealings between attorney and client the former is held to the strict obligations of a fiduciary relation. See 2 R. C. L. tit. *Attorneys at Law*, p. 966.

An attorney is liable to his client for any loss sustained by the latter in consequence of the attorney's fraud. McLead v. Applegate, 127 Ind. 349, 26 N. E. 830; Manley v. Felty, 146 Ind. 194, 45 N. E. 74; Krause v. Lloyd, 100 Ia. 666, 69 N. W. 1062; Hooker v. Axford, 33 Mich. 453; Taylor v. Young, 56 Mich. 285, 22 N. W. 799; Hoopes v. Burnett, 26 Miss. 428; Reigal v. Wood, 1 Johns. Ch. (N. Y.) 402; Loeff v. Lawton, 97 N. Y. 478; Heilbronner v. Douglass, 32 Tex. 215; Porter v. Kruegel (Tex.) 155 S. W. 174; Roller v. McGraw, 63 W. Va. 462, 60 S. E. 410. See also the following cases wherein the rule was recognized but it was held that no fraud was shown: Williams v. Reed, 3 Mason 405, 29 Fed. Cas. No. 17,733; Robertson v. Chapman, 152 U. S. 673, 14 S. Ct. 741, 38 U. S. (L. ed.) 592; Phillips v. Rhodes, 2 Colo. App. 70, 29 Pac. 1011; Bachman v. Goldmark, 48 Super. Ct. (N. Y.) 549; Dewitt v. Herron, 39 Tex. 675. Thus

an attorney has been held liable in damages to his client for failing to impart information as to matters of fact. Baker v. Humphrey, 101 U. S. 494, 25 U. S. (L. ed.) 1065; L'Amoureux v. Vandenburg, 7 Paige (N. Y.) 316, 32 Am. Dec. 635. In the case first cited it was said: "It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. Hoopes v. Burnett, 26 Miss. 428; Jett v. Hempstead, 25 Ark. 462; Foy v. Cooper, 2 Q. B. 937 [42 E. C. L. 937]." In Downard v. Hadley, 116 Ind. 131, 18 N. E. 457, it was said: "It was the appellant's duty, when he ascertained the defect in the title which he was employed to examine and perfect, to inform his client, and to take immediate and diligent steps to perfect it for the latter's benefit." So in Taylor v. Blacklow, 3 Bing. N. Cas. 235, 32 E. C. L. 100, an attorney was held liable in damages to his client for the disclosure to a third person of a defect in the client's title discovered by the attorney in the course of his employment.

Fraudulent misstatements of fact or law made by an attorney to his client will if damage to the latter results sustain an action for damages. Hezelrigg v. Brenton, 2 Duv. (Ky.) 525; Wheaton v. Newcombe, 48 Super. Ct. (N. Y.) 215; Allen v. Frawley, 106 Wis. 638, 82 N. W. 593; Hubbard v. McLean, 115 Wis. 9, 90 N. W. 1077. In Allen v. Frawley, *supra*, it was said: "Whatever may be the rule as to intentional misstatements of the law as between persons upon parity with each other, we cannot for a moment assent to the proposition that courts of equity or law are not to protect the trusting client against such acts on the part of her attorney. In the whole realm of business transactions hardly any act presents more of moral turpitude nor more likelihood of effective fraud than the intentional and self-profiting misinformation as to the law from a trusted attorney to his client, relying on him, as she must, for guidance and protection. It is gratifying to find few, if any, cases where the direct question has been passed on by courts. That fact speaks eloquently the response which lawyers, English and American, have given to the high responsibilities thrust upon them by the opportunities and temptations of their confidential and influential relations with their clients. Courts have hardly had to deal with anything more aggravated than omission to advise clients against the attorney's own interest, or honestly mistaken statements of the law; but there has been, as a rule, no hesitation in declaring even these sufficient to defeat transaction from which the attorney benefits at the expense of his client. . . . This court is not dis-

posed to relax or confuse the niceties of a code of ethics which for so many centuries has, with few exceptions, protected and justified the intrusting of vast property rights and most sacred interests to the care of lawyers, without thought or precaution as to their pecuniary responsibility. And we hold that the allegations of misrepresentation and misstatement of rules of law, if proved as set forth, would constitute actionable fraud."

3. LIABILITY FOR UNAUTHORIZED ACT.

a. In General.

When an attorney undertakes, without his client's consent, to step outside the bounds of his implied authority, he does so at his own risk, and is responsible to the client for any injury sustained by reason of the unauthorized act. *Jones v. Wolcott*, 2 Allen (Mass.) 247; *Coopwood v. Baldwin*, 25 Miss. 129. See also *Fitch v. Scott*, 3 How. (Miss.) 319, 34 Am. Dec. 86; *Armstrong v. Craig*, 18 Barb. (N. Y.) 387; *Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431. Thus in *Coopwood v. Baldwin*, supra, it was said: "When the plaintiff in error as attorney for Baldwin & Gray, without authority from them, took the responsibility of dismissing their suit against Smith, and received in payment of it, from Smith, claims upon other parties, he became liable prima facie in an action on the case for the amount of their claim against Smith, which liability he could only discharge by showing that a judgment, if rendered on the claim at the regular trial term of the suit, would have been unavailing and valueless. There is no such proof in the record, but the evidence would seem to warrant a contrary conclusion."

Where an attorney has been instructed by his client, and such instructions do not conflict with the attorney's duty as an officer of the court, it is safer for counsel to follow the client's instructions so far as the rules of law will permit. *Nave v. Baird*, 12 Ind. 318; *Harris's Appeal* (Pa.) 6 Atl. 761. In *Nave v. Baird*, supra, it was said: "It is often very difficult for an attorney to determine, in a difficult, critical case, the proper steps to be taken in its prosecution or defense. A small circumstance, a slight injudicious move, may have an extremely prejudicial influence. A change of venue, injudiciously taken, may be construed to imply a consciousness of a bad cause; and an unsuccessful attempt to prove facts affecting prejudicially the character of the opposite party, or any of his witnesses, may so recoil as to turn the scale, in a doubtful case, against the party attempting it. In such

cases, it is the duty of the attorney to advise his client to the best of his judgment; and it is generally the wiser course for the client to act upon the advice so given; but if he is unwilling to do so, it is safer for the attorney to follow the instructions of his client, so far as the rules of law may permit. But if he does not do so, and the client sues for damages, it will devolve upon him to show, presumptively, that he was injured by the course pursued by the attorney, in order to recover more, at least, than nominal damages."

An attorney is liable for damage resulting from a failure to follow the lawful instructions of his client. *O'Halloran v. Marshall*, 8 Ind. App. 394, 35 N. E. 926; *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Armstrong v. Craig*, 18 Barb. (N. Y.) 387; *Read v. Patterson*, 11 Lea (Tenn.) 431; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App. § 29, 14 S. W. 1007. See also *Whitney v. Abott*, 191 Mass. 59, 77 N. E. 524. In *Gilbert v. Williams*, supra, the court said: "It would be unnecessary in this case, were it practicable, to define precisely the kind of neglect, for which an attorney is responsible to his client. It will be sufficient to decide this case, that whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible. Let the claim of the plaintiff in the action before us be tried by this rule. In February, or March, 1804, the plaintiff enclosed a copy of a note against Charles Willard to the defendant, informing him that he wished to have the contents collected; that he considered the debt as precarious; and requesting to have it secured immediately by attaching Willard's property. The instructions were to have the debt immediately secured by attaching the property. Such instructions he had a right to give; and it was the duty of the defendant, if he undertook the trust of collecting the debt for the plaintiff, to obey them. He did undertake it; and on the 15th of the same March informed the plaintiff by letter, that he had seen Willard, who, he said, was to continue in business, and that he had assured him, if the note was sent to him (the defendant), he (Willard) would pay it. On the 20th of March, the note was enclosed and sent by the plaintiff to the defendant, without any new instructions, further than as to the manner of remitting the money. From this statement of the facts, it is manifest that the instructions of the plaintiff were disobeyed." Thus an attorney, when so instructed by his client, must bring suit. *Cox v. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486. But see *Hogg v. Martin*, *Riley L.* (S. C.) 156, wherein it was held that an attorney cannot be guilty of neg-

ligence in forbearing to bring a suit, where the parties had agreed to leave one of the matters in dispute to arbitration, the decision of which would render an action unnecessary.

In like manner an attorney is liable for a failure to put a claim into judgment when instructed so to do. *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Hett v. Pun Pong*, 18 Can. Sup. Ct. 290. So, an attorney should comply with his client's instructions as to the mode of remitting an amount collected. *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268; *Kimmell v. Bittner*, 62 Pa. St. 203.

While it is presumed that an attorney appearing for a party not served with process is authorized so to do (see 2 R. C. L. tit. *Appearances*, p. 325) an unauthorized appearance is not a nullity (Id. p. 326). While such an unauthorized act will on familiar principles of agency render the attorney liable, the resultant damage is minimized by the prevailing holding that the appearance and the proceedings had thereon may at any time be vacated on motion.

England.—*Bayley v. Buckland*, 1 Exch. 1, 11 Jur. 564, 5 Dowl. & L. 115; *Hambridge v. De La Crouée*, 3 C. B. 742, 54 E. C. L. 742.

United States.—*Shelton v. Tiffin*, 6 How. 163, 12 U. S. (L. ed.) 387; *Field v. Gibbs*, Pet. (C. C.) 155, 9 Fed. Cas. No. 4,766; *Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 U. S. (L. ed.) 52.

Alabama.—*Wheeler v. Bullard*, 6 Port. 352.

Arkansas.—*Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737.

Iowa.—*Piggott v. Addicks*, 3 G. Greene 427, 56 Am. Dec. 547; *Harsley v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520.

Kansas.—*Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

Kentucky.—*Atkinson v. Howlett*, 11 Ky. L. Rep. 364.

Louisiana.—*Walworth v. Henderson*, 9 La. Ann. 339; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424.

Maryland.—*Munnikuyson v. Dorsett*, 2 Har. & G. 374; *Fowler v. Lee*, 10 Gill & J. 358, 32 Am. Dec. 172.

Massachusetts.—*Jones v. Wolcott*, 2 Allen 247; *Smith v. Bowditch*, 7 Pick. 137.

Michigan.—*Arno v. Wayne Circuit Judge*, 42 Mich. 362, 4 N. W. 147.

Mississippi.—*Schirling v. Scites*, 41 Miss. 644.

New Hampshire.—*Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Smyth v. Balch*, 40 N. H. 363.

New Jersey.—*Hendrickson v. Hendrickson*, 15 N. J. L. 102; *Ward v. Price*, 25 N. J. L. 225.

New York.—*Allen v. Stone*, 10 Barb. 547; *Armstrong v. Craig*, 18 Barb. 387; *Ellaworth v. Campbell*, 31 Barb. 134; *Chatham Bank v. Hochstadter*, 11 Daly 343; *Bogardus v. Livingston*, 2 Hilt. 236; *Williams v. Van Valkenburg*, 16 How. Pr. 144; *O'Hara v. Brophy*, 24 How. Pr. 379; *Jackson v. Stewart*, 6 Johns. 34; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237; *People v. Bradt*, 7 Johns. 539; *American Ins. Co. v. Oakley*, 9 Paige 498, 38 Am. Dec. 561; *Grazebrook v. McCreddie*, 9 Wend. 437; *Adams v. Gilbert*, 9 Wend. 499; *Ingalls v. Sprague*, 10 Wend. 672; *Powers v. Trenor*, 3 Hun 3, 5 Thomp. & C. 231; *Watrous v. Kearney*, 11 Hun 584; *Post v. Charlesworth*, 66 Hun 256, 21 N. Y. S. 168; *Runberg v. Johnson*, 11 Civ. Proc. 283, 5 N. Y. St. Rep. 860; *Brown v. Nichols*, 9 Abb. Pr. N. S. 1; *Brown v. Nichols*, 42 N. Y. 26; *Sperry v. Reynolds*, 65 N. Y. 179; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Chatfield v. Simonson*, 92 N. Y. 209.

Pennsylvania.—*Cypert v. McClune*, 22 Pa. St. 195.

Vermont.—*Coit v. Sheldon*, 1 Tyler 300; *Spaulding v. Swift*, 18 Vt. 214; *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

Wisconsin.—*Cleveland v. Hopkins*, 55 Wis. 387, 13 N. W. 225.

In the absence of substantial injury, the recovery must be nominal. *Harrington v. Huntley*, 4 Alb. L. J. 367. The mere fact that an attorney acts unauthorizedly does not render him liable. To have such an effect the client must suffer loss or injury in consequence of the unauthorized act. Certainly the client has no cause of action where he is benefited by the attorney's conduct. *Phillips v. Rhodes*, 2 Colo. App. 70, 29 Pac. 1011.

b. *Unauthorized Compromise or Release.*

An attorney has no implied authority to compromise or release his client's claim or cause of action. See the notes to *Pomeroy v. Prescott*, 21 Ann. Cas. 574, and *Turner v. Fleming*, Ann. Cas. 1915B 831. An attorney acting without authority in that respect is liable to his client for any damage which may result from his act. *People v. Cole*, 84 Ill. 327; *Helfer v. Spinner*, 147 Ill. App. 448; *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441; *Woodrow v. Hennen*, 6 Mart. N. S. (La.) 157; *Wilson v. Coffin*, 2 Cush. (Mass.) 316; *Johnson v. Dun*, 75 Minn. 533, 78 N. W. 98; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Coopwood v. Baldwin*, 25 Miss. 129; *Houx v. Russell*, 10 Mo. 246. "An attorney has no authority to compromise the claim of his client, and if he does so, he takes upon himself the consequences of its loss, or the damages which he may sustain." *Fitch v. Scott*, 3 How. (Miss.)

314, 34 Am. Dec. 86. In *Repp v. Wiles*, *supra*, it was said: "In the case before us there does not appear to have been an emergency requiring immediate action. While it is found that it was generally supposed the Blair estate was insolvent, and the attorneys acted in good faith in that belief in accepting the offer of compromise, it does not appear that the offer might not have stood for a month without incurring the hazard of loss. The fact that all of the appellants but one lived in distant parts would give the attorneys no authority to accept an offer of compromise, unless they were compelled to act before they could by reasonable efforts advise with their clients concerning the matter. The appellant who was notified of the proposition did not assume to act for any one but himself. There being no emergency under the facts set out in the finding, the compromise was unauthorized as to all the appellants except Benjamin Repp. This being the case, Wiles & Berryman were bound to account for the full amount of the claim to those who did not consent to the compromise." In *Houx v. Russell*, 10 Mo. 246, wherein it appeared that an attorney employed to collect a debt received notes in payment, it was held that he was liable in assumpsit to the client for the amount. The court said: "Whenever an attorney undertakes to travel out of the plain line of his duty, he does so at his peril, and will be held to strict proof, that the departure was indispensable to secure the debt of his principal. There is no evidence in the case showing that Farrar was in doubtful circumstances, or that the plaintiff was in hazard of losing his debt, to demand the exercise of any such power as that on the part of the attorney. On the contrary, it was the duty of the attorney to prosecute the claim in his hands against Farrar, with due diligence and without delay; so that the plaintiff, who was assignee of the notes, might in the event of Farrar being unable to pay have his recourse on the assignor. Instead of pursuing this course, the attorney received from Farrar, in discharge of his two notes, thirty-four small notes upon different individuals in the country, amounting in the aggregate to \$1,013.15, and assigned to him in blank. Shall the law tolerate such a practice, and compel the plaintiff to receive these notes in discharge of his claims against Farrar, or postpone his right of action against the attorney, until the attorney collects the notes? If the attorney could legally receive these notes in discharge of his client's demand, he may insist upon and compel his client to receive them from him; then, in lieu of two notes on the same individual, the payment of which was guaranteed by the assignment, he would have thirty-four or as

many different individuals. Let him put those in the hands of an attorney for collection, and let that attorney pursue the same course, and what will be the final result? When will he get his money? It is contended for the defendant, that if promissory notes were taken by him in discharge of the plaintiff's debt, without his assent or direction, it is a misfeasance, for which a special action may be maintained. This we think very probable. But why turn the plaintiff over to his special action, when the defendant has received what he must have considered as equivalent to money in discharge of his principal's debt, which called for money? We are of the opinion that whatever is received as money, in discharge of a money obligation, should be regarded and treated as money. If so, the plaintiff might bring his action of assumpsit, for money had and received, as in the present case."

In *Wilson v. Coffin*, 2 Cush. (Mass.) 316, it was held on similar facts that an action for negligence would lie, the court saying: "The ruling was, that if the defendant by gross negligence, in a matter he had undertaken to perform as an attorney, had embarrassed the collection of the plaintiff's debt, and put it in such a situation that the plaintiff could not so readily realize the amount of his claim, and the plaintiff's debt was thereby rendered of less value, the plaintiff was entitled to recover damages of the defendant, though Purrington, the original debtor, always had been and was then able to pay the debt, which was left for collection by the plaintiff with the defendant. The correctness of this ruling is too plain and manifest, upon the mere statement of it, to admit of any controversy. It is, in truth, merely stating the common elementary principle that an attorney is answerable to his client for negligence in an action on the case. It is no answer to the charge of negligence, for the attorney to say that the original debtor is able to pay the debt. Nor is it any better answer to say that an action for money had and received might have been brought against him, on the ground that he had compromised the debt without the consent of the client, and had taken security to himself. The defendant, in fact, made the appropriate answer to the charge of negligence, which was, that he had been guilty of no negligence; but this defense was not sustained by the jury, who, by their verdict, have established the charge of negligence. Negligence on the part of the attorney undoubtedly furnishes a ground of action upon which the client may proceed; though the debtor is still able to pay the debt, and though the attorney may have also rendered himself liable for the debt, in an action for money had and received." In *Coopwood v.*

Baldwin, 25 Miss. 129, it was said: "When the plaintiff in error, as attorney for Baldwin & Gray, without authority from them, took the responsibility of dismissing their suit against Smith, and received in payment of it, from Smith, claims upon other parties, he became liable *prima facie* in an action on the case for the amount of their claim against Smith, which liability he could only discharge by showing, that a judgment, if rendered on the claim at the regular trial term of the suit, would have been unavailing and valueless. There is no such proof in the record, but the evidence would seem to warrant a contrary conclusion."

The receipt by the client from the attorney of the amount actually collected is not an accord and satisfaction nor does it work an estoppel. *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

If there appears to be an emergency by reason of which a compromise is apparently demanded in order to save the client's interest, and there is not time or opportunity to consult with the client, an attorney exercising a reasonable degree of skill and discretion is not liable for an error of judgment. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63. See also the note to *Pomeroy v. Prescott*, 21 Ann. Cas. 574, 583, supplemented by the note to *Turner v. Fleming*, Ann. Cas. 1915B 831.

4. LIABILITY FOR ACT OF PARTNER.

The employment of a firm of lawyers is equivalent to the retainer of each of the partners, though only one of them is consulted. *Smith v. Hill*, 13 Ark. 174; *Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523; *Eggleston v. Boardman*, 37 Mich. 14; *Ostrander v. Capitol Invest. etc. Assoc.* 130 Mich. 312, 89 N. W. 964; *MacFarland v. Altschuler*, 77 Neb. 138, 108 N. W. 151; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. See also *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98. Therefore, the firm is responsible to the client for the acts of its individual members within the scope of their authority. *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98; *Warner v. Griswold*, 8 Wend. (N. Y.) 665. The liability of an attorney for the acts of his partner extends to acts which are negligent, fraudulent or unauthorized. *Blair v. Bromley*, 11 Jur. (Eng.) 617, 16 L. J. Ch. 495. *Gordon v. Coolidge*, 1 Sumn. 537, 10 Fed. Cas. No. 5,606; *Priddy v. MacKenzie*, 205 Mo. 181, 103 S. W. 968; *Warner v. Griswold*, 8 Wend. (N. Y.) 665. Compare *Ex p. Flood*, 23 N. Bruns. 86. In *Warner v. Griswold*, supra, the rule was stated as fol-

lows: "A partnership between attorneys is admitted to be lawful. Like other partnerships, it may be composed of two or more individuals, and all will be responsible for the acts of each, within the scope of partnership. They constitute but one person in law. If one of two attorneys, who are partners, receives money collected for a client, and embezzles or absconds with it, that will form no defense to the other partner. If one should be guilty of extortion, the other would be liable to repay what had been illegally received. If a suit instituted in the name of one, should be unskillfully conducted, the other would be responsible to the client in an action for his damages (7 Cow. 416; 8 [Cow.] 258). Both would undoubtedly be liable to the officers of the court, or others, for services rendered in suits conducted in the name of one. Indeed, every responsibility which belongs to other partnerships attaches also to this; and no reason is perceived why the general rules by which the course of proceedings in such cases is regulated, should not also apply." In *Priddy v. MacKenzie*, supra, it was said: "If plaintiffs should succeed in this litigation and recover the property in controversy from MacKenzie, and if it should hereafter be shown that McLeod, a member of the firm of Warner, Dean, Gibson and McLeod, was negligent in the investigation of the title to the property, and as a result MacKenzie lost the property, then the firm and each and every member thereof would be civilly liable to him for the damages sustained by him on account of that negligence. (*Simpson v. Schulte*, 21 Mo. App. 639; 4 Cyc. 966, par. IV; *National Sav. Bank v. Ward*, 100 U. S. 195 [25 U. S. (L. ed.) 621]; 4 Cyc. 964, c.) While it is not pretended that Judge Gibson had any knowledge of the examination of the MacKenzie title by McLeod, yet that fact would not relieve him from his and the firm's liability for the damage occasioned by the negligence of McLeod. One cannot avoid liability for the acts of his partner in the ordinary business of the firm on the ground that he did not know of such acts. (*Curran v. Downs*, 7 Mo. App. 329.) In discussing this question, the supreme court of Georgia used this language: 'It is urged upon us that as Judge Underwood was absent when the business was transacted by his copartner in the firm name, and knew nothing of it, and never received any compensation for the service which his copartner in the name of the firm rendered, and did not become judge until long afterwards, he was free from disqualification; but we think otherwise. What his partner did in the firm name was done by the firm, and upon the firm responsibility, and this was so whether compensation was charged or not.' (*East Rome Town Co. v.*

Cothran, 81 Ga. 359, 367, 8 S. E. 737.)" In *Fornes v. Wright*, 91 Ia. 392, 59 N. W. 51, it was said: "We need not cite authorities to the effect that if the act done was within the scope of the firm business, then each partner is liable, regardless of his knowledge or want of knowledge of the doing of such act. It may work hardship to hold all the members of a firm liable to account for this money when it was received and appropriated by one member of the firm, and when it appears it never went into the assets of the firm; but it is a hardship incident to and growing out of the partnership relation, wherein each is liable for the act of either, if within the proper scope of the firm's business. This money was called for by the firm of Wright, Baldwin & Haldane. It was received by Haldane as a member of the firm, and so receipted for. The draft was indorsed by the latter in the firm name. It was thus a firm transaction, for which each member is accountable. The fact that Haldane conducted all the correspondence in no way affects defendants' liability."

Each member of a firm is responsible for claims placed in its care for collection, irrespective of his personal participation in the transaction. *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Parker v. Gartside*, 178 Ill. App. 634; *Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, rehearing denied 39 Ind. App. 420, 79 N. E. 523; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Dwight v. Simon*, 4 La. Ann. 490; *Porter v. Vance*, 14 Lea (Tenn.) 630; *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817. See *infra*, subdivision II, 5. *Collection of Claims*, as to what constitutes negligence.

Payment to one partner is payment to all. *Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61; *Dundonald v. Masterman*, L. R. 7 Eq. (Eng.) 504, 38 L. J. Ch. 350, 17 W. R. 548; *Cook v. Bloodgood*, 7 Ala. 683; *Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, rehearing denied 39 Ind. App. 420, 79 N. E. 523; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Dwight v. Simon*, 4 La. Ann. 490; *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178; *Wilkinson v. Griswold*, 12 Smedes & M. (Miss.) 669; *Bryant v. Hawkins*, 47 Mo. 410; *Priddy v. MacKenzie*, 205 Mo. 181, 103 S. W. 968; *McFarland v. Crary*, 8 Cow. (N. Y.) 259. In *Cook v. Bloodgood*, 7 Ala. 683, it was said: "In professional partnerships, formed for the practice of the law, if one member of the concern acknowledges the receipt of money for a client, the latter need not inquire how the claim was collected, or whether paid at all, or not; but may charge the firm upon the assumption that the receipt expresses the truth."

But a firm of lawyers is not liable for the acts of one of its members outside the ordinary

course of its business. *Plumer v. Gregory*, L. R. 18 Eq. (Eng.) 621, 43 L. J. Ch. 616; *Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61, 3 C. & K. 272, 17 Jur. 1096. See also *Sims v. Brutton*, 5 Exch. (Eng.) 802, 20 L. J. Exch. 41; *Chilton v. Cooke*, 37 L. T. N. S. (Eng.) 607; *Hedley v. Bainbridge*, 3 Q. B. 316, 43 E. C. L. 752, 2 Gale & D. 483; *Marsh v. Gold*, 2 Pick. (Mass.) 285. See also *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178, wherein it was held that the fact that one member of a firm of attorneys employed to manage a will contest conspired with one of the heirs to cheat the others out of their share of a settlement, after the money had been paid over to the attorney in fact of the contesting heirs, did not render the firm liable for a diversion of the funds, where it acted in good faith until the settlement was made and money paid over. Thus in *Breckinridge v. Shrieve*, 4 Dana (Ky.) 375, it was held that there is no firm liability for a sum borrowed by one of the partners for his own purposes.

The dissolution of a firm of lawyers does not release a member thereof from liability for the acts of his late partner with respect to business which was intrusted to the firm; at least not until notice to the client for the dissolution and conduct on his part from which an election to treat one of the late partners as his sole attorney may be implied. *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Bryant v. Hawkins*, 47 Mo. 410; *Poole v. Gist*, 4 McCord L. (S. C.) 259. And see *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817. But see *Ayrault v. Chamberlin*, 26 Barb. (N. Y.) 83, wherein it was held that where a partnership between attorneys is dissolved after they have commenced a suit to foreclose a mortgage, and a new partnership is formed consisting of one of the members of the old firm and a new member, and the new member retires from the firm, and transfers his interests in the costs of the suit before the money is collected, the retiring member is not liable for the default of his former partner in not paying over the money afterwards received by him. In *Smyth v. Harvie*, *supra*, it was said: "Then, if their partnership embraced the business of collecting money, as well as the practice of the law in other branches of the profession, it became a part of their duty to collect the money after judgment was recovered, unless otherwise agreed. If this was a partnership duty, it continued with each member, after the dissolution of the firm. Plaintiffs gave credit to the firm as it was then constituted, and they did not release themselves from their obligation, by its dissolution. For aught we know, the fact that Tuley was a partner, may have been the inducement to confide the business to the care of the firm. Even

if a dissolution of the partnership could have released the members from liability for a failure to complete the business, it could only have been after notice of the dissolution. In the absence of such notice, plaintiffs had no option in determining whether they would continue the cause in the hands of the member who took charge of the business of the firm, or would place it in the hands of another attorney. It cannot be, that their business can be transferred to others without their consent, so as to escape responsibility. They did not trust either member of the firm separately, but it was to both that the business was intrusted, and they have the right to look to both for its faithful performance." In *Thompson v. Robinson*, 16 Ont. App. 175, it was held that a person entering a firm of solicitors under an agreement that he should have no interest in certain business then in hand was none the less liable to the client for a mismanagement of funds by another partner.

5. LIABILITY FOR ACT OF SUBSTITUTE.

As a general rule an attorney has no power to delegate the authority reposed in him to another. See the note to *Kinhead v. Hartley*, Ann. Cas. 1915D 1, 9. If he does so, without his client's consent, he becomes liable on principles of agency for negligence, default, or wrongdoing on the part of his substitute. *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39; *Kingston Bank v. Roosa*, 2 How. Pr. (N. Y.) 8. See also *Goodman v. Walker*, 30 Ala. 492, 68 Am. Dec. 134. Thus an attorney who receives a claim for collection binds himself to exercise reasonable care, skill and diligence in the performance of the duties so undertaken, and the fact that he intrusts another with the collection does not relieve him from his obligations in this respect.

England.—*Stephens v. Badcock*, 3 B. & Ad. 354, 23 E. C. L. 93; *Simmons v. Rose*, 31 Beav. 1.

Alabama.—*Mardis v. Shakelford*, 4 Ala. 493; *Lewis v. Peck*, 10 Ala. 142.

Arkansas.—*Cummins v. McLain*, 2 Ark. 402; *Kellogg v. Norris*, 10 Ark. 18.

Illinois.—*Walker v. Stevens*, 79 Ill. 193.

Indiana.—*Pollard v. Rowland*, 2 Blackf. 22; *Abbott v. Smith*, 4 Ind. 452; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

Iowa.—*Antrobus v. Sherman*, 65 Ia. 230, 21 N. W. 579, 54 Am. Rep. 7.

Kansas.—*Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264.

Maryland.—*Dentzel v. City*, etc. R. Co. 90 Md. 434, 45 Atl. 201.

Mississippi.—*Grayson v. Wilkinson*, 5 Smedes & M. 268; *Wilkinson v. Griswold*, 12 Smedes & M. 669; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677.

Nebraska.—*McDowell v. Gregory*, 14 Neb. 33, 14 N. W. 899.

New York.—See *Talcott v. Cowdry*, 17 Misc. 333, 39 N. Y. S. C. 1076.

Pennsylvania.—*Riddle v. Poorman*, 3 P. & W. 224; *Krause v. Dorrance*, 10 Pa. St. 462, 51 Am. Dec. 496; *Rhines v. Evans*, 66 Pa. St. 192, 5 Am. Rep. 365; *Bradstreet v. Ever-son*, 72 Pa. St. 124, 13 Am. Rep. 668. See also *Morgan v. Tener*, 83 Pa. St. 305, 3 W. N. C. 398, reversing 10 Phila. 412, 32 Leg. Int. 98, 1 W. N. C. 283.

Tennessee.—*Porter v. Vance*, 14 Lea 629.

The general rule is that when an attorney is employed to collect a claim and he places it in the hands of another attorney, through whose negligence or misconduct the claim is lost, he is liable therefor to the principal in the absence of an agreement or assent that such other attorney should be employed. *Dentzel v. City*, etc. R. Co. 90 Md. 434, 45 Atl. 201.

There is, however, no apparent reason why an attorney should not be within the rule which has been announced frequently with respect to banks and collection agencies, that the employment of an agent to make a collection at a distant place implies authority to a person there resident. See the note to *Kinhead v. Hartley*, Ann. Cas. 1915D 1, 12. In such a case there is a conflict of authority as to the liability of the agent for the negligence or default of the subagent. See the note to *Kinhead v. Hartley*, supra, at page 19.

6. LIABILITY FOR ACT OF CLERK OF ASSISTANT.

The general rule is that an attorney is bound by the acts of a clerk, or other person, in charge of his office, or of business intrusted to the attorney, in so far as such person acts within the apparent scope of his authority. *Cornelius v. Harrison*, 2 F. & F. (Eng.) 758; *Hardy v. Keeler*, 56 Ill. 152; *Hayward v. Goldsbury*, 63 Ia. 436, 19 N. W. 307; *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39 (*distinguished* in *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 933, 4 Am. St. Rep. 284); *Mahoney v. Middlesex County*, 144 Mass. 459, 11 N. E. 689; *Johnson v. Sprague*, 183 Mass. 102, 66 N. E. 422; *McGuinness v. Manhattan R. Co.* 69 App. Div. 606, 74 N. Y. S. 1054; *Power v. Kent*, 1 Cow. (N. Y.) 285, 23 How. Pr. 236. "Details of a law business, especially such as that of the collection of claims, are often not attended to by the attorney, but intrusted to subordi-

nates, whose acts in the conduct of a business are his, so far as civil responsibility therefor, either on his own part or that of his clients, is concerned." *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39. "It fully appears that John J. Post, who delivered the attachment at the sheriff's office, was the managing clerk of the firm of Staffords & Davidson, by whom it was issued, and his acts and declarations admitted in evidence were such as fell within the scope of his agency, and the firm are affected thereby." *Birkbeck v. Stafford*, 14 Abb. Pr. 285, 23 How. Pr. 236.

But an attorney will not be responsible for the conduct of one who assumes to act for him without authority; thus where, during the absence of an attorney from home, his wife received and opened a letter addressed to him containing a draft payable to his order for collection, and the drawee paid the amount of the draft to her, it was held that as she had no authority to receive payment, the drawee was not discharged. *Day v. Boyd*, 6 Heisk. (Tenn.) 458, wherein the decision was rested on the limitations of the implied agency of a wife for her husband, as to which see the note to *Meyer v. Frenkil*, Ann. Cas. 1913C 875.

II. Negligence or Breach of Duty in Particular Matter.

1. ADVICE.

An attorney does not warrant the correctness of his advice on matters of law. *Morrison v. Burnett*, 56 Ill. App. 129; *Citizens' Loan, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5; *Harriman v. Baird*, 6 App. Div. 518, 39 N. Y. S. 592, affirmed 158 N. Y. 691, 53 N. E. 1126; *Bowman v. Tallman*, 40 How. Pr. 1; *Harkness v. Craven*, 199 Pa. St. 267, 48 Atl. 1080; *Hill v. Mynatt* (Tenn.) 59 S. W. 163. See also *supra*, subdivision I, 1, b. *Attorney Not Insurer*. In *Hill v. Mynatt*, *supra*, the court said: "If all of us had to go out for mistakes of judgment upon points of new occurrence, or of nice or doubtful construction, it is apprehended that the ranks of the profession, and of judges not final in their jurisdiction, would be decimated at an appalling rate. We recognize and approve the rule attaching liability to the attorney whose client suffers loss on account of his failure to understand and apply well-established principles of law, settled by textbooks and cases published long enough for him, exercising reasonable diligence, to have informed himself of them. In other words, an attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law. He must

keep pace, so far as reasonable diligence and a fair amount of common sense will enable him to do so, with the literature of his profession, and what the courts have decided. But the law does not require and never has required of a member of the profession that he should be a true Sir Oracle of what the courts have decided or will decide as the law applicable to every given state of facts. In the case at bar attorneys of the greatest eminence in the profession may have well doubted as to the best course to pursue to attain success for their client. There is no imputation in the evidence that they acted except in the utmost good faith, for what they believed to be the best for their client. The most that can be said is that they fell into an error of judgment upon a doubtful question of law." In *Harriman v. Baird*, *supra*, it was said: "There is nothing in the case to justify a finding that the advice which was given to the defendant by the plaintiffs was improper or unskillful. An attorney is not required to insure a client as to the ultimate result of the proceedings which he had advised, nor is the client justified in refusing to compensate him because in the subsequent development of affairs it appears that a course other than that adopted would have turned out more advantageous for the client. If that were so in every litigated case the professional adviser of one party or the other would not be entitled to compensation. No one can say, looking at the problem which was presented to the plaintiffs as to what advice they would give the defendant at the time, just what course it would ultimately appear would be most advantageous for him to adopt, and the record clearly shows that they acted for him in the utmost good faith, advising him as appeared to them at the time to be for his interest, and expended a large amount of money and a great deal of time in endeavoring to extricate him (the defendant) from the position in which he was placed."

But in undertaking to advise a client, the attorney impliedly guarantees that he has a sufficient knowledge of the law for that purpose, and that he will use reasonable care and skill therein. Should he fail in this respect he will be responsible to his client for any damage sustained by reason of such failure. *Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561. See also *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Citizens' Loan Fund, etc. Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Thomas v. Schee*, 80 Ia. 237, 45 N. W. 539; *Heffner v. Wise*, 51 La. Ann. 1637, 26 So. 415; *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698; *Ryan v. Long*, 35 Minn. 394, 29 N. W. 51; *Gihon v. Albert*, 7 Paige (N. Y.) 278; *Couse v. Horton*, 23 App. Div. 198, 49

N. Y. S. 132; *Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. S. 475. And see the cases cited *infra* in this subdivision.

The rule that an attorney is liable for advice negligently given is most frequently applied to erroneous advice given with respect to the validity of title to property, or the existence of incumbrances thereon.

England.—*Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219, 2 C. & P. 238, 12 E. C. L. 107; *Whitehead v. Greetham*, 2 Bing. 464, 9 E. C. L. 483, 10 Moo. C. Pl. 183; *Ireson v. Pearman*, 3 B. & C. 799, 10 E. C. L. 232, 5 Dowl. & R. 687; *Drax v. Scroope*, 2 B. & Ad. 581, 22 E. C. L. 145, 1 Dowl. 69; *Langdon v. Godfrey*, 4 F. & F. 445.

Ireland.—*O'Hanlon v. Murray*, 12 Ir. C. L. 161.

United States.—*Page v. Trutch*, 5 Am. L. Rec. 155, 18 Fed. Cas. No. 10,668; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621.

California.—*Hinckley v. Krug*, 34 Pac. 118.

Illinois.—*Chase v. Heaney*, 70 Ill. 268.

Iowa.—*Thomas v. Schee*, 80 Ia. 237, 45 N. W. 539.

Kentucky.—*Humboldt Bldg. Assoc. Co. v. Ducker*, 82 S. W. 969, 26 Ky. L. Rep. 931.

Maryland.—*Watson v. Calvert Bldg. etc. Assoc.* 91 Md. 25, 45 Atl. 879.

Missouri.—*Gilman v. Hovey*, 26 Mo. 280; *Priddy v. MacKenzie*, 205 Mo. 181, 103 S. W. 968.

New York.—*Byrnes v. Palmer*, 18 App. Div. 1, 26 Civ. Proc. 382, 45 N. Y. S. 479, *affirmed* 160 N. Y. 699, 55 N. E. 1093; *Bachman v. Goldmark*, 48 Super. Ct. 549; *Gardner v. Wood*, 37 Misc. 93, 74 N. Y. S. 750.

Oregon.—*Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631.

Pennsylvania.—*Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

In *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. S. 479, *affirmed* 160 N. Y. 699, 55 N. E. 1093, the court said: "It is also true that the same rule that applies to the liability of an attorney in the conduct of a litigation is applicable to his liability in examining titles. He is certainly not a guarantor that the titles to which he certifies are perfect. He is only liable for negligence or misconduct in their examination. But in determining the question of negligence on the part of an attorney in examining a title, it is necessary to bear in mind the marked difference between proper conduct in that employment and in a litigation. In a litigation a lawyer is well warranted in taking chances. To some extent litigation is a game of chance. The conduct of a lawsuit involves questions of judgment and discretion as to which even the most distinguished members of the profession may differ. They often pre-

sent subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable. But passing titles, as a rule, is of an entirely different nature. A purchaser of real estate is entitled not only to a good but to a marketable title, that is, a title free from reasonable doubt. (*Fleming v. Burnham*, 100 N. Y. 1; *Cambrelleng v. Purton*, 125 N. Y. 610.) In *Jordan v. Poillon*, 77 N. Y. 518, the court of appeals refused to compel a purchaser at a judicial sale to take title. Though the objection presented a mere question of law, the court declined to pass upon it and determine it in the absence of parties interested who would not be concluded by the decision. It is, therefore, the duty of a conveyancer to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk and is willing to accept it. A careful lawyer might readily advise a client that he was entitled to a piece of real property, and that it was proper to bring an action for its recovery, while, at the same time, he would reject a title which involved the same question as to which he had advised a suit."

An attorney is liable in damages to his client where he neglects to advise him concerning matters which come within the scope of his duties. *Jamison v. Weaver*, 81 Ia. 212, 46 N. W. 996; *Hill v. Montgomery*, 84 Ill. App. 300, *affirmed* 184 Ill. 220, 56 N. E. 320; *Broholm v. Anderson*, 178 Ill. App. 623.

So an attorney is liable where he fraudulently gives advice to the injury of his client. See *Leoff v. Lawton*, 97 N. Y. 478. An attorney is liable for damages to his clients from his advice to one of them to testify falsely in a matter committed to the attorney's legal guidance. *Flynn v. Judge*, 149 App. Div. 278, 133 N. Y. S. 794, wherein the court said: "The learned [trial] court stated its view 'that to allow the perjurer himself to sue the man who advised him to commit perjury, to recover damages, would be a most monstrous proposition.' Without quarrel with the soundness of the general proposition, and without considering a germane limitation in cases of fiduciary relation, it seems to us that the learned court lost view of the purpose and bearing of the testimony. The plaintiffs were not seeking to recover damages for a perjury of one of their number, from the inciter of the perjury. They sought to recover what they had been compelled to pay on account of a breach of defendant's obligation as an attorney and counselor at law; and their contention was that as an attorney he advised one of their number to testify falsely in a matter com-

mitted to his legal guidance. This was bad or improper advice, in violation of the obligation of the defendant under his retainer, and damage resulting therefrom might, we think, be actionable."

Liability cannot be predicated on the mere expression of an opinion as to matters of fact, as, for instance, the probability of realizing a certain sum under a judicial sale. *Reumping v. Wharton*, 56 Neb. 536, 76 N. W. 1076, wherein the court said: "The testimony of Mr. Reumping rather tended to show a misapprehension of conditions of fact than of law on the part of Messrs. Wharton & Baird. In effect, plaintiff testified that upon the entry of the decree in the district court these gentlemen said to him it would be of no advantage to him for an appeal to be taken in his behalf, because the property would sell for sufficient to pay plaintiff's claim though it stood in the fourth class. This conjecture was not one which involved the exercise of legal knowledge; indeed, it is quite likely that in the ratio in which attorneys at law qualify themselves to judge of the value of real property they may disqualify themselves for the proper performance of their professional duties. Even if plaintiff in this case relied upon the knowledge of the value of real property possessed by his counsel, any mistaken estimate in that respect would not subject such counsel to liability for damages."

A failure to advise his client on subjects concerning which his opinion is not sought, and of which he is unaware does not render an attorney liable. *In re Fuller*, 4 Kulp (Pa.) 479. In that case it was said: "The charge of negligence against the attorney in not advising the assignee to keep the trust funds separate was properly dismissed by the auditor. His advice was not asked upon the subject, and he did not know that they were being used by the assignee in his business."

2. INVESTMENTS OR SECURITIES.

An attorney who agrees to invest funds for his client must use reasonable care, diligence, and skill in seeing that the investments are safely and prudently made, and that the client is amply secured, and he is responsible for any loss occasioned by his failure so to do. *Langdon v. Godfrey*, 4 F. & F. (Eng.) 445; *Middleton v. Pollock*, 4 Ch. D. (Eng.) 49, 46 L. J. Ch. 39; *Birt v. Burt*, 36 L. T. N. S. (Eng.) 943; *Page v. Trutch*, 5 Am. L. Rec. 155, 18 Fed. Cas. No. 10,668; *Watson v. Calvert Bldg. etc. Assoc.* 91 Md. 25, 45 Atl. 879; *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. S. 873; *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662; *Rogers v. Priest*, 74 Wis. 538, 43 N. W. 510.

In loaning money to another for his client, the attorney should act only for one of the parties, and if he assumes to act for both, although he may be paid by one only, he is responsible for a failure to do for each what his duty as attorney requires him to do. *Donaldson v. Haldane*, 7 Cl. & F. (Eng.) 762; *Taylor v. Blacklow*, 3 Bing. N. Cas. 235, 32 E. C. L. 100, 3 Scott 614; *Cory v. Wirth*, 21 Kan. 10; *Ryan v. Long*, 35 Minn. 394, 29 N. W. 51; *Arnold v. Robertson*, 3 Daly (N. Y.) 298. In *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5, it appeared that an attorney engaged to lend money for a client, lent it, and took a note for the amount made to himself, which he indorsed and delivered to her. It was held that she could not recover against him under a declaration alleging that he had engaged to advise her as to all proper actions necessary for her to take for her security, and complaining that he did not in fact advise her that she must protest the note at maturity in order to charge the indorser. So in *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662, it was held that an attorney employed by the borrower is liable to the lender for negligence if he assumes to act for him. The court said: "In the present case it is undeniable that the defendant was acting for Roberts the borrower, from whom he received his compensation, and to whom alone, upon the manifest understanding of all parties he was to look for it. But that fact does not of itself prevent the relation of attorney and client between plaintiff and defendant, if such was the mutual understanding. There was no evidence of custom in that respect, and the court below might not be able to say as matter of law, certainly we cannot, that such was in fact the custom. But outside of the existence of any general rule there was evidence from which the jury might have inferred that such was the understanding of these parties in this particular case. The defendant unquestionably acted to some extent for and in behalf of the plaintiff. After the money was paid over he kept the mortgage which was then the property of plaintiff, and he put it on record. In so doing he was clearly acting for plaintiff, and if he had negligently delayed recording until a subsequent judgment or other incumbrance slipped in ahead of it, there can be no question that he would have been liable for the negligent performance even of a duty voluntarily assumed. But there was evidence that he did more for plaintiff than put the mortgage on record. *Lawall* testified that he told defendant 'to search the title and the records in reference to liens' and that 'he said he would,' and more to the same effect. The presumption is that this was done in behalf of plaintiff. To Roberts, the borrower, the priority of other incum-

branches was of no concern with regard to this loan, except as bearing on plaintiff's willingness to advance the money, but to plaintiff it was a material fact as part of the inducement or consideration for risking the investment. We are of opinion therefore that there was sufficient evidence to submit to the jury on the existence of the relation of attorney and client in the case. But the nonsuit was also erroneous for another reason. Independent of the relation of attorney and client, there was evidence, already noticed, that defendant undertook certain duties for the plaintiff. The learned judge rightly says that the collusion or fraud could not be found on the evidence in the case, but this does not exclude liability arising from negligence. The principle settled in *Coggs v. Bernard*, 1 Smith's Lead. Cases, that one who undertakes to do, even without reward, is responsible for misfeasance, though not for nonfeasance, has been generally adopted. If, therefore, defendant, knowing that plaintiff was relying on him in his professional capacity to see that her mortgage was the first lien, although Roberts was to pay the fees, undertook to perform that duty, he was bound to do it with ordinary and reasonable skill and care in his profession, and would be liable for negligence in that respect."

But an attorney who has not assumed personally to invest his client's money, and who is called on only to lend his professional aid for the purpose of carrying his client's proposed venture into effect, by investigating the title to the property or other security constituting the subject-matter of the proposed investment, and the preparation of the necessary legal documents, assumes no responsibility for loss not occasioned by any negligence on his part. Thus he will not be liable because of the insufficiency of the security. *Hayne v. Rhodes*, 8 Q. B. 342, 55 E. C. L. 342, 10 Jur. 71; *Cohn v. Heusner*, 9 Misc. 482, 30 N. Y. S. 244. The mere giving of money to a solicitor for the purpose of general investment does not of itself create the relation of trustee and cestui que trust, and so make the solicitor liable as trustee for a deficiency in the security. *Mare v. Lewis*, 4 Ir. Eq. (Eng.) 219. In *Scholes v. Brook*, 64 L. T. N. S. (Eng.) 674, affirming 63 L. T. N. S. 837, a firm of valuers, employed on the recommendation of plaintiff's solicitor to value certain property, were held to be liable for their negligence; but the solicitor was held not to be liable, although he pointed out to the valuers certain suspicious facts, but failed to communicate them to his client. In *Cohn v. Heusner*, 9 Misc. 482, 30 N. Y. S. 244, the court said: "A solicitor or attorney at law is under no duty to dissuade his client from entering up-

on a contemplated business venture. Having concern for the latter's prosperity, the former may tender his advice in that regard, but if he fails so to do he is not chargeable with neglect. The special skill which the solicitor or attorney engages himself to exert in his client's behalf is such as is peculiar to his profession, but the relation of solicitor or attorney and client imposes upon the former no duty as to an exercise of sagacity in business ventures superior to that of the latter." An attorney at law or solicitor, therefore, who has not assumed personally to invest his client's money, and who is called upon only to lend his professional aid for the purpose of carrying his client's proposed venture into effect, by investigation of the title to the property or security constituting the subject-matter of the proposed investment, and the preparation of the necessary legal documents, assumes no responsibility for loss which may come from the client's ill venture."

If, however, an attorney is employed for the purpose of passing on the sufficiency of security, he is liable for negligence or fraud in so doing. *Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219.

3. PREPARING, RECORDING OR KEEPING WRITTEN INSTRUMENT.

An attorney employed to prepare a written instrument is responsible for any loss sustained by his client as the result of his negligence in so doing. *Parker v. Rolls*, 14 C. B. 691, 78 E. C. L. 691; *In re Duntley*, 227 Fed. 381, 142 C. C. A. 77; *Stein v. Kremer*, 112 N. Y. S. 1087.

In *Stannard v. Ullithorne*, 10 Bing. 491, 25 E. C. L. 212, 4 Moo. & S. 359, *Tindal, C. J.*, said: "It may be assumed as a general principle that an attorney, by reason of the emolument he derives from the business in which he is employed, undertakes, and is bound to take care, that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or, at all events, that he does not do so till the consequences have been explained to him." In *Stein v. Kremer*, 112 N. Y. S. 1087, it was said: "As alleged and as testified, the plaintiff having agreed with intending employers for a year, he and they jointly employed the defendants, counselors at law, to draw a contract for his employment for that period, and the contract, by one of them drawn and which the plaintiff as to his part paid for on an advice signed, was, as ruled by this court on a former appeal, a contract determinable at will. Upon such allegations, testimony, and determination, the complaint might not

be, as it was, dismissed when the plaintiff rested." In *Tonn v. Pier*, 89 N. J. Eq. 422, 89 Atl. 510, it appeared that the attorney for a vendee acted for both parties in drawing up the papers and that he failed to protect the rights of the vendor as to security for the deferred payments. The court said: "At the time the agreement was signed the attorney for the defendant undertook to draw for the complainant the mortgage securing the purchase money, and he was to prepare the deed. It does not appear that he ever did in fact draw the mortgage, and, according to his account, the defendant having told him that he was going to pay the amount in cash, he did not, when he went to have the deed executed and delivered, take with him any mortgage, and he had the deed executed and delivered and recorded without securing the complainant in any way for her unpaid purchase money upon the delivery of the deed, or securing for her any evidence that it was still due to protect her against the deed itself. By assuming to draw the mortgage for the complainant, under the agreement, the attorney undertook the duty of taking care of her interest, as well as that of the purchaser, upon the delivery of the deed. . . . There was a clear violation of the duty on his part to protect the interest of this old woman, on taking the title to her property from her, and this whole situation, which existed from the time of receiving the deed up to the time of the alleged payment of the money in February, shows the business advantage that was taken of her, and imposes on the defendant the decided burden of proving, by testimony other than his own, that this money was paid."

Where an attorney agrees to have certain documents recorded, and neglects to do so, he will be responsible for any damage resulting from his negligence in that respect. *Stott v. Harrison*, 73 Ind. 17; *Fenaille v. Coudert*, 44 N. J. L. 290; *Arnold v. Robertson*, 3 Daly 298, *appeal dismissed* 50 N. Y. 683; *Stuart v. Walkup*, 114 N. Y. S. 483; *Miller v. Wilson*, 24 Pa. St. 114; *Lynch v. Wilson*, 22 U. C. Q. B. 226. In *Miller v. Wilson*, 24 Pa. St. 114, the court after reciting that the plaintiff had entered into an agreement with one Carson to pay her an annuity, his obligation being secured by a mortgage, said: "The defendant, Miller, was employed and paid to adjust the business agreeably to this arrangement; and the shape it took was assumed under his direction. He drew the papers, consisting of the bond, the mortgage, and a power of attorney to himself to enter satisfaction on the judgments. He took the power of attorney and executed it. He also took the mortgage, promising to have it recorded, and assuring the plaintiff that she would thus be made entirely safe.

He did not record it, but withheld it until the property was encumbered with other liens (in some of which he himself had an interest) to an amount greater than its value. Carson became hopelessly insolvent, and, excepting his worthless bond, the plaintiff has no security for her claim. The defendant's counsel think that he ought not to pay for the great injury which his neglect has occasioned. The court of common pleas and the jury thought otherwise, and we are of the same mind. The argument is, that the plaintiff has not as yet suffered any actual loss from the defendant's violation of duty; and that she can recover from Miller only in case Carson makes default; because, the mortgage being but a security for the bond, there is nothing due on the former until the condition of the latter is broken. But we hold it for clear law, that Miller did not merely substitute his personal responsibility in place of the mortgage; that he did not become Carson's surety in the bond; but that he subjected himself to an immediate action, in which the plaintiff may recover compensation for all she has lost, and all she is likely to lose, through his misconduct."

But the mere fact that an attorney is employed to prepare papers which are required to be recorded does not make it the attorney's duty to have them recorded. There must be a special undertaking for this purpose, or the original employment must be broad enough to include it. *Fenaille v. Coudert*, 44 N. J. L. 286, wherein the court said: "Attorneys are doubtless liable for negligent omissions to file pleadings and to take the regular steps necessary in the progress of suits in which they have been retained and in which they act for their client. But the filing of such a contract as that in question in this case is not a necessary concomitant of its existence or of its binding force. Whether it should be filed or not must depend upon circumstances. The owner may be thoroughly satisfied of the probity or responsibility of the builder. In such case he may consider it judicious not to file such a contract. By the evidence in this case it would seem that some reasons were supposed to exist why it was not judicious to file this contract. But at all events, the filing of such a contract is not necessary, and whether it should be filed or not is a question not to be determined by the attorney employed to draw it. I have not been able to find any case imposing upon attorneys the duty of filing, recording or registering papers which they have drawn, by reason merely of their employment to draw them. When employed to securely invest money of a client, they are doubtless liable for failing to register or record the securities or to give notice of the lien ac-

quired when necessary for the security of the investment. *Watts v. Porter*, 3 El. & Bl. 743, 77 E. C. L. 743. *Weeks on Attorneys*, § 311, and cases cited. They have been held liable, as any other person might be, on express contracts to record papers drawn by them. *Miller v. Wilson*, 24 Pa. St. 114. But when the record or registration or notice is not necessary to effectuate the purpose of their employment, I find no case holding them liable for failure."

Where a client intrusts important papers to his attorney, the latter should not only return them when the relation of attorney and client ceases, but should not wilfully do anything by which another can gain information concerning the papers; and the fact that the client, without cause, discharges the attorney without paying him and employs another, does not alter the case, though it may give the attorney a right to retain the papers by virtue of his lien. *In re Hahn*, 11 Abb. N. Cas. (N. Y.) 423. See also *In re Wheatroft*, 6 Ch. D. (Eng.) 97, 26 W. R. 69, 46 L. J. Ch. 669; *In re Thomson*, 20 Beav. (Eng.) 545; *Howard v. Gunn*, 32 Beav. (Eng.) 462, 1 Jur. N. S. 718; *Robertson v. Clocke*, 18 App. Div. 363, 46 N. Y. S. 87. A person is not entitled to the possession of notes placed in the hands of an attorney for collection where an interest in the notes is held by others, and he does not show their consent to such possession, nor offer to indemnify them. *Bougher v. Scobey*, 23 Ind. 583. The minutes of testimony taken by a counsel on the trial of an action in which he is retained belong to himself, and not to his client. *Anonymous*, 31 Me. 590.

But an attorney whose office is broken open is not liable for the loss of papers stolen therefrom, where there is no negligence on his part. *Hill v. Barney*, 18 N. H. 607.

4. LITIGATION.

a. Generally.

The general rule is that an attorney who undertakes to conduct litigation impliedly contracts to exercise due care, skill and knowledge of the law in the transaction of his client's business, and his negligence in that regard is a breach of his contract. *Castner v. Gray*, 54 Colo. 551, 131 Pac. 404; *Walpole v. Carlisle*, 32 Ind. 415; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Rooker v. Bruce*, 45 Ind. App. 57, 90 N. E. 86; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Childs v. Comstock*, 60 App. Div. 160, 74 N. Y. S. 643. To subject an attorney to liability a failure to exercise reasonable

care and skill must be shown. *Boynton v. Brown*, 103 Ark. 513, 145 S. W. 242; *Lane v. Storke*, 10 Cal. App. 347, 101 Pac. 937; *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Jaquiss v. Hagner*, 72 N. Y. 605; *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75; *Avery v. Jacob*, 59 Super. Ct. 585 mem. 15 N. Y. S. 564; *Youngman v. Miller*, 98 Pa. St. 196; *Stephens v. White*, 2 Wash. (Va.) 203. But where the client shows negligence the law casts on the attorney the burden of showing an adequate excuse. *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

An attorney is *prima facie* liable in damages to his client for a loss occasioned by his neglect to bring suit within the time limited by statute. *Drury v. Butler*, 171 Mass. 171, 50 N. E. 527; *Kreatz v. McDonald*, 123 Minn. 353, 143 N. W. 975; *Moore v. Juvenal*, 92 Pa. St. 484; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 29, 14 S. W. 1007. In *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814, the court said: "The testimony in the record convinces us of the following facts in this case: That the defendant was employed by the plaintiff to institute a suit for slander against one *Salvadore Dumiglia*; that a sum of thirty-five dollars was deposited with plaintiff for costs. That the defendant filed the petition in the suit, and deposited the necessary sum to cover the costs for the filing of this petition; that he neglected to deposit the amount for service of citation, and through his neglect or inattention the demand of plaintiff against the defendant in the suit for slander became prescribed; that another attorney was employed to prosecute the suit, and the defendant on the trial pleaded the prescription of one year, and the plaintiff's demand was dismissed; that the receipt offered in evidence by the defendant in this suit on the return of the money deposited by the plaintiff had no reference to nor did it include the demand of the plaintiff against this defendant for damages for the neglect to deposit costs for the service of citation in the demand against the defendant in the action for slander; that the plaintiff in the slander suit had a good cause of action, and that had she obtained her judgment for a reasonable amount, the defendant had sufficient property to respond to the judgment. . . . The defendant is undoubtedly, on the facts stated, responsible for the prescription of the demand, and is therefore responsible in damages." In *Zeitlin v. Morrison*, 167 App. Div. 220, 152 N. Y. S. 1000, wherein it appeared that delay in beginning suit was due to the act of the client, the court said: "It is undisputed that defendants prepared for the appointment of a guardian ad litem for plaintiff,

who, being eighteen or nineteen years of age, would have to sign the petition for such appointment. The defendant Schiff testified that he delivered these papers to the plaintiff's brother for the purpose of having him obtain her signature, and that they were never returned. While the brother denied receiving any such instructions, or that he took the petition away, he did not deny Schiff informed him of the necessity of his sister's signing it as a preliminary to bringing the action. Until the petition had been signed an action could not be started. The conduct of the plaintiff and her brother, after it is claimed defendants were retained, indicates with a reasonable degree of clearness they knew an action had not been started. The plaintiff at the time of the accident was eighteen or nineteen years of age. After defendants were consulted, she gave her claim no further attention for several years. Nor did the brother make any further inquiry for upwards of three years."

An attorney is liable for neglecting to notify his client of the giving of insufficient security by the adverse party. *McWilliams v. Hopkins*, 4 Rawle (Pa.) 382.

In *Manufacturers' Paper Co. v. Lindblom*, 80 Ill. App. 267, it was said as to the duty of an attorney who has been served with notice of a motion in a case which is in his hands: "When they were served with notice on Friday or Saturday before that appellants' counsel would on Monday, June 11, 1894, at 10 A. M., or as soon thereafter as counsel could be heard, move that the demurrers be overruled, making no objection to such notice at the time and failing to make any objection known to the court, it became their imperative duty, in the interest of their clients, to attend before the court in obedience to the notice, and see to it that the motion was not heard without being placed upon the calendar of contested motions, or that they were heard and had knowledge of the disposition made of it by the court."

An attorney employed to defend a suit is liable in damages for his failure or neglect so to do. *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268. See also *Newman v. Schueck*, 58 Ill. App. 328. In *Hill v. Finney*, 4 F. & F. (Eng.) 616, it appeared that one A, having been sued for a divorce by his wife, employed an attorney to defend him, telling him he had a good defense, and would consent to a compromise verdict provided no evidence should be taken in the case. The attorney advised him to consent to the compromise, and had him stay away from the trial; as a consequence, the wife's evidence was introduced and was not contradicted, though A had evidence to overthrow it. A

then sued his attorney, alleging that such evidence, going uncontradicted, had damaged him. It was held that if he was induced not to defend, in consideration of the fact that no evidence would be adduced against him, the attorney was liable as for gross negligence. In *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268, it was said: "The case of *Godefroy v. Jay*, 7 Bing. 413, 20 E. C. L. 183, settles this principle; that if an attorney is retained, and suffers a judgment to go by default, he is liable for damages, and it is for him to show that the party has suffered no actual damage. It is not for the plaintiff to show that he had a good defense; and the case cited from 2 Chit. R. 311 is to the same effect. The right of action is tested by the contract. If an attorney undertakes to defend a suit, he must do so, and if he does not the plaintiff will be entitled to damages."

To make an attorney liable for a failure to put in a defense it must appear of course that his client informed him as to the nature of his defense and that it was a meritorious one. *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268; *Benton v. Craig*, 2 Mo. 198. Where a client failed to appear when her case was called and did not furnish her counsel with a list of witnesses, and failed to appear for trial, it was held that her counsel was not warranted in abandoning her defense without having previously given her timely notice of his intention so to do. *Brown v. Green*, 132 La. 1090, 62 So. 154. An attorney is also liable for any loss occasioned by confessing judgment against his client without authority. *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Cyphert v. McClune*, 22 Pa. St. 195; *Jones v. Williamson*, 5 Cold. (Tenn.) 371. And see *Thompson v. Pershing*, 86 Ind. 303. As to an attorney's authority to confess or consent to the entry of judgment, see the note to *Glade Spring Bank v. McEwen*, Ann. Cas. 1914C 542.

b. Pleading.

It is the duty of an attorney to prepare, file, and cause to be served when necessary all such pleadings as are essential properly to present his client's cause for the consideration of the court; and he renders himself liable for any loss or injury which his client sustains in consequence of his failure so to do. *Hunter v. Caldwell*, 10 Q. B. 69, 59 E. C. L. 69, 11 Jur. 770, *affirmed* 12 Jur. 265; *Kenen v. Hill*, 38 N. Bruns. 342; *Walker v. Goodman*, 21 Ala. 647; *Gambert v. Hart*, 44 Cal. 542; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Thompson v. Lobdell*, 7 Rob. (La.) 369; *Varnum v. Martin*, 15 Pick. (Mass.) 440; *McWilliams v. Hopkins*,

4 Rawle (Pa.) 382. In *Varnum v. Martin*, 15 Pick. (Mass.) 440, it appeared that an attorney, being employed to sue on a claim, made a writ, using a blank form in which the common counts in *indebitatus assumpsit* were printed with blank spaces for sums, names, dates, etc. "There were no other counts. The writ directed the officer to attach property to the value of 1200 dollars, and the *ad damnum* was laid at the same sum, but the defendant inserted a declaration for 12 dollars only instead of 1200. . . . The defendant proved that formerly in the blank forms of writs, the word hundred was printed. The plaintiffs proved in answer that for a year or more previous to the making of the writ in question, the blank forms had omitted the word hundred: and that the blank forms used by the defendant for the June term previous were of the new kind; and that at the time when he made the writ in question, he made another writ against Bissell in favor of two of the plaintiffs, in which he wrote the word hundred, the blank forms used in both cases being of the same kind." The court said in sustaining a recovery against the attorney: "In a case like this, where care was required, it was the duty of the attorney to read over the writ, to see that it was correct. And the defendant cannot allege in excuse, the change which had taken place in the blank forms, for the later forms had been in use for a year or longer, and on the same day that the writ in question was made, he used one of these forms and inserted the word hundred."

But an attorney does not guarantee the sufficiency of every pleading prepared by him or under his directions. He is responsible to his client only for those mistakes which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners of ordinary skill and capacity. *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N. Y. S. 455, wherein it was said: "As to the liability of an attorney, he is not held to the rule of infallibility, but is responsible to his client only for those mistakes as a pleader which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners. Courts often differ as to the sufficiency of a pleading without subjecting the judges to the reproach of ignorance or incompetency on account of conflicting views. . . . The question as to whether pleading the payment of the transfer tax was a condition precedent and hence required to be alleged in the complaint, or was a condition subsequent and hence required to be set up in the answer in order to be available as a defense, was decided by the court of appeals by a vote of four to three; Judge Vann writing

the dissenting opinion in which Judges Cullen and Collin concurred. Prior to the decisions in *Bean v. Flint*, no court seems to have passed upon that question. It is clear, in view of this division of opinion in the court of appeals and of the facts before referred to, that the defendants cannot be held to any liability by reason of having believed as the testimony shows, and acted upon the belief, that it was incumbent upon the plaintiff to allege and prove the payment of the transfer tax, nor because of not having applied for permission to amend the answer by pleading the nonpayment of such tax." So in *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75, it was held that the mere fact that a complaint proved to be demurrable did not show that the attorney who prepared it was incompetent or negligent. The court said: "Nor does the allegation that the complaint in the Carter case showed no cause of action necessarily import any negligence on the part of the attorney who drew it. An attorney does not guarantee the sufficiency of every pleading prepared by him or under his direction, but he is responsible to his client only for those mistakes as a pleader which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners of ordinary skill and capacity. See *Von Wallhoffen v. Newcombe*, 10 Hun (N. Y.) 236; 2 Shear. & R. Neg. (4th ed.) sec. 559. The mere fact that a complaint turns out to be demurrable does not show that the attorney who prepared it was incompetent or negligent. If he sets out the facts of the plaintiff's case fully and in proper form, and the question whether they constitute a cause of action or not is fairly debatable, and after being so advised his client desires to obtain the decision of the court thereon, the attorney is justified in proceeding with the suit. Courts often differ as to the sufficiency of a pleading, without subjecting the judges to the reproach of ignorance or incompetency on account of their conflicting views."

An attorney should not be held liable for defective pleadings prepared and filed by other counsel. *Lowry v. Guilford*, 5 C. & P. 234, 24 E. C. L. 295; *Fray v. Foster*, 1 F. & F. (Eng.) 681. See also *Stephens v. White*, 2 Wash. (Va.) 203.

An attorney cannot be held liable for a failure to plead the statute of limitations where the pleading is filed under an order of court requiring an answer to the merits. *Thompson v. Dickinson*, 159 Mass. 210, 34 N. E. 262.

c. Attachment.

A proceeding by attachment being auxiliary to the main action, so far as the services of an attorney are required in that pro-

ceeding they fall within the general employment in the action. *Foulks v. Falls*, 91 Ind. 315.

An attorney who releases an attachment without the consent of his client is liable for the damage caused thereby. *Walker v. Goodman*, 21 Ala. 647, wherein the court said: "The allegation is, that defendants having been retained as attorneys to prosecute an attachment suit, for want of care and skill 'dismissed the levy of the attachment,' and 'released and relinquished all liens which had accrued by reason of such levy,' by which plaintiff 'lost her demand and the means of recovering the same.' This count undoubtedly presents a substantial cause of action against an attorney for negligence. The degree of negligence necessary to charge him is a question of fact for the jury."

It has been held that an attorney, charged with the collection of a demand, having procured an attachment to be made of the debtor's property, which was replevied from the possession of the officer making the attachment, was bound to act as attorney in the defense of the replevin suit, and was responsible for his negligence therein. *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39, wherein it was said: "The defendants were engaged as attorneys to prosecute and collect the plaintiff's debt. They were under legal obligation to discharge this duty with competent skill and fidelity. The object of the suit, instituted by them for the plaintiff, was to obtain judgment, and as the fruits of it, satisfaction of the execution, which issued. They had caused the debtor's property to be attached; and it was their duty, by all legal means, to make that attachment available. They became professionally charged with all legal ancillary proceedings necessary to make the attachment effectual."

The mere employment of an attorney to collect a claim imposes no duty on him to execute an affidavit and bond in attachment for his client. *Foulks v. Falls*, 91 Ind. 315. In that case it was said: "It is not the duty of attorneys to make affidavits in attachment proceedings. They sometimes do so, but the propriety of such course has always been doubted by the profession, and in some instances the right has been questioned. Such a practice should be discouraged rather than imposed as a duty. See *Abbott v. Zeigler*, 9 Ind. 511. It clearly would be unreasonable to hold that under a general employment, such as the contract in this case makes, it is the duty of the attorney to furnish a bond and incur the personal liability that might result therefrom. The propriety of lawyers signing bonds for their clients has always been questioned, and many courts have adopted rules absolutely prohibiting it. See *Ohio, etc. R. Co. v. Hardy*, 64 Ind. 454. The em-

ployment and contract imposed no duty upon appellant to make and execute such affidavit and bond; nor would positive instructions from appellee requiring such services have imposed such duty. The undertaking of the attorney is to perform such services as properly belong to the profession; such as the client, for want of learning and skill, cannot himself perform; but it does not require him to assume the burdens and risks of both attorney and client."

d. Trial.

It is the duty of an attorney who has been retained to conduct the trial of a cause for either party, to be prepared for that purpose when the trial is called. *Mercer v. King*, 1 F. & F. (Eng.) 490; *Reece v. Rigby*, 4 B. & Ald. 202, 6 E. C. L. 451. See also *Hatch v. Lewis*, 2 F. & F. (Eng.) 467, 7 H. & N. 367, 7 Jur. N. S. 1085.

Under the *English* practice, an attorney prepares the case for trial, and turns it over to an advocate or counsel to conduct the trial. Where an attorney fails to hand over his briefs to counsel in time, in consequence of which the latter is unprepared and the client suffers a nonsuit, the court will grant a new trial, but will compel the attorney to pay all the costs made necessary by such proceeding. *De Rouffigny v. Peale*, 3 Taunt. 484; *Townley v. Jones*, 8 C. B. N. S. 289, 98 E. C. L. 289; *Hawkins v. Harwood*, 4 Exch. 503, 7 Dawl. & L. 181.

The attorney is required to be in attendance and personally to supervise every step of the proceeding. *Holy v. Built*, 3 B. & Ad. 350, 23 E. C. L. 91. See also *Mordecai v. Solomon*, Say. 172; *Cresswell v. Bryon*, 14 Ves. Jr. 272. But where two or more attorneys are engaged, and the contract does not require all of them to be present at the trial and participate therein, they may agree, on consultation, that some of their number need not attend. *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801. See also *Rust v. Larue*, 4 Litt. (Ky.) 416, 14 Am. Dec. 172; *Eggleson v. Boardman*, 37 Mich. 19. In *Phillips v. Edsall*, supra, the court said: "Appellant was entitled, under the contract, to the services of all three of the attorneys in each one of the suits mentioned therein. But, it will be noted, the contract was to act as his attorneys and counsel, and do all things deemed necessary to faithfully represent and defend his interests in said cases, according to their best judgment and ability. The spirit of the contract did not require that all three of the attorneys should be present in court when each and every step was taken in each and every one of the six cases, unless in their best judgment such presence was necessary or advisable. The conduct of all

the parties to the contract in regard to the trial and proceedings, in this and the other suits, clearly indicates it was understood by them as is above suggested. It appears that all three of the attorneys acted together in the case in question, and that appellees, after consultation with Mr. Hawley in regard to the case, attended to the trial, and that no complaint was made, at the time, that they did not all three participate therein."

The trial must be conducted with that reasonable degree of care, skill, diligence and learning which is to be expected from the average lawyer, and, failing in this respect, the attorney must answer in damages to the extent of his client's loss. *Reece v. Righy*, 4 B. & Ald. 202, 6 E. C. L. 451; *Swannell v. Ellis*, 1 Bing. 347, 8 E. C. L. 542, 8 Moo. C. Pl. 340; *Godefroy v. Jay*, 7 Bing. 413, 20 E. C. L. 183; *Drais v. Hogan*, 50 Cal. 121; *Skillen v. Wallace*, 36 Ind. 319; *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268. And see the reported case. In *Skillen v. Wallace*, supra, it was said: "The substance of the complaint was, that the plaintiff was the owner of a valuable piece of ground, describing it, in the city of Indianapolis; that one Carlisle was wrongfully in possession of it; that he employed Walpole, who was an attorney at law, to bring and prosecute a suit for the recovery of possession, and damages for its detention. Walpole brought and prosecuted the suit; that the jury in that suit brought in a verdict for the plaintiff for the whole ground, which was of great value; that when the verdict was brought in by the jury, Walpole took and altered it so as to cover a very small and much less, and a totally valueless, piece of ground, and asked the jury to find the verdict thus altered, which they did; that this was carelessness, negligence, and unskillfulness on the part of Walpole, by which the plaintiff was damaged in the sum of ten thousand dollars, and for which sum he claims judgment. A demurrer, for want of sufficient facts, was sustained, and exception taken, and the correctness of this ruling is the only question before us in this case. It is not pretended that an attorney is not liable in damages for his negligence, carelessness, or unskillfulness in his profession, by which his client is injured, and it would be supererogation to cite authorities on this point. But it is contended that the verdict was the jury's and not Walpole's; that all that was done was in the presence and with the sanction of the court and jury, and that, therefore, Walpole cannot be liable, however much his action may have injured his client. We do not concur in this view. If a plaintiff is entitled to recover one thousand dollars, and a jury brings in a verdict for that sum, and the plaintiff's attorney asks the jury to reduce

or alter the verdict to five hundred dollars and they do so, can it be contended that for this act he would not be liable to his client? We cannot see that there is any legal difference in the case before us and the one supposed."

It has been held that an attorney is not necessarily negligent in permitting an incompetent witness to testify. *Garsed v. Boyd*, 12 W. N. C. (Pa.) 16. See also *Breedlove v. Turner*, 9 Mart. O. S. (La.) 354. Or in failing to take an exception to an erroneous ruling. *Pearson v. Darrington*, 32 Ala. 227, wherein it was said: "There seems to have been no want of ability, learning, or care, in the argument by defendant's counsel. The argument, however, did not prevail; and the court charged the jury, that the testimony was sufficient to take the case out of the statute of limitations. The counsel, notwithstanding the decision of the court, adhered to his opinion, but omitted to take a bill of exceptions. Why he did not is not disclosed. It is manifest it was not because he was ignorant of the law; for he had twice asserted, and maintained by argument, the true doctrine of the law as we understand it. It may have been the result of negligence; or because deferring somewhat to the opinion of the presiding judge; and made by his failure in the court below distrustful of the maintenance of his views in the appellate court, his judgment dictated the expediency of a forbearance to except. We are not to presume negligence, when the facts of the case may as well consist with some other hypothesis. *Mardis v. Shackleford*, 4 Ala. 493. We cannot say that there was negligence. There was manifestly no ignorance of law. It is a case in which one, attentive to his duties and understanding the law, has committed an error of judgment, in determining whether he should yield to or revise a decision of the court. The degree of confidence which one has in his own opinion, and the amount of respect which he has for that of the presiding judge, are all elements influencing the decision of such a question. The ruling of the court involved not merely a knowledge of the law, but the ascertainment of the meaning of the testimony. The judge doubtless understood the law correctly, and only erred in the conclusion that the testimony established with requisite clearness a willingness and liability to pay the debts. While we think the testimony was not sufficient, it is undeniable, that the question is not so clear that it might not differently strike the minds of able lawyers. When a lawyer yields to the opinion of the presiding judge, in reference to such a question, and forbears to take an exception, he cannot be convicted of a want of professional skill, professional knowledge, or professional dili-

gence." In *Gabbert v. Evans*, 184 Mo. App. 283, 166 S. W. 635, it was said that whether it is better to present evidence or to submit the case on the proof offered by the adverse party is a delicate question of judgment and that an attorney will not ordinarily be held liable for an error in deciding it.

c. Entry and Protection of Judgment.

It is the duty of an attorney to take all such steps as may be necessary for the due entry and enrolment of a judgment to which his client is entitled; and his neglect of that duty will render him liable for any loss sustained by the client. *Brown v. Bulkley*, 14 N. J. Eq. 451; *Griggs v. Drake*, 21 N. J. L. 169. See also *Farrand v. Land*, etc. Imp. Co. 86 Fed. 393, 58 U. S. App. 559, 30 C. C. A. 128. In *Griggs v. Drake*, supra, it was said: "The record is undoubtedly drawn in a very inartificial manner, and is very improperly encumbered with copies of the original entries in the book of minutes. The case before us is so striking an instance of the want of skill of many of those intrusted with the duty of enrolling or recording the judgments of our courts as to suggest the inquiry whether the attorney of the plaintiff fully performs his duty to his client, who, when skill is required, does not see to it that the judgment is properly made up. Certainly, a client whose judgment should be reversed for error in entering the same on the record, would have just cause of complaint against his attorney."

So, an attorney is bound to obtain judgment before the debtor's property is encumbered, where by the exercise of reasonable skill and diligence he can do so. *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

It has been held that, in the absence of a special agreement, an attorney's duty does not extend to the preservation of judgments from expiration under the statute of limitations. *McKowen v. Kernan*, 35 La. Ann. 331; *Cook v. Foster* (Pa.) 6 Atl. 150. In the case first cited it was said: "There is, however, another and last defense urged against the demand made in this suit, which, in our opinion, should and must prevail, and that is, that there was no special contract or agreement between the plaintiff and defendant, that he, defendant, should have the judicial mortgage reinscribed, and there was no obligation or duty resulting from his employment as attorney in the suit to do so. The evidence satisfies us that there was no such special engagement about the reinscription of the judgment, and not even a request from the plaintiff to the defendant to do so. From his employment in the suit mentioned, it was obligatory on the defendant to prosecute the same to the best of his ability, and

there is no complaint that he did not do so. The reinscription of the mortgage formed no part of the demand in the suit, but was an act outside of it, to be performed by the recorder upon a simple request, requiring no professional knowledge or skill to make it. The plaintiff lived in the parish; as tutor of the minor claiming the judgment he knew or should have known the precise situation of affairs, and was bound to do and perform whatever was necessary, with respect to this judgment, to protect the rights of his wards therein. Defendant was under no obligation to attend to the reinscribing for him in the absence of any request to do so; it was no part of the attorney's duty." So in *Cook v. Foster*, supra, the court said: "The court's affirmance of the defendant's fourth point, which reads as follows: 'The mere entry of a judgment by an attorney at law, without more, imposes on him no liability to notify his client, or revive the judgment when the lien is about to expire,' was undoubtedly proper. In such case an attorney is employed for a special purpose,—the confession of the judgment,—and when that is done his duty ends. Non constat that the client desires him to take charge of the judgment after its entry, for the additional responsibility necessarily involves additional fees which the owner of the judgment may not be willing to pay. As well might prothonotaries who have, under the act of assembly, the same power to confess judgments on judgment bills as have attorneys at law be charged with their subsequent care and revival."

An attorney is liable to his client for any loss caused by his unauthorized or negligent allowance of the vacation or opening of a judgment. *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402. As to the authority of an attorney to vacate or open a judgment in favor of his client, see the note to *Tritsch v. Covington*, Ann. Cas. 1916B 722. In *Clussman v. Merkel*, supra, after holding that an attorney has authority to consent to the opening of a default judgment, the court said: "It would be more discreet for an attorney, before giving such a consent, to confer with his client. If the client knew and could state facts tending to show that by vacating the judgment unconditionally he would be in danger of losing his claim, and that it would be secure if the judgment was to stand as security for such sum as might ultimately be recovered, he might with propriety refuse to consent that the defendant be permitted to answer except upon the terms that the judgment should stand as security. In the case of *Merkel v. Adair*, by the terms of the consent given, the judgment recovered was to stand as security for any sum that might be recovered in that action. If an attorney

waives such a default without consulting or obtaining the consent of his client, and upon the facts then existing and known to the client, and which upon such a consultation it may be justly inferred he would have communicated to the latter, the attorney might expect that the court, according to its customary practice, would impose terms which would make the collection, of whatever sum might be ultimately recovered, reasonably safe; I think he acts at his peril in waiving it, and should be held responsible for any loss directly and naturally resulting from such action on his part."

f. Enforcement of Judgment.

After judgment has been duly entered, an attorney is, in most jurisdictions, impliedly authorized to proceed for the enforcement thereof, and liability may be predicated on his failure to do so. *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 1 Vt. 73. In the case first cited, it was said: "The first writ of execution (being a *fi. fa.* with an alternate *ca. sa.* clause) was issued with promptitude, and although there was subsequently a hiatus of near nine months between the return day of this writ of execution and the issuance of the alias, the return of the sheriff on the first, that the defendant 'was not to be found in his county,' was, under the state of the case as to this point, as shown by the testimony, amply sufficient, in our opinion, to exonerate the defendant from gross negligence in this delay. There was also, we think, sufficient legal testimony to authorize the jury to find that, in failing to sue out further process of execution against the defendant, Smith, after the sale of the negro, the defendant in this action, was influenced *bona fide* by a prudent regard for the interest of his client and to exonerate him as to this conduct from gross negligence. But we are unable to find any testimony in the record going to exonerate him from the duty of taking further steps against Pullen, the security in the forthcoming bond. This bond had been taken by the sheriff of Arkansas county in discharge of his official duty, and a part of this duty in the premises was to take sufficient security. This, of itself, in the absence of testimony to the contrary, would have authorized a prudent man to infer that Pullen was solvent. And although there was no direct evidence that the defendant knew Pullen's place of residence, reasonable diligence would have induced him to make inquiry as to the fact from the sheriff of Arkansas county, who had taken the forthcoming bond, if indeed he was uninformed as to this fact. No such exonerating proof was adduced, nor

are there any facts or circumstances proven as to Pullen's pecuniary condition or other collateral facts that authorized a finding that in failing to pursue him with other process the defendant was superinduced *bona fide* by a prudent regard for the interest of his client. Nor is it shown that, in his failure to proceed further, the defendant was controlled in the performance of his duties by any instructions either express or implied from his client. If the judgment upon the forthcoming bond was void, he might have disregarded it and taken other proceedings; if erroneous and not void, he might have taken steps for its reversal. And although it may be void or erroneous, it will not, by any means, follow that for this reason the defendant was necessarily guilty of gross negligence for want of knowledge and skill. (*Godfrey v. Dalton*, 6 Bing. 460, 19 E. C. L. 132; *Russel v. Palmer*, 2 Wils. C. Pl. (Eng.) 325, 6 Munf. (Va.) 557.) But the defendant took no steps at all, and has failed to develop by his testimony any fact or circumstances by way of excuse, and but for those touching the doubtful pecuniary condition of Mrs. Smith, he would not have excused himself for not taking further steps against her."

If the failure of an attorney to collect a judgment is due to negligence it is immaterial that he acts in good faith. *Miller v. Prescott*, 157 Wis. 264, 146 N. W. 1124.

An attorney is liable to his client for any loss resulting from his negligence in the enforcement of a judgment. *Phillips v. Bridge*, 11 Mass. 246; *Enterline v. Miller*, 27 Pa. Super. Ct. 463. In the case last cited it was said: "An attorney must be held to know the return day of process issued by his direction, must keep himself informed of the steps taken by the sheriff in its execution, and must give all instructions necessary to secure his client's interests. It is usual for the attorney, on execution process, to give directions respecting the property which he desires should be sold, especially when this is real estate; and, if he omits this, he should at least ascertain what has been done in the premises by the sheriff and act as the interest of his client requires. He must be held to know that when the return day of a *fi. fa.* has passed without a levy, the writ is *functus officio*; that a *vend. ex.* is issued only for a sale by virtue of a levy made on an antecedent writ; and he must at all times inform himself of the state of the record, and of the sheriff's proceedings, before taking or directing any further step based thereon. . . . The proceedings subsequent to the return day of the *fi. fa.* were wholly irregular, and not title passed by the sale. They were in disregard of well-settled rules of practice, which every attorney must

be expected to understand and observe. An attorney is not, indeed, responsible for a mistake of the sheriff to which he in no way contributes. But when he acquiesces in such a mistake, and directs further proceedings, founded on it, he makes the error his own, and is answerable for the loss to his client arising from such proceedings."

Ordinarily, however, an attorney's duties with respect to the enforcement of judgments are fully performed when he causes proper process for that purpose to be placed in the hands of the officer whose duty it is to execute it, and gives such instructions as are necessary for the guidance of such officer. The attorney need not attend personally to the levy or sale under the process. *Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Gaines v. Becker*, 7 Ill. App. 315. See also *Holmes v. Peck*, 1 R. I. 242. Nor does the general duty of an attorney require him to search for property which may have been fraudulently disposed of, or to institute new and collateral proceedings with reference to such property. *Morgan v. Giddings (Tex.)* 1 S. W. 369. So, negligence cannot be predicated on an attorney's failure to levy an execution where it appears that the judgment debtor had no property, which would have been subject thereto. *Siddall v. Haight*, 132 Cal. 320, 64 Pac. 410.

g. Proceedings for Review.

As a general rule, the implied authority of an attorney ends with the entry of a final judgment in the trial court; and, while there are some exceptions to this rule (see note, 16 Ann. Cas. 928), it has been held that he will not be held liable for failure to take proceedings for the review of a cause unless he has been directed, and has agreed, to do so. *Hey v. Simon*, 93 S. W. 50, 29 Ky. L. Rep. 315, wherein the court said: "The rule is, that if an attorney is employed to bring an action, his authority ends with the rendition of final judgment in the case, and that he has no authority to take an appeal without further employment or direction from his client. *Richardson v. Talbot*, 2 Bibb. (Ky.) 382. We do not mean to say that a broader authority may not be conferred upon an attorney when he is employed. We only mean that the authority to bring or prosecute an action ends with the termination of the suit. The language of the petition in this case which we have quoted shows no more than that Simon was employed to institute and prosecute the actions against Harding. When the cases were decided in the Harrison circuit court it was incumbent upon the plaintiff to direct his attorney as to what further steps he should take. It is

not alleged in his petition that Hey was not present at the trial, or did not know of the judgment, or that he gave any directions to Simon as to taking an appeal; and no facts are shown from which any liability would be imposed upon Simon for not informing him of the necessity for executing a supersedeas bond. It is not alleged that he did not know it was necessary to execute a supersedeas bond, or that he could or would have given the bond if Simon had informed him that it was necessary to do so."

Where he has been retained for this purpose, however, it is the attorney's duty to take all proper steps to bring the cause before the appellate court, and his failure to do so will render him liable for any loss suffered by his client as a consequence thereof. *Drais v. Hogan*, 50 Cal. 121; *Rosebud Min. etc. Co. v. Hughes*, 16 Colo. App. 162, 64 Pac. 247; *Childs v. Comstock*, 69 App. Div. 160, 74 N. Y. S. 643. Where a solicitor is relied on to perfect an appeal, counsel engaged in the same case are not liable. *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617. In *Drais v. Hogan*, supra, it was said: "But assuming that the defendant had the management of the cause in the district court—and in view of the implied findings below, we must assume that he did—the grossest mismanagement after all is found in his failure to appeal from the judgment itself. The complaint of Budd and Dudley, upon which the judgment against Lucinda Drais was founded, was radically defective, and wholly insufficient to support that judgment. An appeal from the judgment itself would have brought up the pleadings as being part of the judgment-roll, and must have terminated in a virtual defeat of the action. An inspection of the record in that cause, in view of the uniform decisions of this court, from the case of *Rowe v. Kohle*, 4 Cal. 285, to the present time, as to the capacity, or rather the want of capacity, of a married woman to bind herself by such a contract as was alleged in that case, is decisive upon this point. In this view it was inexcusable in the defendant to have permitted the time limited by statute for an appeal from the judgment itself to pass away, and so to allow the rights of the defendant in that action to become lost in the abortive attempt to obtain a new trial, when such new trial, even had it been properly obtained, was not necessary for her protection under the circumstances of the case."

In *Montrose v. Baggott*, 161 App. Div. 494, 146 N. Y. S. 649, it was held that the making of a stipulation which did not as a matter of law have the effect of releasing the sureties on an appeal bond was not negligence, though a trial court erroneously gave the stipulation such an effect.

In *Gabbert v. Evans*, 184 Mo. App. 283, 166 S. W. 635, it was held that no damage resulted to the client from the negligent failure of an attorney to take an appeal within the time limited by statute where every question involved could be reviewed on a writ of error, which was still available at the time the attorney was superseded by another. The court said: "While a writ of error is denominated a new suit and an appeal is a continuation of the former suit, yet, for all practical purposes, the one is as effective in having errors of the trial court corrected by an appellate court as the other. It is the common practice in the appellate courts of this state when appeals fail for any reason, or even on dismissing same voluntarily, to at once bring the case up by writ of error. The only answer to this suggested by the defendant is that plaintiffs failed to advise her of her right to take the case up on writ of error. The evidence, however, shows that the judgment of the Young case was compromised and settled within three or four months after its rendition. It further appears that defendant, as so often happens, when she lost the case in the trial court, became dissatisfied with her attorneys, the plaintiffs, and straightway consulted and employed a new attorney to advise her in the further conduct of the cause and that he negotiated and arranged the compromise. The defendant practically ceased to communicate with or to ask or take advice from plaintiffs. She had abundant time to sue out a writ of error, and no doubt her new attorney advised her of such right to do so, if she was really advised that a review of the case by an appellate court would avail her anything and desired to pursue that remedy, of which evidence is lacking."

5. COLLECTION OF CLAIMS.

a. In General.

An attorney to whom claims have been intrusted for collection must exercise the same reasonable degree of care, skill and diligence as is required in the performance of other professional duties; and if he neglects to do so, he will be liable to his client to the extent of the loss sustained by reason of his negligence.

England.—*Kemp v. Burt*, 4 B. & Ad. 424, 24 E. C. L. 93; *Williams v. Gibbs*, 5 Ad. & El. 208, 31 E. C. L. 317.

Alabama.—*Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

Arkansas.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

California.—*Drais v. Hogan*, 50 Cal. 121.

Georgia.—*Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

Illinois.—*Stevens v. Walker*, 55 Ill. 151.

Indiana.—*Reilly v. Cavanaugh*, 29 Ind. 435 (taking judgment on insufficient service); *Foulks v. Falls*, 91 Ind. 315.

Kentucky.—*Eccles v. Stephenson*, 3 Bibb 517; *Townsend v. Dittoe*, 6 Ky. L. Rep. 290.

Louisiana.—*McMicken v. Brent*, 6 Mart. N. S. 249; *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814.

Maine.—*Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39; *Wilson v. Russ*, 20 Me. 421.

Massachusetts.—*Varnum v. Martin*, 15 Pick. 440; *Wilson v. Coffin*, 2 Cush. 310; *Dearborn v. Dearborn*, 15 Mass. 316.

Mississippi.—*Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86.

New York.—*Smedes v. Elmendorf*, 3 Johns. 185.

Pennsylvania.—*Cox v. Livingston*, 2 Watts & S. 103, 37 Am. Dec. 486; *Riddle v. Poorman*, 3 Pen. & W. 224; *Waln v. Beaver*, 161 Pa. St. 605, 29 Atl. 114, 493.

South Carolina.—*Hogg v. Martin*, *Riley L.* 156.

Tennessee.—*Gaar v. Hughes*, 35 S. W. 1092.

Texas.—*Oldham v. Sparks*, 28 Tex. 425; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App. § 29, 14 S. W. 1007.

Vermont.—*Crooker v. Hutchinson*, 2 D. Chip. 117.

Virginia.—*Rootes v. Stone*, 2 Leigh 650; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

Wisconsin.—*Ott v. Hood*, 152 Wis. 97, 139 N. W. 762.

In *Oldham v. Sparks*, 28 Tex. 425, it was said: "Gross neglect by an attorney at law in failing to collect a claim received by him for that purpose would render him liable to his client for the amount of damages consequent upon such negligence. (*Cox v. Livingston*, 2 Watts & S. 103.) There is nothing in the petition which negatives the existence of such neglect in the present case. On the contrary, the facts that the claim was in the hands of plaintiffs in error several years without any effort being made to collect it, and that it became barred by limitation whilst in their possession, and they have rendered no reasonable excuse therefor, show sufficient negligence on their part to entitle the defendant in error to the judgment she obtained before the justice of the peace." In *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386, the court said: "The court below did not err in charging the jury, that money raised by attorney upon a judgment in his own favor, by extraordinary diligence, ought not to be applied by him to the claim of his client in his hands for collection. The facts were, that the defendant, having a judgment against the debtor of his client, employed an agent at the cost of one-half his debt, to subject property in one of the remote counties of the state, and did subject it. Such a contract he could not make for his client

without special authority. He is bound to the highest honor and integrity, to the utmost good faith. As a general rule, he will not be permitted to pursue his own interests when they conflict with those of his client. By assuming the trust to collect, he pledges himself to protect his interest against all others, even his own. Yet, if in the exercise of a diligence beyond the powers and obligations of his trust, he realizes a fund out of the common debtor, we know of no rule of law or equity which would compel him, at the peril of accountability in damages, to pay it to his client. To appropriate money raised as this was, is no violation of professional honor. What facts will constitute professional faith and fulfil the requirements of professional honor, it would be in vain to attempt to ascertain by any general tests. Each case, in this regard, must be determined by its own facts. Clearly, however, it is the interest of the community, and also of a profession distinguished for its liberal views, its lofty honor, and its great social and moral influence, that the liability of its members, upon the score of good faith, should be subject to an exceedingly stringent rule." In *Riegi v. Phelps*, 4 N. D. 272, 60 N. W. 402, with respect to the duty of an attorney employed to make a collection to disclose to his client the facts relating to a proposed compromise, it was said: "They were under obligations to disclose to her, or to those acting for her, who had employed them, all facts affecting her rights. They were bound to apprise her of the amount which had been collected before securing her assent to accept from them any sum in settlement of the note. To inveigle her into consenting to receive only thirty per cent of the amount collected, by a suppression of the facts, was not only a betrayal of trust, but, under the circumstances, amounted to a positive fraud." As to the matters within the implied scope of an employment to collect, the court said in *Stubbs v. Beene*, 37 Ala. 627: "It must be conceded, that an attorney at law, who receives a claim for collection, in the absence of proof to the contrary, will be presumed to have received it for collection by suit; and that, by the implied terms of such contract, he is required to give his professional skill and attention to all the ordinary stages of the litigation. See *Mardis v. Shackelford*, 4 Ala. 493; also, *Smedes v. Elmendorf*, 3 Johns. (N. Y.) 187. So, if any cross litigation be instituted, which bears directly on the further progress of the suit under his control, it is possibly his duty to represent his client in such defensive cross litigation. *Dearborn v. Dearborn*, 15 Mass. 316; *Smallwood v. Norton*, 20 Me. 87. But those matters which lie outside of the regular line of professional

attorneyship, and which partake rather of the character of agencies, rest on a different principle. While an attorney may lawfully perform many of these agencies, he is not, in the absence of an express engagement to do so, bound to perform them. They are not among the implied obligations he incurs, when he assumes the relation of attorney for another."

An attorney who accepts depreciated money is liable to his client for the loss sustained. *Botts v. Crenshaw*, Chase 224, 3 Fed. Cas. No. 1,690; *West v. Ball*, 12 Ala. 340; *Van Vacter v. Brewster*, 1 Smedes & M. (Miss.) 400; *Pidgeon v. Williams*, 21 Grat. (Va.) 251. See also *Wickliffe v. Davis*, 2 J. J. Marsh. (Ky.) 69; *Lord v. Burbank*, 18 Me. 178.

An attorney does not guarantee or insure the collection of claims placed in his hands, and if he acts in good faith, to the best of his skill, and with a reasonable degree of care and diligence, he is not responsible for failure to collect. *Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482; *Stubbs v. Beene*, 37 Ala. 627; *Moore v. Winston*, 66 Ala. 296; *Nisbet v. Lawson*, 1 Ga. 275; *Bougher v. Scobey*, 23 Ind. 583; *Nickless v. Pearson*, 81 Ind. 427; *Nickless v. Pearson*, 84 Ind. 602; *Hughes v. Boyce*, 2 La. Ann. 803; *Odlin v. Stetson*, 17 Me. 244, 35 Am. Dec. 248; *Wilson v. Russ*, 20 Me. 421; *Wright v. Ligon*, Harp. Eq. (S. C.) 166; *Read v. Patterson*, 11 Lea (Tenn.) 430; *Morgan v. Giddings* (Tex.) 1 S. W. 369; *Tuley v. Barton*, 79 Va. 387; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199. See also *supra*, subdivision I. 1. b. *Attorney Not Insurer*. As to the validity of an agreement whereby a larger measure of liability was assumed the court said in *Morrill v. Graham*, 27 Tex. 646: "It is also charged in the petition, that *Morrill*, by an express promise and undertaking to this effect, bound himself to pay *Graham* the amount of his debt upon his ultimate failure to collect it. It is quite evident from an inspection of the charge of the court that the verdict of the jury did not rest upon this latter ground. We need, therefore, at present, only say, that such a contract, if supported by a sufficient consideration, is unquestionably valid and binding, and that limitation would not commence running against it until the final termination of the proceedings advised and instituted by the attorney, for the collection of the debt for which he has thus bound himself. The mere confidence, however, on the advice of the attorney, or acquiescence in the course he wished to pursue in the matter would not be sufficient to support an action upon the promise of the attorney, to pay the debt, if he should fail to collect it. But it would be otherwise, if in consideration of such promise

the client should agree not to withdraw the business from the hands of the attorney, or consent, on the faith of such promise, to waive a proceeding which otherwise he would have taken, and by reason of which his debt would have been secured." See to the same effect *Gregory v. Gleed*, 33 Vt. 405.

An attorney who receives and holds a claim for the convenience of the owner, and for the purpose only of receiving and paying over the money paid thereon, no compensation being charged or received, cannot be held responsible in case the debt is barred by limitation. *McAdoo v. Lummis*, 43 Tex. 227. Where an attorney is authorized to use his discretion as to what is best to be done in the interest of a client whose claim he has undertaken to collect, he cannot be held liable for a failure to succeed unless such failure is occasioned by a want of knowledge of the elementary principles of law such as every practicing attorney is presumed to understand, or, having such knowledge, he does not exercise it. *Morgan v. Giddings* (Tex.) 1 S. W. 369. See also *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Bennett v. Phillips*, 57 Ia. 174, 10 N. W. 328; *Wright v. Ligon*, Harp. Eq. (S. C.) 166; *Morrill v. Graham*, 27 Tex. 646; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117; *Hopkins v. Willard*, 14 Vt. 474. In the case last cited it was said: "The demand was left with the defendants for collection, without any express instructions as to the course to be pursued by them, and the question must depend upon the implied powers of the attorney in such case. Certainly no fault can be found with the charge of the court, which requires the attorney to use common diligence in the collection of the demand, by which we are to understand that degree of diligence which a man of ordinary prudence would use in his own business. If, in the absence of any special instructions, such degree of diligence is used, the attorney cannot be charged with negligence, as this, in a case like the present, simply implies a want of ordinary care. The court told the jury that the defendants had a discretion not to have the debtor committed, if there was good reason to believe that such a course would be injurious to the creditor, and that after commitment, he had the same right to release the debtor from jail, and that he might do this, without consulting the creditor, when he resided at a distance, provided he acted as a man of common prudence, and in so doing he might be guided by the apparent circumstances of the debtor. In *Briggs v. Georgia*, 10 Vt. 68, it was held that, in this state, there is combined in the character of attorney that of agent to ascertain extent, and that an attorney, employed to conduct a litigated suit, might employ assistant counsel in the absence and upon the credit of his

client. Much more should the attorney, who receives a demand for collection from a distant creditor, combine the character of agent. This will be, ordinarily, beneficial for the creditor, and is in accordance with our course of business. When the creditor is remote, he cannot be supposed to be particularly advised of the situation of the debtor; and if the attorney uses the requisite diligence, he must certainly be justified in acting upon the result of his information. Though we may have extended the powers of an attorney somewhat beyond his powers at common law, yet, it is believed, that the views now expressed are in accordance with a long course of practice in this state, founded in good reason."

b. Failure to Care for Proceeds.

Money collected by an attorney belongs to the client. It has been said that the attorney occupies toward such money the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund, and that the circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61, wherein it was also said that whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the cestui que trust has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. See also supporting the same rule, *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28, R. & M. 274, 21 E. C. L. 438; *Gilbert v. Welsch*, 75 Ind. 557. If a person acts for another as solicitor and as trustee, and receives money in the latter capacity, it is not by operation of law eo instante transferred to his hands as solicitor. *Scott v. State*, 2 Md. 284.

An attorney making a collection must notify the client with reasonable promptness, *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28; *Jett v. Hempstead*, 25 Ark. 462; *Spencer v. Smith*, 45 Ind. App. 17, 87 N. E. 154; *Voss v. Bachop*, 5 Kan. 59; *Riegi v. Phelps*, 4 N. D. 272, 60 N. W. 402; *Gaar v. Hughes* (Tenn.) 35 S. W. 1092; unless circumstances make the giving of notice impracticable. *Pidgeon v. Williams*, 21 Grat. (Va.) 251, wherein it was said that "even when the client is not informed of the fact, circumstances may excuse the attorney for the failure to give notice; as, for example, if his client has left the country, or his whereabouts is not known to the attorney, or he has not the means of communicating with him by reason of a state

of war, the relations of one being with one of the belligerents, and of the other with the other belligerent, so that intercourse and intercommunication between them is interrupted."

An attorney should not mingle his client's money with his own, *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; *Dean v. State*, 147 Ind. 215, 46 N. E. 528; see also *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28; *Ansley v. Anderson*, 35 Ga. 8; *Norris v. Hero*, 22 La. Ann. 605; *McAllister v. Com.* 30 Pa. St. 536; *Pidgeon v. Williams*, 21 Grat. (Va.) 251; *Sargeant v. Downey*, 49 Wis. 524, 5 N. W. 903, nor should such money be deposited in a bank in the name of the attorney individually, *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; though a deposit of his client's money to the individual account of the attorney does not, in itself, amount to a conversion. *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201. In *Naltner v. Dolan*, supra, it was said: "Money belonging to a client having been received by the attorneys, in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it occurred, the question is, having acted in the utmost good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not with their own funds, notwithstanding the bank was in good credit when the deposit was made? The receipt of money by an attorney, under the circumstances disclosed in this case, does not ipso facto create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit cannot be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies toward it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he exercises the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused. . . . The authorities, however, distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving by extraneous evidence

that the fund was not the individual money of his trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the cestui que trust has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the cestui que trust has the option to do likewise. . . . Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited. *Gilbert v. Welsch*, 75 Ind. 557; 2 Leading Cases in Equity, 1805. Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof aliunde as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option. Applying the principles stated to the facts found, the conclusion follows, that the appellants assumed the risk that the bank, in which the fund was deposited in their name, and from which it could only have drawn by their check, would be able to respond with the money when their check for it should be presented. The fact that none but money belonging to clients was deposited in the account in which the fund in question was placed does not alter the case. The controlling consideration is, that it was deposited to the credit of the firm, without anything to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so, the owner had the right to elect to stand upon the title to the deposit, as he found it. Having so elected, there is no rule of law which authorizes any inquiry into the motives for so taking the title, short of an express or implied direction, from the owner of the fund."

If money collected is properly deposited in the name of the client and the latter is promptly notified, the attorney is protected notwithstanding the subsequent failure of the bank. *Rogers v. Hopkins*, 70 Ga. 454; *Pidgeon v. Williams*, 21 Grat. (Va.) 251. See also *Kimmell v. Bittner*, 62 Pa. St. 203; *Gaar*

v. Hughes (Tenn.) 35 S. W. 1092. In *Pidgeon v. Williams*, supra, it appeared that an attorney, having collected a claim, deducted his fees and deposited the balance in a bank, which was then solvent and in good standing, to the credit, not of his private account, but of an account called the collection account, to the credit of which he was in the habit of depositing all moneys collected for clients. The name of the client, for whose benefit the deposit was made, was entered in the bank book opposite the entry of the deposit. The client neglected to call for his money for some years, and until after the bank had become insolvent. It was held that the attorney was not liable for the money so deposited and lost.

c. Failure to Pay Over Proceeds.

It is the duty of an attorney who makes a collection to pay the proceeds promptly to his client.

United States.—In re Martin, 167 Fed. 236.

Alabama.—Cameron v. Clarke, 11 Ala. 259.

Arkansas.—Burke v. Stillwell, 23 Ark. 294.

California.—McRaven v. Dameron, 82 Cal. 57, 23 Pac. 33.

Georgia.—Nisbet v. Lawson, 1 Ga. 275.

Illinois.—Jacobson v. Jones, 128 Ill. App. 55.

Indiana.—Dawson v. Compton, 7 Blackf. 421; Bougher v. Scobey, 16 Ind. 151; Spencer v. Smith, 45 Ind. App. 17, 87 N. E. 154.

Kentucky.—Wellenbrock v. Speckert, 55 S. W. 200, 21 Ky. L. Rep. 1369.

Maine.—Newcastle v. Bellard, 3 Greenl. 369.

Michigan.—Robinson v. Hawes, 56 Mich. 135, 22 N. W. 222; Reynolds v. Cavanaugh, 139 Mich. 387, 102 N. W. 986.

Mississippi.—Grayson v. Wilkinson, 5 Smedes & M. 268.

Missouri.—Houx v. Russell, 10 Mo. 246; Sullivan v. Grace, 5 Mo. App. 594; Jenkins v. Clopton, 141 Mo. App. 74, 121 S. W. 759.

Nebraska.—See Jennings v. Simpson, 12 Neb. 558, 11 N. W. 880.

New York.—Sackett v. Breen, 50 Hun 602 mem. 3 N. Y. S. 473; Caccia v. Isecke, 123 App. Div. 779, 108 N. Y. S. 542; Weber v. Manheimer, 23 Misc. 157, 50 N. Y. S. 668; Matter of Keen, 39 Misc. 374, 79 N. Y. S. 857; Marvin v. Ellwood, 11 Paige 365.

Utah.—Everett v. Jones, 32 Utah 489, 91 Pac. 360.

Vermont.—Goodyear Metallic Rubber Shoe Co. v. Baker, 81 Vt. 39, 15 Ann. Cas. 1207, 69 Atl. 160, 17 L.R.A. (N.S.) 667.

Virginia.—Gathright v. Marshall, 1 Hen. & M. 427.

Wisconsin.—Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Ott v. Hood, 152 Wis.

97, Ann. Cas. 1914C 636, 139 N. W. 762, 44 L.R.A. (N.S.) 524.

In *Ott v. Hood*, 152 Wis. 97, Ann. Cas. 1914C 636, 139 N. W. 762, 44 L.R.A. (N.S.) 524, it was said: "It is often said, in adjudicated cases of this kind, that no cause of action arises except upon demand and refusal to pay, so one is liable to indulge in the idea that there is an unconditional rule to that effect. Such rule presupposes that the collector has reasonably notified his principal of the collection and only waits opportunity to pay over the money personally, or remit the same in such manner as such principal may direct. The client need not, in order to protect his interests in such circumstances as here, keep in touch with the attorney's office in order to demand the money. He may wait for notice, relying upon the duty to give such notice within a reasonable time, and in case of failure he may sue without further ceremony. The delay completes the cause of action as perfectly as demand and refusal."

A similar liability rests on an attorney to turn over any property other than money which is received for the client. *Cameron v. Clarke*, 11 Ala. 259; *Commonwealth Bank v. Patton*, 4 J. J. Marsh. (Ky.) 190; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

An attorney is not justified in delaying the payment of the proceeds of a collection because a third person informally claims the fund. *Jacobson v. Jones*, 128 Ill. App. 55; *Dunn v. Vannerson*, 7 How. (Miss.) 580. See also *Boulden v. Hebel*, 17 Serg. & R. (Pa.) 312. *Compare Sims v. Brown*, 6 Thomp. & C. (N. Y.) 5, holding that there is no difference between the nature and the extent of the liability of an attorney and that of any other agent in respect to moneys collected by him for his principal and claimed by a third person; and that accordingly, where an attorney, after notice from the plaintiff that she claimed moneys collected by him in an action brought in behalf of one A., paid it over to his client, the plaintiff was entitled to recover of the attorney the amount so paid over. See also *Peyser v. Wilcox*, 64 How. Pr. (N. Y.) 525; *Mahler v. Hyman*, 17 N. Y. S. 588.

The relation in which an attorney stands to his client will not permit him to file an ordinary bill of interpleader on every claim made to the fund which has been collected by him for his client. *Marvin v. Ellwood*, 11 Paige (N. Y.) 365. But where the fund has been formally claimed by a third party the attorney is warranted in demanding indemnity from his client before he turns it over to him, and, should the client fail so to indemnify him, the attorney may seek an interpleader, or other proceeding in the nature thereof, for the purpose of determining the ownership. *Marvin v. Ellwood*, 11 Paige

(N. Y.) 365; *Peyser v. Wilcox*, 64 How. Pr. (N. Y.) 525; *Mahler v. Hyman*, 17 N. Y. S. 588.

The fact that the attorney knows that the debtor has filed a petition in bankruptcy does not require him to withhold payment to his client of money collected. In *re Martin*, 167 Fed. 236.

As a rule, payment must of course be made to the client or his agent. *Wallace v. Peck*, 12 Ala. 768; *Fargo Gaslight, etc. Co. v. Greer*, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589. It has been held that an attorney, who received the amount of a note left with him for collection by a client, and applied it conformably to his instructions, although the note was not negotiable, and was payable on its face to a third person, and no assignment to the client indorsed on it, was not liable to the person who was apparently entitled to the note, but of whose actual claim to the money due on it the attorney had no notice, if it appears that such person himself had placed the note in the hands of the client, with authority to collect it; and that it made no difference, that the attorney was surety for the debts, to which, by the direction of his client, he had applied the amount collected. *Penny v. Caldwell*, 1 Bailey L. (S. C.) 345. But a payment to a third person on the direction of the client or his agent will protect the attorney. *Long v. Sampson*, 4 Ky. L. Rep. 532; *Atkinson v. Howlett*, 11 Ky. L. Rep. 364; *Strohecker v. Hoffman*, 19 Pa. St. 223; *Kimmell v. Bittner*, 62 Pa. St. 203; *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1. Compare *Nisbet v. Lawson*, 1 Ga. 275, wherein it was held that if an attorney collects money under the direction and in the name of an agent knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent, it is not a discharge of the attorney from his liability to his principal.

In *Peck v. Wallace*, 19 Ala. 219, it was held that when a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, and does not claim any lien on it, and the note itself is payable to a third person, and not indorsed, a payment by the attorney of the proceeds of the note to the payee will discharge him from all liability to the person who places the note in his hands.

Where a claim is collected by one to whom it is remitted by the attorney for collection, he may pay it to the attorney. *Tyler v. Cockrell*, 107 S. W. 799, 32 Ky. L. Rep. 1126. And if he assumes the responsibility of making payment to the owner, both he and the attorney who remits the claim to him, will be liable if payment is made to the wrong person. *Lewis v. Peck*, 10 Ala. 142.

But it seems that, in the absence of a beneficial interest in the claim, the attorney cannot sue his subagent for the fund in his own name. *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Herron v. Bullitt*, 3 Sneed (Tenn.) 497. See also *Poor v. Guilford*, 10 N. Y. 273, 61 Am. Dec. 749. And on the other hand the owner of the claim may recover the proceeds from one to whom the claim is remitted by his attorney for collection. *Ex p. Edwards*, 7 Q. B. D. (Eng.) 155; *Robbins v. Heath*, 11 Q. B. 257 note b, 63 E. C. L. 257 note b; *Hanley v. Cassan*, 11 Jur. (Eng.) 1088; *Iron-ton Rolling Mills Co. v. Ross*, 6 Bush (Ky.) 103; *Thacker v. Dun*, 1 Mo. App. 41; *Riegi v. Phelps*, 4 N. D. 272, 60 N. W. 402. See also *Cobb v. Becke*, 6 Q. B. 930, 51 E. C. L. 930. Compare *Robbins v. Fennell*, 11 Q. B. 248, 63 E. C. L. 248.

The attorney may deduct his lawful fees from the amount collected. *Com. v. McKay* (Ky.) 20 S. W. 276; *Tyler v. Cockrell*, 107 S. W. 799, 32 Ky. L. Rep. 1126; In *re Klein*, 101 N. Y. S. 663. But the fact that the amount of his fees is in dispute does not warrant the attorney in retaining the whole sum collected until the dispute is settled. *Conyers v. Gray*, 67 Ga. 329; *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222. See also *Hamel v. People*, 97 Ill. App. 527. But it seems that he may retain the full amount claimed by him. See *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222. In that case, after stating the facts, the court said: "The facts above stated show that, at the utmost, according to the affidavit, the defendant's claim did not exceed \$683.05 against plaintiff, and that amount would be the greatest sum he would be entitled to retain out of the moneys received by him, conceding for the purpose of this question that he could retain money received from one suit to apply upon services rendered in others. The facts, therefore, shown by the affidavit, prove clearly and without question that defendant retained and refused to deliver to plaintiff at least the sum of \$1,516.95 more than he had a right to do. It needs no argument to show that such conduct was improper. It was misconduct in his professional employment, for which an action will lie sounding in tort, based upon neglect or violation of professional duty; and the evidence offered was admissible, and tendered to support the first two counts of the declaration. An attorney has an undoubted right to a lien upon the money or papers of his client which have come to his possession, derived from, or pertaining to, the suit in which his legal services were rendered, to secure payment, not only for his services in that suit, but also for all professional services rendered his client in other suits; but where he receives money, he has no lien upon or right to retain any sum beyond the amount owing him from

his client for professional services, and it is clearly his duty to pay over to his client, on demand, any sum he has received beyond what his client owes him for such services. Indeed, the statute makes such neglect or refusal of the attorney to pay over moneys collected or received for his client or other person, within a reasonable time after demand, a misdemeanor and punishable by imprisonment or fine. How. Stat. sec. 9152. In a case where there is a disagreement between the attorney and client as to the amount due him for professional services, and the attorney retains in good faith what he believes to be justly his due, he would not be liable to the client in this form of action [trover]; he would not be guilty of professional misconduct or a violation of professional duty. But the evidence in this case shows that the amount retained was far beyond the amount owing to defendant, and also that the pretext upon which the defendant claimed the right to keep it was unfounded in fact; and the inference to be drawn is that it was not detained by defendant in good faith, or in the honest belief that it was fairly due to him from the plaintiff. The relation of attorney and client is one of confidence based upon the ability, honesty and integrity of the attorney; and he cannot be justified in retaining in his hands money belonging to the client, for the purpose of forcing the client to settle at unreasonable terms demanded by the attorney, or for the purpose of driving a hard and extortionate bargain with his client. The honor of the profession, as well as the dignity and purity of courts of justice, whose officer the attorney is, require that such practices shall not be sanctioned."

III. *Extent of Liability.*

Unless a person seeking to recover for the negligence of his attorney shows that substantial injury has resulted, his recovery will be confined to a nominal sum. *Lane v. Storke*, 10 Cal. App. 347, 101 Pac. 937; *Hinckley v. Krug*, 34 Pac. 118; *Nave v. Baird*, 12 Ind. 318; *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617, 9 Detroit Leg. N. 604; *Joy v. Morgan*, 35 Minn. 184, 28 N. W. 237; *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Arnold v. Robertson*, 3 Daly (N. Y.) 298; *Lamprecht v. Bien*, 125 App. Div. 811, 110 N. Y. S. 128; *Quinn v. Van Pelt*, 56 N. Y. 417; *Harter v. Morris*, 18 Ohio St. 492; *Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693; *Collier v. Pulliam*, 13 Lea (Tenn.) 114. In *Quinn v. Van Pelt*, supra, it was said: "The action is not brought for the purpose of annulling or rescinding the contract, or recovering back the consideration, but for the enforcement of the contract and the recovery of damages for its

alleged breach. Various breaches are set out in the complaint, and damages therefor to the amount of \$20,000 are demanded. The plaintiff holds the defendant to his engagement, and claims from him damages for its nonperformance to a much larger amount than the consideration which the defendant received for his undertaking. This claim necessarily affirms the contract, and concedes the right of the defendant to retain the consideration. Whatever we may think of the propriety of the original arrangement, we are compelled, in obedience to well-settled rules of law, to hold that in such an action the onus is upon the plaintiff to prove the breach of the agreement and the amount of damages sustained by reason thereof, and that she can recover only the damages thus proved. The court, at the trial, reversed this order of proceeding and held that the plaintiff was entitled to recover back the consideration, less such sum as the defendant should prove to be the value of the services actually rendered by him under the agreement. We think that this was an erroneous view of the case, and it necessarily follows that we must reverse the judgment. If regarded as an action *ex delicto*, for the breach by an attorney of his professional duty, the same result must follow. The measure of damages is not the amount of the fee which he received. The damages may be more or less than the amount of the fee, and the burden rests upon the plaintiff to prove them, and not upon the defendant to prove how much of his stipulated fee he actually earned." In *Joy v. Morgan*, 35 Minn. 184, 28 N. W. 237, wherein it was charged that a mechanic's lien was lost because of the negligence of the claimant's attorney, it was said: "Plaintiffs' recovery (if any) must be of damages, and if, notwithstanding defendant's negligence, they have collected their demand through the lien proceedings, they have suffered no damages, and cannot recover. Prima facie they have collected their demand by bidding in the property sold in the lien proceedings. If they have in fact failed to do so, it is because Mrs. Bowdish had no interest in the lot sold, or not sufficient to satisfy the plaintiffs' judgment and costs of sale. If this is so, it is for plaintiffs to overcome the prima facie presumption against them by so showing." In *Lane v. Storke*, 10 Cal. App. 347, 101 Pac. 937, wherein it was alleged that an attorney wrongfully withdrew from a suit before the trial, the court said: "The damages claimed in both counts are based solely and alone upon the alleged fact that the result of the trial in the case of *Allen v. Williams* and the proceedings in bankruptcy against the firm of *Williams & Company* and *Williams* would have been different under the management of defendant. There are no means whereby such

question can be determined. Observation teaches us the result of trial cannot be predicted with any degree of certainty, even though conducted by lawyers possessing the marked skill and ability attributed under oath, upon information and belief, to defendant. While defendant might have obtained a judgment against Williams for the \$4,000, or secured an adjudication of his insolvency, all as contended by plaintiff, still we cannot say the result might not have been even more disastrous to his client had he not withdrawn as her attorney. Judgment for a greater sum might have been obtained against her in the one case, and in the other she, too, as well as Williams and the copartnership, might have been adjudged solvent."

In the absence of circumstances warranting the allowance of punitive damages, the client can recover no more than the actual damage sustained by him.

United States.—*Suydam v. Vance*, 2 McLean 99, 23 Fed. Cas. No. 13,657. See also *Maryland Casualty Co. v. Price*, reported in full, post, this volume, at page 50.

Arkansas.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

Connecticut.—*Huntington v. Rumnill*, 3 Day 390.

Georgia.—*Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Lilly v. Boyd*, 72 Ga. 83.

Illinois.—*Goldzier v. Poole*, 82 Ill. App. 469.

Massachusetts.—*Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524.

Michigan.—*Dean v. Radford*, 141 Mich. 36, 104 N. W. 329.

Mississippi.—*Grayson v. Wilkinson*, 5 Smedes & M. 268.

New York.—*Quinn v. Van Pelt*, 56 N. Y. 417; *Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431; *Fay v. McGuire*, 20 App. Div. 569, 47 N. Y. S. 286, affirmed without opinion 162 N. Y. 644, 57 N. E. 1109; *Childs v. Comstock*, 69 App. Div. 160, 74 N. Y. S. 643; *Lamprecht v. Bien*, 125 App. Div. 811, 110 N. Y. S. 128; *Flynn v. Judge*, 149 App. Div. 278, 138 N. Y. S. 794.

Ohio.—*Harter v. Morris*, 18 Ohio St. 492.

Pennsylvania.—*McDaniels v. Cutler*, 3 Brewst. 57; *Derrickson v. Cady*, 7 Pa. St. 27.

Rhode Island.—*Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693.

South Carolina.—*Johnson v. Monroe*, 3 Hill L. 8.

Vermont.—*Crooker v. Hutchinson*, 2 D. Chip. 117.

In *Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, several statements of the rule were quoted with approval, the court saying: "As we have seen, the action was for a wilful violation of duty in settling a claim without authority. The

measure of damages applicable in such cases may be the same as if the action was based upon negligence. In either case, we think the damages recoverable are those shown to exist, and that the burden of showing the amount of damages suffered rests upon the plaintiff. In III Am. & Eng. Enc. of Law (2d ed.) 391 the rule is stated as follows: 'In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that the claim was turned over to the attorney for collection; that there was a failure to collect, and that this failure was due to the culpable neglect of the attorney, and that but for such negligence the debt could or would have been collected.' Again, at page 396, the rule as to unauthorized acts is stated as follows: 'An attorney, being without authority to take certain steps in regard to his client's matters, is liable personally for any injury suffered by his client in consequence of his improperly assuming to act where he has no authority. . . . But in these, as in other cases, the client must show that he has suffered actual damage in consequence of the unauthorized acts of his attorney.' In *Weeks on Attorneys at Law* (2d ed. § 319) the measure of damages is stated to be: 'In actions against attorneys for negligence or wrongs, the debt lost and costs sustained through their negligence furnish, when the action can be maintained, the obvious measure of damages, where this measure definitely exists.' In 2 *Shearman & Redfield on Negligence* (§ 753) it is said: 'Where an attorney is chargeable with negligence, an action lies immediately. . . . The damages do not necessarily extend to the nominal amount of the debt lost by the attorney's negligence, but only to the loss actually sustained. . . . The existence of the debt, alleged to have been lost by the attorney's negligence, must, of course, be proved by competent evidence.'" The rule was laid down and the authorities discussed in *Goldzier v. Poole*, 82 Ill. App. 469, where it was said: "In suits against attorneys at law for damages by reason of negligence of the attorney in the management of the client's litigation, it is a general rule that the extent of the damages must be affirmatively shown, for the attorney is only liable for the actual injury which his client has sustained, and not necessarily for the nominal amount of the client's demand. *Weeks on Att'ys at Law* (1st ed.) 293; 2 *Greenleaf Ev. secs.* 146, 148; *Suydam v. Vance*, 2 McLean 99, [23 Fed. Cas. No. 13,657]; *Cox v. Livingston*, 2 *Watts & S. (Pa.)* 103; *Harter v. Morris*, 18 Ohio St. 493; *Eccles v. Stephenson*, 3 *Bibb (Ky.)* 517; *Cox v. Sullivan*, 7 Ga. 144.

Hence, when a claim is alleged to have been lost by the attorney's negligence, in order to recover beyond nominal damages, it must be shown that it was a subsisting debt, and that the debtor was solvent. *Weeks on Att'ys at Law*, 293; *Russel v. Palmer*, 2 Wils. C. Pl. (Eng.) 325, also reported in 2 Comyn on Cont. 3d Am. Ed. p. 252; *Bruce v. Baxter*, 7 Lea (Tenn.) 477; *Staples v. Staples*, 85 Va. 76; *Pennington v. Yell*, 11 Ark. 212. There are decisions holding to the contrary, but we think that the weight of authority supports the rule as announced by the citations above. All of the decisions to the contrary will be found to have been based, either directly or indirectly, upon the authority of *Godfrey v. Jay*, 7 Bing. 413, 20 E. C. L. 183. That case was decided in 1831, and appears to have been altogether based upon the authority of *Marzetti v. Williams*, 1 B. & Ad. 415, 20 E. C. L. 412, which was decided in King's Bench in 1830. But in *Marzetti v. Williams* it was only held that the plaintiff was entitled to nominal damages in absence of proof of actual damages. The authorities cited in *Moorman v. Wood*, 117 Ind. 144, relied upon by appellee, do not support that decision, in so far as it announces the doctrine contended for by counsel for appellee. In *Collier v. Pulliam*, 13 Lea (Tenn.) 114, the decisions contra are distinguished from cases like the one here, where the interest lost by negligence of the attorney is a demand for money or damages, and where the value of the interest lost, and hence the actual injury resulting from the negligence, depends wholly upon the validity of the demand, and the solvency of the one against whom the demand was made. We do not regard decisions in cases where the attorney is chargeable with fraud (*Jennings v. McConnel*, 17 Ill. 148, and others), as in point or controlling in cases where, as here, the only ground of action is negligence." In *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524, it appeared that an attorney by negligently bringing suit deprived his client of the security of a contract for the conditional sale of an engine. The court said: "The measure of damages was the market value of the engine at the time of bringing the action which deprived him of that right." In *Dean v. Radford*, 141 Mich. 36, 104 N. W. 329, it appeared that an attorney negligently failed to carry out his client's instruction to pay the interest on a mortgage, by reason whereof the mortgage was foreclosed and the land sold for less than its value. Holding that the attorney was not liable for the difference between the value of the land and the price secured the court said: "Was the circuit judge right in holding that Mr. Radford should not be liable for the loss of the real estate? It has already appeared that the plaintiff agreed in the mortgage to

keep the property insured, to pay the taxes, and pay interest every six months, and that in case of default in any of the above particulars the principal and interest might be declared due. His testimony was to the effect that he had no other way to get the money. It is not claimed the property was bid in for the benefit of Mr. Radford. It is not claimed he agreed to pay any other amount than the \$168, or to take care of any other amounts which might become due as interest, in insurance, or taxes. Can it be said that, if the \$168 had been paid, the subsequent instalments of interest would be paid as these became due, and there would be no foreclosure? It is true the plaintiff testified he had negotiated for a builder's construction loan, which he believed he could have obtained; but it is apparent from his testimony that there was no good basis for that belief. Can it be said the failure to pay the \$168 was the proximate cause of the loss of the real estate?"

If a person sustains loss because of the negligence of his attorney in the collection of a debt, the measure of damages is the amount of the loss actually sustained, and not the nominal amount of the demand. *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Dearborn v. Dearborn*, 15 Mass. 316; *Voth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488; *Crooker v. Hutchinson*, 2 D. Chip (Vt.) 117. Where an attorney negligently fails, in violation of express instructions from his client, to issue execution on a judgment, he is liable in any event for nominal damages, and if the judgment could have been collected by execution, and is afterwards lost through the insolvency of the debtor, he is liable for the full amount of the judgment; but if the client discharges the negligent attorney, and the judgment could then have been collected by execution, which the client negligently fails to have issued, and the debtors afterward become insolvent, the attorney is liable only for nominal damages, the negligence of the client being the proximate cause of the loss. *Read v. Patterson*, 11 Lea (Tenn.) 431.

Punitive damages may be recovered where the wrong charged and proved against the attorney shows malice, fraud, or such gross negligence or recklessness as to indicate, on the part of the attorney, a wilful or wanton disregard of his client's rights. Thus it has been held that punitive damages may be recovered where an attorney falsely gives his client information that leads her to a second marriage which renders her liable to indictment and prosecution for bigamy. *Hill v. Montgomery*, 84 Ill. App. 300, affirmed 184 Ill. 220, 56 N. E. 320. So, an attorney may become liable for punitive damages which

his client has been obliged to pay, or which he has failed to recover from another, because of his attorney's negligence. *Patterson v. Frazer* (Tex.) 79 S. W. 1077. But see *Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693, wherein the following facts appeared: "A., an attorney, issued for B., his client, a void writ upon which C. was arrested. After judgment in favor of C., an action of malicious prosecution was commenced against B. by C., in which he recovered the sum of \$400 as damages. This amount, which was largely punitive, was based upon one or more allegations of the gravamen, viz.: (1) That the officer (through ignorance and without instructions from A.) took C. to the county seat after bail had been procured; (2) that the affidavit was false in stating that B. had a just claim against C.; and (3) that it was false in stating that C. was about to leave the state. After satisfaction of the judgment, B. brought an action against A. for negligence and recovered the amount of said judgment as damages." It was held that "none of the things alleged as gravamen against B. upon which punitive damages were recovered could be charged upon A. as the proximate result of his neglect;" and also that "A. was liable for issuing the void writ, for the cost of prosecuting the original suit; the judgment against B. in that suit; and, if C. should sue for an illegal arrest, the judgment against B. on that account."

The attorney may, of course, show any facts which have a tendency to mitigate the damages. *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; as, for instance, a settlement by the client of the action in connection with which the negligence is charged, *Drury v. Butler*, 171 Mass. 171, 50 N. E. 527; or that the client continued to employ the attorney after he had knowledge of the alleged negligence, *Derrickson v. Cady*, 7 Pa. St. 27. But in a suit against an attorney for negligence in not moving for a return of property in a replevin suit, on nonsuit, it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property, as that would amount to a retrial of the replevin suit. *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39.

IV. Defenses.

Those defenses which consist in a showing that the attorney has exercised reasonable skill and diligence or that his errors were excusable are necessarily included in the discussion of the criteria of negligence in other subdivisions of this note. As to the effect of showing that no injury resulted from the act complained of, see *supra*, subdivision III. *Extent of Liability.* The statute of limita-

tions is treated *infra*, subdivision X. *Limitation of Action.*

An attorney may prove that he was not retained in time to perform the act which he is charged with having neglected, *Stephens v. White*, 2 Wash. (Va.) 203; or that his client failed to give him the information requisite to a proper performance of his duties, *Hastings v. Halleck*, 13 Cal. 204; *Salisbury v. Gourgas*, 10 Mete. (Mass.) 442; *Benton v. Craig*, 2 Mo. 198. In *Hastings v. Halleck*, *supra*, it was said: "The plaintiff alleges that he had a good defense to the whole of the claim of Adams & Co. because of an unauthorized change in the plans of building (which had been agreed on by all the parties interested in the property), made by Woods and Haskell, the agent and resident partner of Adams & Co. by which alone the additional expense was incurred, and the advances made necessary; that defendants were fully informed of this defense, but failed to set it up in answer to the suit, and by stipulation for the affirmance of the judgment, after deducting interest, deprived plaintiff of the benefit of a new trial, in which such defense could have been established. The only evidence that the defendants were apprised of, the grounds of defense stated, is contained in an allegation in the complaint (which plaintiff insists is not sufficiently controverted by the answer), and the fact that the plaintiff was, while the suit was pending, and before his second departure from the state, in frequent consultation with defendants, and living upon terms of close intimacy with one of them. It is at all times difficult, if not impracticable, to produce evidence of the tenor of confidential communications between client and attorney, and perhaps the evidence offered, being the only kind of which the case is susceptible, would be sufficient to warrant the jury in finding that plaintiff had put defendants in possession of all the facts which constituted his defense to the action. But in order to charge the defendants with negligence in failing to set up such defense, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorneys." So in *Lee v. Dixon*, 3 F. & F. (Eng.) 744, it was held that an attorney was not liable for bringing an action in the wrong court where he was misled by his client as to the amount in issue.

An attorney may show that he acted in the matter complained over under the instruction of his client. *Holmes v. Peck*, 1 R. I. 242.

In *Carr v. Glover*, 70 Mo. App. 242, it was said: "The referee found that Mr. Glover 'acquiesced' in the pleading as filed by Mr. Carr. The learned trial judge says the mere acquiescence is not sufficient to estop Glover

from pleading negligence on the part of Carr. Ordinarily this would unquestionably be true. As a rule a client not only acquiesces in pleadings prepared and filed by his attorney, but he implicitly relies upon him in that regard. But the ordinary relations between client and attorney did not exist in this case. Here the client was an able lawyer. As shown by the correspondence between him and his attorney, the pleadings to be filed and the effect of a plea to the jurisdiction were discussed, and authorities cited by each." In *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617, 9 Detroit Leg. N. 604, it was held that an attorney charged with negligence may show that the client relied on another attorney with respect to the matter complained of.

An attorney, sued for negligence or want of skill, cannot set up in defense of the action the fact that the contract between him and his client was champertous. *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134, wherein it was said: "Champerty, in the stipulation of commissions, cannot avail the attorneys in this case. That portion of the contract being void, the attorneys having performed services could have maintained an action for reasonable compensation. *Holloway v. Lowe*, 1 Ala. 246, approved in *Elliott v. McClelland*, 17 Ala. 206. Being entitled to the benefits of the retainer, it would be monstrous to relieve them from its responsibilities."

An attorney charged with negligence in failing to make a collection may prove, in his defense, that the claim which he was employed to collect was not owing to his client, *Jackson v. Tilghman*, 1 Miles (Pa.) 31; or that it was not collectable, *Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482; or that the failure to collect was due to the act of the client, *Ransom v. Cothran*, 6 Smedes & M. (Miss.) 167.

V. Release by Client of Liability of Attorney.

The client may, of course, release his attorney from all liability in the performance of his professional duties. *Derrickson v. Cady*, 7 Pa. St. 27. See also *Hamsher v. Kline*, 27 Pa. St. 397. In the case first cited it was said: "On the 31st December, 1842, the parties came to an arrangement, which resulted in a mutual release. There is no evidence on that subject, except the paper signed by the plaintiff, viz.:

'A. Cady
v.
L. Wood and R. Sexton. }

Judgment in the
Common Pleas of
Crawford County.

In consideration of David Derrickson releasing me from his charges as counsel for me heretofore, I do not hereby release him; and

he not to act as counsel for me any further, unless employed again.

December 31, 1842.

Asa Cady.'

The court claimed the exclusive right to declare the legal effect and operation of this paper, and instructed the jury that it did not embrace the present controversy; in this case it formed no defense. What, then, did it embrace? Here was a misunderstanding between the attorney and his client. The former alleging that he had general discretionary powers, and that he had exercised his best judgment and abilities in the case. The latter denying this, and complaining of the unfortunate release of the Meadville lots, executed more than two years before. There is not an allegation in the paper book of any other point of dissatisfaction. The attorney releases his client from his charges as counsel; and for that consideration, the client releases him, from what? Why, in the case stated in the release; and he is no longer to act as his attorney in the case. As there was no ground of complaint but the one between the parties, and the case of *Cady v. Wood and Sexton*, stated in their mutual release, it could relate to no other matter."

But the rule that an attorney dealing with his client for his own benefit is bound to show that the transaction was in all respects fair and equitable (see 2 R. C. L. tit. *Attorneys at Law* p. 966) is applicable; and it must be clearly shown that the giving of the release was free from fraud, influence, or mistake, and that the client was fairly acquainted with all the material facts and circumstances. *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. S. 873, wherein it was said: "The proof is abundant to show that the plaintiff relied entirely upon the judgment and fidelity of the defendant in intrusting to him her money for purposes of investment. He assumed to know the values of the respective properties in which he invested her money, and he also knew that she relied thereon. At the time the instrument of ratification was signed, it does not appear that she had full knowledge upon the subject of the Bartlett loan. It is true that the defendant testified that he told her generally concerning the transaction. He does not, however, say that he informed her that he had loaned the money to Bartlett upon insufficient security for its safe protection. In respect to the conversation, his statement is, in general terms, that he explained all of the transactions to her, and that she expressed satisfaction therewith. The defendant says, 'I then asked her to give me something to show her satisfaction with what I had done during her absence, especially as the holders—' At this point he was interrupted by the presentation of a paper, and made no

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further statement concerning it, aside from the fact that he dictated a statement to the stenographer, who took it down on the machine. An examination of the paper itself shows that it was something more than a satisfaction and an approval of his transactions, as, among its provisions, is the following: 'And I agree to save yourself and said Thomas and Foraker harmless of any and all claims, cost or damage growing out of any proceedings connected with any of the several aforesaid matters.' It is quite evident from the language of this document that the defendant was anxious not only to procure an expression of satisfaction, but the execution of such a paper as would hold him harmless from all his acts. The rule governing dealings in such relation had been announced in the law in no uncertain terms.

Applying these rules to this case, and considering the finding of the referee in connection with the evidence in the case, we are of opinion that this transaction did not operate as a ratification of the defendant's acts, and as a release from his liability to her for his negligent acts. It must be made to appear that she knew and fully understood the entire transaction, and what her legal rights were in the premises, before force will be given to the ratification and release."

VI. Imposition of Costs on Attorney.

The court has inherent power to impose costs on an attorney who has been guilty of misconduct.

England.—Bennet v. Wade, 2 Atk. 328; Matter of Hogan, 3 Atk. 313; Thomas v. Vandermoolen, 2 B. & Ald. 197, 20 Rev. Rep. 404; Blundell v. Blundell, 5 B. & Ald. 533, 7 E. C. L. 181, 1 Dowl. & R. 142; In re Bainbridge, 11 Beav. 620; Upton v. Brown, 20 Ch. D. 731, 47 L. T. N. S. 289, 30 W. R. 817; Aubrey v. Aspinall, Jac. 441; Bromage v. Davies, 4 Jur. N. S. 683; In re Gregg, L. R. 9 Eq. 137, 39 L. J. Ch. 107, 23 L. T. N. S. 234, 18 W. R. 589; Baker v. Loader, L. R. 16 Eq. 49, 42 L. J. Ch. 113, 21 W. R. 167; In re Dartnall [1895] 1 Ch. 474, 64 L. J. Ch. 341, 12 Rep. 237, 72 L. T. N. S. 404, 43 W. R. 644; In re Armstrong [1896] 1 Ch. 536, 65 L. J. Ch. 258, 74 L. T. N. S. 134, 44 W. R. 281; Seldon v. Wilde [1910] 2 K. B. 9, 79 L. J. K. B. 621; Martinson v. Clowes, 52 L. T. N. S. 706, 33 W. R. 555; Ex p. Cuthbert, 1 Madd. 77; Cockle v. Whiting, 1 Russ. & M. 43; Cook v. Broomhead, 16 Ves. Jr. 133; Williams v. Jones, 4 W. R. 99.

Ireland.—Knox v. O'Brien, 3 Ir. Eq. 62.

Canada.—Brigham v. Smith, 2 Ch. Chamb. (Ont.) 462; Doe v. Dobson, 7 N. Bruns. 531.

United States.—Bogart v. Electrical Supply Co. 23 Blatchf. 552, 27 Fed. 722.

Indiana.—Loveland v. Jones, 4 Ind. 184; Brown v. Brown, 4 Ind. 627, 58 Am. Dec. 641.

Kentucky.—Respass v. Morton, Hardin 226.

Mississippi.—Topp v. Pollard, 24 Miss. 682.

New York.—Britt v. Van Norden, 1 Johns. Cas. 390; Heyers v. Denning, Col. & C. Cas. 75; Britt v. Van Orden, Col. & C. Cas. 99; Bradt v. Walton, 8 Johns. 298; Baur v. Betz, 1 How. Pr. N. S. 344, 7 Civ. Proc. 233, affirmed 99 N. Y. 672; Attleboro Nat. Bank v. Wendell, 64 Hun 208, 22 Civ. Proc. 225, 10 N. Y. S. 45; In re Kelly, 59 N. Y. 595; In re Kelly, 62 N. Y. 198.

Ohio.—Kerr v. Chillicothe Bank, Wright 737.

Tennessee.—Sharp v. Fields, 5 Lea 326; Finley v. Acme Kitchen Furniture Co. 119 Tenn. 698, 109 S. W. 504.

And see the note to Simmons v. Liberal Opinion, 21 Ann. Cas. 876.

Thus an attorney who inserts impertinent or scandalous matter in pleadings may be ordered to pay the costs of having it expunged. N. Y. Code Civ. Pro. § 545. See also Cook v. Rosslyn, 3 Giff. (Eng.) 175, 7 Jur. N. S. 1070, 5 L. T. N. S. 133; Powell v. Kane, 2 Edw. (N. Y.) 450; Powell v. Kane, 5 Paige (N. Y.) 265; Cushman v. Brown, 6 Paige (N. Y.) 539; McVey v. Cantrell, 8 Hun (N. Y.) 522. In Brown v. Brown, 4 Ind. 627, 58 Am. Dec. 641, it was said: "The court taxed the costs of the cause against the attorney of the plaintiff, because of the unnecessary grossness and indelicacy of the petition, and of his improper deportment in reading it. To set aside this taxation, the cause is brought here. To protect itself against gross violations of decency and decorum, is a necessary incidental power of a court. They have the right to punish in this way such misconduct as is alleged in this case on the part of an attorney. It is a power to be exercised at the sound discretion of the judge, and this court can interfere only where it is shown to have abused its discretion." In Motion Picture Patents Co. v. Yankee Film Co. 92 Fed. 134, it was held that the continuation of a pending suit for infringement of a patent, and the taking of testimony therein by complainant after he had filed a petition for a reissue on the ground of the invalidity of the patent in suit, constituted a "multiplication of proceedings," so as unreasonably and vexatiously to increase the costs, within the meaning of Rev. St. § 982 (2 Fed. St. Ann. 291) and on a dismissal of the suit after the granting of a reissue the defendant was held to be entitled thereunder to a special allowance commensurate with the expense occasioned thereby.

In some instances costs have been imposed where counsel was guilty of negligence only. In re Bolton, 9 Beav. 272, 10 Jur. 22; Ridley v. Tiplady, 20 Beav. 44, 24 L. J. Ch. 207, 1

Jur. N. S. 249, 3 W. R. 276; Layton v. Wood, 3 Jur. 124; In re Bradford, 15 Q. B. D. 635, 53 L. J. Q. B. 65, 50 L. T. N. S. 170, 32 W. R. 238; Ellis v. King, 5 Madd. 21; Fawkes v. Pratt, 1 P. Wms. 593; De Rouffigny v. Peale, 3 Taunt. 484, 12 Rev. Rep. 687; White v. Hillacre, 3 Y. & C. Exch. 278, 8 L. J. Exch. 65; Wood v. Wood, 4 Russ. 558; In re Spencer, 39 L. J. Ch. 841, 18 W. R. 240, 21 L. T. N. S. 808; Taylor v. Gorman, Flan. & Kel. 567, 4 Ir. Eq. 550; Palake v. Paakaula, 6 Hawaii 269; Respass v. Morton, Hardin (Ky.) 234; Jordan v. National Shoe, etc. Bank, 45 Super. Ct. (N. Y.) 423; Den v. Fen, Col. & C. Cas. (N. Y.) 303; Excise Com'rs v. Purdy, 22 How. Pr. (N. Y.) 312; Kane v. Van Vranken, 5 Paige (N. Y.) 62; Ex p. Robbins, 63 N. C. 309.

In Ex p. Robbins, supra, it was said: "It is said that there is no precedent in North Carolina, either reported or that can be recollected, of a court compelling an attorney to pay costs for negligence merely. That may be admitted; but the power to do this is not a distinct power, but only a branch of the general power to punish for contempt; it is treated in all the books, in connection with the other instances, and referred to the same source. Upon the authorities cited, there can be no doubt of the practice of the English courts to regard what is called in Pitt v. Yalden [4 Burr. 2060] ubi supra, 'lata culpa,' or 'crassa negligentia,' on the part of an attorney, as a contempt of court; and no reason is seen, why this instance of the general power should be denied to the court of this state, unless it be taken away, as is argued for the appellants, by an implication from sec. 5, ch. 9, Rev. Code. This statute provides that, when a plaintiff shall be compelled to pay costs, by the neglect of his attorney to file a declaration in proper time, he may recover such costs from the attorney, by warrant. This implication does not arise; it is a well-known principle, that when one remedy exists at common law, and a statute gives another, the latter is cumulative."

An attorney who assumes to represent a party to an action is personally liable for costs if he acts without authority, or his supposed client is nonexistent.

England.—Simmons v. Liberal Opinion [1911] 1 K. B. 966, 21 Ann. Cas. 876; In re Manby, 3 Jur. N. S. 259, 26 L. J. Ch. 313; Fricker v. Van Grutten [1896] 2 Ch. 649; Tabernor v. Tabernor, 2 Keen 670, 6 L. J. Ch. 19; Pinner v. Knights, 6 Beav. 174. See also Dundas v. Dutens, 2 Cox Ch. 236, 1 Rev. Rep. 112; Wade v. Stanley, 1 Jac. & W. 654.

Canada.—Meyers v. Lake, 1 Grant Ch. (U. C.) 305; Smith v. Turnbull, 1 Ont. Pr. 88; Shaw v. Ormiston, 2 Ont. Pr. 152; Weir v. Hervey, 1 U. C. Q. B. 430; Henderson v.

McMahon, 12 U. C. Q. B. 288; Fisher v. Holden, 17 U. C. C. P. 395; Scribner v. Parcells, 20 Ont. 554. See also Betts v. Chapman, 7 N. Bruns. 450.

Illinois.—Anonymous, 11 Ill. 488.

New York.—Cornell v. Allen. Col. & C. Cas. 75; People v. Bradt, 6 Johns. 318; Bradt v. Walton, 8 Johns. 298; American Ins. Co. v. Oakley, 9 Paige 496, 38 Am. Dec. 561; Balbi v. Duvet, 3 Edw. 418; Derickson v. McCordle, 2 How. Pr. 196; Jordan v. National Shoe, etc. Bank, 45 Super. Ct. 423; Deutsch v. Webb, 10 Abb. N. Cas. 393; Attleboro Nat. Bank v. Wendell, 64 Hun 208, 22 Civ. Proc. 225, 19 N. Y. S. 45; Post v. Charlesworth, 66 Hun 256, 21 N. Y. S. 168; Kelly v. New York City R. Co. 122 App. Div. 467, 106 N. Y. S. 894.

Ohio.—Falor v. Beery, 8 Ohio Dec. 306, 6 Ohio N. P. 290, 7 Ohio N. P. 645.

Pennsylvania.—See Paterson v. McPherson, 32 Leg. Int. 320, 1 W. N. C. 454.

Tennessee.—Sharp v. Fields, 5 Lea 326.

Virginia.—Howard v. Rawson, 2 Leigh 733.

Compare Hamilton v. Wright, 37 N. Y. 502, where it appeared that an attorney prosecuted an action of ejectment in the name of the grantors and grantee in a deed, against a defendant in possession, and failed, and it was held that the grantors were liable for costs notwithstanding the prosecution was without their knowledge, the defendant having a right to presume a retainer.

In Thomas v. Finlayson, 19 W. R. (Eng.) 255, it was held that the rule that proceedings taken by a solicitor, without proper authority, would be annulled with costs to be paid by him, did not apply unless he was aware of the circumstances which invalidated his authority, and moreover, that notice from the other side was not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were true.

Where a solicitor employed by one of several administrators files a bill in the names of all, he will not be compelled to pay costs, although the name of a coadministratrix is inserted without her consent. Dare v. Allen, 2 N. J. Eq. 288.

But costs will not be imposed on counsel merely because of inadvertence, or slight, or excusable error. Matter of Tacke, 1 Connolly 119, 3 N. Y. S. 431; Hauser v. Herzog, 141 App. Div. 522, 126 N. Y. S. 337; Bird v. Wessels, 119 N. Y. S. 329. In Bird v. Wessels, supra, it was said: "Costs upon a motion in a special proceeding are discretionary; but they cannot be imposed upon the attorney, except in the form of a fine. No basis for the punishment of the attorney appears in this case. Mistaken zeal, not coupled with deceit or other improper conduct, should not be punished in this form by any court."

VII. Liability to Third Person.

The liability of an attorney to a third person for acts done in his representative capacity is beyond the scope of the present discussion. See generally 2 R. C. L. tit. *Attorneys at Law*, p. 1029. The question arises most frequently in respect to the liability of an attorney for malicious prosecution in bringing a suit for his client, which is discussed in the note to *Anderson v. Canaday*, Ann. Cas. 1915B 714.

The liability of an attorney for negligence is confined to the client. An attorney is under no obligation to exercise reasonable care, skill, and diligence towards strangers, as he is with respect to his client, and, therefore, he is not responsible to them for mere negligence. *Fish v. Kelly*, 17 C. B. (N. S.) 194, 112 E. C. L. 194; *National Savings Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L.R.A. 862; *Roddy v. Missouri Pac. R. Co.* 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L.R.A. 746; *Killip v. Empire Mill Co.* 2 Nev. 34; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631. In *Buckley v. Gray*, supra, it was said: "It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enter into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter." So in the leading case of *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621, it was held that an attorney who was employed by the owner of land to report in his title was not liable for an error in his report thereon to a third person who relying thereon loaned money to the client. The court said: "Satisfactory proof is exhibited that the defendant was duly employed by the pretended owner of the lot to examine his title to the same; and it is conceded that he did so, or that

his son made the search for him, and that he made and signed the certificates in question, and that he was paid for his services by his employer; nor is it questioned that the title was defective as alleged. Concede that, and it follows as an implication of law that the defendant assumed to possess the requisite knowledge and experience to perform the stipulated service, and that he contracted with his employer that he would use reasonable care and skill in the performance of the duties. For a failure in either of these respects, if it resulted in damage to his employer, he, the employer, is entitled to recover compensation. *Chase v. Heaney*, 70 Ill. 268. Decisions of the courts of the highest authority support that proposition; but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title, or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the services he did perform in respect to the transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law as expounded by the decisions of the court. Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty."

In this connection it must be borne in mind that the liability of an attorney to a person for whom he assumes to act is none the less because his services are gratuitous (see supra, subdivision I. 1. a. *Degree of Care or Skill Required in General*) and that an attorney assuming to represent both parties to a transfer of realty is liable to either though he is employed by one only (see supra, subdivision II. 2. *Investments or Securities* and II. 3. *Preparing, Keeping or Recording Written Instrument*).

VIII. Form of Action for Negligence or Breach of Duty.

An action against an attorney for negligence originates in contract. At common law the client could sue either in assumpsit or in trespass on the case, though the latter form of action was usually adopted, and under modern practice those remedies or their code substitutes may be employed. *Swannell v. Ellis*, 1 Bing. 347, 8 E. C. L. 542; *Legge v. Tucker*, 1 H. & N. (Eng.) 500; *Russel v. Palmer*, 2 Wils. C. Pl. (Eng.) 325;

Cook v. Bloodgood, 7 Ala. 683; Walker v. Goodman, 21 Ala. 647. See also Pinkston v. Arrington, 98 Ala. 489, 13 So. 561; Sevier v. Holliday, 2 Ark. 512; O'Barr v. Alexander, 37 Ga. 195; Goldzier v. Poole, 82 Ill. App. 469; Hill v. Montgomery, 84 Ill. App. 300, affirmed 184 Ill. 220, 56 N. E. 320. See also Morrison v. Burnett, 56 Ill. App. 129; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Salisbury v. Gourgas, 10 Metc. (Mass.) 442; Wilson v. Coffin, 2 Cush. (Mass.) 316; Dearborn v. Dearborn, 15 Mass. 316; Currey v. Butcher, 37 Ore. 380, 61 Pac. 631; Holmes v. Peck, 1 R. I. 242; Croker v. Hutchinson, 1 Vt. 73. *Book account* does not lie. Smalley v. Soragen, 30 Vt. 2.

In *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631, it was said: "The overruling of the motion constitutes the first assignment of error. It was based upon the contention that the complaint states two causes of action,—one for a breach of contract, and the other in tort for certain alleged fraudulent acts of the defendants in the course of their employment, but, as we understand the pleading, the gist of the action is the negligence of the defendants in the performance of a duty which they owed to the plaintiff by reason of their employment. She avers that they undertook and agreed to examine for her the title to certain land which she contemplated purchasing, and that the work was so negligently and carelessly done that they failed to discover and report to her a judgment lien thereon, by reason of which she was damaged. Where one adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, the law imposes a duty to exercise reasonable care and skill, and if an injury results to his client from want thereof he is liable to respond in damages to the extent of the injury sustained. This duty and liability arises from the relation of the parties under the contract, rather than from the contract itself, and at common law the injured party could sue, either in assumpsit, for a breach of the implied promise, or in case, for the neglect of duty: 3 Enc. Pl. & Pr. 107. In the latter instance it is necessary to aver the contract of employment, showing the relation of attorney and client, as a matter of inducement, because without such contract there could be no duty to the plaintiff, and hence no liability. As stated by Mr. Justice McDonald, in *Emigh v. Pittsburgh*, etc. R. Co. 4 Biss. 114, 8 Fed. Cas. No. 4,449: 'When there is a contract, either express or implied, from which a common-law duty results, an action on the case lies for a breach of that duty, in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus, if a lawyer or physician is engaged by special contract to render professional services, and if, in the

performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract.'

A bill in equity cannot be based on the mere fact of negligence of an attorney in the performance of a professional duty. *British Mut. Invest. Co. v. Cobbold*, L. R. 19 Eq. (Eng.) 627, 44 L. J. Ch. 332, 23 W. R. 487; *Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *Crothers v. Lee*, 29 Ala. 337; *Nancrede v. Voorhis*, 32 N. J. Eq. 524. In *Universal Sav. Corp. v. Morris Plan Co.* 234 Fed. 382, it was held that the client's remedy for the disclosure by his attorney of information acquired in the course of his employment was by an action at law for damages and not by an injunction to prevent the use of the information thus disclosed.

If an attorney's fraudulent act results in damage to his client he is liable in an action at law. *Roberts v. Gates*, 146 Mich. 169, 109 N. W. 264; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631; *Allen v. Frawley*, 106 Wis. 638, 82 N. W. 593. Under the New York statute (Civ. Code Proc. § 70) making an attorney liable in treble damages to one injured by his deceit or collusion, such misconduct must impede or prejudice the rights or remedies of the injured party, and must be adjudicated in the proceeding. *Franzone v. Tumminelli*, 67 Misc. 549, 123 N. Y. S. 455. See also *Looff v. Lawton*, 14 Hun (N. Y.) 588. In *Roberts v. Gates*, supra, it appeared that an attorney employed to clear a title purchased an adverse title for himself taking it in the name of a third person. The client was compelled to purchase from that person at an increased price, which was paid over to the attorney. The court said: "The learned trial judge was of opinion that, as matter of law, plaintiff could not purchase the title of Mr. Ballard (Sholes), pay the amount demanded, and charge it to Gates, although Gates may have been employed as an attorney and have been guilty of a breach of the contract of employment; that, possibly, if plaintiff had contested his ejectment suit concerning the land to a conclusion and had been compelled to pay a certain amount for breach of his covenants of warranty, and the jury had found the employment to be as claimed, and the breach of it, he might have recovered such sum from the defendant Gates. I know of no legal objection, the facts being established, to the recovery by plaintiff in an action at law of this sum of money as money in the hands of the defendant Gates which, in equity and good conscience, belongs to plaintiff, and in my opinion the case should have been submitted to the jury under proper instructions."

In case of a fraud perpetuated by means of the fiduciary relation of attorney and client a bill in equity will lie. *Brainard v. Singo*,

164 Ala. 353, 51 So. 522; *Maloney v. Terry*, 70 Ark. 189, 66 S. W. 919, 72 S. W. 570; *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299; *Kelly v. Allin*, 212 Mass. 327, 99 N. E. 273; *Broyles v. Arnold*, 11 Heisk. (Tenn.) 484. Thus equity has jurisdiction of a bill by a client against his attorney charging that the latter, in settling a claim against the client, fraudulently procured and retained a greater sum from the client than was paid to settle the claim. *Maloney v. Terry*, 70 Ark. 189, 66 S. W. 919, 72 S. W. 570, wherein the court said: "We are asked to reverse only upon the ground that the court had no jurisdiction. The appellants contend that there was a complete and adequate remedy at law, and for that reason the court of chancery should have transferred the cause to the law court. For the purpose of this motion we must look only to the complaint, and treat its allegations as true. It sets up the trust relation, and shows that the money sued for was obtained through fraudulent representations, and was received and is held in fiduciary capacity. That was sufficient to give the chancery court jurisdiction. Having jurisdiction of the subject-matter, it does not have to give it up because a court of law could also give complete and adequate redress."

The duty of an attorney to pay over money collected by him for his client rests in contract and is to be enforced by an action of assumpsit or its modern equivalent. *Cameron v. Clarke*, 11 Ala. 259; *Ellis v. Henry*, 5 J. J. Marsh (Ky.) 247; *Houx v. Russell*, 10 Mo. 246; *Sackett v. Breen*, 50 Hun 602 mem. 3 N. Y. S. 473; *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Bredin v. Kingland*, 4 Watts (Pa.) 420; *Campbell v. Boggs*, 48 Pa. St. 524; *Albright v. Mercer*, 14 Pa. Super. Ct. 63; *Palmer v. Thompson*, 4 Rich. L. (S. C.) 607. But see *Albright v. Mercer*, 14 Pa. Super. Ct. 63. If there has been an actual conversion of the fund by the attorney the action for its recovery may sound in tort. *Pratt v. Brewster*, 52 Conn. 65; *Tinkham v. Heyworth*, 31 Ill. 519; *Clegg v. Baumberger*, 110 Ind. 539, 9 N. E. 700; *Stage v. Stevens*, 1 Denio (N. Y.) 267; *Yates v. Blodgett*, 8 How. Pr. (N. Y.) 278; *Sinclair v. Higgins*, 111 App. Div. 206, 97 N. Y. S. 415. And see *Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716; *Flanagan v. Pearson*, 42 Tex. 1, 19 Am. Rep. 40. But a mere failure to pay over the proceeds of a collection, or a deposit thereof in a bank in the name of the attorney, is not sufficient to warrant an action in form for conversion. *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Gopen v. Crawford*, 53 How. Pr. (N. Y.) 278; *Pierce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774. In *Jackson v. Moore*, supra, it was

said: "Although the cause of action which the plaintiff set forth in her complaint is one based upon a tort entirely, viz., a clear claim that the defendant had converted to his own use certain specific moneys received by him from Keck for her, and which she claims has damaged her to the amount of \$260.80, she has been allowed to recover, as upon an accounting, for such share of a fund that the defendant collected for herself and brothers as she upon this trial testified to be hers. This was a clear error. Such a recovery is based upon an entirely different liability from that set forth in the complaint. When an attorney collects a debt due to his client, he does not convert the money received by placing it in bank to his own credit, and mixing it with his own funds. The money so received is not the client's property, and the attorney's obligation regarding the same is one resting on contract merely,—to account for it, and pay over such sum as, upon an accounting, shall be found to be due from him thereon. And even if he neglects to so account and pay for a demand made, he is not liable in trover, as for a conversion of such amount. *Walter v. Bennett*, 16 N. Y. 250. Therefore, upon the facts as stated in the complaint, an action of trover could not be sustained against the defendant."

A bill of equity will not ordinarily lie in case of a failure to pay over the proceeds of a collection. *Marsh v. Whitmore*, 1 Hask. 391, 16 Fed. Cas. No. 9,122; *Crothers v. Lee*, 29 Ala. 337; *Pfau v. Fullenwider*, 102 Ill. App. 499. But if an attorney refuses to account as to money collected by him a bill for an accounting will lie.

United States.—*Stanwood v. Wishard*, 128 Fed. 499.

Alabama.—*Mardis v. Shackelford*, 6 Ala. 433; *Kirkman v. Vanlier*, 7 Ala. 224.

Indiana.—*Bougher v. Scobey*, 16 Ind. 151 23 Ind. 583.

Kentucky.—*Scott v. Wickliffe*, 1 B. Mon. 353.

New Jersey.—*Kelley v. Repetto*, 62 N. J. Eq. 246, 49 Atl. 429.

New York.—*Matter of Raby*, 29 App. Div. 225, 51 N. Y. S. 552; *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Pallace v. Niagara*, etc. Power Co. 131 App. Div. 453, 115 N. Y. S. 340; *Secor v. Tradesmen's Nat. Bank*, 148 App. Div. 141, 133 N. Y. S. 197; *In re Keen*, 39 Misc. 374, 79 N. Y. S. 857; *Tiffany v. Hess*, 67 Misc. 258, 122 N. Y. S. 482, affirmed 140 App. Div. 933, 25 N. Y. S. 1147.

Pennsylvania.—*McDaniels v. Cutler*, 3 Brews. 57.

The summary proceedings authorized by statute in most jurisdictions in case of a wrongful withholding by an attorney of money as property of his client are not available

to a client complaining only of negligence or mismanagement on the part of his attorney. *Lombard v. Whiting, Walk. (Miss.) 229*, wherein it was said: "This being a summary remedy, given by statute, cannot be extended beyond the express letter. We are clearly of opinion that an attorney cannot be charged in this mode of proceeding for any misfeasance. And if the plaintiff has any ground of complaint, for an injury sustained by the compromise, he must resort to his action on the case." So in *Banks v. Cage, 1 How. (Miss.) 293*, the court said: "The defendants, as attorneys at law, acted out of the scope of their power, in receiving notes in satisfaction of the execution, but the notes received by them, cannot for that reason be considered as money. The plaintiff might have resorted to his action against them, but the summary remedy by motion, against an attorney, can only be sustained when he has actually collected the money, by course of law, and refuses to pay it over."

IX. Survival of Action.

The survival of an action for the negligence of an attorney is discussed in the note to *Newman v. Gates, 6 Ann. Cas. 649*, and no recent cases seem to have passed on this question.

X. Limitation of Action.

In the absence of fraud, the statute of limitations begins to run against a cause of action based on the negligence of an attorney from the time the cause of action accrues; that is, when the attorney commits an affirmative breach of the duty with which he is charged. *Battley v. Faulkner, 3 B. & Ald. 288, 5 E. C. L. 288*; *Short v. McCarthy, 3 B. & Ald. 626, 5 E. C. L. 403*; *Granger v. George, 5 B. & C. 149, 11 E. C. L. 185*; *Howell v. Young, 5 B. & C. 259, 11 E. C. L. 219*; *Sheriff v. Bradshaw, 1 Cro. Eliz. 53*; *Smith v. Fox, 6 Hare 386, 12 Jur. 130*; *Rhines v. Evans, 66 Pa. St. 195, 5 Am. Rep. 365*; *Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662*; *Smith v. Owen, 7 Lea 53*. Compare *Glenn v. Cuttle, 2 Grant Cas. (Pa.) 273*; *Derrickson v. Cady, 7 Pa. St. 27*; *McDowell v. Potter, 8 Pa. St. 189, 49 Am. Dec. 503*; *Downey v. Garard, 24 Pa. St. 52*. In *Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602, 51 L.R.A.(N.S.) 279*, it was said: "All that appellant is here seeking is damages claimed to have been suffered because of the wrongful act of respondent. The action is plainly one based upon a breach of duty growing out of the relation existing between the parties, a contractual relation which calls for a full disclosure; and when by reason of the failure to make a full and

complete disclosure, or the withholding or concealment of facts which should have been disclosed, loss is suffered, there is a breach of duty, and for such breach an action will lie. But, like any other action founded upon a breach of duty imposed either by law or contract, the action arises out of the breach, and the statute of limitations begins to run from the time of the breach and not from the time of its discovery. No action lies for speaking an untruth, unless, by virtue of the relation between the parties, the law imposes the duty of speaking the truth. No action lies for concealment, unless the law imposes the duty of disclosure. In this case the duty is one growing out of the relation between the parties and that relation is one based upon contract. The relation, it is true, is fiduciary, but that does not disturb the fact that it is contractual, and that a cause of action based upon the breach of the contract accrues when the contract is violated and not when the violation is discovered." In *Wilcox v. Plummer, 4 Pet. 172, 7 U. S. (L. ed.) 821*, it was said: "The only question in the case is, whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite. And this we hardly feel at liberty to treat as an open question. It is not a case of consequential damages, in the technical acceptance of those terms, such as the case of *Gillon v. Boddington, 1 C. & P. (Eng.) 541, 11 E. C. L. 463*, in which the digging near the plaintiff's foundation was the cause of the injury; for in that instance no right or control was violated, and by possibility the act might have proved harmless, as it would have been had the wall never fallen. Nor is it analogous to the case of a nuisance; since the nuisance of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery. The ground of action here, is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted, is the question: for from that time the statute must run. When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered, but on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

Of course, where the attorney conceals from his client the facts which constitute the cause of action, the running of the statute will begin only from the discovery thereof by the

client. *Voss v. Bachop*, 5 Kan. 67; *Compare* *Cornell v. Edsen*, supra. As to what constitutes such a concealment, see the note to *Fortune v. English*, 9 Ann. Cas. 77.

In actions charging an attorney with negligence in failing to collect his client's claims, the statute of limitations begins to run after the lapse of a reasonable time in which the claim might either have been collected, or proceedings to enforce the collection might have been instituted. *Wilcox v. Plummer*, 4 Pet. 172, 7 U. S. (L. ed.) 821; *Mardis v. Shackelford*, 4 Ala. 493; *McArthur v. Baker*, 7 Ky. L. Rep. 441; *Downey v. Garard*, 24 Pa. St. 52; *Morrison v. Mullin*, 34 Pa. St. 17; *Barton v. Dickens*, 48 Pa. St. 518; *Campbell v. Boggs*, 48 Pa. St. 524; *Rhines v. Evans*, 66 Pa. St. 192, 5 Am. Rep. 365. In the case last cited, it was said: "As the case stands, then, Evans took no step whatever to collect the due bill of \$365, and Rhines has lost his money. Under these circumstances, when did the statute of limitations begin to run? All the authorities agree in this, that it began when the cause of action first arose—that is, when Evans first became liable to Rhines for neglecting to collect the money: *Campbell v. Boggs* [48 Pa. St.] 524; *Downey v. Garard* [24 Pa. St.] 52; *Morrison v. Mullin* [34 Pa. St.] 17; *Barton v. Dickens* [48 Pa. St.] 518. But when did Evans become liable to Rhines for neglect of duty? It is clear he did not at the date of the receipt, for that would allow no time to perform the duty. Clearly a reasonable time must be allowed to begin. The attorney must be invested with some discretion in the absence of peremptory instructions. As remarked by the present chief justice, *Morrison's Administrator v. Mullin*, supra, 'to give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued, by the diligence required of the party. When the time for doing an act necessarily precedent to bringing a suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins.' What is a reasonable time is a question most frequently dependent on circumstances, and therefore to be submitted in such cases to the jury. In the case of *Livingston v. Cox*, 6 [Pa. St.] 360, a suit against a debtor in failing circumstances seems to have been held an unreasonable time, and the plaintiff Cox recovered against Livingston. And where the duty is immediate, as in the collection of money, the right of action accrues and the statute begins to run from the time of the attorney's receipt of the money, even though he gives no notice of its collection, the law deeming it gross negligence on part of the creditor to neglect to make inquiry for six years, unless the attorney has been guilty of concealment or of some act to put his client off his guard. Ann. Cas. 1917B.—4.

Such is the modern doctrine qualifying and to some extent overruling *McDowell v. Potter*, 8 [Pa. St.] 189, and some previous cases. See *Campbell v. Boggs* [48 Pa. St.] 524; *Downey v. Garard* [24 Pa. St.] 52, and authorities therein cited. The same duty of diligence on part of the creditor to prevent the bar of the statute is to be found in analogous cases; as where a call for instalments under a subscription to stock is necessary: *Pittsburgh, etc. R. Co. v. Byers* [32 Pa. St.] 22. See also *Morrison v. Mullin*, supra. Let us examine then, in view of these principles, the facts of the case before us. Evans received the note for collection on the 10th of February, 1858, and this suit was not commenced against him until seven years and five months had elapsed. Was the period of one year and five months sufficient to enable the court to say as a matter of law that the delay by Evans for that time to take any steps toward collection was unreasonable? Doubtless it was in the power of Rhines to show, if the facts were so, that during this time Evans had proceeded diligently, and that the lack of diligence occurred afterward during the period of the remaining six years; or to show that Evans had given him false information or otherwise misled him, and thus to prevent the bar of the statute. But as the case stands before us Evans did nothing whatever, and Rhines remained quiescent during this whole period of seven years and five months. Under these circumstances what was to be left to the jury? There were no facts, no circumstances to enable them to determine the reasonableness or unreasonableness of the delay except the mere lapse of time, and this was fully within the knowledge of the court. It became, therefore, a question of law for the court to decide, and surely it is not a difficult question to determine, for no one could assert that it is reasonable the attorney should delay seventeen months without taking a step or that the creditor should delay seven years and five months without making an inquiry or bringing a suit."

Where a claim is lost through the misconduct or fraud of an attorney with whom a collection agency has intrusted it for collection, and the replies of the agency to inquiries made are calculated to throw the claimants off their guard, the statute of limitations begins to run against the claimants only from the time of their discovery of the fraud. *Morgan v. Tener*, 83 Pa. St. 305.

With respect to the time when the statute of limitations begins to run against an action by the client to recover money collected by an attorney, see the notes to *Goodyear Metallic Rubber Co. v. Baker*, 15 Ann. Cas. 1207, and *Ott v. Hood*, Ann. Cas. 1914C 636.

Actions against attorneys for negligence being, in most instances, based on the theory of a breach of contract on the part of the

attorney, the statute of limitations, governing the time within which such actions may be brought, may be set up by the attorney by way of defense. Where the negligence charged cannot be said to be a breach of contract, the statute of limitations applicable to torts generally would apply. *Mardis v. Shackelford*, 4 Ala. 493; *Foulks v. Falls*, 91 Ind. 315; *Cook v. Rives*, 13 Smedes & M. (Miss.) 329, 53 Am. Dec. 88; *People v. Brotherson*, 36 Barb. (N. Y.) 662; *Thomas v. Ervin, Cheves L.* (S. C.) 22, 34 Am. Dec. 586; *Smith v. Owen*, 7 Lea (Tenn.) 53; *Bruce v. Baxter*, 7 Lea (Tenn.) 479; *Hawkins v. Walker*, 4 Yerg. (Tenn.) 188. In *Foulks v. Falls*, supra, the court, after stating the duties of an attorney to his client, said: "It is not the duty of attorneys to make affidavits in attachment proceedings. They sometimes do so, but the propriety of such course has always been doubted by the profession, and in some instances the right has been questioned. Such a practice should be discouraged rather than imposed as a duty. See *Abbott v. Zeigler*, 9 Ind. 511. It clearly would be unreasonable to hold that under a general employment, such as the contract in this case makes, it is the duty of the attorney to furnish a bond and incur the personal liability that might result therefrom. The propriety of lawyers signing bonds for their clients has always been questioned, and many courts have adopted rules absolutely prohibiting it. See *Ohio, etc. R. Co. v. Hardy*, 64 Ind. 454. The employment and contract imposed no duty upon appellant to make and execute such affidavit and bond; nor would positive instructions from appellee requiring such services have imposed such duty. The undertaking of the attorney is to perform such services as properly belong to the profession; such as the client, for want of learning and skill, cannot himself perform; but it does not require him to assume the burdens and risk of both attorney and client."

MARYLAND CASUALTY COMPANY

v.

PRICE ET AL.

United States Circuit Court of Appeals,
Fourth Circuit—February 29, 1916.

231 Fed. 397.

Attorneys — Liability for Negligence.

In a suit against an attorney for negligence, plaintiff must prove the attorney's

employment, his neglect of a reasonable duty, and that such negligence resulted in and was the proximate cause of loss to the client.
[See note at end of this case.]

Same.

In a suit against an attorney for negligence, the test of the sufficiency of the declaration is whether its allegations, if proved, would make out a case, and, if proof of the facts alleged as to the negligence and resulting loss would establish a cause of action, the declaration is not demurrable.

[See note at end of this case.]

Same.

In an action by a liability insurer, the declaration alleged that defendants had been for several years plaintiffs retained attorneys, that plaintiff notified them of an action against a policyholder and directed them to enter an appearance and instructed them to make such defense and take such steps as should be necessary to prevent a judgment, that they neglected to do so and a default judgment was recovered, and that plaintiff attempted to settle the suit, and could have settled it for \$2,000 if the default judgment had not been rendered. It is held that while defendants were not advised of any facts constituting a defense, and it was not even alleged that there was a defense or that plaintiff intended to defend on the merits, and the inference was permissible that plaintiff's real purpose was to have a formal appearance or plea entered which would prevent a judgment for a time and enable plaintiff to make an advantageous settlement, the declaration sufficiently showed defendants' employment by plaintiff.

[See note at end of this case.]

Same.

In a liability insurer's action against its attorneys for negligence, the declaration alleged the bringing of an action for injuries against a policyholder, that plaintiff was bound to indemnify the policyholder against loss not exceeding \$5,000 and was bound to defend the suit at its own expense, that it instructed defendants to enter an appearance and make a defense, that it attempted to settle the suit and could have settled it if a default judgment had not been rendered, that defendants failed to enter an appearance or make any defense, and that by reason thereof a judgment for \$15,000 was rendered by default, and that plaintiff was bound to pay the amount thereof. It is held that in the absence of any allegation that the policyholder had a defense to the action for injuries, or that the injured person was not justly entitled to recover \$15,000, the declaration stated no cause of action, as it was not shown that if the attorneys had made a proper defense no judgment or a judgment for a less sum would have been recovered, and while it did allege that plaintiff was bound to pay the default judgment, though for more than its limited liability, there was no disclosure of facts showing such liability, and the allegation stated only a conclusion of law.

[See note at end of this case.]

Same.

Though nominal damages were recoverable for the attorneys' failure to do anything whatever, the declaration nevertheless failed to show that the amount involved gave a federal court jurisdiction, since, where the pleadings show that there cannot legally be a judgment for an amount necessary to give jurisdiction, jurisdiction cannot attach, though the damages are laid in the declaration at a larger sum.

[See note at end of this case.]

Same.

In a liability insurer's action against attorneys, an amended declaration alleged the bringing of an action for injuries against a policyholder, that plaintiff was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend the suit, that defendants were instructed to appear and defend but neglected to do so and by reason of such neglect a judgment for \$15,000 was rendered by default which plaintiff was bound to and did pay, that defendants knew that plaintiff's liability was limited and that it was obliged to defend the suit, that if they had appeared and made a defense plaintiff's liability would have been only \$5,000, though the judgment against the policyholder might exceed that amount, and that their negligence was the direct cause of loss to plaintiff of the difference between \$5,000 and the amount of the judgment. It is held that, in the absence of any allegation that the policyholder had a meritorious defense which would have defeated a recovery or reduced the amount of the judgment, the declaration was insufficient, since it did not show that plaintiff was under any obligation to pay in excess of \$5,000, as the allegation that it was compelled to pay the judgment was a mere conclusion of law without any facts to justify it, and it was evident that it was not liable to the policyholder for more than \$5,000 if the policyholder had no meritorious defense.

[See note at end of this case.]

Liability Insurance — Failure of Insurer to Defend Suit — Liability to Insured.

The holder of a liability insurance policy, under which the insurer was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend a suit at its own expense, could not recover more than \$5,000 because of the insurer's failure to defend an action resulting in a default judgment for \$15,000 without alleging and proving a meritorious defense to the action against it.

Same.

A liability insurer suing its attorneys for negligence in failing to defend an action against a policyholder resulting in a default judgment for \$15,000 had the burden of showing that the party recovering the judgment did not have a valid claim against the policyholder for \$15,000.

Pleading — Amendment Properly Refused.

A liability insurer suing its attorneys for negligence in failing to defend an action for

injuries against a policyholder alleged that it was bound to indemnify the policyholder against loss not exceeding \$5,000 and to defend the suit, that by reason of the attorneys' negligence a default judgment was rendered for \$15,000, and that it could have settled for no more than \$2,000 if the default judgment had not been rendered. An amended declaration proceeded on the theory that the attorneys' failure to defend made plaintiff liable for the full amount of the default judgment and sought to recover the difference between the amount of the judgment and \$5,000. After the sustaining of a demurrer to the amended declaration, it asked leave to amend further by striking out the averment that it could have settled for not exceeding \$2,000 had the judgment not been rendered. It is held that it was not error to refuse to allow this amendment, where it was not shown that the allegation sought to be stricken was inadvertently made, or that it was not in precise accordance with the facts established, as in one aspect of the case the facts averred would defeat a recovery if there was no meritorious defense to the action against the policyholder because the action would not then involve the jurisdictional amount.

Error to United States District Court, Southern District of West Virginia: **KEL-LEB**, Judge.

Action by Maryland Casualty Company, plaintiff, against George E. Price et al., partners, doing business as Price, Smith, Spilman & Clay, defendants. Judgment for defendants. Plaintiff brings error. The facts are stated in the opinion. **AFFIRMED.**

Clyde B. Johnson, Walter L. Clark and Conley & Johnson for plaintiff in error.

Malcolm Jackson, George E. Price and Buckner Clay for defendants in error.

Sitting: **PRITCHARD, KNAPP and WOODS**, Circuit Judges.

[400] **KNAPP, J.**—The Maryland Casualty Company brings this suit for damages alleged to have resulted from the negligence of defendants as attorneys at law employed by the plaintiff. The averments of the declaration filed January 6, 1915, may be summarized as follows:

That one Gail V. Lynch brought an action against the Wylie Permanent Camping Company to recover the sum of \$15,000 for personal injuries received by her in August, 1908, while a passenger on one of the camping company's coaches in Yellowstone Park; that under its contract of insurance the plaintiff was bound to indemnify the camping company against any loss suffered by it in such suit, not exceeding \$5,000, and was also bound to defend the suit at its own expense; that the defendants, who had been for several years the retained attorneys of plaintiff, were

instructed by it to enter an appearance for the camping company in the suit of Mrs. Lynch, and to make such defense and take such steps as might be needful to prevent a judgment; that the defendants thereupon advised plaintiff that it was not necessary to enter an appearance at rules to avoid a default judgment, but that they would look after the case for the plaintiff and keep it advised in regard thereto; that the plaintiff, relying upon its attorneys to discharge their duty in the premises, attempted to settle the suit of Mrs. Lynch, and could have settled the same for not more than \$2,000, if a default judgment in her favor had not been rendered; that the defendants wholly failed and neglected to enter an appearance or make any plea or defense in the action against the camping company, and that by reason of such neglect a judgment for \$15,000, besides interest and costs, was rendered by default; that under its contract of insurance the plaintiff was bound to and did pay the amount of said judgment, amounting to about \$20,000, and that said judgment would not have been rendered, and plaintiff would not have had to pay the same, except for the negligence of defendants; and that they thereby became indebted to plaintiff in the sum mentioned.

To this declaration a demurrer was interposed which was sustained by the court below, chiefly upon the ground that the declaration failed to allege properly that plaintiff had suffered any damages by reason of the negligence of defendants, and that it was necessary, in order to make out a case, to allege that the camping company had a good defense to Mrs. Lynch's action or allege that a less sum would have been recovered in that action but for the negligence of defendants.

The plaintiff then filed an amended declaration which repeated all the allegations of the original and added averments to the following effect: That the defendants by reason of their former employment knew that the liability of plaintiff under its contract of insurance was limited, and that by the terms of said contract the plaintiff was obligated to defend the Lynch suit; that the defendants were employed for that purpose; that, if they had appeared for the camping company and made a defense, the extent of the plaintiff's liability would have been only \$5,000, although the judgment against the camping company might exceed that amount; and that the negligent failure of defendants to enter an appearance and defend the Lynch suit was the direct [401] cause of loss to the plaintiff of the difference between \$5,000, its maximum liability under the policy, and the \$20,000 default judgment which it paid.

The defendants demurred to the amended declaration, and this demurrer was sustained by the court for reasons stated in its opinion.

The plaintiff then asked leave to further amend its declaration by striking out the averment that it could have settled the Lynch Case, but for the fact that a default judgment was obtained, for an amount not exceeding \$2,000. The court refused to allow this amendment on the ground that it did not appear that the allegation sought to be stricken out had been inadvertently inserted, and because that allegation was an admission of fact which affected the cause of action and the jurisdiction of the court. These rulings are challenged in the assignments of error.

In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client. And the test of the sufficiency of the declaration in such a suit is whether its allegations, if proven, would make out a case. In other words, if proof of the facts alleged as to negligence and resulting loss would establish a cause of action, the declaration is not demurrable.

With reference to these requirements, we hold that the fact of employment in this case is sufficiently pleaded, though a word of comment upon the averments in that regard may not be unsuitable. The declaration does not allege that the defendants were employed in this particular case, but that under their general employment they were notified of its pendency and directed to take certain action therein. The averment is this:

"This plaintiff notified the defendants of the institution and pendency of said action and directed said defendants as attorneys at law for and representing this plaintiff to enter an appearance on behalf of said Wylie Permanent Camping Company, defendant in said action so brought and pending as aforesaid, and instructed its said attorneys, the defendants herein, to make such defense and take such steps as should be necessary to prevent a judgment being rendered therein against said Wylie Permanent Camping Company; and plaintiff says that it became and was the duty of said defendants and each of them to enter an appearance in said action for the said Wylie Permanent Camping Company and do any and all other things of a legal professional character that were necessary to make up the issue in said action and defend against the judgment therein sought by said Gail V. Lynch."

It will be observed that the defendants are not advised of any facts which would constitute a defense in whole or in part to the suit against the camping company. It is not even stated that there was a defense to the suit, or that the plaintiff intended to defend it on the merits. Indeed, when the declaration is

carefully read, and reference is made to what is said about the sum for which the case could have been settled, the inference is certainly permissible that the real purpose of plaintiff was to have a formal appearance or plea entered, which would for the time being prevent a judgment and thus enable plaintiff to effect an advantageous settlement. However, as already said, we do [402] not at all doubt that the declaration sufficiently shows the employment of defendants.

The neglect of a reasonable duty on the part of defendants under their employment is amply alleged, and no question is made as to the sufficiency of the declaration in that regard.

The case then comes to the question whether the averments of the declaration, if proven as set out, would establish that the negligence of defendants resulted in and was the proximate cause of loss to the plaintiff. In other words, does the pleading meet the third requirement above stated by sufficient allegations?

We think it clear that the original declaration does not allege sufficient facts to charge the defendants with liability, because it does not show that plaintiff suffered any damage by reason of their negligence. It is not alleged that if the attorneys had appeared and made a proper defense there would have been no judgment against the camping company, or that the judgment would have been for a less sum. The averment is merely that the default judgment would not have been rendered if defendants had not failed to appear; and the declaration nowhere alleges that the camping company had any defense to the action of Mrs. Lynch, or that she was not justly entitled to recover \$15,000, on account of her injuries. It is true that the declaration alleges that plaintiff under its contract of insurance was bound to and did pay the default judgment. But it does not allege how or why, or under what contract provisions, this obligation was incurred. It merely avers that plaintiff was liable to indemnify the camping company against any loss up to \$5,000, and that it was bound to defend at its own expense the suit of Mrs. Lynch. In short, there is no disclosure of facts on which the liability is predicated, and therefore the averment at most states only a conclusion of law. It follows that the original declaration was properly held to be insufficient because it does not allege that the camping company had a meritorious defense to the Lynch suit, which the defendants negligently failed to interpose, and that she would not have recovered a judgment, or that such judgment would have been for a much less amount, if the defendants had not failed to discharge the duties of their employment.

We are satisfied that this conclusion is in accord with the weight of authority, although there is some conflict in the reported decisions. Among the cases which sustain the views we have expressed are *Harter v. Morris*, 18 Ohio St. 492; *Bruce v. Baxter*, 7 Lea (Tenn.) 477; *Spangler v. Sellers*, 5 Fed. 882; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199; *Goldzier v. Poole*, 82 Ill. App. 469; *Vooth v. McEachen*, 181 N. Y. 29, 73 N. E. 488, 2 Ann. Cas. 601; *Gabbert v. Evans*, 184 Mo. App. 283, 166 S. W. 635. The rule established by these cases is to the effect that suits against attorneys for negligence are governed by the same principles as apply in other negligent actions. If an attorney, in disregard of his duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, it does not follow that the client has suffered damage, because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it. It is said that [403] there is a difference between the case of an attorney who fails to do anything for his client, and one who makes an inexcusable mistake in attempting to comply with instructions; but we do not perceive any basis in principle for such a distinction. In either case the burden is upon the client to prove the damages he has suffered. Some of the cases hold that nominal damages may be recovered if the attorney fails to do anything whatever; but such a holding would not avail the plaintiff here, because upon that theory the amount involved would be insufficient to give the court jurisdiction. *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 18 S. Ct. 645, 42 U. S. (L. ed.) 1111. In that case the Supreme Court said:

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that, if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Barry v. Edmunds*, 116 U. S. 550, 560, 6 S. Ct. 501, 29 U. S. (L. ed.) 729, 732; *Wilson v. Daniel*, 3 Dall. 401, 407, 1 U. S. (L. ed.) 655, 657."

As above stated, the original declaration was held demurrable because it did not allege that there was a meritorious defense to the Lynch suit which would have defeated recovery, or reduced the amount of the judgment, if the defendants had not failed to perform their duty. The amended declaration likewise omits these averments, and plaintiff contends that the necessity for making them is avoided by the added allegations of the amendment, the substance of which has been

already recited. The contention advanced is set forth in the brief as follows:

"It must be borne in mind, however, that this suit is not by the defendant against whom the default judgment was rendered, but is by a casualty company with a limited liability, and the obligation to defend. This is important because it makes it unnecessary to charge that the actual defendant had a good defense to the action in which the default judgment was rendered. The defense which the attorneys were employed to make, if proper skill was used in and attention given thereto, would not affect the liability of the casualty company as to any sum above the \$5,000 maximum liability under the policy."

It will thus be seen that under the amended declaration plaintiff seeks only to recover what it paid out in satisfaction of the default judgment in excess of its contract liability of \$5,000. The right to recover this excess is based on the ground that, if plaintiff had performed its obligation to defend the Lynch suit, the extent of its liability would have been \$5,000, even if there were no defense to that suit; that this obligation to defend was committed to defendants; and that by reason of their neglect the plaintiff suffered damages to the amount of the difference between \$5,000 and the sum actually paid in satisfaction of the default judgment. It is sought in this way to avoid the necessity of proving that there was a meritorious defense to the Lynch suit. Indeed, the plaintiff says in effect that it does not at all matter whether or not there was a defense to that suit, since the defendants knew or should have known the character and extent of its obligation, and are therefore liable for the excess over \$5,000.

We are persuaded that this contention, however plausible, will not bear the test of close examination. The declaration avers that the [404] plaintiff, by virtue of its contract of insurance, was under an absolute liability of \$5,000, and also under a contingent liability arising out of its obligation to defend any suit against the insured. It does not attempt to recover the \$5,000 paid on account of its absolute liability, because for that purpose it would have to show that the judgment would have been for less than \$5,000 if the attorneys had defended the suit. But it says that it would not have been obliged to pay in excess of the \$5,000, which was paid on account of its absolute liability, except for the negligence of defendants, as it was compelled to pay this excess because of the breach of its obligation to defend. But the difficulty is that the declaration fails to allege any facts which show that the plaintiff was under obligation to pay in excess of \$5,000. True, the declaration alleges that by reason of the negligence of defendants the plaintiff breached its contract to defend any

suit against the camping company, and that in consequence it was compelled to pay the default judgment. But the allegation that it was compelled to pay the default judgment is clearly a non sequitur, because no facts are stated which show how or why it was compelled to pay that judgment, except the averment that it violated its obligation to defend the suit. This is at best a mere conclusion of law without the disclosure of any facts which justify the conclusion.

It seems evident that the contingent liability of plaintiff for breach of contract to defend the Lynch suit could not exceed the damages suffered by the camping company because the suit against it was not defended; and manifestly that damage is the difference between the default judgment and the judgment which would have been rendered if the suit had been properly defended. But if there was no defense to that suit, and none of any sort is alleged by the plaintiff, there would be no difference because on that assumption the default judgment is the same as or no greater than the judgment which would have been recovered if defense had been made, and therefore no damage has been suffered by the camping company. If this be a correct analysis of the situation, it follows that the default judgment, so far as it exceeded \$5,000, was paid without legal liability and cannot be recovered from defendants.

This appears from another point of view. If the camping company sued plaintiff to recover the amount of the default judgment, it would have to allege and prove, in order to recover more than \$5,000, substantially the same facts that we think the plaintiff must allege and prove in this action. In either case, it would be necessary to allege and prove a meritorious defense to the Lynch suit. In other words, it comes to the question of which party must assume the burden of proof, and we are constrained to hold that the burden is upon the plaintiff to show that Mrs. Lynch did not have a valid claim against the camping company for \$15,000, and that she would have failed to secure a judgment, or only secured one for a less amount, if her suit had been defended. For this reason we are of opinion that the new averments in the amended declaration do not avoid the necessity of alleging and proving that there was a meritorious defense to the Lynch suit, which if duly interposed would have defeated the action or reduced [405] the judgment, and the amended declaration is therefore demurrable because it does not so allege.

The remaining question needs but a word of comment. We are convinced that the court below did not err in refusing to allow plaintiff to further amend its declaration by striking out the following averment:

"Plaintiff avers that it could have compromised and settled the claim upon which the said action of Gail V. Lynch against Wyllie Permanent Camping Company was instituted by the payment of a sum of money not in excess of \$2,000, up to the time that the default judgment was rendered in said action as hereinafter set forth."

It is not shown that this allegation was inadvertently made, or that it is not in precise accordance with the facts. Moreover, in one aspect of the case, the facts averred would defeat plaintiff's right to recover, if there were no meritorious defense to the Lynch suit, because the jurisdictional amount would not then be involved. The state and federal statutes quoted by plaintiff are clearly designed to prevent injustice on account of formal defects in pleading, and to permit liberal amendments to cure such defects; and this purpose is emphasized in the authorities cited. We have carefully examined these statutes and decisions and are satisfied that they do not support the plaintiff's contention.

Affirmed.

NOTE.

The reported case lays down the rule that for negligence in the discharge of a professional duty an attorney is liable only for the damage actually sustained by his client, and that the amount of that damage must be proved and not left to conjecture as to the possible outcome of litigation had the negligent act not been performed. The liability of an attorney for negligence is discussed in the note to McLellan v. Fuller, reported ante, this volume, at page 1.

WITHERS

v.

BARNES ET AL.

Kansas Supreme Court—June 12, 1915.

95 Kan. 798; 149 Pac. 691.

Deeds — Delivery Held Sufficient.

The facts concerning the delivery of a deed considered, and held sufficient to constitute a valid delivery.

[See Ann. Cas. 1915C 378.]

Joint Tenancy — Right to Create.

Section 2966 of the Gen. St. of 1909, abolishing joint tenancies and survivorship, does not make it unlawful for a grantor to convey an estate to two grantees or the survivor

of the two; and the survivor may lawfully take the entire fee under such a conveyance.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Leavenworth county.

Action by Jennie B. Withers, plaintiff, against Caroline A. Barnes et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

William Dill, William W. Hooper and Elijah Robinson for appellant.

A. E. Dempsey, Floyd E. Harper and Stewart Taylor for appellees.

[798] **DAWSON, J.**—This is an appeal from a judgment of the district court of Leavenworth county in an action brought by Jennie B. Withers against her sister Caroline A. Barnes and her brother Hiram Wilson Barnes to recover an interest in certain real estate, apparently the family domicile, conveyed to Caroline by her father, Delos N. Barnes. The brother disclaimed any interest in the property and alleged that it belonged to his sister Caroline by virtue of a valid deed executed and delivered to her during their father's lifetime.

The father had been a man of considerable property. [799] His will disposed of extensive land holdings and city lots in the counties of Leavenworth, Wyandotte and Sedgwick in this state and in Platte and Jackson counties in Missouri. The beneficiaries were his son Hiram and his three daughters, Mrs. Jennie B. Withers, Miss Caroline A. Barnes and Miss Jessie Barnes. To the casual reader of the will, no great departure from an equitable division of the property between his children is apparent. The division would appear sufficient to make them all well-to-do. The plaintiff married about 1882. The mother died in 1893, and Caroline remained single and kept house for her father until his death in 1912. The will was executed February 2, 1903. The deed to the disputed property was in terms of general warranty and in part recited:

"This indenture made this 1st day of April, 1904, between Delos N. Barnes, a widower of Leavenworth, in the county of Leavenworth and the state of Kansas, of the first part, and Jessie Barnes and Caroline A. Barnes, or the survivor, of the second part."

At that time the daughter Jessie was an invalid, and she died June 3, 1907. A few days after her death, the father handed some deeds to Caroline saying:

"Here are some deeds I want you to have. These deeds have to be delivered. You take these down to Mr. Dempsey and get a receipt for them. . . . I suppose now you will be marrying some good-for-nothing fellow and turn me out of doors."

Caroline followed her father's instructions and Mr. Dempsey kept the deed until after the death of Mr. Barnes in March, 1912, when it was recorded. During the period between the making of his will and his demise Mr. Barnes made some other deeds to Caroline and the others, but with their consent he at various times sold some of such properties to third parties. Obviously this must have been done before any such deeds to his children were recorded and perhaps before they were delivered.

[800] The testimony of Mr. Dempsey, in whose custody the deed was placed by Caroline by the advice or direction of her father, is also pertinent on the question of delivery, and that question is the determining factor in this lawsuit. Mr. Dempsey's testimony, abridged, reads:

"I am a practicing attorney in the city of Leavenworth since the fall of 1894, starting in to practice here; I occupied offices with Judge Gillpatrick; he went on the bench in 1900, but for some years after that he made the same office his headquarters; he and the deceased, Delos N. Barnes, were close friends, and the latter often called at the office to visit with the judge, and I got quite well acquainted with him; sometimes when Judge Gillpatrick was not present he would engage in conversation with me; the only matter that had a legal phase that he discussed with me was in connection with these deeds I have mentioned here; that was perhaps along in 1904, I can't fix the date exactly; on more than one occasion he mentioned the matter of drawing up deeds for his two girls, who were at home, and he said he had consulted with Judge Gillpatrick and Senator Baker whether it would be legal to make deeds and leave them in the hands of someone for these girls, or whether it might be better for him to deliver the deeds direct to them. The first time that I knew that he had made any deeds was when Miss Carrie Barnes brought them to my office some time in 1907; she came with these deeds to my office and left them with me to keep for her, and I gave her a duplicate receipt for them, and kept a copy of the receipt myself. . . . These deeds remained in my possession until they were recorded, at the direction of Caroline A. Barnes.

"I met Mr. Barnes several times after the deeds were left with me by Miss Caroline, but he never mentioned anything about them."

The jury made special findings of fact, and in accordance therewith the district court gave judgment for defendant Caroline A. Barnes.

The principal contentions of counsel for appellant are, (1) that the evidence proved no proper delivery of [801] the deed; and (2) that if the deed conveyed title to Caroline, it was only an undivided half interest.

We have recited the main facts upon which the ultimate fact of delivery depends. The deed was executed to Jessie and Caroline, or the survivor, in 1904. The father retained possession of the deed until after the death of Jessie in 1907. There was therefore no delivery as to Jessie. After Jessie died he gave the deed to Caroline under the circumstances narrated by her and it was deposited with Mr. Dempsey as testified by him. Did this constitute a delivery? The district court so found. Was there any reservation of control of that deed by the father? No such evidence is adduced. What are the inferences? That the father was not doing a useless or futile thing; that he intended the ordinary consequences of his acts; and these also are in keeping with his conversations with witnesses that he intended that Jessie and Caroline, who had stayed at home and kept house for him, should have the home place. They are also in harmony with his proved purpose that Caroline, who had the care of Jessie, the invalid, should have that property. These conversations were after the deed was executed in 1904 and before its delivery in 1907, and were competent under all the rules of evidence.

The judgment of the district court on this question cannot be disturbed.

What merit is there to the contention of appellant that Caroline should only take a half interest in the property? The conveyance was to Jessie and Caroline, or the survivor. We have already noticed that Jessie had died before the delivery of the deed. The grant to Jessie failed also because a conveyance cannot be made to a dead person. But it is urged that section 2966 of the General Statutes of 1909, which abolished survivorship in joint tenancies, nullifies the words "or the survivor" in this conveyance. We think not. Considering the circumstances, the intent of this conveyance [802] is as plain as the noonday sun. The father intended that these two daughters, or the survivor of them, should have the family domicile. He was not concerned about the intricacies of a form of land holding which had been abolished in Kansas. If both daughters had lived until delivery of the deed, they would be technically tenants in common—merely the owners in fee simple. Since one of them died, the survivor of them

took the entire fee in strict accord with the language of the grant. Section 2966 of the General Statutes of 1909 abolished joint tenancies and the doctrine of survivorship *by operation of law*. It would be far-fetched indeed to hold that the grantor of a fee could not *purposely* make a conveyance which would confer common ownership on two grantees or the entire fee on one of them upon the death of the other.

The judgment is affirmed.

NOTE.

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I. Introductory.

The purpose of the present note is to show, by a review of the cases, the rule of the common law of England with respect to the question whether the creation of an estate in two or more owners resulted in a joint tenancy or in a tenancy in common, to show the trend away from the rules of the early common law, the changes therein by the courts and by statute, and the present status of those two estates in the law. The note confines itself strictly to a consideration of joint tenancy and tenancy in common, excluding consideration of coparcenary, jointure, and entireties. Cases treating of the attributes and distinguishing characteristics of the various estates in cotenancy, and of the rights of cotenants have not been included, except where a decision has been made on the specific question whether a given cotenancy was joint or in common.

The note excludes, therefore, cases dealing with the following questions: (1) Whether a devise creates a life estate and remainder or a joint tenancy; (2) whether an estate is an estate tail or a joint tenancy; (3) whether property of partners is partnership property or in common; (4) whether an estate is held in severalty or in common; (5) whether an estate is held in severalty or jointly; (6) the devolution of joint tenancies; (7) the crea-

tion of tenancy in common by the destruction of the unities of a joint tenancy; (8) community property; (9) coparcenary; (10) jointure; (11) entirety.

For cases relating to a joint deposit in a bank as creating a joint tenancy, see the note to *Kennedy v. McMurray*, Ann. Cas. 1916D 515; and for a discussion of the question of a devise to persons "jointly" as creating a joint tenancy, see the note to *Overheiser v. Lackey*, Ann. Cas. 1914C 229.

II. In England.

1. AT LAW.

At the early common law the general rule was that a transfer of an estate to two or more grantees, in the absence of an expressed intention to sever the interests, was deemed to create a joint tenancy rather than a tenancy in common. The law favored joint tenancy rather than tenancy in common, because the latter estate tended to split up feudal services and hence to disorganize the feudal military system. *Fisher v. Wigg*, 1 Salk. 391; *Ward v. Everet*, 1 Ld. Raym. 422; 2 Blk. Com. 180, 193. In *Fisher v. Wigg*, supra, it was said, as indirectly quoted in the report of the opinion: "Joint tenancies were favored, for the law loves not fractions of estates, nor to divide and multiply tenures. N. B. Whilst the estate continues in joint tenancy, there is no alteration of the tenure. But if you turn it into a tenancy in common, all the entire services multiply." And Sir William Blackstone said, on this point: "Now if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. . . . A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint tenancy rather than tenancy in common; because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied by joint tenancy, as they must necessarily be upon a tenancy in common." 2 Blk. Com. 180, 193.

Thus a settlement of lands on a husband and wife for life, remainder to the heirs of both their bodies, *simpliciter*, without further

qualifying words, has been held to create a joint tenancy, with survivorship, among the children of the marriage. *Staples v. Maurice*, 4 Bro. P. C. 580, wherein it was said: "There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants; and wherever that equality does not subsist, as between a corporation and a private person, there can be no joint tenancy. If any of the joint tenants have a bad opinion of their own lives, they may sever the joint tenancy and destroy the right of survivorship, by a deed granting their respective shares in trust for themselves, or may enter into covenants not to take advantage of each other by survivorship. But if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which our law affords no assistance."

It was a general rule of the law courts, however, that if the wording of the gift showed a clear expression of an intention to sever the interests, or to transfer the estate to the grantees as one of severed interests, the granted estate could be deemed a tenancy in common. *Bois v. Roswell*, 1 Lev. 232; *Fisher v. Wigg*, 1 Salk. 391; *Denn v. Gas-kin*, 2 Cowp. 657; *Cooper v. Jones*, 3 B. & Ald. 425, 5 E. C. L. 333; *Goodtitle v. Stokes*, 1 Wils. K. B. 341; *Doe v. Prestwidge*, 4 M. & S. 178, 16 Rev. Rep. 436. See also *Hurd v. Lenthall*, Style 211.

Where there were words of survivorship, however, they were conclusive in law as to the intention to create a joint tenancy rather than a tenancy in common; and the addition of words which tended to show an intention to sever the interests, such as "equally to be divided between them" was not sufficient to cause a court of law to construe the estate to be a tenancy in common. *Hurd v. Lenthall*, Style 211; *Ward v. Everet*, 1 Ld. Raym. 422.

Anciently it was held that the words "equally to be divided" were not sufficient in a will to show an intention to sever, and to pass a tenancy in common, but that they created a joint tenancy. This was held in the sixth year of the reign of Queen Elizabeth, 1564, by Mountague, C. J., who said that if a man devise his land to his two sons, "equally to be divided between them," they are joint tenants till division is made, for the said words, viz., "to be divided" are words in the future tense. Bendl. 19. The same ruling was made in *Dickens v. Marshal*, 1 Cro. Eliz. 330 (54 Eliz. A. D. 1611) wherein it also appears that the future tense of the words "to be divided" was the reason for the decision. Croke's report of the decision on that point is as follows: "They all

conceived it was a joint estate, and that they shall not take by parts in common; for he doth not appoint a division to be made. But Fenner said, that in 2 Eliz. Hide v. Southcot, it was adjudged, that a devise of land to two equally divided, this was a tenancy in common. But here it is to two equally to be divided; and it is not certain that a division shall be made." See also *Fisher v. Wigg*, 1 Salk. 391. This old rule was questioned, but without decision, in *Dyer* 25a. Later, however, it was held that "equally to be divided" when used in a will created a tenancy in common. *Fisher v. Wigg*, 1 Salk. 391, wherein it was said: "A devise to two and their heirs equally to be divided was formerly looked on as a joint estate. Vide Dy. 25, 158; Benl. 19; 3 Cro. 330. Now indeed it is an estate in common, not by force of the words, but that it appears to be the intention of the party that there should be no survivorship." See also *Hurd v. Lenthall*, Style 211. This was the settled rule in equity. See the cases cited *infra*, in subdivision II. 2. *In Equity*.

Even after the rule was changed as to wills, it was still held by the courts of law that the words "equally to be divided" in a deed created a joint tenancy rather than a tenancy in common. *Ward v. Everard*, 1 Salk. 390, 1 Ld. Raym. 423. See also *Hurd v. Lenthall*, Style 211. And see 2 Blk. Com. 193. In *Ward v. Everard*, *supra*, it was said, per Holt, C.J.: "The words, equally to be divided, cannot make a tenancy in common in a deed, though they may in a will; and the words, to have and receive 20l. a-piece, are an explanation how the money on receipt is to be distributed, viz., so much to one, and so much to another; but do not sever the grant nor the rent; for it is not several rents nor several grants, but one rent and one grant undivided." In *Hurd v. Lenthall*, Style 211, it was said by Roll, C. J., that "the words equally to be divided in a will do make a tenancy in common by construction, but in a grant it would be otherwise."

In time, however, this rule in turn was changed and it was held at law that the words "equally to be divided," used in a deed, showed an intention to sever the interests, and they were accordingly construed to create a tenancy in common. *Fisher v. Wigg*, 1 P. Wms. 14 (Holt, C.J., *dissentienti*). The word "equally" was held to be of the same effect as "equally to be divided," creating a tenancy in common. *Denn v. Gaskin*, 2 Cowp. 657. A devise to several "in ratable and equal proportion" showed an intent to create a tenancy in common, and it was held to create such rather than a joint tenancy. *Bois v. Roswell*, 1 Lev. 232. And the words "equally between them, share and share alike" were held to have the same effect at

law. *Cooper v. Jones*, 3 B. & Ald. 425, 5 E. C. L. 333.

Deeds of uses, like wills, were construed according to the intention of the grantor, so that a deed of uses to several, equally to be divided, conveyed a tenancy in common, not a joint tenancy. *Goodtitle v. Stokes*, 1 Wils. K. B. 341.

The ancient tendency of the courts of law to construe a grant to two or more as a joint tenancy rather than a tenancy in common led to the practice of inserting the words "to hold as tenants in common and not as joint tenants," which was suggested by Sir William Blackstone as the usual and the safest way to limit a tenancy in common. 2 Blk. Com. 193-194, wherein it is said: "And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold as tenants in common, and not as joint tenants."

Where these express words of exclusion as well as of description, "to hold as tenants in common and not as joint tenants," were used, they of course governed the construction of the estate by the law courts. *Doe v. Prestwidge*, 4 M. & S. 178, 16 Rev. Rep. 436.

The preference for joint tenancies, with their feature of survivorship, was an outgrowth of the feudal necessity of keeping estates in a simple condition, so as not to split up the feudal military services. Being based on principles of feudal military tenure, the reason for the preference ceased with the ceasing of those tenures. The modern tendency in England, even in the law courts, is to construe cotenancies as tenancies in common rather than as joint tenancies. It seems that this change of tendency had its incipency in the effect which the statute of 12 Chas. II. had of abolishing military tenures and converting them into free and common socage. This suggestion was made as early as 1747, though it was made, it will be noticed, in a court of equity, not a court of law. *Haws v. Haws*, 3 Atk. 524, wherein the Lord Chancellor said: "The general rules insisted on are true, for certainly joint tenants are not favored here, because they introduce inconvenient estates, and do not so well provide for families, therefore this court [the court of equity] leans against them, and so, I believe, do the courts of law now, though they favored them formerly, and the ground upon which they went, was the multiplication of services under the old tenures, but the statute of 12 Car. 2, c. 24, sec. 1, has reduced the several sorts to socage tenure only." And the same suggestion was made the following year by the lord chan-

cellor in *Stones v. Heurtly*, 1 Ves. 165, where in it was said: "First, antiently, and before the great alteration in the law by the abolition of tenures, courts of law were very favorable to joint tenancies, to prevent the splitting of tenures and services: but they have since very much gone off from that, and endeavored as much as possible to construe it a tenancy in common, from the inconveniences of construing it joint: and from that time allowances have been given to the words equally to be divided to make a tenancy in common: although in grants to this day they will not."

2. IN EQUITY.

a. Generally.

In equity the tendency, even in early times, was against joint tenancy and toward tenancy in common, because equity deemed a joint tenancy an inconvenient estate. *York v. Stone*, 1 Salk. 158, 1 Eq. Cas. Abr. 293, par. 1; *Stones v. Heurtly*, 1 Ves. 165; *Haws v. Haws*, 3 Atk. 524; *In re Woolley* [1903] 2 Ch. 206. See also *Jolliffe v. East*, 3 Bro. C. C. 25; *Staples v. Maurice*, 4 Bro. P. C. 580. And see other cases cited *infra*, this section.

In *York v. Stone*, *supra*, Lord Chancellor Cowper said that "a joint tenancy is an odious thing in equity." In *Stones v. Heurtly*, 1 Ves. 165, the lord chancellor said: "But courts of equity have long before been favorable to tenancies in common, wherever they could lay hold of any words to construe it so, from its being a greater equality, a better provision, and preventing estates from going by accident contrary to the intent." In *Haws v. Haws*, 3 Atk. 524, it was said by the lord chancellor: "The general rules insisted on are true, for certainly joint tenants are not favored here, because they introduce inconvenient estates, and do not so well provide for families, therefore this court [the court of equity] leans against them." In *Jolliffe v. East*, 3 Bro. C. C. 25, Lord Thurlow said: "I believe it is very well understood that the court [the equity court] decrees a tenancy in common as much as it can." In the case of *In re Woolley* [1903] 2 Ch. 206, the court said: "But in a case of ambiguity the court very properly leans to the construction which creates a tenancy in common in preference to a joint tenancy. Not one ordinary person in twenty, I doubt whether one in a hundred, not being a lawyer, has the slightest idea that a devise or bequest to several nominatim, or to a class of persons without more, does not confer upon each a several and separate share which would pass to his representatives. So, as Lord Hatherley says in *Robertson v. Fraser*

[L. R. 6 Ch. 696] 'anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy.'"

The attitude of the courts of equity toward cotenancies, and their tendency, on the slightest pretext of expressed intention, to construe them as tenancies in common rather than joint tenancies is well illustrated by the remarks of Vice-Chancellor Sir W. Page Wood, in *Williams v. Hensman*, 1 Johns. & H. 546, wherein he suggested that the legislature ought to enact that a joint tenancy could only be created by express words, so as to relieve the courts of equity from the necessity of relying on verbal minutiae as showing intent to sever. He said: "In these questions of joint tenancy the court has frequently been driven to rely on minute grounds for holding a severance to have taken place, by the unfortunate circumstance that the legislature has not thought fit to interpose by introducing the rule that express words shall be required to create a joint tenancy in place of the contrary rule which is established, that words pointing to severalty of interest are necessary to constitute a tenancy in common. Under certain circumstances, as in the case of mortgages of trust money, a joint tenancy is a considerable convenience; but it would be very desirable that, in general, in the absence of any express direction, a tenancy in common should be the construction adopted."

It has, therefore, been a well-settled rule in equity since early times that a court of equity will deem a cotenancy to be a tenancy in common rather than a joint tenancy if in the grant or limitation of the estate there appear any words or circumstances which show an intention that the interests granted be severed, or that there be no survivorship. *Lashbrook v. Cock*, 2 Meriv. 70; *Hamell v. Hunt*, Prec. Ch. 163; *Prince v. Heylin*, 1 Atk. 493; *Owen v. Owen*, 1 Atk. 494; *Haws v. Haws*, 3 Atk. 524; *Stones v. Heurtly*, 1 Ves. 165; *Rigden v. Vallier*, 2 Ves. 252; *Jackson v. Jackson*, 7 Ves. Jr. 535, 9 Ves. Jr. 591; *Horn v. Coleman*, 1 Smale & G. 169; *In re Phene*, L. R. 5 Eq. 346; *Atty-Gen. v. Fletcher*, L. R. 13 Eq. 128; *Robertson v. Fraser*, L. R. 6 Ch. 696; *Kew v. Rouse*, 1 Vern. 353; *Ive v. King*, 16 Beav. 46. See also *Harrison v. Barton*, 1 Johns. & H. 287, 7 Jur. N. S. 19, 1 L. J. Ch. 213, 9 W. R. 177; *In re Woolley* [1903] 2 Ch. 206.

But, although equity has long favored tenancy in common, and will hold an estate to be such on slighter expression of intention than courts of law, it is well settled that, in the absence of any expressed intention to sever the interests, equity regards an estate granted by will or deed to two or more as being a joint tenancy, with survivorship.

Morley v. Bird, 3 Ves. Jr. 628, 4 Rev. Rep. 106; Armstrong v. Armstrong, L. R. 7 Eq. 518; Morgan v. Britten, L. R. 13 Eq. 28; Eagles v. LeBreton, L. R. 15 Eq. 148; In re Laverick, 18 Jur. 304; Walker v. Camden, 16 Sim. 329; Frewen v. Relfe, 2 Bro. C. C. 220, 29 Eng. Rep. (Reprint) 123; Stratton v. Best, 2 Bro. C. C. 233; Campbell v. Campbell, 4 Bro. C. C. 15; Doe v. Ironmonger, 3 East 533; Shore v. Billingsley, 1 Vern. 482; Davenport v. Hanbury, 3 Ves. Jr. 257; Stuart v. Bruce, 3 Ves. Jr. 632; Jackson v. Jackson, 7 Ves. Jr. 535; Crooke v. De Vandes, 9 Ves. Jr. 197, 32 Eng. Rep. (Reprint) 577, 11 Ves. Jr. 330; Hall v. Digby, 4 Bro. P. C. 577, 2 Eng. Rep. (Reprint) 393; Mason v. Clarke, 17 Beav. 126; Lucas v. Brandreth, 28 Beav. 274; Owen v. Gibbons [1902] 1 Ch. 636, 71 L. J. Ch. 338, 86 L. T. N. S. 571, 18 Times L. Rep. 347. See also Barker v. Giles, 9 Mod. 157; Jolliffe v. East, 3 Bro. C. C. 25.

In Morley v. Bird, 3 Ves. Jr. 628, 4 Rev. Rep. 106, it was held in equity that a specific bequest of consols to four daughters simply created a joint tenancy. Arden, M. R., admitting that the tendency of that time in equity was toward tenancy in common, held that without words of severance a cotenancy would still be deemed a joint tenancy. He said: "Great doubts have been entertained by judges both at law and in equity as to words creating a joint tenancy or a tenancy in common; and it is clear, the ancient law was in favor of a joint tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the courts lately in favor of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint tenancy. It is true, the courts seeing the inconvenience of that have been desirous, wherever they could find any intention of severance, to avail themselves of it; and their successive determinations have laid hold of any words for that purpose. 'Equally to be divided' (Rigden v. Vallier, 2 Ves. 252), 'equally, among, between,' even in law I believe, certainly in equity, create a tenancy in common: but without those words it is a joint tenancy." It was held in Morgan v. Britten, L. R. 13 Eq. 28, and in Stratton v. Best, 2 Bro. C. C. 233, that a gift to "all and every the child and children" created a joint tenancy, those words not being deemed sufficient to show an intention to sever the interests. In Eagles v. LeBreton, L. R. 15 Eq. 148, it was held that a testamentary gift, at the death of A & B "to pass to my relatives in America" created a joint tenancy in the American relatives. In the case of In re Laverick, 18 Jur. 304, there was a devise to C. B. and

J. T. for life, and at their death "the said premises to go to their children," and it was held that the children took as joint tenants, not as tenants in common. It was said in that case, per Sir J. Stuart, V. C.: "As to the question, whether they take as tenants in common or as joint tenants, I must hold that they take as joint tenants, for there are no words to show they were to take as tenants in common." In Jolliffe v. East, 3 Bro. C. C. 25, after remarking that equity will construe a cotenancy as in common whenever it can, Lord Thurlow said: "If, indeed, there are not words that will point to a tenancy in common, the rule of survivorship must take place."

A fortiori, if the wording of the gift shows a clear intention on the part of the grantor that the interests shall not be severed, or that there shall be the element of survivorship, a court of equity will bow to this expression of intention and hold the estate to be a joint tenancy. DeWitte v. DeWitte, 11 Sim. 40; Bustard v. Saunders, 7 Beav. 92, 7 Jur. 986; Heasmon v. Pearse, L. R. 11 Eq. 522, L. R. 7 Ch. 275; Barker v. Giles, 9 Mod. 157; Jones v. Hall, 16 Sim. 500; Cock v. Burrish, 1 Vern. 425; Garrick v. Taylor, 29 Beav. 79, 7 Jur. N. S. 116, 30 L. J. Ch. 211, 3 L. T. N. S. 460, 9 W. R. 181, 54 Eng. Rep. (Reprint) 556, affirmed in 4 De G. F. & J. 159, 31 L. J. Ch. 68, 7 Jur. N. S. 1174, 5 L. T. N. S. 404, 10 W. R. 49, 45 Eng. Rep. (Reprint) 1144; Cookson v. Bingham, 17 Beav. 262.

Since the essence of a joint tenancy is that it has the four unities of possession, interest, time and title, out of the necessity of the case a tenancy will, in both law and equity, be deemed in common rather than joint if it lacks any one of these unities. Woodgate v. Unwin, 4 Sim. 129, wherein a limitation to several persons was held not to create a joint tenancy because the cotenants under the limitation would derive title at different times, viz., when they respectively reached the ages of twenty-one, and hence there was no unity of time.

b. Illustrations.

(1) "Equally to Be Divided," and Like Words.

It has long been well established that equity courts consider the words "equally to be divided" or "shared" as creating a tenancy in common in the case of a will, because they show an intention to sever the interests. Prince v. Heylin, 1 Atk. 493; Owen v. Owen, 1 Atk. 494; Haws v. Haws, 3 Atk. 524; Jolliffe v. East, 3 Bro. C. C. 25; Ackerman v. Burrows, 3 Ves. & B. 54. See also Rigden v. Vallier, 2 Ves. 252. And a legacy to two

"jointly and between them" has been held to be the same as a legacy to two "to be equally divided between them," and hence to create a tenancy in common. *Perkins v. Baynton*, 1 Bro. C. C. 118. So a devise to several to hold "share and share alike" creates a tenancy in common. *Heathe v. Heathe*, 2 Atk. 121; *Cormack v. Copous*, 17 Beav. 397. In *Heathe v. Heathe*, *supra*, it was said: "A question that was made upon the first will, whether the words share and share alike make a tenancy in common or a joint tenancy, is given up, and very rightly, for it has been held these 200 years to be a tenancy in common." And the addition of the mere words "between them" has the same effect. *Lashbrook v. Cock*, 2 Meriv. 70; *Atty.-Gen. v. Fletcher*, L. R. 13 Eq. 128.

And it has been held in equity that a devise to several, to be divided equally among them, created a tenancy in common although words of survivorship were added, more weight being given by the court to the intention to divide the interests than to the intention to create a survivorship. *Haws v. Haws*, 3 Atk. 524; *Stones v. Heurtly*, 1 Ves. 165. Compare *Clerk v. Clerk*, 2 Vern. 323, wherein such a limitation was held to create a joint tenancy. And compare also the cases cited *supra*, under the heading *At Law*, for the contrary rule of the law courts. In a devise in trust to pay to A, B and C and the survivor or survivors of them share and share alike, the words of survivorship should not, it has been held, be construed to defeat the effect of the words "share and share alike" which would impart a tenancy in common, but should be referred to some time, as the death of the testator or the death of the life tenant. *Russell v. Long*, 4 Ves. Jr. 551. And with respect to a gift to A, B and C with substitutional gifts over of the "respective shares" of each in case of his death, the reference to the respective shares has been held to be sufficient evidence of an intention to sever, to make the gift a tenancy in common. *Ive v. King*, 16 Beav. 46.

The words "equally to be divided" have also been held to be sufficient, in a deed operating by way of a covenant to stand seized, to create a tenancy in common. *Rigden v. Vallier*, 2 Ves. 252. They have been said to be sufficient to create a tenancy in common in the surrender of a copyhold. *Rigden v. Vallier*, *supra*. And by the assignment of a term to trustees for several, to be equally divided among them, a tenancy in common has been held to have been created. *Hamell v. Hunt*, Prec. Ch. 163.

So the word "participate" has been held to be sufficient evidence of intention to sever to make a tenancy in common in equity. *Robertson v. Fraser*, L. R. 6 Ch. 696, wherein the court construed a residuary bequest to

A and B and a codicil declaring that the residuary bequest should read as if the names A, B and C were inserted in the place of A and B, "so that C should participate in such bequest—with A and B." It was said in that case by Lord Hatherley, L. C.: "I cannot doubt, having regard to the authorities respecting the effect of such words as 'amongst' and 'respectively,' that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common. Perhaps it would have been well if the courts had held that in bequests, as in partnerships, every community of interest was to be considered a tenancy in common. But that has not been done. However, putting aside such words as 'alike' and 'equally'—for they may be considered more decidedly inconsistent with joint tenancy, inasmuch as the interests of joint tenants are very rarely quite equal, considering the difference that may exist in the ages of the legatees—it does not appear to me that such words as 'amongst' and 'respectively' are at all stronger than 'participate.' I have, therefore, no doubt that the word 'participate' is sufficient to indicate an intention to divide, and to create a tenancy in common. My doubt has been as to the effect of the peculiar form of the codicil; but my doubt is not sufficient to induce me to reverse the decision of the vice-chancellor."

In *Campbell v. Campbell*, 4 Bro. C. C. 15, it was held that a legacy "to and amongst the children of A & B" showed an intention to sever and created a tenancy in common.

Where there was a devise to A and B, "paying £25 a year out of the rents" to one during his life, viz., £12, 10s. by each of them, it was held that the stipulation for the separate halves of the payment showed an intent to sever and created a tenancy in common. *Kew v. Rouse*, 1 Vern. 353.

(2) Reference to Statute of Distributions.

Where there is a gift to a class to be ascertained by a reference to the statute of distributions, and where the reference to the statute is not only to ascertain who will take but to denote that they will take according to the shares and by the titles given by the statute, the persons designated will take as tenants in common, rather than as joint tenants. *Horn v. Coleman*, 1 Smale & G. 169; In re *Nightingale* [1909] 1 Ch. 385 [1909] W. N. 17. And where there is a reference to the statute, it is to be taken *prima facie* to mean that the shares and titles are to be such as would be given by the statute, though a contrary intent may appear which will rebut this presumption. In re *Nightingale*, *supra*.

But where it appears that the language of a gift refers to the statute of distributions simply to ascertain the individuals without referring to it to define the interests, the legatees will take as joint tenants. *Withy v. Mangles*, 4 Beav. 358; *Elmesley v. Young*, 2 Myl. & K. 780. See also *In re Gray* [1896] 2 Ch. 802.

(3) Power of Appointment or Advancement.

It has been held that a devise or bequest in trust with a power of appointment among the children of the testator shows an intention on the part of the testator that the gift be severed and divided among the children by the donee of the power, and that, therefore, such a devise creates a tenancy in common instead of a joint tenancy. *In re Phene*, L. R. 5 Eq. 346; *Casterton v. Sutherland*, 9 Ves. Jr. 445. In the case of *In re Phene*, supra, it appeared that there was a bequest to executors in trust for M for life and after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their [the children's] advantage." This was held to show an intention to have the executors divide the fund, the subject of the bequest, among the children and hence to create a tenancy in common. In *Casterton v. Sutherland*, 9 Ves. Jr. 445, under a devise to the testator's wife for life, and after her death "unto and amongst all and every our children, in such manner and in such proportions as my said wife shall either in her lifetime or by her last will and testament direct and appoint," it was held that the children living at the death of the testator became equally entitled as tenants in common subject to the life estate of the widow.

Likewise it has been held that where a will designates a class to take an original share by substitution in such a way as would ordinarily create a joint tenancy, the fact that the will contains a clause allowing advancements to be made to individuals of this class by the trustees will cause a court of equity to consider the estate conveyed to the class by the will as a tenancy in common instead of a joint tenancy, because an advancement to one and a resulting debit on his share could not be worked out if they took as joint tenants. *In re Dunn* [1916] 1 Ch. 97, [1915] W. N. 376, 113 L. T. N. S. 1206, 85 L. J. Ch. 168, wherein the court said: "Lord Redasdale said: 'Joint tenancy as a provision for children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement as the joint tenancy cannot be severed.' Though not directly applicable to the present case, that passage shows the inconvenience of construing a class gift as a joint tenancy, if the testator intended the power of

advancement to apply to the members of the class. If, therefore, the power of advancement applies to the class taking the benefit of Henry Treffrey Dunn's share by substitution, as I think it clearly does, the question is whether there is sufficient to enable me to say there is a tenancy in common. In *L'Estrange v. L'Estrange* ([1902] 1 Ir. Rep. 372, 467) the testator merely devised the residue of his property to trustees for the benefit of his six children, with power to his trustees to advance such sums as they might think fit for their education and advancement. That was a general power and did not refer in terms to the portion or share to which any child would be entitled. After reading the power of advancement, Lord Ashbourne, L. C. said: 'The question is, does the use of these words indicate an intention on the part of the testator to cut down the joint tenancy to a tenancy in common? It is one of those clauses of which, when read for the first time, one may not see the full effect, or ascertain how far the words will go; but when read more closely it is clear that the words confer a power, not of maintenance, but of advancement. If a sum, perhaps of a considerable amount, were advanced for one child, it would be right to debit that sum against his or her share, and that debit could not be worked out if these children were joint tenants, and could not be done unless they were tenants in common.' He then held that the advancement clause was a sufficient indication that the children were to take as tenants in common. And I think that in the same way here the advancement clause enables me to say that the benefit that accrued to H. T. Dunn's nearest blood relations owing to his death in the testatrix's lifetime went to them as tenants in common. And I declare that they take as tenants in common and not as joint tenants."

(4) Joint Tenancy Expressly Intended.

In accordance with the general rule that an expressed intention to create a joint tenancy will prevail in a court of equity, it has been held that a gift to a woman and her children, independently of her husband, or so that the same might not come into the hands of her husband, created in equity a joint tenancy, because it showed an intention that there should be survivorship. *DeWitte v. DeWitte*, 11 Sim. 40; *Bustard v. Saunders*, 7 Beav. 92, 7 Jur. 986. And a gift to A, J, and R. share and share alike, but if one of them should die before the age of twenty-one, "his share should vest in and belong to the survivors," was held to be a specific provision for survivorship and created a joint tenancy. *Jones v. Hall*, 16 Sim. 500.

With respect to a legacy to two nephews "equally to be divided between them" and,

further, an appointment that the same be paid to the testator's executors "in trust to be laid out for the benefit of residuary legatees," it has been held that the intent to make the gift joint, apparent in the last clause, outweighed the intent to sever, expressed in "equally to be divided," and that, therefore, a joint tenancy passed to the legatees. *Cock v. Burrish*, 1 Vern. 425.

And where there is an expressed intent to create a joint tenancy, the courts of equity will go far to uphold that intent. Thus in a case wherein it appeared that there was a devise to trustees, to convey to the testator's three daughters, as soon as they should respectively reach twenty-one, "to them and the heirs of their bodies, and their heirs as joint tenants," it was held that the devise could not create a joint tenancy because, since the daughters would attain their majority at different times, there could not be the unity of time, but the court gave effect to the intent of the testator by construing, by an application of the *cy pres* doctrine, the limitation to be of cross remainders, like a joint tenancy having the element of survivorship, instead of construing it to be a tenancy in common. *Marryat v. Townly*, 1 Ves. 102.

(5) Contract for Joint Tenancy.

In a case wherein it appeared that cotenants articulated among themselves for a survivorship in their interests, equity has given force to the agreement by holding that they held as joint tenants. *Hayes v. Kingdome*, 1 Vern. 33, 23 Eng. Rep. (Reprint) 288, the report of which case in Vernon represents the Lord Chancellor, Lord Nottingham, as having said "if there had been no covenant it should survive," but in a note to that remark, 23 Eng. Rep. (Reprint) 289, it is said: "According to Lord Nottingham's own report, he said quite the contrary, namely, that if there had not been a covenant for survivorship, equity would have hindered it.—MS. note in Mr. Hargrave's Vernon."

Equity will also decree specific performance of a contract for a joint purchase as a contract for the purchase of a joint tenancy, it appearing from the contract that the intention was to create a joint tenancy and not a tenancy in common. *Aveling v. Knipe*, 19 Ves. 441, 13 Rev. Rep. 240, wherein it was said, by Sir Wm. Grant, M. R.: "On the face of the agreement they jointly contract with the vendor; but a doubt was suggested, whether a court of equity would in any case execute such an agreement by a conveyance in joint tenancy. It would not, if there were any circumstances, from which it could be collected, that a joint tenancy was not in contemplation; but I have no conception that it is of course upon a controversy

between two purchasers to depart from the letter of their agreement, and decree them to be tenants in common."

(6) Purchasers, Joint Adventurers, or Dis-seizors.

A purchase by two or more jointly, each contributing equally, *prima facie* creates even in equity a joint tenancy, and, in the absence of anything to show an intent to sever, it will be construed to create such an estate. *Harris v. Fergusson*, 16 Sim. 308, 60 Eng. Rep. (Reprint.) 892; *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, par 3. See also *Harrison v. Barton*, 1 Johns. & H. 287, 7 Jur. N. S. 19, 1 L. J. Ch. 213, 9 W. R. 177. So a purchase by partners, paid for in partnership funds, creates a joint tenancy. *Wray v. Wray* [1905] 2 Ch. 349, 74 L. J. Ch. 687, 93 L. T. N. S. 304, 54 W. R. 136. But if there is anything in the transaction to show an intention to sever the interest, equity will construe the purchase as creating a tenancy in common. *Harrison v. Barton*, 1 Johns. & H. 287, 7 Jur. N. S. 19, 1 L. J. Ch. 213, 9 W. R. 177. If the contribution to the purchase is unequal, the purchasers are partners rather than joint tenants. *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, par. 3.

It has been held that the rules that apply to the construction of cotenancies created by will or deed have no application to mere joint business ventures, and that such a joint venture will not create a joint tenancy, nor will there be survivorship in the interests of the joint adventurers therein. *Jeffereys v. Small*, 1 Vern. 217; *Lake v. Craddock*, 3 P. W. N. S. 158. In *Jeffereys v. Small*, *supra*, it was said: "The custom of merchants, as to bills of exchange, is now extended to inland bills, and the custom of merchants is extended to all traders, to exclude survivorship (vide Vin. Ab. Tit. Surv. [D]: and though it is common for traders in articles of copartnership to provide against survivorship, yet that is more than is necessary: and he said, he took the distinction to be, where two become joint tenants or jointly interested in a thing by way of gift or the like, there the same shall be subject to all the consequences of law . . . but as to a joint undertaking in the way of trade or the like, it is otherwise: and decreed for the plaintiff accordingly."

Joint disseizors have been held to occupy lands as joint tenants, because their wrongful act gives them the same possession, the same interest, and the same title at the same time. Thus where R and B, holding as tenants in common, continued wrongfully to hold over after the termination of their estate, their tenancy in common as rightful owners became converted into a joint tenancy as disseizors. *Ward v. Ward*, L. R.

6 Ch. 789; wherein Lord Hatherley, L. C., said: "Here two persons are in lawful possession of a copyhold; the title under which they hold it comes to an end, but they continue in possession, and thus go on holding a certain share of the property without any title whatever. In what capacity do they so hold on? It appears to me as joint tenants. The possession of each became wrongful as to this share at the same moment of time, so that they acquired their title at the same moment of time, they held by one common right or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy. The case is very analogous to that of one of three tenants in common conveying his share to the other two without words of severance. The two are joint tenants of the share so conveyed, though they remain tenants in common as to their original shares."

III. In Canada.

In Canada the tendency, at least in the equity courts, has always been in favor of tenancies in common. *Fisher v. Anderson*, 4 Can. Sup. Ct. 406, wherein the court said: "Though unquestionably at the present day tenancies in common are favored rather than joint tenancies, it cannot be doubted that where the words used create a joint tenancy and there is nothing to indicate a contrary intention, no words or circumstances which, either expressly or by implication, create a severance, that must be taken to be the real intent of the testator, but wherever slight words of severance are found, the court acts upon them, and this the more readily in cases where provision is being made for families, for courts of equity have always inclined to tenancies in common when a question arises upon a provision for children."

In accordance with the modern tendency away from the estate of joint tenancy and in favor of tenancy in common, a statute was enacted in 1834, 4 Wm. IV. ch. 1, sec. 48, providing, for Canada, that when after the day mentioned in the section land shall be granted, etc., to two or more persons other than executors or trustees, in fee simple, or for a less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of the grant, etc., that they shall take as joint tenants. This statute, it will be seen, changed the rule of the common law, that in the absence of qualifying words or express contrary intention a grant to two or more created a joint tenancy instead of a tenancy in common, *Adamson v. Adamson*, 17 Ont. 407.

This statute only had the effect of changing such estates as before its enactment

would have been held to be joint tenancies into tenancies in common. It affected no other estates. *Matter of Shaver*, 31 U. C. Q. B. 603, wherein the court said: "Such being clearly the state of the law at the time of passing of the 4 Wm. IV. ch. 1, did the 48th section of that statute in any way affect the rights or interests of husband and wife under a conveyance of lands to them during coverture? In our judgment it did not. It appears to us manifest from the language of the section as a whole, that its sole object and effect was, and is, to change the rule of the common law so that assurances, etc., which before the 4 Wm. IV. created a joint tenancy, should when executed after the 1st of July, 1834, create a tenancy in common, unless a contrary intention appeared on the face of the deed, etc., that the grantees should take as joint tenants. It never was contemplated that it should affect a conveyance which before July, 1834, could not create a joint tenancy; the language of the section in question being, that where land shall be granted, etc., to two or more persons, etc., 'it shall be considered that such persons took or take as tenants in common, and not as joint tenants'—that is, as they would before the statute; clearly showing that the only conveyances in the mind of the legislature were those which without the act would have passed the lands in joint tenancy, and, as already shown, a conveyance to husband and wife would not do so."

A gift by will to several "to be divided" between them has been held to create a tenancy in common. *Re Hislop*, 70 Ont. W. N. 614, affirmed 22 Dominion L. Rep. 710, 8 Ont. W. N. 53.

And even where there are words that import an intention to create a joint tenancy, the addition of words amounting to a division, or showing an intent to sever, are controlling, and the estate granted will be deemed a tenancy in common, not a joint tenancy. *Fisher v. Anderson*, 4 Can. Sup. Ct. 406; *Clark v. Clark*, 17 Can. Sup. Ct. 376. In *Fisher v. Anderson*, supra, after quoting from many of the cases cited supra in subdivision II. 2. *In England, In Equity*, the court said: "From all which it may safely be affirmed that where words of joint tenancy are coupled with words amounting to a division, there will be a tenancy in common."

Effect will be given, however, to an express purpose to create a joint tenancy, in the absence of words showing that a division or severance of interests is intended. *Re Perrie*, 21 Ont. L. Rep. 100, 16 Ont. W. Rep. 90, in which case a devise and bequest of real and personal property to two "jointly to enjoy the same," was held to create a joint tenancy.

It has been held in Newfoundland that a bequest in trust "for the benefit of all my children" created a joint tenancy with survivorship. *In re MacDougall* [1884-1896] Newfoundland L. Rep. 7.

A joint tenancy may be created by disseizin as well as by devise or deed but in such a case the disseizin must take place at the same moment, otherwise the unity of time will be lacking and without that unity the estate cannot be a joint tenancy. *Myers v. Ruport*, 8 Ont. L. Rep. 668, wherein the plaintiff sought a declaration of title by adverse possession in his favor, claiming as joint tenant with his wife who had been holding adversely to the lawful owners. It was held that he was not a joint tenant with his wife, because his disseizin of the defendants only started at the time that he married his wife, whereas hers started before the marriage, and therefore there was no unity of time.

Where three of five tenants in common acquire title against the other two by adverse possession under the statute of limitations, they acquire such title as joint tenants, so that they become joint tenants of the two-fifths while remaining tenants in common of the three-fifths. *In re Livingstone*, 21 Can. L. Rep. 521, 2 Ont. L. Rep. 381, in which case the court said: "It was agreed between counsel that no statute is in force in Ontario which declares that titles taken under conveyances, wills, etc., are tenancies in common and not joint tenancies unless R. S. O. 1897, ch. 119, sec. 11, applies to the case. This being so I am of opinion that the two-fifths of the estate acquired as always by the three tenants in common who were in possession were taken by them in joint tenancy and not as tenants in common, and that the three in possession after having as above acquired by virtue of the statute the two-fifths were tenants in common of their original three-fifths and became and were joint tenants as to the two-fifths so acquired. There are, I think, unity of possession of interest of title and of time of commencement of title. At common law a conveyance of land to these three without words of severance would impart to them a joint tenancy, and I think the case analogous here as to the two-fifths acquired as above."

IV. In United States.

1. IN GENERAL.

Joint tenancy, with its *jus accrescendi*, or right of survivorship, is an estate of distinctly feudal origin, and founded on feudal military expediency. See cases cited *supra*, in subdivision II. *In England*. This being so the tendency in America has from the

first been away from that estate and in favor of tenancy in common. See cases cited *infra*, throughout this note. The legislatures of practically every state have advanced what was already a tendency of judicial construction, by statutory enactments more or less radically changing the common law as to the construction of cotenancies. See cases cited *infra*, particularly *Trammell v. Harrell*, 4 Ark. 602. Some of those statutes abolish joint tenancies entirely; some of them virtually abolish them by abolishing the *jus accrescendi*, in whole, or with certain exceptions; and some allow joint tenancies only where the instrument creating an estate expressly declares it to be such, by providing that in the absence of an express declaration of intention to create a joint tenancy an estate to two or more is to be deemed a tenancy in common, thus changing the common law *quoad hoc*. Because of the variety of these statutes the law of the several states will be treated by jurisdictions.

The federal courts of the United States enforce the statutory provisions of the respective states as to the nature of estates in cotenancy. *Randall v. Phillips*, 3 Mason 378, 20 Fed. Cas. No. 11,555; *Robinson v. Codman*, 1 Sumn. 121, 20 Fed. Cas. No. 11,970. They likewise follow the interpretation given to state laws on that subject by the state courts. *Everitt v. Duss*, 197 Fed. 401.

2. ALABAMA.

The incident of survivorship in joint tenancy has been abolished in Alabama by the statute which provides: "When one joint tenant dies before the severance, his interest does not survive to the other tenants, but descends and vests as if his interest had been severed and ascertained." Code of 1907, sec. 3419 (Clay's Dig. 160).

The Alabama court has said several times that by virtue of the foregoing statute joint tenancy is abolished and no longer exists in that state. *Dunn v. Mobile Bank*, 2 Ala. 152, 156; *Parsons v. Boyd*, 20 Ala. 112; *Hill v. Jones*, 65 Ala. 214. In *Hill v. Jones*, *supra*, the court said, obiter: "The words of the devise to his wife and daughter, in the will of Thomas M., importing a division of the estate between them, a separate interest in each, would, at common law, have created a tenancy in common. In this state, joint tenancy does not exist, the statute abolishing its distinguishing incident, the *jus accrescendi*. Code of 1876, sec. 2191."

The statute abolishing survivorship, however, has application only to such joint tenants as hold in their own right. It has no application to such as hold jointly en

autre droit and hence the element of survivorship still exists in the case of joint trustees. *Parsons v. Boyd*, 20 Ala. 112, wherein the court said: "Our statute, it is true, has done away with all joint tenancies, as known at the common law, and declares that when two or more persons shall hold an estate, real or personal, jointly, and one joint tenant dies before severance, his interest in the joint estate shall not survive to the remaining joint tenant or joint tenants, but shall descend to, and be vested in, his heirs or other legal representatives, in the same manner as if his interest had been severed and ascertained. *Clay's Dig.* 169. This act, however, only applies to such joint tenants as hold the absolute property in their own right, and not to those who hold as trustees merely, or in autre droit. The evil that our statute intended to remedy was, to cut off the *jus accrescendi*, or right of survivorship, which existed at the common law, and to give to the heirs at law of joint tenants the interest of their ancestors, in the same manner as if they had held as tenants in common, and not as joint tenants. It was thought unreasonable that the death of one joint tenant should give the entire estate to the survivor for his own use, to the exclusion of the heirs or next of kin of the deceased tenant. But when the tenants hold as trustees for particular purposes, or in autre droit, and can gain no advantage to themselves by the right of survivorship, then they are not within the reason of the statute, nor does the evil exist which it intended to remedy, for no profit or benefit will result to the survivor, and although he takes, by the death of his cotenant, the entire legal title, yet he will hold it as trustee, or in the right of another, and for his use and benefit. Joint trustees are not within the reason of the statute, nor the evil intended to be remedied by it, and to hold that their joint title is affected by the act could be productive of no good; it could avoid no evil, but, on the contrary, might often lead to protracted litigation, and serious injury to the trust estate."

3. ALASKA.

Joint tenancy is abolished in Alaska by a statute (*Civ. Code*, p. 367, § 62), a re-enactment of the Oregon Code, and all persons having an undivided interest in real property are to be deemed and considered tenants in common. *Binswanger v. Henninger*. 1 Alaska 509.

4. ARKANSAS.

As to real estate, the common-law rule that a grant to two or more, *simpliciter*, created a joint tenancy has been changed

in Arkansas by a statute which provides that "every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in such grant or devise to be a joint tenancy." [*Kirby's Digest*, sec. 739 (*Rev. Stat.* chap. 31, secs. 1-9.)]

Under this statute, a joint tenancy cannot exist in Arkansas, except in the case of executors or trustees, unless the instrument itself declares that the estate granted is to be a joint tenancy. *Cockrill v. Armstrong*, 31 Ark. 580, wherein the court said: "There can be no question as to the intention of this enactment, and under it we must hold: That it is only where the grant is to executors or trustees, as such, or where by the terms of the grant or devise a joint tenancy is devised, that a joint tenancy can exist. It is, therefore, not sufficient that an estate be granted or devised to several persons, to make them joint tenants. The deed or devise must declare that they are such, in order to bring the parties within the common-law rule upon the subject of joint tenancy. It therefore becomes necessary to determine whether in this devise it was in terms intended that these sons should hold as joint tenants. The language of the devise is as follows: 'I hereby bequeath and devise all my estate, real and personal, including all my effects of every description whatever, subject to the limitations herein set forth, to my sons James Trooper Armstrong, David I. Armstrong and Frank Will. Armstrong, whom I constitute and appoint my sole executors. . . . Upon a fair construction of these provisions, we think that the first clause was intended to be a devise to the sons of the estate simply, and although at the common law they would hold the estate as joint tenants, yet under our statute they hold as tenants in common.'"

And even where under the statute a joint tenancy might otherwise exist, its distinguishing characteristic, the *jus accrescendi*, has been abolished by another statute (section 4423, *Kirby's Digest*, *Rev. Stat.* chap. 82) which provides: "All survivorships of real and personal estate are forever abolished." The statute abolishing the right of survivorship in Arkansas, however, had reference only to survivorship as an incident to the estate of joint tenancy. Accordingly choses in action are not within the statute, and survivorship therein has not been abolished. *Trammell v. Harrell*, 4 Ark. 602; *Sessions v. Peay*, 19 Ark. 267. In *Trammell v. Harrell*, supra, in an elaborate discussion of the history of survivorship as an incident to joint tenancy, it was said: "The 6th sec. of ch. 58 of the Revised Code, p. 476, declares that 'all survivorships of real and

personal estate are forever abolished.' Now, the inquiry is as to the meaning of this sentence. Was it intended to abolish the right of action surviving to a joint payee or obligee, and confine us to comparatively encumbered remedies? Or was it to prevent this very state of things that the whole sentence was inserted? In order to ascertain the true meaning of the act we will first inquire what was the old law, the mischief and remedy upon this subject. The territorial law declared that the doctrine of survivorship, in cases of joint tenancy should never be allowed. Now, it is apparent that the revised statutes only reaffirm and reassert that principle. All the states in the Union have similar provisions, and they are all upheld by alike high and patriotic considerations. The doctrine of entails and primogeniture, and the *jus accrescendi*, and the abolition of all patents of nobility, were the feudal badges which the American government intended to sweep away, and thus break down all hereditary family succession by unfettering property and distributing it equally and justly among all the members of society. What is the meaning of 'all survivorships of real and personal estate?' It means that kind of an estate that springs out of a joint tenancy. To constitute a joint tenancy there must be a unity of interest, of title, of time and possession, and this usually relates to realty, although it is sometimes true in regard to personal estate. The destruction of any one of these unities will terminate the joint tenancy. 2 Black. Com. 185, Co. Lit. 193. Joint tenancies are now regarded with so little favor, both in courts of law and equity, that whenever the expression will admit of it, the estate shall always be regarded as held in common. *Fisher v. Wigg*, 1 P. Wms. 14n. 1 Ld. Raym. 622. And Lord Cowper says that a joint tenancy in equity is an odious thing. Things personal may be held in joint tenancy; as, if a personal chattel be given to two or more absolutely, they are joint tenants thereof, and unless the jointure be severed, the same doctrine of survivorship will take place as in lands and tenements. 2 Black. Com. 399; 1 Vern. 488. Between partners in trade or farming, generally speaking, there can legally be no survivorship as to personal property in possession, for each of their respective shares goes to their personal representatives, and they become tenants in common with the survivor, the maxim being *inter mercatores jus accrescendi locum non habet*. Co. Lit. 3, 282, 182a. A court of equity will bar survivorship, although the deceased wished the stock to survive. And if two persons take a farm the lease will survive, but if they lay out money in the way of trade, that shall not survive. Although there is no sur-

vivorship as to partnership property in possession, yet, according to the principles of the common law, there is as to choses in action; for, when one or more partners having a joint and legal interest in a contract die, an action against the parties must be brought in the name of the survivor; and the executor or administrator of the deceased cannot join, neither can he sue separately, but must resort to a court of equity to obtain from the survivor the testator's estate. 1 East 497. See Salk. 441. These principles clearly show that the kind of survivorship that the legislature intended to abolish, as to personal estate, related alone to a joint tenancy in such estate, and to the rents and profits issuing out of the realty. It was where the whole interest in the estate passed, and where the survivor took all that the act abolished, and not the mere right of action, which would always pass or survive to a co-obligee. Now, as to choses in action, as notes, bonds and the like, there never was survivorship, if they were given in any way of trade. And this shows that the survivorship in relation to personal estate, which the legislature abolished, was never intended to include such a case. And the general words of the act must be taken in a qualified sense; for, unless that be done they will defeat the very object and intention of the statute. Instead of remedying the evil, it would produce the very mischief intended to be cured. It would operate to the prejudice of trade and commerce, by encumbering the remedies by which rights would be asserted. Such a construction put upon the act would be in direct derogation of all the principles of commerce, which are now so firmly and beneficially established among all civilized nations. And men, instead of being encouraged to join their means and efforts together, for important objects and ends, for trade and other purposes, would stand aloof from each other, if, upon the decease of one partner, the other had not the sole right to wind up the business. We think this principle, so completely and intimately blended as it is in our commercial relations, too plain to require further illustration or argument."

Under the statutes of Arkansas, devise of lands to executors to sell and divide the proceeds equally among the children of the testator creates a tenancy in common, not a joint tenancy. *Lester v. Kirtley*, 83 Ark. 554, 104 S. W. 213.

5. CALIFORNIA.

The statutes of California sustain the following provisions: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or trans-

fer, when expressly declared in the will or transfer, to be a joint tenancy, or when granted or devised to executors or trustees. [Commissioners' Amendment, approved March 10, 1901; took effect July 1, 1901.] (Civil Code, § 683.) And "every interest created in favor of several persons in their own right is an interest in common, unless acquired by them as executors or trustees or in partnership for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property, or unless when conveyed to a husband and wife, the conveyance declares that it is to be held by them as tenants by the entireties. [Commissioners' Amendment, approved March 16, 1901; took effect July 1, 1901.] (Civil Code, § 686.) And it is further provided that "a devise or legacy given to more than one person vests in them as owners in common." (Civil Code, § 1350.) Section 683 of Civil Code, supra, was founded on the Act of April 27, 1855, which provided as follows: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy."

Before the enactment of the statute of 1855, a conveyance to two or more, simply, without other qualifying words, created a joint tenancy as at common law. Greer v. Blanchar, 40 Cal. 194, wherein a conveyance "in trust for the use and benefit of Harriet M. Risly and S. Risly" made before the enactment of the statute, was held to be a joint tenancy.

Under that statute, and under the code provisions heretofore quoted a conveyance to two or more creates a tenancy in common unless in the conveyance itself the estate is expressly declared to be a joint tenancy. Bowen v. May, 12 Cal. 348; In re Hittell, 141 Cal. 432, 75 Pac. 53; Conde v. Dreisam-Gold Min. Co. 3 Cal. App. 583, 86 Pac. 825. In Bowen v. May, supra, the court said: "The fact that two persons join in a mortgage of lands does not raise a presumption that the estate conveyed is joint property. Joint tenancies are not favored by our system—the statute having abrogated the common-law rule of conveyances in this respect—so that in order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared in the conveyance itself, otherwise the estate conveyed will be held by the grantees as tenants in common. (Wood's Dig. art. 380.)"

Where the provisions of the statute (Civil Code, § 683) are complied with, a joint tenancy with survivorship may exist in personalty as well as in realty. Denigan v. San

Francisco Sav. Union, 127 Cal. 142, 149, 50 Pac. 390; In re Harris, 169 Cal. 725, 147 Pac. 967; Kennedy v. Kennedy, 146 Pac. 647.

The Act of 1855 was not retroactive, i. e. it did not affect joint tenancies created previous to its passage, and the court has said that it could not have done so. Dewey v. Lambier, 7 Cal. 347; Greer v. Blanchar, 40 Cal. 194. In Dewey v. Lambier, supra, the court said: "It may be supposed that the first section of the Act of 1855, passed April 27, concerning conveyances, has destroyed the joint tenancy that was created by deed. The statute was only intended to apply to future and not to past conveyances. Indeed, the power of the legislature to affect past contracts, and alter or destroy the nature or tenure of estates, could not be maintained." And in Greer v. Blanchar, 40 Cal. 194, it was said: "It is also contended that the Act of April 27, 1855, which provides that 'every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy,' changed the rule, and converted existing joint tenancies, which were not expressly declared to be such, in the grant or devise by which they were created, into tenancies in common. There is nothing in the statute showing that it was intended that it should have a retrospective operation; and, if such were the intention, the legislature had not competent authority to give such an effect to the statute, as would deprive joint tenants of one of the essential elements of their tenure—the right of survivorship."

The statute of 1855 has been held not to apply to trustees, and under it there was survivorship between joint trustees. Saunders v. Schmaelzle, 49 Cal. 59, wherein the court said: "The trustees held the title as joint tenants. Whenever, by the terms of gift, it is doubtful whether trustees take as joint tenants, or tenants in common, courts will construe a joint tenancy if possible. (Perry on Trusts, sec. 343, and cases cited.) And the Statute of April 27, 1855, provided: 'Every interest in real estate granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy.' (Acts 1855, 1871.) On the death of Halleck, therefore, the whole estate devolved upon the survivors. The survivorship of the estate carries with it survivorship of such powers as are annexed to the trust. 'If an estate is vested in three trustees upon a trust to sell, there, as the power is coupled with an interest, and the interest survives, the power also survives. And this is as old as Lord

Coke, who says: "If a man deviseth land to his executors to be sold, and maketh two executors, and one dieth, yet the survivor may sell, because as the estate, so the trust shall survive; and so note the diversity between a bare trust and a trust coupled with an interest." (Perry, sec. 505.)"

Under the Act of 1855, a devise "to my . . . daughter . . . and to her children" has been held to create a tenancy in common. *In re Utz*, 43 Cal. 201.

It was said in *Dewitt v. San Francisco*, 2 Cal. 289, 297, that two corporations cannot hold as joint tenants. In that case the court said: "Joint tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely: unity of interest, unity of title, unity of time, unity of possession. . . . Two corporations cannot hold as joint tenants, because two of the essential unities are wanting, namely: of the same capacity and title. . . . Nor can they hold as joint tenants, for another reason: being each perpetual, there can be no survivorship between them; and this, as we have just seen, is the distinguishing incident of this estate. Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them."

6. COLORADO.

In Colorado survivorship as an incident to cotenancies has been abolished by statute (Act of 1861 Colorado, now *Mills Ann. Stats.* 1912, § 4152). That section provides as follows: "If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose in the same view as if such deceased joint tenants had been tenants in common. [L. '61 p. 113, § 1; R. S. '68, p. 368, § 1; G. L. '77, § 1406; G. S. '83, § 1832; 2 M. A. S. § 2526; R. S. '08, § 3602.]" No case within the scope of this note has been found construing the foregoing statute.

7. CONNECTICUT.

In Connecticut survivorship, as an incident to joint tenancy, has not been recognized, at least since 1769. *Phelps v. Jepson*, 1 Root 48, 1 Am. Dec. 33 (March 1769); *Allen v. Almy*, reported in full, post, this

volume at page 112; *Bill v. Payne*, 62 Conn. 140, 142, 25 Atl. 354 (semble). See also *Bolles v. Smith*, 39 Conn. 217, 219. In *Phelps v. Jepson*, supra, it appeared that there were joint tenants of land, that one of them died and that the survivor made a deed of the whole premises to the plaintiff. The question in the case was whether the plaintiff was entitled to the whole or to only one moiety of the premises, and the court adjudged the plaintiff to be entitled to only one moiety. In a note to the case, apparently by Judge Root, the reporter, it is said: "By this decision the doctrine of survivorship between joint tenants was exploded, and determined not to be the law in this state, which settled the law as to this point, and has never since, to my knowledge, been contradicted or shaken."

It follows that there is no practical distinction between joint tenancy and tenancy in common in that state. *Whittlesey v. Fuller*, 11 Conn. 337, 340; *Houghton v. Brantingham*, 86 Conn. 630, 86 Atl. 664; *Allen v. Almy*, reported in full, post, this volume, at page 112. In *Houghton v. Brantingham*, supra, the court said: "The defendants claim that they take the estate jointly under a technical joint tenancy with all of its incidents, including survivorship. If there is survivorship, it is by virtue of the provisions of the will, and not by virtue of the joint tenancy. There may be joint tenancies in this state, but survivorship as an incident thereto has never been recognized here. There is here practically no difference between a joint tenancy and a tenancy in common. Each tenant is seized of an undivided share of the whole, proportioned to the number of tenants, as was the case at common law in tenancies in common. But at common law, in the case of a joint tenancy, each tenant is seized of the whole as well as of every part—per my et per tout—and it is to this seizin by each of the entirety that the incident of survivorship is due. Upon the death of one, the other or others remain seized of the whole. In this state, therefore, there can be no joint tenancy with the right of survivorship, unless such right is created by the will or other conveyance creating the tenancy. Whether it can be so created, we need not in this case inquire."

There may, however, be joint tenancies, of a kind, but without the distinguishing incident of the *jus accrescendi*. *Houghton v. Brantingham*, 86 Conn. 630, 86 Atl. 664; *Allen v. Almy*, reported in full, post, this volume, at page 112.

It has been said that the law of Connecticut prefers an estate in common to a joint tenancy, thus showing that some distinction between the two estates is recognized. *Bill v. Payne*, 62 Conn. 140, 142, 25 Atl. 354;

Allen v. Almy, reported in full, post, this volume, at page 112.

Although the law does not recognize the *jus accrescendi* as an incident to an ordinary joint tenancy, nevertheless where there is a gift by legacy or devise to a class it has been held that the share of a deceased legatee or devisee goes to the survivor or survivors, and that if the testamentary gift is to the donees as joint tenants they take, *prima facie*, as a class, otherwise they take as tenants in common. *Jacobs v. Bradley*, 30 Conn. 365; *Bolles v. Smith*, 39 Conn. 217. See also *Morris v. Bolles*, 65 Conn. 45, 31 Atl. 538; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758; *Humason v. Andrews*, 72 Conn. 595, 45 Atl. 354. In *Bolles v. Smith*, *supra*, it appeared that there was a residuary devise to A, B and C, the nephews of the deceased testator, who were the only sons of the testator's brother, and that they had lived with the testator; that he had no lineal heirs, no brothers and sisters living, and that all his other nephews and nieces had been provided for by legacies. It was held that under the foregoing circumstances it appeared to have been the intention of the testator to give the residuary devise to B, and C as a class and not as tenants in common, so that the share of A, he having predeceased the testator, went to B and C by survivorship. The court said, in that case: "It is true that by the law of Connecticut the survivors, in ordinary cases of joint tenancy, do not take the whole estate. But the argument does not depend upon the *jus accrescendi*. If they are joint tenants, *prima facie* they take as a class. If they take as a class the lapsed legacy goes to the survivors."

It has been laid down as a general rule of construction, that where a legacy is given to two or more persons, *nominatim*, to be divided equally among them, and one of them dies before the testator, his share will become intestate, i. e. such legatees take as tenants in common; but that where the legacy is to two or more as a class, the share of a deceased legatee survives to the others; but that all these rules yield to the manifest intention of the testator. *Bolles v. Smith*, 39 Conn. 217, 219; *Morris v. Bolles*, 65 Conn. 45, 52, 31 Atl. 538; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758; *Humason v. Andrews*, 72 Conn. 595, 45 Atl. 354. In *Bolles v. Smith*, *supra*, it was said: "It is a general rule of construction that where a legacy is given to two or more persons, *nominatim*, to be equally divided among them, and one of them dies before the testator, his share will become intestate; but where the legacy is to two or more as a class, the share of a deceased legatee goes to the survivor or survivors. *Prima facie* joint legatees take as a

class; otherwise where the legacy is given to them as tenants in common. All these rules however yield to the manifest intention of the testator, as gathered from the whole will, viewed in the light of the surrounding circumstances," and these words have been quoted in the other cases cited under the foregoing proposition.

Therefore if there is anything in the will or in the surrounding circumstances which will make manifest the intention of the testator that the legatees or devisees are to take not as a class but severally there will be no survivorship. *Morris v. Bolles*, 65 Conn. 45, 52, 31 Atl. 538; *Rockwell v. Bradshaw*, 67 Conn. 8, 16, 17, 34 Atl. 758; *Humason v. Andrews*, 72 Conn. 595, 45 Atl. 354. See also *Bolles v. Smith*, 39 Conn. 217.

It has been held that in a devise to the testator's daughters the words "share and share alike" show such an intent to create several interests that they make a tenancy in common not a joint tenancy, and that therefore the devise is not a devise to a class and the share of a deceased devisee does not go to the survivors. *Humason v. Andrews*, 72 Conn. 595, wherein the court said: "In the case before us the gift was to the testator's daughters, naming them, and the income was to be divided equally between them. The phrase 'share and share alike' occurs both in the second and in the fourth clauses of the will. In the latter it clearly means that the three grandchildren shall take severally one-third of the residue of the estate. We see no reason why the same words in the second clause should not mean that one-half of the income of the estate is given to each of the two daughters. Under the general rules of construction above cited, we think the income was not given to them jointly, but severally as tenants in common, and that each of the daughters took individually and not as a member of a class. We discover nothing in the language of the will or the attendant circumstances to indicate a contrary intention of the testator. The court of common pleas erred in overruling the demurrer and deciding that the plaintiffs were entitled to recover."

8. DELAWARE.

By virtue of a Delaware statute, no estate in joint tenancy may be created, except to executors and trustees, other than by the express use of the particular words "to be held as joint tenants, and not as tenants in common." *Davis v. Smith*, 4 Harr. 68. The statute is as follows: "No estate in joint tenancy, in lands, tenements, or hereditaments, shall be held or claimed by or under any grant, devise, or conveyance made to any persons, other than to executors or trustees,

unless the premises therein mentioned shall be expressly granted, devised, or conveyed to such persons, to be held as joint tenants and not as tenants in common." (Revised Code, chap 86, sec. 1.)

Unless the testator uses the particular words prescribed by the statute, his intent to create a joint tenancy, no matter how clear, will be of no effect. *Davis v. Smith*, 4 Harr. 68, wherein it was held that a devise to A and B "jointly, their heirs and assigns forever," did not create a joint tenancy but a tenancy in common. The court said: "The court cannot regard the intention of a testator, when such intention is contrary to law. The intention of this testator, even if it appears to have been to devise a joint tenancy, cannot be carried out, unless he uses the words which are necessary to create such an estate."

9. DISTRICT OF COLUMBIA.

The courts of the District of Columbia, in accord with the modern tendency of both English and American courts, favor tenancy in common rather than joint tenancy. *Seitz v. Seitz*, 11 App. Cas. 358.

But since Congress has not seen fit, like the legislatures of practically all the states, to change the rule of construction of cotenancies, the common-law rule still prevails in the district, that a conveyance of land to two or more, without any sufficient expression of intention to sever, will be construed to create a joint tenancy and not a tenancy in common, whatever may have been the true intent of the parties. *Seitz v. Seitz*, 11 App. Cas. 358, wherein the court said: "We fully recognize the fact that, however the case may have been in the past, neither in our own country nor in England at this day is the construction favored that would make a joint tenancy rather than a tenancy in common. It has been said that courts of equity are even astute to find reasons for the construction that from any given instrument of writing would raise a tenancy in common, rather than a joint tenancy. And it is undoubtedly true, that in the vast majority of cases substantial justice is done and effect given to the true intention of the parties by such construction. At the same time, we are compelled also to recognize the fact that it is an inflexible and inexorable rule of the common law, repeatedly declared to be in force in the District of Columbia, and become an absolute rule of property, which could not be disregarded without disturbing a vast number of titles and unsettling the whole law of real estate, that a conveyance of land to two or more persons, without any sufficient indication of intention in the instrument of conveyance that the grantees are to

hold in severalty, is to be construed as joint tenancy, and not as a tenancy in common, whatever may have been the true intention of the parties in that regard. We know that this rule of the common law has been changed almost everywhere else by statute; but the Congress of the United States has not yet thought proper to change it in the District of Columbia, notwithstanding that its attention has been called to the subject; and we are bound by the rule as it stands."

10. FLORIDA.

The doctrine of survivorship as applied to joint tenancies in real and personal property is abolished in Florida by a statute which provides as follows: "The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state." (Gen. Stats. § 2294; Rev. Stats. of 1892, § 1819.) No Florida case within the scope of this note has been found.

11. GEORGIA.

The doctrine of survivorship as applied to joint tenancies was abolished in Georgia by the 51st section of the constitution of 1777, and has not been recognized since. *Lowe v. Brooks*, 23 Ga. 325; *Carswell v. Schley*, 56 Ga. 101, 108; *Equitable Loan, etc. Co. v. Waring*, 117 Ga. 599, 676, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L.R.A. 93. That section provided as follows: "Estates shall not be entailed; and when a person dies intestate, his or her estate shall be divided equally among his or her children; the widow shall have a child's share or her dower at her option."

Not until 1857, however, was it definitely decided (in *Lowe v. Brooks*, 23 Ga. 325) that the foregoing section of the constitution had the effect of abolishing the *jus accrescendi* and because of some doubt in this regard the legislature in 1828 passed an act abolishing survivorship in joint tenancy in lands, and in 1854 an act was passed extending the provisions of the Act of 1828 "to personal estate held in joint tenancy." *Lowe v. Brooks*, 23 Ga. 325, wherein the history of these statutory enactments was outlined as follows: "By a rule of the common law, on the death of one joint tenant, the property held in joint tenancy, whether real or personal, went to the surviving joint tenants. In 1828, the legislature passed an act in these words: 'Whereas, it is doubtful whether the right of survivorship, as under the English Law, does not still exist in this state, in all estates of joint tenancy. Be it enacted, That from, and after, the passage of this act, when two or more persons shall hold and possess any estate of lands in joint

tenancy, in this state, and one or more of said joint tenants may depart this life during the existence of said estate, the title or interest of the deceased joint tenant, in said estate shall not go and become the property of the surviving joint tenant or tenants, as under the English law, but that the same shall be distributed as all other estates, under the existing laws of this state.' Cobb's Dig. 545. This act confines itself to estates in 'lands.' In 1854, the legislature extended the act 'to personal estate held in joint tenancy.' Acts of 1853-4. 70." See also Bryan v. Averett, 21 Ga. 401, 68 Am. Dec. 464.

The effect of the foregoing provisions of the fundamental and statute law of Georgia has been preserved in the even more sweeping provision of the Civil Code: "Joint tenancy does not exist in this state, and all such estates, under the English law, will be held to be tenancies in common under this code." (Civil Code, § 3142.) By virtue of that statute a will granting an estate in such words as at common law would have created a joint tenancy will, in Georgia, create a tenancy in common. Harrison v. Harrison, 105 Ga. 517, 31 S. E. 455, 70 Am. St. Rep. 60.

However, in spite of the sweeping character of the provision of the code abolishing joint tenancies, it has been held that contracts expressly providing for survivorship are not forbidden thereby. Equitable Loan, etc. Co. v. Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L.R.A. 93, wherein the court said: "While the doctrine of survivorship as applied to joint tenancies has been distinctly abolished and does not exist in this state, there is no law of this state that we are aware of which prevents parties to a contract, or a testator in his will, from expressly providing that an interest in property shall be dependent upon survivorship. Of course all presumptions are against such an intention; but where the contract or will provides, either in express terms or by necessary implication that the doctrine of survivorship shall be recognized, we know of no reason why a provision in the contract or will dependent upon such doctrine may not become operative under the laws of this state."

. . . At common law an estate in joint tenancy, with the incident of survivorship, was created in any case where lands or tenements were granted to two or more persons, to be held in fee simple, fee tail, for life, for years, or at will. The mere creation of the estate in two or more persons, without more, drew to it the incident of survivorship. See 2 Bl. Com. 180. In Georgia the mere creation of the estate in two or more persons never draws to it survivorship as an incident, and the presumption is in all cases that survivorship was not intended. But where by

express terms or necessary implication a survivorship is provided for, the law of Georgia allows it to exist."

12. HAWAII.

In Hawaii the courts adopt the modern statutory rule rather than the common-law rule, and hold cotenancies to be in common unless there is expression of an intention to create a joint tenancy. Zupplein v. Austin, 6 Hawaii 8, wherein the court said: "Estates will be taken to be held in common and not in joint tenancy, unless it shall be expressly said that the grantees, feoffees, or devisees, shall hold the same lands jointly, or as joint tenants, or to them and the survivor, or unless some words are used which show an intention that the same shall be held in joint tenancy."

It has been held in Hawaii that the members of a land *hui*, or peculiar Hawaiian land partnership, are tenants in common of the land, in proportion to their respective ownership of shares. Pilipo v. Scott, 21 Hawaii 609; In re Assessment of Taxes, 21 Hawaii 676. See also Burrows v. Paaluhii, 4 Hawaii 464; Foster v. Kaneohe Ranck Co. 12 Hawaii 363.

13. IDAHO.

The common law as to joint tenancies has been abrogated in Idaho by a statute which provides as follows: "Every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise." (Rev. Codes, §§ 3059, 3104.)

Under the foregoing provision it has been held that where the heirs of a deceased entryman are granted a patent for the lands entered by their ancestor, they take as tenants in common and not as joint tenants. Powell v. Powell, 22 Idaho 531, 126 Pac. 1058.

14. ILLINOIS.

a. Statutes Stated and Compared.

In 1821 the General Assembly of Illinois passed an act "concerning partition and joint rights and obligations," section 2 of which has never been expressly repealed but has been continued in all the revisions and now appears verbatim as paragraph 6744 (sec. 1, chap. 76) of Illinois Statutes Annotated (1913) as follows: "That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administra-

tors, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common." *Gaunt v. Stevens*, 241 Ill. 542, 89 N. E. 812.

But in 1827 another act was passed regarding joint tenancies, which has also been re-enacted to date, and, except for the replacing of the word "whatever" by "whatsoever," and of the last words "a tenancy in common" by the words "in tenancy in common," appears verbatim as paragraph 2236 of Illinois Statutes Annotated, as follows: "No estate in joint tenancy in any lands, tenements [or] hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common." *Gaunt v. Stevens*, 241 Ill. 542, 89 N. E. 812.

It will be seen that in spite of the fact that these two statutes have both been re-enacted through all the revisions, they appear on their face inconsistent. The first was a sweeping abolition of the *jus accrescendi*, abolishing thereby all distinction between joint tenancy and tenancy in common. The second recognizes a distinction, and allows a joint tenancy to be established by an express declaration that the premises are to pass "not in tenancy in common, but in joint tenancy."

Reading the two statutes together, the question would immediately arise whether by "joint tenancy" the Act of 1827 meant to allow the joint tenancy of the common law, with its essential incident of survivorship, or whether it meant joint tenancy as that estate was left by the Act of 1821, i. e. an estate stripped of the incident of survivorship and indistinguishable, practically, from tenancy in common.

That question came directly before the court in the case of *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. 81, and the court answered it by holding therein that the Act of 1827 worked a repeal of the Act of 1821 to the extent that it allowed joint tenancy to be expressly created; that the joint tenancy thus allowed was the common-law estate, with survivorship; and that the subsequent re-enactment of the contradictory statutes without change had left the law in just the same state that it was in after the original enactment of the second statute and before the first revision.

These statutes were fully discussed and interpreted in the case of *Mette v. Feltgen*, *supra*, which settled the law on this point.

The court said therein: "It seems plain that the act of 1821 undertook to deal only with joint tenancies and tenancies in common held by the tenants in their own rights, or in right of their wives. Such is the express limitation contained in the language of section 1, and that limitation undoubtedly was intended to apply to and control the entire act. No other tenancies were within the legislative contemplation. The act therefore had no application to estates held by executors, trustees, or others holding estates in *autre droit*. But as to estates held by the tenants in their own rights or in right of their wives, whether held as joint tenants or tenants in common, the act gave the right to compel partition, and in cases of joint tenants, if partition was not made, the right of survivorship was taken away, and it was provided that the part of the tenant dying first should pass by descent or devise, and be subject to debts, dower, charges, etc., and be transmissible to executors or administrators, and be considered to every intent and purpose in the same view as if the deceased joint tenant had been a tenant in common. The effect of this statute clearly was, to practically abolish joint tenancies where the estates were held by the tenants in their own rights or in right of their wives, or, that which is the same thing, to convert them into tenancies in common. The right of survivorship, which is and always has been the principal and distinguishing incident of joint tenancies, was taken away, and upon the death of the tenant without having made partition, the estate was to be treated and considered, to every intent and purpose, as a tenancy in common. The Act of 1827 made no reference to that of 1821, but as it was the later expression of the legislative will, it had the effect of repealing or modifying the former act, in so far as it was inconsistent therewith. It becomes important then, in the first place, to determine the proper interpretation to be placed upon that act, standing by itself. In using without explanation or qualification the terms 'joint tenancy' and 'tenancy in common,' terms having at common law a fixed and well understood meaning, it was doubtless intended to use them in their ordinary common-law sense. Its effect was to restore the right to create estates in joint tenancy, as known at common law, in so far as that right was abrogated by the Act of 1821, rather by tacit recognition than by express words, and then undertook to change the rule of presumptions obtaining at common law, where a conveyance of lands was made to two or more persons. Where an estate was conveyed to a plurality of persons without adding any restrictive, exclusive or explanatory words, such conveyance, at common law, was held to constitute

the grantees joint tenants and not tenants in common, it being necessary, in order to create a tenancy in common by deed, to add exclusive or explanatory words, so as to expressly limit the estate to the grantees, to hold as tenants in common and not as joint tenants. 2 Black. Com. 180, 193. By section 5 of the Act of 1827, this rule, except in cases of conveyances to executors or trustees, was precisely reversed. Under that section, a conveyance to two or more persons, without restrictive or explanatory words, created a tenancy in common, and in order to create a joint tenancy, the estate had to be expressly declared to pass, not in tenancy in common but in joint tenancy. If the question had arisen at any time after the passage of the Act of 1827 and prior to the revision of 1845, it would have presented no material difficulty. The rule established by the Act of 1827 would have been held to prevail, that being the latest act, and as that act clearly recognized the existence of estates in joint tenancy, a well-known species of common-law estates, and expressly provided the mode in which they might be created, the result would have logically followed, that joint estates created in the manner prescribed were joint tenancies in the common-law sense, and possessing the qualities and incidents which the common law attaches to them, notwithstanding the provisions of the Act of 1821 to the contrary. The view that the estate in joint tenancy referred to in the Act of 1827 was the common-law estate, with its common-law incidents, is strengthened by reference to the provisions of the act in relation to the tenancy when vested in executors or trustees. As we have already seen, tenancies of that character are not within the purview of the Act of 1821, nor affected by its provisions. They were doubtless excluded from the operation of that act, on account of the manifest impropriety of compelling partition between joint tenants holding in a trust capacity, and the obvious advantages resulting from an application of the rule of survivorship to joint tenants of that character. The Act of 1827 also expressly excepts from its operation executors and trustees, thus keeping in force as to them the common-law rule, but provides that in other cases, to create a joint tenancy, it must be expressly declared in the deed to be such and not a tenancy in common. But there is nothing in the Act of 1827 furnishing the least indication that the legislature intended to attach to joint tenancies where the tenants held in their own right, any other or different incidents, than those which properly belonged to the estate where executors or trustees were the tenants. It is beyond question that in the latter class

of joint tenancies, it was the intention of the act that the incident of survivorship should prevail, and as the act furnishes no indication to the contrary, it would seem to be equally clear, that the same rule was intended to apply to those where the tenants were such in their own right. Up to the passage of the Revised Statutes of 1845, the law on the subject, so far as it was declared by statute, was to be found in the Act of 1821, as modified by the Act of 1827, the latter act prevailing and furnishing the rule in all matters where the two were inconsistent with each other. It would seem therefore that the re-enactment of these two statutes, without change of phraseology, in the revision of 1845, and again in the revision of 1874, was intended as a re adoption of the statutory law on the subject in precisely the condition in which it was before any revision was made. It has been held, and we think correctly, that where there are repugnant provisions in a revised code, those portions which are transcribed from later statutes must be deemed to repeal sections adopted earlier, or transcribed from earlier statutes, or to so modify them as to produce agreement between such repugnant provisions. *Endlich on Interpretation of Statutes*, sec. 183. Under these circumstances, we are disposed to hold that the two statutes under consideration still sustain to each other the same relation which existed prior to the revision of 1845, and that they should be construed now the same as they would have been construed prior to that revision. As a consequence, the Act of 1827 must still be regarded as repealing or modifying the Act of 1821, to the extent of permitting parties to create the common-law estate of joint tenancy, with its common-law incidents, by expressly declaring in a deed running to two or more grantees, that the estate conveyed shall pass not in tenancy in common, but in joint tenancy."

In a separate opinion in the same case Mr. Justice Magruder, while arriving at the same effect as that reached by the majority of the court, argued that there was no necessary conflict in the statutes; that the first did not abolish all joint tenancies, but only such as would at common law be created by operation of law, leaving such as might be created by express declaration or contract of the parties; and that the second statute merely recognized this class of joint tenancies and prescribed how they might be expressly created.

b. Effect of Statutes.

Joint tenancies are not favored in Illinois as they were at common law. *Slater v. Gru-*

ger, 165 Ill. 329, 333, 46 N. E. 235; *Mustain v. Gardner*, 203 Ill. 284, 67 N. E. 779; *Cover v. James*, 217 Ill. 309, 75 N. E. 490.

It has been held that the Act of 1821 applied to personal property as well as to realty, and abolished the right of survivorship therein. *Hay v. Bennett*, 153 Ill. 271, 38 N. E. 645, *affirming* *Bradford v. Bennett*, 48 Ill. App. 145.

The intention to create a joint tenancy must be so clear as not to leave a reasonable doubt in the mind of the court of the purpose to create that estate, otherwise it will be a tenancy in common. *Gaunt v. Stevens*, 241 Ill. 542, 99 N. E. 812, wherein it was said: "While it is settled that the exact words of the statute need not be used in the instrument, yet the unfavorable disposition of the legislature toward joint estates has influenced this court in establishing the rule that the intention to create such estate must be so clearly expressed as to leave no reasonable doubt in the mind of the court of the purpose to create such estate."

A deed granting an estate to two or more "not as tenants in common, but as joint tenants," thus using the words of the statute, creates a common-law or joint tenancy with the right of survivorship. *Mette v. Felts* (Ill.) 27 N. E. 911.

To create an estate in joint tenancy it is not, however, necessary to use the exact words of the Act of 1827, "not in tenancy in common, but in joint tenancy," nor to use the words "joint tenancy." Any words will create a joint tenancy which show: (1) That the testator (or grantor) understood the nature of and distinction between a tenancy in common and a joint tenancy; and (2) that he clearly intended to create a joint tenancy, or to create a survivorship right as an incident to a granted cotenancy. *Slater v. Gruger*, 165 Ill. 329, 46 N. E. 235; *Mustain v. Gardner*, 203 Ill. 284, 67 N. E. 779; *Cover v. James*, 217 Ill. 309, 75 N. E. 490 (semble.) In *Slater v. Gruger*, supra, it appeared that in the deed in question there was a specific provision for survivorship in the premises in the naming of the grantees, and after the description of the premises the following appeared: "The conveyance herein is made to said grantees in joint tenancy." Holding this to be sufficient to pass a joint tenancy under the Act of 1827, the court said: "But it is argued by appellees that no estate in joint tenancy can be created unless the language of the statute is used in the grant, and the premises are not only declared to pass in joint tenancy, but that they are not to pass in tenancy in common. It is urged that this deed is not sufficiently explicit in that regard. It is plain that joint tenancies are not favored by the legislature, and it was

undoubtedly the object of the statute that the deed should clearly and explicitly show that the premises are not to pass in tenancy in common; but where that is the real intention, and it is made clear by the instrument, the particular phraseology used to show it cannot be important. The mere use of different terms, where it is clear that the parties understood the nature and incidents of the different estates, and where the language shows that the estate intended is clearly not a tenancy in common but a joint tenancy, should not defeat their purpose." In *Mustain v. Gardner*, 203 Ill. 284, 67 N. E. 779, the court said: "The only question presented by this record is whether the devisees took as joint tenants or as tenants in common. Joint tenancies are looked upon with disfavor in this state. For this reason section 5 of the act concerning conveyances (1 Starr & Cur. Stat. 1896, p. 916) was adopted. [Here the court quotes the statute of 1827.] The devise does not expressly declare that the estate thereby created and devised is an estate in joint tenancy and not an estate in common. But such a declaration is not indispensable. It is enough if it shall appear from the phraseology of the devise that the testator understood the nature and incidents of the two estates, and the language employed be such as to clearly and explicitly show that the premises are not to pass in tenancy in common. . . . In the absence of an affirmative declaration that the estate devised is in joint tenancy, an estate in tenancy in common will be devised, unless it clearly and explicitly appears from the language employed that the testator understood the nature and incidents of the different estates and intended to create a joint tenancy. The quality of survivorship is the distinguishing feature of a joint tenancy, and where the grant or devise expressly imparts that quality to the estate, . . . it will be deemed effectual to create a joint tenancy, though the negation indicated by the statute be omitted." In *Cover v. James*, 217 Ill. 309, 75 N. E. 490, a conveyance to two grantees and "in case of the death of either . . . , the other to have the whole of said property without litigation" was held to be valid to create a survivorship, although the court said that it was unnecessary to decide whether a joint tenancy was created or not.

A devise to A and B, "during their joint lives, and to the survivor of them during her natural life," creates a joint tenancy under the statute. *Pritchard v. Walker*, 22 Ill. App. 286, *affirmed* 121 Ill. 221, 12 N. E. 336.

In the absence of any words to show clearly that the grantor understood the natures of the two estates, and that he intended to create a joint tenancy or survivorship, a

grant of a cotenancy will create a tenancy in common. *Cheney v. Teese*, 108 Ill. 473; *Mustain v. Gardner*, 203 Ill. 284, 67 N. E. 779. In the case last cited, the court held that a tenancy in common was created by a devise to the wife and daughter of the testator, "jointly," and "to them and their heirs and assigns forever." The court said: "The devise under consideration does not, in terms, negative the presumption which arises from the statute that it was the intention of the testator to create an estate in tenancy in common, and does not, in terms, declare it to be the intent to create a joint tenancy; nor do we find anything in the language of the devise to indicate that the testator understood the nature and incidents of the different estates, or either of them, and desired that an estate having the peculiar characteristic of survivorship should pass by the devise. The word 'jointly,' found in the devise, cannot be accepted as sufficient to show, clearly and explicitly, that the testator intended that the estate devised should possess the attribute of survivorship. Tenants in common or coparceners hold the estate 'jointly' until a severance is effected. . . . It is entirely consistent with the use made by the testator of this word 'jointly' to construe it as indicating only an intent to devise the estate to both devisees, and as it cannot be construed to declare, explicitly and clearly, the intent that the estate, as an entirety, should inure to the survivor of the devisees, it cannot avail to take the devise out of the operation of the statute. The statute must be given effect and the estate devised declared to be an estate in tenancy in common."

Even where there are words, such as words of survivorship, which alone might show an intention to create a joint tenancy, the addition of other words which show an intention of, or a contemplation of, a division or distribution will negative and outweigh the expression of intention to create a joint tenancy and will make the estate created a tenancy in common. *Gaunt v. Stevens*, 241 Ill. 542, 89 N. E. 812, wherein it was held that a devise to "my said wife . . . and my two daughters . . . and to the survivor or survivors of them, share and share alike" created a tenancy in common, not a joint tenancy. The court said: "If the instrument contains language from which it can reasonably be inferred that the maker contemplated a division of the property among the purchasers, or from which it can be seen that a distribution, either in equal or unequal shares, was intended, such language will be held to negative an intention to create an estate in joint tenancy and the purchasers will take as tenants in common. . . . The only language of the fourth

clause of the will now under consideration that gives any color of the claim that a joint estate was intended are the words, 'to the survivor or survivors of them.' Whether these words, if unlimited in any way, would be sufficient to create a joint tenancy we are not called upon to decide, since in our opinion the words 'share and share alike,' which immediately follow the words of survivorship, clearly indicate that the testator intended that there should be an equal division between such of the devisees as might be living at his death, which division is inconsistent with the existence of a joint estate."

15. INDIANA.

An Indiana statute provides as follows: "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy." (*Burns Ann. Stats.* 1908, § 3953; *R. S.* 1881, § 2922; *R. S.* 1843, p. 417, sec. 18.) And the next section is as follows: "The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees, as such, shall be held by them in joint tenancy."

The law of Indiana looks with disfavor on joint tenancies and aims to prevent their creation. This has been the attitude toward joint tenancies at least since 1843. *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L.R.A. 42; *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980.

Under the foregoing statute a conveyance to two or more creates a tenancy in common unless it is expressed in the instrument, or it manifestly appears from the tenor of the instrument that the intention was to create a joint tenancy. *Nicholson v. Caress*, 45 Ind. 479; *McMillan v. Hadley*, 78 Ind. 590; *Fountain County Coal, etc. Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Stevens v. Reynolds*, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

By the expression of the statute "from the tenor of the instrument" is meant the wording of the instrument. The circumstances surrounding the grantor and attendant on the execution of the instrument cannot be looked to. *Nicholson v. Caress*, 45 Ind. 479, wherein the court said: "It should be observed that there are two clauses to the

latter portion of section 18. [R. S. 1843.] In the first clause, the intention is to be expressed in the instrument, while in the other the intention is to be gathered from the tenor of the instrument. By the word 'tenor' is meant the exact words of the instrument. We think the true construction of the section is, that all conveyances and devises of land or of any interest therein, to two or more persons, with the exception stated, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy, or it shall appear from what is expressed in the instrument that it was intended to create an estate in joint tenancy. The purpose to create a joint tenancy must appear from the instrument in one or the other of the modes above indicated. We cannot look to the circumstances surrounding the grantor and attendant upon the execution of the instrument, to ascertain his intention. The intention must appear from an express declaration in the instrument that the grantees or devisees shall hold as joint tenants, or from the words used in the instrument. In the deed under examination, it is not expressed that the grantees shall hold the land as joint tenants, nor does such intention manifestly appear from the language employed. We think the grantees held the land as tenants in common, and that upon the death of Peter his estate for life terminated, and the estate in fee descended to and vested in the heirs at law of the grantor, Thomas Nicholson."

If there are both words which show an intention to create a joint tenancy and words which show an intention to create a tenancy in common, the estate will be a tenancy in common, for in such case it does not "manifestly appear" as the statute requires that a joint tenancy is intended. *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980, reversing 74 N. E. 12, wherein it appeared that there was a devise to the wife of the testator for life, remainder to his children to be owned "equally and jointly . . . or in case of the decease of any of said children, his or her share to descend to the heirs of their bodies, if any, and if not, to those surviving." It was held that, while "jointly" and the alternative provision for survivorship looked in the direction of a joint tenancy, those expressions were outweighed by the word "equally" and the provision "to descend to the heirs of their bodies," which looked toward tenancy in common. The court said therein: "It does not, however, admit of question that tenants in common have a unity of possession . . . although not of title, and therefore a court, in considering the word 'jointly,' is not necessarily put to

the dernier resort of rejecting it, or of holding that a joint tenancy has thereby been created. . . . But granting that the word, without restrictive language, is sufficient, notwithstanding the statute, to create a joint tenancy, we cannot consent that it be given controlling force in cases where it is found associated with other words or provisions which tend to rebut what is perhaps its prima facie meaning. The word 'equally,' at least if it is not found in company with some more controlling word, has always been regarded as implying a tenancy in common . . . and, this being true, we are of opinion that the use of that word is a circumstance to be considered in determining the intent of the testator. It is certain, in view of the statute, that the word 'jointly' will not bear any imposed weight. There remains the further fact that the provision in regard to the share of a deceased child going to the heirs of his body tends to show that a tenancy in common was intended, since, as a joint tenant is, as to his companion, while the tenancy exists, seized of the whole, the recognition of a several interest in one tenant, as where his interest is referred to as a share, tends to show that a joint tenancy was not intended. . . . We are of opinion, in view of the statute, that the will in question did not create a joint tenancy in the remaindermen."

A deed to two or more "jointly" with no further words of qualification makes it "manifestly appear," within the meaning of the statute, that a joint tenancy was intended, and creates a joint tenancy. *Case v. Owen*, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253, in which case the court said: "Our statute, section 3341, Revision of 1894, provides that all conveyances and devises of land, or of any interest therein, made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy. This statute completely reverses the ancient common-law rule, for joint tenancy was a favorite of the ancient common law, and no special words or limitations were necessary to call it into existence, but, on the other hand, words or circumstances of negation were indispensable to avoid it. *Freeman Cotenancy and Partition*, section 18. Under this statute, however, it must be created by express words or limitations. The question for our decision, therefore, is, does the use of the word 'jointly' in this deed have the effect of vesting in Lydia Reese and John Reese an estate in joint tenancy? It is a familiar

rule that in construing a deed, as in construing any other written instrument, it is to be considered as a whole, and that effect is to be given to each and every clause and word found in it if that is possible. As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles the word 'jointly' can find no place in describing an estate to be held by them. To hold that this deed created in the grantees a tenancy in common, we would be compelled to strike out and wholly reject the word 'jointly.' This we are not at liberty to do. Under the well known rules of construction we are required to give it effect; and when that is done we are constrained to hold that this deed vested in Lydia Reese and John Reese an estate in joint tenancy."

A deed by a court commissioner to A and B, on petition of the administrator of an intestate estate, to enable them to procure funds to pay the debts of the estate, created a tenancy in common under the Indiana statute. *Stevens v. Reynolds*, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

Survivorship is abolished in Indiana as an incident to joint tenancy in personal property, unless expressly stipulated for in the instrument, by the statute providing as follows: "The survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument." (*Burns Ann. Stats.* 1908, § 9726; *R. S.* 1881, § 6060.) Under that statute, where there is a bequest of personal property to two or more, with no expression of an intention that the survivor shall take the whole, there is no survivorship in the cotenancy created, which is, therefore, practically a tenancy in common. *Johnson v. Johnson*, 128 Ind. 93, 27 N. E. 340; *Thieme v. Union Trust Co.* 32 Ind. App. 522, 70 N. E. 276. In *Johnson v. Johnson*, supra, the court said: "Under the rules of the common law it was important to know whether a devise or bequest to two or more persons created a joint estate or an estate in common, for if the estate was joint, the survivor took the whole; but if the estate was one in common, the whole did not go to the survivor. And the decided weight of authority is, that a devise to two or more persons simply makes the devisees joint tenants, and this is true whether the devise be made to a trustee, or otherwise. 3 *Jarman Wills*, p. 4, and authorities cited. The law of Joint Tenancy, however, is now of little importance in the United States, as it has been abrogated by statute in nearly all states in the Union. . . . Our statute upon the subject now under consideration, section 6060, *R. S.* 1881, is as follows: 'The survivor of persons hold-

ing personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.' Under this statute, property held by two or more persons as joint tenants does not go to the survivor, unless it is so expressly stipulated in the instrument creating the estate. As there is no provision in the will now under investigation which indicates an intention on the part of the testator that the survivor should take the whole estate on the death of one of his granddaughters, we are of the opinion that Ella Dearmond did not take the interest of her sister, upon her death, as the survivor."

16. IOWA.

The Iowa statute regarding cotenancies is as follows: "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed. (*Code of 1897*, section 2923 [*C.* '73, § 1939; *R.* § 2214; *C.* '51, § 1206].)

Joint tenancy, with its characteristic common-law incident of survivorship, exists in Iowa. *Wood v. Logue*, 167 Ia. 436, 149 N. W. 613. But it is not favored by the law of that state. *Hoffman v. Stigers*, 28 Ia. 302, wherein the court said: "It is true that at one time the common law favored, by reason of the right of survivorship, title by joint tenancy. For it thus, as was supposed, tended to combine or unite the feudal services, consolidate tenures and strengthen the feudal connection. And this was its policy. Of course, the reason of this policy would cease with the abolition of tenures; and neither in England nor in this country are these estates now favored. The title is, hence, said to be greatly reduced in extent, and the incident of survivorship still more extensively destroyed. . . . And, therefore, the rule in this country is, that all estates vested in two or more persons are to be deemed tenancies in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate. In most of the states this rule is declared by statute. Or, if not to the full extent stated, at least many and great innovations have been made upon the estate as it stood at common law; very many of them abolishing the *jus accrescendi*, or right of survivorship. And hence in this state it is declared that conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed. *Rev.* § 2214. With us, therefore, when the estate is held by two or more, not as trustees, but in their own right, nothing being expressed to the contrary, the tenancy would be in common. And thus most plainly and authoritatively

is the estate of joint tenancy disfavored by our law. There is no reason, no necessity, for such an estate, except under the most peculiar circumstances. In the language of the old Massachusetts statute (1785, ch. 62), tenancies in common are 'more beneficial to the commonwealth and consonant with the genius of republics.' And as now we in most of the states condemn entailments, or perpetuities, so we do and should joint tenancies, or at least their common-law incident—the right of survivorship."

By the effect of the foregoing statute the common-law rule that an estate to two or more was a joint tenancy unless there were an express intention to create a tenancy in common, has been exactly reversed in Iowa, and an estate to two or more in their own right will be deemed a tenancy in common unless a contrary intent is expressed. *Gilmore v. Jenkins*, 129 Ia. 686, 6 Ann. Cas. 1008, 106 N. W. 193.

If from the words of a deed the manifest intent to create a joint tenancy appears, effect will be given to that intent in spite of the fact that the deed was inartificially drawn and the words were inapt in a strict legal sense. *Wood v. Logue* reported in full, post, this volume at page 116, wherein the court construed a deed in which the grantor conveyed a one-third interest in certain premises to each of his two sisters, providing that he and the two sisters should jointly occupy the premises so long as they all remained unmarried, the deed containing further a clause providing for survivorship in the following words: "In case of the death of the grantor, the grantees are to inherit the undivided one-third interest of the grantor, and in case of one of the grantees dying first, the grantor and the surviving grantee are to inherit that portion of the property that is owned by the grantor and grantee that are deceased. It is understood between the grantor and grantees herein that the one dying last is to be the absolute owner of the property herein described, and he or she may dispose of the entire property by will or in any other way that he or she may desire."

Although a city ordinance providing for the sale of cemetery lots provided also that lots so sold should be indivisible, a conveyance of such a lot to two grantees, no expression of intent to create a joint tenancy being made, was held to have created a tenancy in common, not a joint tenancy. *Anderson v. Acheson*, 132 Ia. 744, 110 N. W. 335, 9 L.R.A. (N.S.) 217, wherein it was said: "Nor do we think appellant's contention that Joshua and Mike Whaley acquired the lot as joint tenants, and that, therefore, upon Joshua's death his interest passed to Mike as survivor, is sound. Sec-

tion 2923 provides that 'conveyances to two or more in their own right create a tenancy in common, unless the contrary intent is expressed.' As said, the interest of Joshua was something more than an ordinary license. The right to the use of the ground as a burial place passed to his heirs, and the conveyance to him and Mike Whaley was within the rule of this statute. See *Bolton v. Oberne*, 79 Ia. 278. True, the ordinance of the city declared that the lot should be indivisible, but this, like other provisions, was enacted for the regulation and control of the lots, and not to define the nature of the interests which might be acquired therein."

17. KANSAS.

A statute of Kansas, enacted in 1891, provides as follows: "If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate of thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenants or tenants of estate in entirety had been or were tenants in common; but nothing in this act shall be taken to affect any trust estate." (General Statutes, § 2552.)

The foregoing act abolished joint tenancy. It had, however, only a prospective effect, and had no effect to abolish estates in joint tenancy which had vested prior to its enactment. *Best v. Tatum*, 78 Kan. 215, 96 Pac. 140, 130 Am. St. Rep. 365. And its effect was to abolish only joint tenancies created by law. It does not prevent the creation of a right of survivorship in a cotenancy by a proper express contract. See the reported case.

Since the Act of 1891 expressly excepts trust estates, joint tenancy with survivorship still exists in trust estates. *Boyer v. Sims*, 61 Kan. 593, 60 Pac. 309, wherein the court said: "It was also objected that Sims, the surviving trustee, could not maintain the action in his own name. This objection is likewise untenable. The conveyance was made to the grantees in terms of joint tenancy, and upon the death of Kellam, Sims, the survivor, became invested with the whole of the title. (*Baker v. Steward*, 40 Kan. 442, 19 Pac. 904, 2 L.R.A. 434; *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919; *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598.) Although the trust conveyance was made in 1896, after the enactment of chapter 203,

Laws of 1891 (Gen. Stat. 1897, ch. 109, § 31; Gen. Stat. 1899, § 2472), which abrogated the rule of survivorship in joint tenancy, yet the final clause of that act expressly excepts trust estates from its operation. The law of survivorship in joint tenancy applies in case of trust estates as well as those of other character."

Joint tenancies existed in Kansas before the enactment of the Act of 1891. *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919; *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598. See also *Wilson v. Johnson*, 4 Kan. 747, 46 Pac. 833. In *Simons v. McLain*, supra, the court said: "The grand incident of joint tenancy is survivorship, by which the entire tenancy, on the decease of any joint tenant, remains to the survivors, and at length to the last survivor. . . . By the policy of the American Law 'joint tenancy, if not a subject of aversion, is rarely a matter of preference.' (Freeman, Coten. 2d ed. § 35.) In Connecticut the judiciary, at an early day, entirely ignored what they styled 'the odious and unjust doctrine of survivorship.' . . . In Ohio the supreme court held that joint tenancy did not exist, on account of the statute in that state of partition and distribution. . . . But in most of the states the rule of the common law concerning estates in joint tenancy continued until abolished by statute. . . . In this state the legislature, on March 10, 1891, passed an act 'to abolish survivorship in joint tenancy.' (Laws of 1891, ch. 203, p. 349.) A majority of this court, in *Baker v. Steward*, 40 Kan. 442, and *Shinn v. Shinn*, 42 Kan. 1, recognized 'estates in entirety,' where the deed is made to the husband and wife, and ruled that in such a case the survivor of the two, at the death of the other, was entitled to the entire estate. This, of course, was a full adoption of the rule of 'estates in entirety,' as recognized by the common law. The writer of this dissented in that case. But following the law thus declared by the majority of the court, and in view of the recognition of joint tenancy by the statutes of the state, and that 'survivorship in joint tenancy' was not expressly abolished by statute until 1891, long after the execution of the deed of the 17th of May, 1872, and long after the death of E. G. Tewksbury, on the 22d of March, 1877, we must hold that estates by joint tenancy existed in Kansas prior to March 10, 1891." In *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598, it was said: "To our minds, the will created a joint tenancy in the devisees, and, therefore, upon the death of the mother her interest in the land became vested in her children. The distinguishing feature of joint tenancy is survivorship—the casting of descent upon co-owners, and not upon heirs. Such species

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of tenancy existed in Kansas until abolished by the statute."

Joint tenancies were not favored in the law even before the passage of the statute but they could be created by words which showed such an intent. *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598.

18. KENTUCKY.

As early as 1796 the following statute was enacted in Kentucky: "Joint tenants may be compelled to make partition; and when a joint tenant dies, his part of the joint estate, real or personal, shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution. (Kentucky Statutes, § 2348.)

By that statute the common-law right of survivorship in joint tenancy has been said to have been abolished. *Louisville v. Colburne*, 108 Ky. 420, 56 S. W. 681, 22 L. Rep. 64; *McCallister v. Folden*, 110 Ky. 732, 62 S. W. 538. In the case first cited the court said: "In order to constitute an estate in joint tenancy, the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. The chief peculiarity of this estate is the right of survivorship, by which, upon the death of one joint tenant, the entire tenancy remains to the surviving cotenants, not to the heirs or other representatives of the deceased, the last survivor taking the whole estate (see 2 Bl. Com. p. 180); and the common law favored title by joint tenancy by reason of this very right of survivorship, but the policy of the law in this state is against survivorship, and as early as 1796 abolished it by statute, which still survives, in section 2348, Kentucky Statutes."

The Act of 1796, however, has been held to have had no retroactive effect. It did not destroy the *jus accrescendi* in joint tenancies which vested prior to its enactment. *Barclay v. Hendrick*, 3 Dana 378; *Overton v. Lacy*, 6 T. B. Mon. 13, 17 Am. Dec. 111. In *Overton v. Lacy*, supra, it was said by the court: "If there had been no agreement between Clough and Waller Overton to divide and make partition of the land, we should have no hesitation in saying that Waller Overton ought not to be compelled to surrender the title which he derived by the grant from the commonwealth to any part of the land. Having obtained the title as he did, at a time when the right of survivorship was an incident to estates held in joint tenancy, he must occupy as favorable ground as he would have done, had the grant issued in the lifetime of both him and

Clough Overton, and the title which he now holds had afterwards come to him as the survivor, and although the *jus accrescendi* has never been the favorite of courts of equity, no case is recollected where those courts have assumed the power to dispense with the law and without any agreement between the joint tenants in their lifetime to sever the estate, to compel the survivor to surrender any part of the title to the representatives of the deceased tenant."

In spite of the Statute of 1796, tenants in common may, by deed or contract inter partes, convert their holding into a cotenancy with the right of survivorship, but, by so doing, they cannot so create a technical joint tenancy as to deprive themselves of the right of partition. *Truesdell v. White*, 13 Bush 616, wherein it appeared that several tenants in common made a deed inter partes specifically providing that they should hold as joint tenants, that there should be survivorship, and that the premises should not "be held subject to any division or distribution." The court said: "The several tenants in common, who held and owned the lands in controversy in this action, could not convert their holding into a technical joint tenancy, and the deed inter partes of the 3d of July, 1840, was ineffectual so far as it attempted to contravene the express provisions of the Act of 1796. But as it rested on a valid and sufficient consideration, it will be upheld and enforced according to the manifest intention of the parties, so far as this can be done without subverting or disregarding the objects intended to be accomplished by the statute. . . . Notwithstanding these covenants, and further limitations set out in the preamble of the deed, to the effect that the parties should hold as joint tenants and not as tenants in common, and should have no power or right to enjoy or hold the property or its profits or issues otherwise than as joint tenants, and that neither of them should have the right or power to sell or dispose of his or her interest, they did hold such estates, as they reserved to themselves, as tenants in common, with the right to have partition and to sell and convey at will. But the material question in this cause is as to the character of estate each of the parties reserved. It is evident that each retained an absolute life estate, and that upon the death of each, his or her interest was to pass to the survivors jointly, and that the last survivor was to take an absolute estate in the whole property, unless some one or more of the life tenants should leave a child or children at the time of his or her death, in which event the entire remainder in fee was to vest in such child or children."

No exception of trust estates is to be found in the statute and it abolishes survivorship in joint trust estates as in all other joint tenancies. *Sanders v. Morrison*, 7 T. B. Mon. 54, 18 Am. Dec. 161, wherein the court said: "Knowing the inconvenience of spreading a naked trust of this kind into so many hands, by a descent or devise, we have resorted to the act of assembly, 2 Dig. K. L. 686, to discover whether we could not make a trust of this nature an exception to the general rule of destroying survivorship between joint tenants; but in this resort we have been disappointed, and that act is express and decisive in all cases, even in joint trust estates, and is conclusive against the appellee, and precludes his escape. Survivorship is there taken away between all joint tenants, 'whether they be such as might have been compelled to make partition or not, or of whatever kind the estate or things holden may be.' It therefore expressly includes unlimited trusts as this, and leaves the title to pass to the representatives of the one dying, to be held in common with the survivor."

It seems that the Act of 1796 did not abolish survivorship in choses in action; for it has been held that an insurance policy made payable to the wife and children of the insured as beneficiaries, inures to the benefit of the last survivor of the children if the wife and all the other children are dead without issue. *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208.

Joint tenancies as at common law existed prior to the destruction of the *jus accrescendi* by statute, and although courts of equity gave effect to slight circumstances to show that a tenancy in common was intended instead, they would hold a cotenancy to be a joint tenancy, in the absence of such circumstances. *Barclay v. Hendrick*, 3 Dana 378.

It has been held that an estate devised to two or more persons "to be equally divided" created a tenancy in common rather than a joint tenancy, before the enactment of the Act of 1796. *Briscoe v. McGee*, 2 J. J. Marsh. 370. And the same has been held as to a devise to several "and their heirs forever, according to quantity and quality, each taking possession of his part when he comes of age," although there was an added stipulation that if one or more of them should die before he or they came of age, then he devised "his or their part to be equally divided among the survivors." *Doe v. Botts*, 4 Bibb 420.

19. MAINE.

The Maine Act of 1821 (now R. S. c. 75, § 10) provides: "Conveyances not

in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint tenancy shall be so held."

Estates in joint tenancy are not favored in the law of Maine, and the disfavor in which they are held is a very old tendency in New England. *Stetson v. Eastman*, 84 Me. 366, 24 Atl. 868; *Staples v. Berry*, 110 Me. 32, 36, 85 Atl. 303. In the case first cited, the court said: "Although it may be that the English courts would regard a clause like this as creating a legacy in joint tenancy, and thus giving the whole of the residue to the surviving tenant, we cannot believe that such would be the construction in many of the states of this country, and we are convinced that such should not be the construction in our own state. We think the presumption here is exactly the reverse of that recognized by the English courts. Whilst in that country a devise or bequest to two or more persons implies a joint tenancy unless the contrary appears, here it implies a tenancy in common unless a different intention is indicated by the will and the attending circumstances. Our institutions and policies are averse to the doctrine of survivorship as applied to tenants holding in their own right, although there may be meritorious exceptions. We have as a people inherited a feeling of opposition to the principle from early legislative manifestations against it. As early as in 1643, the general court of the Plymouth Colony expressed its disfavor of the principle by an act providing as follows: 'That where lands or tenements fall in joint partnership either by gift, grant or purchase or otherwise, that if any of the partners do die before the division thereof shall be made, that the heirs and assigns of such as shall so decease shall not be deprived of the right, title and interest into such said lands and tenements but shall have his or their proportion as duly and equally as any of the survivors or their heirs or assigns, any act, ordinance, custom or provision made to the contrary in any wise notwithstanding, as fully and amply as if division thereof had been formally made.' Plymouth Colony Laws, ed. of 1836, p. 75. By force of the sixth clause of the sixth section of the constitution of the commonwealth of Massachusetts, this enactment continued to be the law of the commonwealth until its scope was enlarged by an act, passed on March 7, 1786, which provided that all grants and devises of real estate to a plurality of persons should be construed as creating tenancies in common, unless a contrary intention be indicated by the terms of the devise or grant. Our own statute is to the same effect, first enacted in 1821, now con-

tinued in R. S. c. 73, § 7, and running as follows: 'Conveyances not in mortgage, and devises of land to two or more persons, create estates in common (and not joint estates), unless otherwise expressed. Estates vested in survivors on the principle of joint tenancy shall be so held.'"

In the absence of express words in a will or deed showing an intention to create an estate in joint tenancy, a grant to two or more will create a tenancy in common under the statute. *Spencer v. Chick*, 76 Me. 347, wherein it was said: "The will of Timothy Wentworth did not create joint estates in the devisees; it created estates in common. 'Conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed.' R. S. c. 73, § 7. It is not otherwise expressed in the will of Timothy Wentworth. There is no word or phrase in it which can by any possibility be construed as expressing an intention that devisees should take as joint tenants. Consequently, they take as tenants in common; and upon the death of one of these tenants in common, his estate passes on to his successor."

By virtue of that statute, joint tenancies can only be created by unequivocal and compelling language. *Staples v. Berry*, 110 Me. 32, 85 Atl. 303.

The statute expressly negatives an intention to apply to conveyances in mortgage and it has been held that two mortgagees of land conveyed to them in mortgage, as security for a debt due them, hold such land as joint tenants, with the right of survivorship. *Kinsley v. Abbott*, 19 Me. 430.

It will be seen that the terms of the Act of 1821 include only cotenancies in land, but it has been held that the seeming exclusion therein of other kind of property was only because the legislature did not conceive that joint tenancies with survivorship ever existed in personalty, and that the act therefore applies to all kinds of property. *Stetson v. Eastman*, 84 Me. 366, 24 Atl. 868, wherein a residuary bequest to B. Bachelder and H. Bachelder, simply, was held to create a tenancy in common, and not a joint tenancy in the personalty bequeathed. The court said: "There would be no question in the present case, on this point, if the gifts were of real estate and not of personal property; but the argument for the person claiming as survivor is, that the statute was designed to include realty within its operation and exclude all other property. It seems incredible to us that any such distinction could have been contemplated. There is more reason for rejecting the offensive doctrine in its application to chattels or moneyed securities than in its application to landed estates. And great incongruity

and inconvenience must arise if applied to the one class of property and not to the other. The explanation of the apparent omission to embrace all kinds of property within the legislative interdiction is that the lawmakers did not understand that the principle ever applied to any property other than real estate. Nor were they, in our judgment, mistaken in that supposition. The principle of survivorship was not extended to tenancies in chattels by the English courts until after the Massachusetts Act of 1786, an act as binding on us as upon the courts in that commonwealth until we virtually adopted its provisions by an act of our own passed in 1821. Our ancestors little dreamed that any vitality was left in the principle after the colonial law of 1643. The acts of 1643 and 1786 were intended more as declarations of principle, or declarations against a principle, than as undertaking to repeal any acknowledged and binding law. The English cases give no reason for maintaining the doctrine of joint tenancy in chattels, excepting that of the analogy which exists between devises and bequests, and the very reason given for the adoption of the doctrine in that country forbids its adoption here. It exists there because there it is the law as applicable to real estate. It does not exist here because here it is not the law as applicable to real estate. It gained an ascendancy in the English courts in about the beginning of the present century, having before that time been repeatedly doubted or denied. It never had growth or life in most of the American courts."

20. MARYLAND.

The Code of Maryland (Art. 50, sec. 13, which was the Act of 1822) provides: "No deed, devise or other instrument of writing shall be construed to create an estate in joint tenancy, unless in such deed, devise or other instrument of writing it is expressly provided that the property thereby conveyed is to be held in joint tenancy." That statute distinctly recognizes both tenancy in common and joint tenancy as existing estates. *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737.

The law of Maryland views joint tenancies with disfavor, and will give the widest and most liberal construction to testamentary instruments in order to defeat them. *Chew v. Chew*, 1 Md. 163, 171. See also *Maybury v. Brien*, 15 Pet. 37, 10 U. S. (L. ed.) 653. In spite of the Act of 1822, however, a right of survivorship may be created, expressly, as by the use of the word "survivor." *Craft v. Wilcox*, 4 Gill 506. But a cotenancy will be held to be a tenancy in common in the absence of express words providing that it shall

be a joint tenancy. *Purdy v. Purdy*, 3 Md. Ch. 547.

Survivorship in the case of joint trustees was not affected at all by the Act of 1822, for such survivorship was not one of the evils which that statute intended to remedy. *Gray v. Lynch*, 8 Gill 403, wherein the court said: "But, it is said, conceding the principle of survivorship in relation to such cases, apart from all legislation upon the subject, yet that the principles of joint tenancy are wholly abrogated by the Act of 1822, ch. 162. All that need be said in answer thereto is, that this act of assembly was not intended to apply to devises or grants made to trustees for the benefit of third persons. Survivorship in such cases formed no part of the evil designed to be remedied, and not being within the intent or spirit of the act, is not embraced by it."

An admission in pleading that two such persons jointly purchased a slave has been held to be no evidence that they were joint tenants of the slave, the presumption being that they were tenants in common thereof. *Gibbons v. Riley*, 7 Gill 82.

The rights of cocontractors in a contract for the purchase of an option are within the provisions of the statute and are construed to be the rights of tenants in common, not joint tenants and therefore severable. *Clark v. Harmer*, 9 App. Cas. (D. C.) 1, wherein the court had before it a contract executed in the District of Columbia, but for the purchase of an option on real estate in Maryland. The court said: "The contract, although executed in the District of Columbia, is a contract for the purchase and sale of an interest in real estate in the state of Maryland, and must be construed with reference to the laws of that state regarding real estate. The Code of Maryland (Art. 50, sec. 13) provides that 'no deed, devise or other instrument of writing shall be construed to create an estate in joint tenancy unless in such deed, devise, or other instrument of writing it is expressly provided that the property thereby conveyed is to be held in joint tenancy.' Whatever interest, therefore, Harmer and Lippman acquired under the contract, they acquired as tenants in common, and not as joint tenants; and the plaintiff must be presumed to have contracted with them as tenants in common, and with each one for his own undivided half of the property. Consequently, it was entirely competent for Harmer and Lippman to act separately and severally with regard to their respective interests."

Before the enactment of the Act of 1882 it was held that a residuary legacy "to be equally divided between my brother J. S. and my brother G. S.'s children" created a tenancy in common, and made J. S. a ten-

ant in common with an equal share with the children of G. S. Maddox v. State, 4 Har. & J. 539. And it was also held that a devise to several children "to be divided equally, share and share alike," created a tenancy in common and not a joint tenancy. *Moody v. Elliott*, 1 Md. Ch. 290, wherein it was said by the court: "And in opposition to the right of the grandchildren, it was also insisted in the argument that the children of the testator, whether the benefit of the devise was to be confined to the survivors of the widow or not, took as joint tenants, and that consequently, the children of the deceased brothers must be excluded, upon the doctrine of survivorship—the will having been executed prior to the Act of 1822, ch. 162, which abolishes thereafter, estates in joint tenancy, except where the deed, devise, or instrument of writing, expressly declares that the property shall be so held. It appears to me, however, to be very clear upon authority, that this devise does not create an estate in joint tenancy. Perhaps, in the present disposition of the courts in regard to these estates, it would not do so even in a deed and in a court of law; but, unquestionably, in a court of equity, and acting upon a will, it cannot have that effect. 4 Kent 361. The words of the devise are, 'to be divided equally, share and share alike,' which words, even in a deed, have been construed to create a tenancy in common. 1 Thos. Coke 773 note 42. And the cases referred to in the same note show that the words, 'share and share alike,' or 'between,' or any other words indicating an intention that the devisees shall take several and distinct shares, will make them tenants in common."

In 1793 it was held that a devise of several tracks of land to two persons, to be equally divided between them as to quantity, created a tenancy in common. *Partridge v. Colegate*, 3 Har. & McH. 339.

But in 1807 it was decided that a grant "unto John and Eliza Towers, to have and to hold the premises or dwelling house during the lives of the said John and Eliza Towers" created a joint tenancy with survivorship. *Hannan v. Towers*, 3 Har. & J. 147, 5 Am. Dec. 427, wherein it was said by Chase, C. J.: "The grant being unto John and Eliza Towers, to have and to hold the premises or dwelling house during the lives of the said John and Eliza Towers, I am of opinion that a joint estate vested in John and Eliza Towers during their lives, and the quality of survivorship being incident to a joint estate, or joint tenancy, without any technical or other words being necessary to confer that quality. I am also of opinion that the whole devolved on the survivor during her life, according to the case as stated by the honorable chancellor."

21. MASSACHUSETTS.

a. In General.

The Massachusetts Act of 1785 (now R. L. chap. 134, sec. 6) provides as follows: "A conveyance or devise of land to two or more persons or to husband and wife, except a mortgage or a devise or conveyance in trust, shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy."

Joint tenancy and its doctrine of survivorship are not in harmony with the genius of American institutions, and they are not favored by the law of Massachusetts. *Burnett v. Pratt*, 22 Pick. 556; *Park v. Parker*, 216 Mass. 405, 103 N. E. 936.

Joint tenancy exists, however, in personal property as well as in real property. *Atty.-Gen. v. Clark*, 222 Mass. 291, 110 N. E. 299.

The Act of 1785 had a retroactive effect and applied to grants and devises made before its passage, because its effect was beneficial rather than detrimental to the rights of tenants. *Annable v. Patch*, 3 Pick. 360; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Miller v. Miller*, 16 Mass. 59. In *Miller v. Miller*, supra, the court said: "The statute, in its terms, applies to estates created before as well as after its enactment. The principle is nevertheless correct, that the legislature cannot impair the title to estates, without the consent of the proprietors, unless for public objects, when an adequate consideration shall be provided. But there can be no objection to the operation of any legislative act retrospectively, which shall enlarge or otherwise make more valuable the title to any estate; for the consent of the holder may always be presumed, to such acts." In *Annable v. Patch*, 3 Pick. 360, the court construed the following words as creating a tenancy in common under the statutes: "I give all the remainder of my estate, both real and personal, to my daughter Sarah Annable, and the children born of her body, including all my wife has the improvement of during her life after her decease." Holding that his devise was affected by the statute though made before its passage, the court said: "But it has been argued, that if Sarah did not take an estate tail, she and her children took as joint tenants. But the St. 1785, c. 62, § 4 (see Rev. Stat. c. 59, § 10) is decisive on this point. It is no valid objection, that the will took effect before the passing of this act. The statute extends to past grants and

devises in express terms, and its operation is not to impair any vested right. It serves rather to render the tenure more beneficial. No estate had vested in any survivor previous to the passing of the act, and therefore from and after that time, Sarah and her children held as tenants in common, whatever might have been the construction of the devise before."

A grant or devise to two or more which shows neither from its wording nor from its tenor that it is intended to create a joint tenancy, creates a tenancy in common under the statute. *Nash v. Cutler*, 16 Pick. 491; *Jones v. Crane*, 16 Gray 308; *Walsh v. Young*, 110 Mass. 396.

It is a general rule that a devise or bequest to several persons, expressly providing that the gift is to be divided equally or is to go share and share alike, or showing that there is to be a division, as by specifying the proportions, etc. creates a tenancy in common and not a joint tenancy. *Sohier v. Inches*, 12 Gray 385; *Walker v. Dewing*, 8 Pick. 520; *Frost v. Curtis*, 167 Mass. 251, 45 N. E. 687; *Shattuck v. Wall*, 174 Mass. 167, 54 N. E. 488; *Lyman v. Coolidge*, 170 Mass. 7, 56 N. E. 831; *Stanwood v. Stanwood*, 179 Mass. 223, 226, 60 N. E. 584; *Osgood v. Rodgers*, 186 Mass. 238, 71 N. E. 306; *Loomis v. Gorham*, 186 Mass. 444, 71 N. E. 981. See also *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Clafin v. Tilton*, 141 Mass. 343, 5 N. E. 649 (bequest to A and B "each"). In *Holbrook v. Finney*, supra, it was said: "It was settled that if an estate be devised to two or more, equally to be divided, they are tenants in common. The same construction is applied to a devise to two or more, share and share alike. (1) Also the words equally to be divided, in a covenant to stand seized, or in the surrender of a copyhold, or in a deed appointing uses, create a tenancy in common. (2) This construction has been adopted, because the words in equal shares, or equally to be divided, import a division in futuro. The words in this deed are in equal proportion; and it is said that they do not imply a future division, but are applied only to the respective interests in the thing conveyed. On this ground, they must be considered as wholly inoperative; for without them, the grantees would have taken an equal interest in the lands granted. To give them operation, may they not be considered as equivalent to the words in equal purporties or shares, and thus contemplate a future partition?"

Words which will justify the construction of a gift as a joint tenancy under the statute must show that the distinction between a joint tenancy and a tenancy in common was in the mind of the donor and that he clearly intended to create a joint estate.

Nash v. Cutler, 16 Pick. 491, wherein the court construed a devise upon the death of the testator's wife "to my children, hereinafter named, to hold the same to them, their heirs and assigns." The court said: "To construe a gift as of a joint estate, under this statute, it must appear that the distinction between a joint estate and a tenancy in common was in the mind of the donor, and that he clearly intended to create a joint estate, or that such construction is required in order to carry into effect a declared or manifest intent. The generality of the latter words in the clause is to be restrained by the character of those which precede; it is to be construed by the maxim, *noscutur a sociis*. Any other construction would in effect repeal the statute. If all words, since the statute, were to be construed as showing a manifest intention to give a joint estate within the meaning of the statute, which would be so construed at common law, the statute would be inoperative. In the will in question, there are no words like those put by way of example in the statute, and no words manifesting a clear intent of the testator to create a joint tenancy, having a distinction between that and a tenancy in common, in his mind, and therefore we are all of opinion, that by force of this statute, this clause in the will gave a vested remainder to the five children as tenants in common."

A conveyance to two or more persons expressed to be in joint tenancy, creates a joint tenancy. *Atty.-Gen. v. Clark*, reported in full, post, this volume at page 119. And a devise to two or more "and survivor or survivors of them" creates a joint tenancy. *Stimpson v. Batterman*, 5 Cush. 153. In *Atty.-Gen. v. Clark*, supra, it appears that two tenants in common of real estate conveyed it to a third person who reconveyed it to them in joint tenancy, and they also had several stocks and bonds issued to them as joint tenants, cash paying half. They were held to be joint tenants of both the realty and the personalty. In *Stimpson v. Batterman*, 5 Cush. 153, the court said: "But if these children took vested remainders on the death of the testator, as we think they did, then, the question is whether they took as joint tenants or as tenants in common. And we are of opinion that they took as joint tenants. The devise is to the 'children and survivor or survivors of them,' which are apt words to create such an estate; and taking into consideration all the clauses of the will, we cannot doubt that such was the intention of the testator."

But words of severance will outweigh words indicating an intention to create a joint estate. *Burghardt v. Turner*, 12 Pick. 534; *Miller v. Miller*, 16 Mass. 59. In *Miller v. Miller*, supra, the court said: "From

the words of the deed in this case, it is not easy to ascertain whether the grantor intended to convey a joint estate or a tenancy in common. The words 'jointly and severally' would seem to import a several interest; so that on the death of either of the grantees, the whole estate should not inure by survivorship to the other; but yet we cannot infer, from these words alone, that a tenancy in common was intended, as they are not inconsistent with a technical joint estate. It cannot, however, be doubted that this deed would, by the operation of the statute of 1785, create a tenancy in common; for it contains none of the expressions, which are to constitute exceptions. For although the words jointly and severally are strangely introduced, they do not import an intention to create a joint, any more than a separate, estate in moieties. The statute, therefore, is decisive, unless for the objection, that it cannot have a retrospective operation, so as to change an estate, which was vested by the deed several years before the statute passed." In *Burghardt v. Turner*, 12 Pick. 534, the court construed a deed to two persons "jointly and equally to be divided between them" to create a tenancy in common, under the Act of 1785, if not at common law. The court said: "Then the question is, whether this deed created an estate in joint tenancy or a tenancy in common in Peter and Jacob. Viewing it as a question at common law, there does not appear to be any considerable difficulty in it; but it is unnecessary to express an opinion upon that point, because the court are of opinion, that by force of the statute these grantees became tenants in common. St. 1785, c. 62, § 4. This statute went into operation and took effect in June, 1786, and Peter Burghardt died in June, 1787, leaving Jacob surviving him."

A conveyance to a man and woman, in contemplation and in consideration of their impending marriage, no words appearing in the conveyance to indicate a joint tenancy or survivorship, creates a tenancy in common under the statute, and this estate is not affected by the subsequent marriage of the grantees. *Walsh v. Young*, 110 Mass. 396, wherein the court said: "As the demandant was not married at the time of the conveyance to her and James T. Walsh, she took one undivided half of the estate as tenant in common with him, unless 'it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.' Gen. Sts. c. 89, §§ 13, 14. There are no words of limitation which indicate joint tenancy or survivorship. The intent can be inferred only from the recital of the consideration. Nothing appears from that except the contemplation of subsequent

marriage. The operation of the deed was not to depend upon the consummation of that purpose. It took effect on delivery; and its effect would not have been changed by a failure of the intended intermarriage. We think it does not manifestly appear from the deed that the grantees were intended to take only as husband and wife; and therefore that an undivided estate in common vested in each. The estate having thus vested, the subsequent intermarriage of the grantees would not change the nature of the respective titles."

A deed to A and B, wife of A, "as tenants by the entirety and not as tenants in common," which could not take effect as creating an entirety because A and B were not actually husband and wife, has been held to show a sufficient intention to create a survivorship to make the estate conveyed a joint tenancy rather than a tenancy in common. *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938.

It has been held that several grantees in a deed of trusts, who take in trust for specified purposes, take under the statute of 1785 as tenants in common. *Robison v. Codman*, 1 Sumn. 121, 21 Fed. Cas. No. 11,970.

b. Exceptions.

The exception of mortgages in the statute does not mean that in all cases of conveyance in mortgage to two or more the estate will be a joint tenancy; it merely serves to leave cases of mortgages open to inquiry on their particular facts, and to be construed as before the enactment of the statute. *Gilson v. Gilson*, 2 Allen 117.

The rule is that if a mortgage is given to secure separate debts or obligations or duties, it will be a tenancy in common; but, if given to secure a joint debt, it will be construed a joint estate. *Burnett v. Pratt*, 22 Pick. 556; *Blake v. Sanborn*, 8 Gray 154, distinguishing *Burnett v. Pratt*, 22 Pick. 556; *Gilson v. Gilson*, 2 Allen 117; *Appleton v. Boyd*, 7 Mass. 131; *Goodwin v. Richardson*, 11 Mass. 469; *Park v. Parker*, 216 Mass. 405, 103 N. E. 936. See also *Webster v. Vandeverter*, 6 Gray 428. In *Appleton v. Boyd*, supra, the court said: "The objection to the demandant's title is founded on the statute of 1785, c. 62, § 4, which provides that all conveyances to two or more grantees shall be adjudged to convey estates in common, unless it appear from the conveyances that the intent of the parties was, that joint estates should pass. The conveyance before us is a mortgage to two persons in fee, to secure the payment of a debt jointly due to the mortgagees. As, upon the death of either mortgagee, the remedy to recover the debt would survive, we are of opinion

that it was the intent of the parties that the mortgage, or collateral security, should comport with that remedy; and, for this purpose, that the mortgaged estates should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt, which would be clearly repugnant to the intention of the parties to the mortgage. The objection to the demandant's title to the whole cannot prevail; and judgment must be rendered on the verdict for the demandant, as on a mortgage." In *Burnett v. Pratt*, 22 Pick. 556, holding that the mortgage before it, being given to two persons to secure their several demands, created in them a tenancy in common, the court said: "If a mortgage be given to secure a joint debt, it shall be so construed as to create a joint estate, notwithstanding the provisions of our statute. As the debt would survive, so the lien upon the estate should also survive, otherwise the security might be inadequate, and the object of the parties defeated. . . . But if a mortgage be given to two or more persons to secure their several debts, the obvious purpose of the parties must be, to give to each, security for his particular debt. The mortgage therefore should, according to the meaning of the parties and pursuant to the provisions of our statute, be construed to create a tenancy in common." In *Park v. Parker*, 216 Mass. 405, 103 N. E. 936, it was held that where several tenants in common conveyed the premises to a purchaser who gave his note secured by mortgage on the land, the mortgagees were tenants in common, not joint tenants, and that, therefore, there was no survivorship. The court said therein: "In the case at bar the original payees of the note and grantees in the mortgage had been tenants in common of the real estate, and their shares were equal. The presumption is strong that they expected the note to stand in the place of the land they had sold, with like proportional interest in each. It is unlikely that as between themselves they intended that a relation so different and so speculatively uncertain in its nature as joint tenancy should be substituted for the plain and definite equal ownership of tenants in common. There is no evidence tending to show that purpose. In equity it is not to be imposed upon the parties in the absence of anything to indicate that they understood that any such situation was being created. When the note, to which the mortgage was security, has been paid in full, and in a sense stands in place of the land of which the payees were tenants in common, there is no rigid rule of law which requires the principle of joint tenancy to apply to the money. The effect of *Appleton v. Boyd*, 7 Mass. 131, does not go to this extent."

And the assignment of a joint mortgage to two or more persons as trustees makes them joint tenants thereof. *Webster v. Vandeventer*, 6 Gray 428.

But the exception of mortgages in the statute applies only to mortgages before foreclosure. After foreclosure the mortgagees become purchasers de novo, and two joint creditors to whom a mortgage is made to secure the joint debt become tenants in common by virtue of the statute of 1785 after foreclosure of the mortgage. *Goodwin v. Richardson*, 11 Mass. 469, wherein the court said: "The debts for which this land was originally mortgaged to the partners were part of their joint stock; and they were accordingly joint tenants of the mortgaged premises; so that, on the death of one partner, by which the debt survived, the remedy on the mortgage survived also. This was decided in the case of *Appleton v. Boyd*, cited for the plaintiff, and we are perfectly satisfied with that decision. But it does not necessarily follow that the estate continues joint after a foreclosure of the mortgage, when it ceases to be a security for a debt. The same reason no longer exists. The mortgage is not used nor wanted as a remedy, which must follow the nature of the right. The land is no longer a pledge; but the title is vested absolutely in the mortgagees. Whilst it continues a pledge, it is a mere incident to the debt; and either partner, by releasing the debt, would, in effect, release the mortgage, and destroy their joint title and estate in the land. Although, as between the mortgagor and mortgagee, the latter is considered as seized of the land, yet, to most purposes, his estate is merely a chattel interest, following the nature of the debt. As to all the world, except the mortgagee, the mortgagor is considered as the owner of the land, until an actual entry under the mortgage; and his right of redemption, for three years after entry for the condition broken is not a mere equitable claim, but is secured to him by statute. The foreclosure operates as a new purchase by the mortgagees. They acquire thereby an absolute title to the land. It is no longer an incident to the debt; nor is it connected with it, any more than if the partners had received payment of the debt, and had laid out the money in the purchase of the land."

The Act of 1785 applies only to estates arising by will or by deed, having the estates of disseizors as at common; therefore joint disseizors are joint tenants. *Putney v. Dresser*, 2 Metc. 583; *Fowler v. Thayer*, 4 Cush. 111 (semble). In *Putney v. Dresser*, supra, it was said by the court: "The defendant contends that the disseizin in 1818, by *Moses Dresser* and *Aaron Dresser*, the grantees in the deed from *Moses Putney*, was

not a joint disseizin, or one which would create a joint tenancy in them, but only an estate as tenants in common. It is true that under St. 1785, c. 62, the title in Moses Dresser and Aaron Dresser, if any passed to them under their deed from Moses Putney, would have been an estate in common, and not in joint tenancy. But no title passed to them under that deed, their grantees having no title and no right to convey. As respects the plaintiffs, they were strictly disseizors, and as much so as if they had entered without receiving any deed. The inquiry then arises as to the effect of a disseizin by two or more persons. Littleton, § 278, says, 'if two or three disseize another of any lands or tenements to their own use, then the disseizors are joint tenants.' There may be, therefore, a joint tenancy created by disseizin, as well as by a deed or devise. The St. of 1785, c. 62, applies only to cases arising under deeds and wills, leaving the cases of disseizin to be regulated by the common law. It seems to us, therefore, that the disseizin in the present case was a joint disseizin; and being such, it was not competent for the disseizors to qualify it, and limit it to a tenancy in common, to the prejudice of the legal owner of the estate. If the estate of the two disseizors might be qualified, as between themselves and their heirs, and if the effect of their deed from Moses Dresser would have been to estop them from setting up, as against each other, an estate in joint tenancy, yet this should not be allowed to affect the disseizee, or be prejudicial to his rights."

22. MICHIGAN.

The statutes of Michigan regarding cotenancies contain the following provisions: "Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." (Howell's Mich. Stats. § 10665; 1st ed. § 5559.) "All grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not joint tenancy, unless expressly declared to be in joint tenancy." (Howell's Mich. Stats. § 10666; 1st ed. § 5560.) "The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife." (Howell's Mich. Stats. § 10667; 1st ed. § 5561.)

A conveyance to two or more, simply, in a case not such as is excepted in the foregoing statute, creates a tenancy in common

in Michigan. *Downing v. Birney*, 112 Mich. 474, 70 N. W. 1006, 117 Mich. 675, 76 N. W. 125.

A deed to two or more, expressed to be in joint tenancy or to them as joint tenants, creates a joint tenancy with survivorship, under the foregoing statutory provisions. *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832; *Root v. Snyder*, 161 Mich. 200, 126 N. W. 206. In the case last cited it was held that a deed to four persons "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them, forever" created a joint tenancy and did not constitute a violation of the rule against perpetuities.

And an express provision for survivorship makes the granted estate a joint tenancy. *Midgley v. Walker*, 101 Mich. 583, 60 N. W. 296, 45 Am. St. Rep. 431.

Survivorship is an essential attribute of a joint tenancy in Michigan as at common law, and where words are used sufficient under the statute to create a joint tenancy, the intent must clearly appear in the instrument itself in order to avoid the rule of survivorship. *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832.

The exception of mortgages made by the statute (section 10667) does not prevent the creation of a tenancy in common in a mortgage, but has the effect only of leaving mortgages to be interpreted as they would have been at common law. It follows that a mortgage with covenants which are several, not joint, creates a tenancy in common in the mortgagees. *Cooley v. Kinney*, 109 Mich. 34, 36, 66 N. W. 674, wherein the court said: "The statute (2 How. Stat. § 5560) providing that grants to two or more persons shall be construed to create estates in common is subject to the exception in the next section, which excludes mortgages. The effect of this legislation is not, however, as we think, to prevent the execution of a mortgage with covenants which are several. The sole effect is to leave the rule as at common law, and a mortgage which was not joint at the common law is no more so since this statute."

But it has been held that a debt to two or more jointly passes to the survivor or survivors of them, on the death of one or more of them. *Cote v. Dequindre*, Walk. Ch. 64. And where a mortgage, securing one debt, is assigned to several assignees, they take as joint tenants with survivorship. *Martin v. McReynolds*, 6 Mich. 70.

23. MISSISSIPPI.

A Mississippi statute (Code of 1906, § 2770 [§ 2441, Code 1892; § 2301, Code 1871]) provides as follows: "All conveyances or

devises of land made to two or more persons, or to a husband and wife, shall be construed to create estates in common and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship; but this provision shall not apply to mortgages or devises, or conveyances made in trust." This statute is a substantial re-enactment of art. 18, p. 309, Revised Code of 1857, except that the latter did not contain the references to husband and wife and to entireties.

By the Act of March 4, 1803, re-enacted in 1882, survivorship was abolished as an incident to joint tenancies in land, that statute reading as follows: "If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy, or dower, or transmissible to executors and administrators, and be considered, to every other intent and purpose, in the same manner as if such deceased joint tenants had been tenants in common." *Day v. Davis*, 64 Miss. 253, 8 So. 203. And that statute has been held to have abolished the *jus accrescendi* in joint tenancies in personalty as well as in realty. *Nichols v. Denny*, 37 Miss. 59. But it has been held that the Act of 1803 did not prevent the express creation of a right of survivorship even in a tenancy in common. *Shanks v. Chambless*, 1 Miss. (Walk.) 249. However, it seems that that statute was repealed by art. 18, p. 309, R. C. 1857, to the extent that it allowed joint tenancies with the right of survivorship to be expressly created.

In the absence of words showing an intent to create a joint estate or to create a survivorship, an estate to two or more persons creates, by virtue of the statute (Code of 1906, § 2770), an estate in common. *Hawkins v. Hawkins*, 72 Miss. 749, 18 So. 479, wherein the court held that a tenancy in common was created by a conveyance in the following terms: "We give to them, our said nieces, Lizzie V. Hawkins, Alice V. Herring and Sallie Cowles Herring, said lot as described, with all appurtenances, emoluments and rents arising from the same during their natural lives, and at their death to the descendants of their bodies in fee, if any they may have, but if they have none to survive them, then, in that event, to the heirs of their brothers and sisters in fee." The court said therein: "The chancellor was of opinion that, but for the statute, the conveyance under review would have given a joint estate for their lives to the nieces of the grantor, with remainder at the death of the survivor to the descendants of the life tenants. In this

conclusion we entirely concur. . . . We concur also in the conclusion that it does not sufficiently appear by the deed that the grantor intended to preserve the right of survivorship, to withdraw the conveyance from the operation of the statute."

Under the foregoing section of the Code of 1906 a deed to a mother "and her children" vests the estate in the mother and in a child in esse as tenants in common. *Brabham v. Day*, 75 Miss. 923, 23 So. 578.

The section of the code governing cotenancies has no application to trust estates, which are in fact expressly excepted, so that an estate conveyed to two or more trustees jointly makes them joint tenants with the *jus accrescendi*. *McAllister v. Plant*, 54 Miss. 106, wherein it was said: "It is well settled, that, where an estate is conveyed to trustees jointly, the right of survivorship exists; that, upon the death of one, his interest does not descend to his heirs, but vests in the other; and that this rule is not affected by statutes abolishing joint tenancies and converting them into tenancies in common, unless the language of the statute expressly embraces trust estates. The reason for this is obvious. The evil to be remedied by the conversion of joint tenancies in common was the improper accretion to one party of that which properly belonged to two, and the consequent enrichment of one and impoverishment of the other's estate. But inasmuch as trust property, whether held by one or both, would only be held for the benefit of the cestui que trust, whose estate would be in no manner affected by the death of one of the trustees, the reason of the law ceases, and with it the law itself."

24. MISSOURI.

The Missouri statute is as follows: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy." (R. S. 1909, § 2878; R. S. 1899, § 4600.)

The foregoing section of the Revised Statutes has been on the statute books of that state in its present form since 1865 (G. S. 1865, p. 443, sec. 12), and, with the exception of the provision as to husband and wife, since 1835. *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135.

Under the Act of 1865, unless a grantor in a deed or a maker of a will expresses his intention to create a joint tenancy by a conveyance or testamentary gift to more than one person other than trustees, executors, or spouses, the estate granted will be a tenancy in common, no matter what his intention

may have been. *Rodney v. Landan*, 104 Mo. 251, 15 S. W. 962; *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135. See also *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L.R.A. 166. See also *Nalle v. Parks*, 173 Mo. 616, 73 S. W. 596. In *Rodney v. Landan*, supra, it was said: "The next question is whether these remaindermen were tenants in common or joint tenants. According to the statute an interest in real estate granted or devised to two or more persons, not executors, trustees or husband and wife, is a tenancy in common, 'unless expressly declared, in such grant or devise, to be in joint tenancy.' R. S. 1865, sec. 12, p. 443. Now, while the testator speaks of this property as their 'joint property' transferable by 'joint' deed, still there is no express declaration that it is to be held by them in joint tenancy. It is quite common to speak of property as joint property when nothing more is meant than ownership of the same property by different persons. The policy of the American law is opposed to survivorship, and that policy is clearly indicated in our statutes. While joint tenancies are not abolished in this state, still to create such a tenancy there must be an express declaration to that effect in the deed or will creating the estate, and that is not done by the will of James I. Reilly." In *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135, the court said: "But both cases failed to note that while such reasons and rules obtained at common law, no such thing is now possible, but that deeds and wills in such matters are placed by the statute of this state upon exactly the same footing, and the common-law rule in reference to the right of survivorship by a member of a class to the whole property granted or devised to individuals as members of a class is expressly abolished, and that under the statute every grant or devise of real estate to two or more persons—executors, trustees and husband and wife excepted—is declared to create a tenancy in common and not a joint tenancy unless expressly declared in such grant or devise to be a joint tenancy. . . . Grantors or testators who do not wish the statute to apply and to create only a tenancy in common are given the right to so arrange it, but they must expressly declare in the grant or devise that a joint tenancy is intended, or else the courts must construe it to be a tenancy in common. There is no distinction under the statute between a deed and a will in this regard."

Under the statute of 1865 it has been held that a devise to the testator's "daughters Julia and Victoria jointly" created a tenancy in common because it was not expressed to be in joint tenancy. *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772.

25. MONTANA.

The following statutory provisions have been enacted in Montana: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." (Rev. Codes, § 4438.) "Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in § 4438 (1105)." (Rev. Codes, § 4441.) "A devise or legacy given to more than one person vests in them as owners in common." (Rev. Codes, § 4796.)

In *Butte, etc. Consol. Min. Co. v. Montana Ore Purchasing Co.* 25 Mont. 41, 63 Pac. 825, it was held that an early territorial act abolishing survivorship in joint tenancies had no retroactive effect to change the nature of joint tenancies which had already vested. The act referred to was replaced by the Code of Civil Procedure of 1895, which enacted the foregoing sections quoted from the present revision of the code.

26. NEBRASKA.

Joint tenancies are not favored in Nebraska, and a cotenancy is presumed to be a tenancy in common, but there has been no statutory abridgment of the right to create a joint tenancy in that state by an express contract. *Sanderson v. Everson*, 93 Neb. 606, 141 N. W. 1025, wherein the court said: "Joint tenancies are created by contract, and, if not so created, they do not exist. True, they are not favored, and, if not expressly created by contract, the law presumes the tenancy is in common, and that upon the death of one of the holders of the title his or her interest descends to his or her heirs. But this is not true of joint tenancies. It is true that, in order to create a joint tenancy, the purpose must be clearly expressed, otherwise the tenancy will be held to be in common. But no one will contend that it is not competent for the parties to contract in a deed to two or more persons, whether husband and wife or not, that the conveyance is to the one for life and to the others in remainders in fee. Such is the effect of a conveyance to both as joint tenant with the right of survivorship. It is a clear matter of contract, and the intention of the parties must govern."

27. NEVADA.

The common-law rule as to cotenancies was changed in Nevada by a statute of 1861

which provided as follows: "Every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy."

Under that act cotenants are presumed to hold as tenants in common in the absence of an express declaration that they are to hold as joint tenants. *Smith v. Shrieves*, 13 Nev. 303.

28. NEW HAMPSHIRE.

The common law as to cotenancies has been changed in New Hampshire by the following statute: "Every conveyance or devise of real estate made to two or more persons shall be construed to create an estate in common and not in joint tenancy, unless it shall be expressed therein that the estate is to be holden by the grantees or devisees as joint tenants, or to them and the survivor of them, or unless other words are used clearly expressing an intention to create a joint tenancy." (Pub. Stats. c. 137, § 14.) The foregoing section is a re-enactment of an Act of 1807.

It has been held that the statute had a retroactive effect, converting into tenancies in common joint tenancies created before its enactment, and that the statute as so construed was not invalid as impairing the obligation of contracts. *Miller v. Dennett*, 6 N. H. 109, wherein the court said: "In changing joint tenancies, created by deeds then existing, into tenancies in common, it furnished no new rule to govern the decision of any action then pending or of any cause of action. The statute, applied to the deed, in this case, would take away no vested right. Neither John nor William had any vested interest in the moiety of the other. The acquisition of the whole estate by survivorship would have been in either nothing more than a hope or expectation, like the expectation of a child to inherit the estate of a parent. The statute, thus applied, operates upon an existing estate, but not retrospectively within the meaning of the constitution. It can no more be considered a retrospective law than a statute altering the descent of intestate estates. It neither gives, nor takes away, any right or interest. The application of the statute to a case where one joint tenant had actually taken the land by survivorship, at the time the statute was passed, and which is a case excepted from the operation of the statute, would be an instance of the very thing, which the constitution intended to prohibit. Thus applied, it would take away a vested right, make a new rule for the decision of existing cases, and would be in its nature an exercise of

judicial power. But it is further said, that this statute, applied to the deed in this case, is a law, impairing the obligations of a contract, within the meaning of the constitution of the United States. We do not perceive this. The statute only changes a joint tenancy into a tenancy in common. The contract, which created the estate, is not altered or impaired. The deed conveyed an estate in joint tenancy, and that estate must now be considered as remaining, until the statute of 1809 changed it into a tenancy in common. Such a change did not impair the obligations of any contract in the deed, but merely made the grantees tenants in common from the time the statute took effect."

29. NEW JERSEY.

In 1812 the following statute was enacted in New Jersey: "No estate after the passing of this act shall, in this state, be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage or decision heretofore made to the contrary notwithstanding." *Condert v. Earl*, 45 N. J. Eq. 654, 18 Atl. 220.

That statute changed the common-law rule that a cotenancy was a joint tenancy unless expressed to be a tenancy in common. *Sentliffe v. Jacobs*, 84 N. J. L. 128, 86 Atl. 929, wherein it was said: "Under the original arrangement, and until the January reduction, it seems plain that the parties were tenants in common of an estate for years. At common law it would have been a joint tenancy, whether the estate were for years or of freehold, unless expressly specified as a tenancy in common. 2 Bl. 179. Our statute of 1812 reversed this rule and provided that 'no estate' should be considered an estate in joint tenancy unless it were set forth in the grant or devise creating such estate, that a joint tenancy was intended."

It has been held, however, that the Act of 1812 had no retrospective effect on cotenancies created before its enactment, because to give it such effect would be to make it an impairment of the obligation of contracts and in violation of the federal constitution. *Berdan v. Van Riper*, 16 N. J. L. 7, wherein the court said: "If the Act of 1812 was intended and must be construed by us to have a retrospective operation, it is one of those statutes which Judge Paterson in *Calder v. Bull*, 3 Dall. 397 [1 U. S. (L. ed.) 648] emphatically condemns, as contrary to sound legislation and the fundamental principles of the social compact. Nevertheless, if the legislature has spoken in language plainly

and unequivocally indicating their intention to convert estates in joint tenancy created prior to 1812 into tenancies in common, we are not at liberty to disregard that intention, unless it manifestly violates the salutary provision in the Constitution of the United States, which prohibits the states from passing any law 'impairing the obligation of contracts.' That instrument does not prohibit the states from passing retrospective laws generally, but only ex post facto laws, or such as subject a party to punishment or forfeiture for an act antecedently done, and which when done was not punishable at all, or not in the manner or to the extent prescribed. *Watson v. Mercer*, 8 Pet. 88 [8 U. S. (L. ed.) 876]; and in the same case, it was decided that the Supreme Court of the United States had no right to pronounce an act of a state legislature, void, as contrary to the Constitution of the United States from the mere fact that it divested antecedent vested rights of property. Nor is there any provision in the constitution of this state, nor any adjudication of this court, denying to our legislature the right to enact retrospective laws of any kind, or laws altering or divesting previously existing and vested rights. See also *Satterlee v. Matthewson*, 2 Pet. 380 [7 U. S. (L. ed.) 458]. . . . In *Green v. Biddle*, 8 Wheat. 84 [5 U. S. (L. ed.) 569], the Supreme Court of the United States say: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.' And I think, it may be safely added, that any law which changes the influence and legal effect of an existing contract, as between the original parties thereto, or as between parties claiming under it, giving to one a greater and to the other a less interest or benefit in the subject-matter of the contract, than by its terms or its legal operation they would be entitled to, is a law 'impairing' its 'obligation' within the meaning of the Constitution. Apply these principles to the case before us, and if the act in question is retrospective, it seems to me to be directly in conflict with that provision in our national charter, which prohibits any legislative violation of contract."

Under that statute it has been held that it is unnecessary to use the negation "not an estate of tenancy in common," it being sufficient to declare the estate to be in joint tenancy. *Condert v. Earl*, 45 N. J. Eq. 654,

18 Atl. 220, wherein it was said by the court: "The question is, whether, in order to create an estate in joint tenancy under that act, it is necessary to use the negative as well as the affirmative words in it, or, indeed, any particular form of language. I do not think the question is open to the least debate or doubt. The statute, as I interpret it, does not undertake to prescribe any particular mode or language in which the parties shall express their intention. It says the intention to create the estate in question must be expressly set forth in the grant; that is, it must not be left to inference or implication. And here it is to be observed, that the two estates mentioned are entirely inconsistent with each other; they cannot exist and be held at the same time by the same parties in the same property. If an estate is held by several persons as joint tenants, it is not and cannot be held by them at the same time as tenants in common. It follows, that to say of an estate that it is held by several persons as joint tenants, is to say, in effect, that it is not held by them as tenants in common, precisely as when you say a thing is square or white you say, in effect, it is not round or black. And so when a gift to more than one person says that the estate shall be held by them as joint tenants, it is, in effect, expressly, and not by inference or implication merely, set forth that it is the intention of the parties that the estate shall be held in joint tenancy and not in tenancy in common. In such case the result is the effect of direct and express assertion, and not of inference or implication merely. The object of the statute was to prevent joint tenancies being created by mere inference from the context or by doubtful language, and it confined the parties to direct and explicit expression. In my judgment that result is attained when it is declared to be the intention of the parties that the estate shall be held by them as joint tenants. The use of the words 'and not as tenants in common,' adds nothing to the sense of the others, and is mere tautology and surplusage."

It has been held that the Act of 1812, although it used the words "grant or devise," was broad enough to cover leases for years. *Sentliffer v. Jacobs*, 84 N. J. L. 128, 86 Atl. 929, wherein the court said: "The act of 1812 is as broad as the rule which it was intended to change, and may be considered, notwithstanding the words 'grant or devise' as applicable to estates for years, though each tenant in this case was clearly bound to the landlord for the whole rent."

Estates to two or more trustees were within the effect of the Act of 1812, not having been excluded therefrom. But that will was changed by the Act of April 1, 1868 (*Nix*.

Dig. 1006), which, however, had no retroactive effect to change into tenancies in common joint trust estates which had vested prior to its enactment. *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394, wherein it was said: "The act relative to trustees, passed April 1st, 1868 (Nix. Dig. 1006, Rev. p. 1224) was intended to change this rule in the case of trustees, and had it been passed before 1817, would have made this an estate in joint tenancy. This act was intended to have a retrospective effect, and by its words applies to all estates theretofore granted, and thereafter to be granted. And although an act will not be construed to have a retrospective effect, unless its words expressly require it, yet this act must be so construed. But so far as it affects estates vested before its passage, it must be held to be unconstitutional and inoperative."

It has been held that a bequest to several persons to "be equally divided between them forever" creates a tenancy in common. *Mason v. Methodist Episcopal Church*, 27 N. J. Eq. 47.

It has been held that a devise by a testator to her niece, her mother, and her brother, and "to the survivor of them, and to the heirs and assigns of such survivor," creates a joint tenancy in the devisees. *Appgar v. Christophers*, 33 Fed. 201.

30. NEW YORK.

a. In General.

The New York statute is as follows: "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised." (Real Prop. Law, § 66.) This statute expressed what has been the policy of the law of New York since 1786, when the first law of that nature was passed. *Gage v. Gage*, 43 Hun 501.

Joint tenancies are not favored in the law of New York, as they were at common law. *Colson v. Baker*, 42 Misc. 407, 87 N. Y. S. 238.

By the foregoing statute the common-law rule that a cotenancy was construed as joint unless expressly declared to be in common has been reversed. *Gage v. Gage*, 43 Hun 501; *Purdy v. Hayt*, 92 N. Y. 446; *Overheiser v. Lackey*, 207 N. Y. 229, Ann. Cas. 1914C 229, 100 N. E. 738; *Matter of Lent*, 1 Misc. 264, 22 N. Y. S. 917. In *Overheiser v. Lackey*, supra, it was said: "The rule of

the common law that a grant or devise to two or more persons without other words created a joint tenancy was abolished early in the history of this state, and at the time when the will of Hester Marsh, the mother, took effect the rule which replaced it was embodied in the provision of the Revised Statutes which declared that 'every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy.' (1 Revised Statutes 727, § 44.) This provision has been re-enacted in the existing Real Property Law. (Real Property Law, § 66.) Similar legislation abrogating the common-law doctrine favorable to joint tenancy has been enacted generally throughout the Union where 'the political policy has been to encourage the distribution of land among the people, to advance which all conveyances to more than one person except to husband and wife have been construed to be tenants in common unless another estate is fixed by express and definite words of limitation.' (*Simons v. Bollinger*, 154 Ind. 83.) Joint tenancy, originally a favorite of the common law, is now made an object of disfavor in most of the states by statutes requiring the grantor or deviser who wishes to create a joint tenancy to insert words in his deed or devise clearly showing his intent so to do."

Unless there are words used which clearly indicate an intention to create a joint tenancy, a grant or devise to two or more persons creates a tenancy in common under the statute. *Utica Bank v. Mersereau*, 3 Barb. Ch. 529, 49 Am. Dec. 189; *Gage v. Gage*, 43 Hun 501; *Campbell v. Rawdon*, 18 N. Y. 412; *Everitt v. Everitt*, 29 N. Y. 39; *Purdy v. Hayt*, 92 N. Y. 446; *Mott v. Ackerman*, 92 N. Y. 539; *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60; *Dana v. Murray*, 122 N. Y. 604, 28 N. E. 21; *In re Kimberly*, 150 N. Y. 90, 44 N. E. 945; *Moffett v. Elmendorf*, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; *Steinway v. Steinway*, 163 N. Y. 183, 57 N. E. 312; *McDonald v. McDonald*, 71 App. Div. 116, 75 N. Y. S. 674; *McPhillips v. Fitzgerald*, 76 App. Div. 15, 78 N. Y. S. 631, affirmed 177 N. Y. 543, 69 N. E. 1126; *Jones v. Hand*, 78 App. Div. 56, 79 N. Y. S. 556, affirmed 175 N. Y. 519, 67 N. E. 1084; *Matter of De Rycke*, 99 App. Div. 596, 91 N. Y. S. 159; *Schneider v. Heilbron*, 115 App. Div. 720, 101 N. Y. S. 152; *Wurz v. Wurz*, 27 Abb. N. Cas. 68, 15 N. Y. S. 720; *Colson v. Baker*, 42 Misc. 407, 87 N. Y. S. 238; *Matter of Krummenacker*, 60 Misc. 55, 112 N. Y. S. 596.

In the case of *In re Kimberly*, 150 N. Y. 90, 44 N. E. 945, it was held that a devise and bequest of all the testator's estate "unto my three sisters," naming them, simply cre-

ated in them a tenancy in common. In *Steinway v. Steinway*, 163 N. Y. 183, 57 N. E. 312, it was held that a testamentary provision that upon the death of the brother of the testator each of his children should take both the income and the principle of certain stocks, in stipulation proportions, created a tenancy in common in those children there being no express provision for survivorship or that the estate be in joint tenancy. The court said: "We have thus far assumed that the contingent estates were given to the children of William Steinway as tenants in common, and not as joint tenants. Tenancy in common in such cases is the statutory rule, unless the will expressly declares a joint tenancy. (1 R. S. 727, sec. 44.) Here it does not so declare, but the import of the words employed is that each one of William's children is to take both income and principle in equal proportions, and by that the testator meant that each one should take what he intended to give him, separately and solely for himself or herself. No survivorship or accumulation is mentioned. This court has steadily refused to infer a joint tenancy, in the absence of words expressly intended to declare it."

A fortiori where the instrument shows a clear intent to create a tenancy in common instead of a joint tenancy, that intent well be followed. *Westcott v. Cady*, 5 Johns. Ch. 334, 9 Am. Dec. 306; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Everitt v. Everitt*, 29 N. Y. 39; *Stevenson v. Lesley*, 70 N. Y. 512; *Smith v. Edwards*, 88 N. Y. 92; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *Tompkins v. Verplanck*, 10 App. Div. 572, 42 N. Y. S. 412; *Hornberger v. Miller*, 28 App. Div. 199, 50 N. Y. S. 1079. In *Everitt v. Everitt*, supra, the court said: "If this was less clearly so, upon the terms of the statute, the particular provisions of this will show that the gifts were distributive and several, and not joint. The testator contemplated that, at the time of his death, these three children, or such of them as should survive him, might be of full age, and he accordingly provided, by the second clause of the tenth section, that the residue should be immediately paid to them, in equal proportions, share and share alike. Then, after providing for the case of any of them being minors, at the time of his death, and in that event, confiding the management of the property to his executors, until they should all attain their full age, he directs the executors then to pay over the funds to them, in the same proportions as above provided in the case of his not departing this life, until the youngest one living at the time of his decease should become of age. The third clause of the same section contains further evidence

of the several and distributive character of the interests of the children, in the discretionary direction to make advances to Rosine and Margaret, in anticipation of the receipt by them of their respective shares; and the sixth and seventh clauses confirm the same position, by directing marriage-portions, to a limited amount, to be paid to such of the daughters as should be married while under age, with the approbation of the executors, to be paid out of their shares of the residue. And the eighth clause, which provides for the eventual distribution of the whole residue in three shares, each of these daughters being entitled to one share, is further and conclusive evidence that they took as tenants in common. It would be impossible to maintain, in the face of such language, that the residue was given to them jointly, or otherwise than as tenants in common, even if the statute were not imperative to the same purpose." In *Stevenson v. Lesley*, 70 N. Y. 512, it was said by the court: "The intent of the testator in the will in question to devise the residuary estate to his grandchildren in shares, and not as an entirety, thereby creating a tenancy in common, and not a joint tenancy, is denoted by the use of terms appropriate to create a tenancy in common. (2 Jar. on Wills, 142.) The residuary estate is devised to the trustees in trust for the grandchildren 'share and share alike,' and is 'to be paid and conveyed to each of said children respectively, as they each become of age, in equal shares.' This language clearly creates a tenancy in common, without the aid of the statute provision upon the subject. (1 R. S. 727, § 44.)" In *Smith v. Edwards*, 88 N. Y. 92, the court said: "In dealing with this question we must also concede to the appellants the advantage of their contention that the legatees took distributively—as tenants in common and not as joint tenants. (1 R. S. 727, § 44; *Everitt v. Everitt*, supra; *Tucker v. Bishop*, 16 N. Y. 402.) The testator's purpose in that respect appears plain from the phrasing of his will. He speaks repeatedly of the 'share' or 'portion' of each. He defines specifically what that share or portion shall be, as regulated and measured in its proportions by the amount of legacies previously bequeathed to the same persons. In case of the death of any one, he gives 'his or her aforesaid legacies and portion to his or her children,' and provides that 'the share and portion of any one under age' shall be kept invested. We are, therefore, to deal with the share of each separately and by itself, and determine simply whether it is proper and lawful to say that such right vested in the legatee upon the death of the testator." In *Thompkins v. Verplanck*, 10 App. Div. 572, 42 N. Y. S. 412, the

court said: "In the sixth clause of the will the testator directs that the fund arising from the sale of the Wall street property shall, at the death of the longest liver of his wife and son, be equally divided between said son and daughter or their lawful descendants. The gift to the son and daughter unquestionably is, both under our statute and at common law, a gift to them as tenants in common; so the survivor could not take the whole."

It has been held that in order to create a joint tenancy under the statute it is not necessary to use the specific words "joint tenancy," but that any words clearly importing an intent to create such an estate will do. *Overheiser v. Lackey*, 207 N. Y. 229, Ann. Cas. 1914C 229, 100 N. E. 738, *reversing judgment*, 144 App. Div. 897, 129 N. Y. S. 1138; *In re McKelway*, 95 Misc. 473, 160 N. Y. S. 783.

It is, of course, sufficient to transfer an estate to several grantees "as joint tenants and not as tenants in common." *Colson v. Baker*, 42 Misc. 407, 87 N. Y. S. 238; *Matter of Heiser*, 85 Misc. 271, 147 N. Y. S. 557; *Walter v. Ham*, 68 App. Div. 381, 75 N. Y. S. 185. In *Colson v. Baker*, supra, two tenants in common made a deed to two grantees declaring that the grantees should take "as joint tenants and not as tenants in common." It was argued that on technical grounds, since a joint tenancy must have the four unities of possession, interest, time and title, tenants in common could not, by joining in a deed, create a joint tenancy except by the circuitous method of conveying the premises to one grantee, accepting from him a reconveyance in joint tenancy, and then conveying the estate to their grantees. The court held, however, that this was unnecessary and that a direct conveyance by the tenants in common created a joint tenancy. The court said: "In all references to the 'four unities' requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two other persons. In *Thomas, Coke on Littleton* (vol. 1, p. 732), it is stated: 'If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry for the term of their lives and after he taketh a wife, they are joint tenants and yet they come to their estate at several times.' Citing *Brent's Case*, 3 Dyer (Eng.) 340. Here the joint tenancy in the use is created by the act of the feoffor for himself and another. If this were an exception to the general rule, or peculiar to husband and wife, or the law of uses some mention would be made of it by Coke or Blackstone, as it is cited in the chapter on joint tenancy. While it is true that joint

tenancy is no longer favored as at common law, yet it still exists when by grant it is expressly declared that the estate is to be a joint tenancy. Real Property Law, art. 2, § 56. *Murphy v. Whitney*, 140 N. Y. 541, recognizes the right of co-owners to agree among themselves to hold the property as joint tenants, or so that the survivor would take the entire fee. If, therefore, a tenant in common may thus agree with his cotenant, why may not the owner of the fee likewise agree with his grantee to whom he has conveyed an undivided half? It being conceded that the intent to create a joint tenancy in *Mary Ann Baker and Johanna Baker* is clear and distinct, and that it could have been accomplished by a conveyance through a dummy, a third party, I see no reason for insisting upon such circuitousness, but I think it was so created by the deed of Mary and Elizabeth to Mary and Johanna, and that Johanna having died Mary took the entire fee by survivorship."

The use of the word "jointly" is not conclusive that a joint tenancy was intended, but whenever doubt arises on the meaning of that word the court will seek aid in solving the ambiguity by inquiring whether the instrument was prepared by a lawyer familiar with the technical distinctions between the different estates or by a layman not presumed to have such knowledge. *Overheiser v. Lackey*, 207 N. Y. 229, Ann. Cas. 1914C 229, 100 N. E. 738, wherein the court, from a consideration of the will in question as a whole, decided that it had not been prepared by a lawyer, and that, therefore, the use of the word "jointly" did not show an intent to create a joint tenancy. In that case it was said: "Where a doubt arises, as in the case at bar, as to the intent of a deviser in using the word 'jointly,' the courts have sought aid in solving the ambiguity by inquiring whether the instrument of devise was prepared by a lawyer familiar with the technical distinctions between different kinds of estates or by a layman who cannot be presumed to have had any such knowledge. Thus in the case of *Mustain v. Gardner*, [203 Ill. 284] the court remarked upon the fact that there was nothing in the language of the devise 'to indicate that the testator understood the nature and incidents of the different estates or either of them and desired that an estate having the peculiar characteristic of survivorship pass by the devise.' We are not informed by any extraneous evidence as to the authorship or identity of the person who prepared the will which is in question here; but the indications to be found in the instrument itself do not point to authorship by a lawyer. In every specific legacy of money or other personal property the words 'give and devise' are used; where-

as we could hardly assume that a lawyer would not know that the word 'devise' was inappropriate to a gift of personal property. Then in the ninth paragraph there is an attempt to create a trust for the simple purpose of holding the portion of the estate allotted to the daughter Hester, and the trustees are therein given full authority 'to grant, lien, bargain, sell,' etc., the interest of that daughter. The use of the word lien instead of alien would hardly have been possible to anyone possessing a legal training. It is true there are expressions in the will such as a lawyer might use, as for example, 'convey and assure' and 'counsel learned in the law;' but these indicate that the document was drawn up by a layman who had in some manner acquired a smattering of the law, rather than by a trained professional hand. We are, therefore, entitled to assume, I think, that the form of this will and of the devise in question was not dictated or controlled by any discriminating knowledge concerning the difference between joint tenancy and tenancy in common."

In construing a will drawn by a lawyer of experience, giving a devise to the testator's wife and son "as joint tenants and tenants in common," it has been presumed that this repugnant and self-nugatory expression was a mistake and was amended to read as the usual formula "as joint tenants and not as tenants in common." *Walter v. Ham*, 68 App. Div. 381, 75 N. Y. S. 185, wherein it was said: "The will in question was drawn by a lawyer of considerable experience. It may be presumed that he knew that, if no words were employed declaring the character of the estate of the devisees, they would take as tenants in common. The fact that it was deemed necessary to use language descriptive of such estate in order to express the testator's intent would indicate that such intent was to give the different estate from that which they would have received had the will been silent on that subject. Again, the expression generally used in wills or other instruments where the desire is to create a joint tenancy is 'as joint tenants and not as tenants in common.' This usage being a matter of common knowledge the courts may take judicial notice of it. . . . If, therefore, the language of this will is amended by inserting after the word 'and' the words 'not as' we have an expression in common use which clearly expresses the intent of the testator to create a joint tenancy. The alternative to this construction is either to disregard the entire clause as meaningless or to say that the testator used language for the purpose of declaring the character of the estate of the devisees when such declaration was entirely unnecessary. . . . If the language of the Ann. Cas. 1917B.—7.

will had been 'to my said wife Ruthetta and to my said son Madison Ham as joint tenants,' stopping there, no question could be raised that this was a sufficient express declaration. Within the authorities above cited we may expunge all of the words of that clause of the will after the words 'joint tenants,' or may amend the clause following those words by inserting after the word 'and' the words 'not as.' In either case the intent is 'expressly declared' in the will."

Even the expression of an intention to create a right of survivorship among several devisees will not necessarily make a joint tenancy, for effect can be given to this intention by construing the limitation to be of cross remainders. *Purdy v. Hayt*, 92 N. Y. 446, wherein the court said: "In this case there are no words of survivorship, and no words from which the intention to create a joint tenancy in the estate devised to the two sisters clearly appears, and nothing short of this at least will satisfy the language of the statute. But it was manifestly the intention of the testator that the survivor of the two sisters should succeed for life to the interest of the sister first dying. The testator gives to the two sisters the use and occupation of the farm during their respective lives, and the intent that the surviving sister should have the use of the whole farm after the death of the other is clearly indicated by the restriction of the power vested in the executors to sell the farm, to a sale to be made 'after the decease of my sisters, Jane and Catharine,' and a sale before that time would have been unauthorized. But the purpose of the testator, that his surviving sister should enjoy the whole estate after the death of the other, can be accomplished without construing the original estate in the two as a joint tenancy. There seems to be no objection to a limitation to two as tenants in common for life, and of the share of the one first dying to the survivor for life. . . . The raising of cross remainders by implication is not unusual, and where such an implication is justified by the language of the will, and will accomplish the purpose of the testator, it is the duty of the court so to construe the will as to give effect both to the statute and to his intention."

b. Personal Property.

The statute changing the common-law construction of instruments creating cotenancies applies to estates in personality as well as to estates in realty. *Lane v. Brown*, 20 Hun 382; *In re Lapham*, 37 Hun 15; *Bliven v. Seymour*, 88 N. Y. 469; *Mills v. Husson*, 140 N. Y. 99, 35 N. E. 422; *In re Kimberly*, 150 N. Y. 90, 44 N. E. 945; *Com-*

mercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834; Matter of Lent, 1 Misc. 264, 22 N. Y. S. 917; Matter of Munter, 19 Misc. 201, 44 N. Y. S. 605; Baumann v. Guion, 21 Misc. 120, 46 N. Y. S. 715. In Commercial Bank v. Sherwood, *supra*, the court said: "Any doubt upon the subject, however, would seem to be removed by the nature of the bill of sale, which was to Frederick A. Sherwood, and to Catharine Bolton, in their own right. By such a transfer they must be deemed to take as tenants in common and not by a joint interest. The statutory rule that 'every estate granted or devised, to two or more persons, in their own right, shall be deemed a tenancy in common, unless expressly declared to be in joint tenancy,' (2 R. S. 727, § 44) I think should apply as well to a transfer of personal property as to real estate. It indicates a policy of the state with respect to ownership of property and should be given general application as a rule." In Matter of Munter, 19 Misc. 201, 44 N. Y. S. 605, the court said: "The rule that a legacy to two or more persons named, without further qualifications, constitutes a legacy to them as tenants in common, and not as joint tenants is now well settled in this state, and upon this question the early cases of Putnam v. Putnam, 4 Bradf. 308, and Gardner v. Printup, 2 Barb. 83 must be regarded as overruled as well as the early English rule holding a contrary doctrine."

It has been held that the statute applies to chattel interests in land. Blanchard v. Blanchard, 4 Hun 287 (*overruling* Putnam v. Putnam, 4 Bradf. 309); McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631, *affirmed* in 177 N. Y. 543, 69 N. E. 1126. In Blanchard v. Blanchard, *supra*, it was held that the statute applied to a testamentary disposition of a chattel interest in realty. The court said in that case: "Such an estate is treated as personal property in every respect. In case of the death of the owner, it goes to the executor, and not to the heir at law. These devisees, therefore, took the gift to them as tenants in common, notwithstanding it is one of personal property; for it is provided by statute, that every estate devised to one or more persons shall be a tenancy in common, unless expressly declared to be in joint tenancy, and that provision embraces all estates in land, whatever may be the duration of them. The remark of Surrogate Bradford on this subject, in Putnam v. Putnam [4 Bradf. 308] was too broad."

But it has been held that, while the statute applies to personal property, nevertheless, since personal property may be transferred without an instrument in writing, it is competent to prove by parol an intent to create a joint tenancy by a transfer of personality to several persons. Matter of Kaup-

per, 141 App. Div. 54, 125 N. Y. S. 878, *affirmed* 201 N. Y. 534, 94 N. E. 1095, wherein the court said: "The statute by its terms is limited to real property. So far as the nature of the tenure of an estate in personal property is concerned, it may be conceded that the statutory rule here expressed is applicable also to personal property. . . . It may be that in the case of real property the statutory presumption that grantees hold as tenants in common 'is only removed by an express declaration that they take as joint tenants, or by words from which it clearly appears that there is an intention to create a joint tenancy,' and that 'this intention can only be gathered from the expression used in the devise or grant, and must be a necessary implication from it.' . . . But in the case of real property, 'an estate or interest' therein, 'other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person, creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.' (Real Prop. Law [Laws of 1896, chap. 547], § 207.) So the Statute of Wills makes necessary (with an exception not here important to be noticed) a written instrument subscribed and attested with certain formalities. (2 R. S. 63, § 40.) But in the case of personal property no instrument in writing is necessary to transfer the title thereto or create an estate therein, and it would seem unreasonable to insist that, although the title might be transferred and the estate created by parol, evidence as to the character of that estate, and that it was a joint tenancy and not a tenancy in common, must be reduced to writing."

c. Executors and Trustees.

Where executors or trustees hold as such, the Act of 1786 does not apply to their estates, and they hold as joint tenants. Lorillard v. Coster, 5 Paige 172, *reversing* 14 Wend 265; Matter of Steencken, 51 App. Div. 417, 64 N. Y. S. 660. See also Everitt v. Everitt, 29 N. Y. 39; Troy v. Smith, 11 N. Y. 261.

But the nature of the estate of trustees, in reference to the rights of their cestuis que trust, depends upon the nature of the rights or interests of the latter, and the equitable estates of cestuis que trust are within the provisions of the Act of 1786. Lorillard v. Coster, 5 Paige 172, *reversing* 14 Wend. 265, wherein it was held that a devise to the testator's brother and to his twelve

nephews and nieces, in trust to apply the rents and profits to the use of the twelve nephews and nieces during their joint lives, and to the survivor or survivors of them, created, not a joint tenancy, but a tenancy in common with cross remainders, under the statute making a grant to two or more a tenancy in common unless expressed to be in joint tenancy.

It has been held that the mere fact that the grantees in a deed are described as executors, there being nothing else in the deed to show that it is intended that they shall take as trustees, or in trust, does not make the estate a joint tenancy. *Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 570, wherein it was said: "Although the grantees in the deed of February, 1818, which created the estoppel, are described as executors, there is nothing in that deed to show that the estate was intended to be granted to them as trustees, so as to create a joint tenancy which would belong to the survivors. The estoppel, therefore, vested the legal title to the premises in the three grantees named in that deed, as tenants in common, under the provisions of the Act of February, 1786, directing the mode of conveyances to joint tenants."

31. NORTH CAROLINA.

The Revisal of North Carolina statutes contains the following provisions: "In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns respectively of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the said joint business; but as soon as the same shall be effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner, all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners." (Rev. § 1579.) "In all cases where only a naked trust not

coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estate under the same shall be exercised by any of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four." Rev. § 1580.) "Every estate vested in executors, administrators or collectors, as such shall be held by them in joint tenancy." (Rev. § 166.) Section 1579, supra, was enacted in 1784 (Laws of 1784, chap. 204, sec. 6), with the exception of the proviso regarding partnership property which was a later addition.

The Act of 1784 did not abolish estates in joint tenancy. *Vass v. Freeman*, 56 N. C. 221, 69 Am. Dec. 734; *Rowland v. Rowland*, 93 N. C. 214.

It had the effect of abolishing survivorship where that incident of a joint tenancy would otherwise have been created by law. *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202; and only then in the case of joint tenancies held in fee. *Blair v. Osborne*, 84 N. C. 417; *Powell v. Morisey*, 84 N. C. 421; *Rowland v. Rowland*, 93 N. C. 214.

Joint life estates were not within the mischief intended to be remedied by the Act of 1784, and survivorship in such estates was not abolished thereby. *Powell v. Allen*, 75 N. C. 450; *Blair v. Osborne*, 84 N. C. 417; *Powell v. Morisey*, 84 N. C. 421. In *Powell v. Allen*, supra, the court said: "It follows that Richard Terrell, the survivor of the three devisees, is entitled to the whole tract of land for his life, unless 'estates for life' come within the operation of the Act of 1784. That is the question. The act is in these words: In all estates, real or personal, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators or assigns of the tenant so dying, in the same manner as estates by tenancy in common.' It is obvious that these words cannot be made to apply to joint tenants for life. In regard to real estate, on the death of one of the tenants for life his part cannot descend to his heirs, but must go either to the survivor or some third person entitled to take, not by descent but by purchase, under the limitation law. In regard to personal estate, on the death of one of the tenants for life his part cannot pass to his executors, administrators or assigns, but must go either to the survivor or some third person entitled to take, not un-

der the tenant dying, but by force of the limitation over. The word 'assigns' has no signification, but evidently is a mere expletive thrown in by force of habit to accompany the words 'executors and administrators;' for if the tenant dying had in his lifetime made an assignment of his part, the effect was to sever the joint tenancy, and there was no occasion for a statute to prevent his share from being acquired by the 'jus accrescendi.' It is also obvious that the case of tenants for life does not come within the mischief which called for the enactment of the statute. The evil was that when an estate of inheritance was held in joint tenancy on the death of one, his part passed absolutely to the survivor, and the heirs of the tenant dying were wholly excluded; the object was to legislate in favor of the heirs of the dying tenant, but as far as the statute indicates, the rights of third persons taking by purchase under the limitation, and the rights of the survivor claiming under the common-law rule, were not intended to be interfered with, for as between them the doctrine of survivorship works no crying hardship. The learned and very studious counsel for the plaintiff Mr. Haywood, when asked by the court, stated that he had not been able to find any case in which the Act of 1784 was extended to estates for life, or where the point was presented. This shows that there was no mischief in respect thereto calling for a remedy; besides, if the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the 'jus accrescendi' in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personal property." In *Blair v. Osborne*, 84 N. C. 417, the court said: "The deed in the absence of any words of inheritance unquestionably conveys only a life estate to the donees, and whether the children take the estate jointly with their mother, or in remainder after her life, the estate is a joint tenancy, for the Act of 1784 which converted joint tenancies into estates in common, had reference only to estates of inheritance. Such is the reasonable construction of the act and the interpretation which has been given to it by this court in *Powell v. Allen*, 75 N. C. 450."

In the case of a grant to two or more for life, therefore, the common-law rule maintains, in North Carolina, that an estate to two or more is a joint tenancy, in the absence of words showing an intention to create a tenancy in common. *Powell v. Allen*, 75 N. C. 450.

The Act of 1784 does not prohibit the creation of a survivorship right by a proper express contract for such a right, by written

contracts as to land, or oral contracts as to personalty. *Vass v. Freeman*, 56 N. C. 221, 69 Am. Dec. 734; *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202. In the case last cited it was held that an agreement between two owners of a note, payable to them jointly, that the note should belong to the survivor upon the death of either was valid to create a right of survivorship.

It has been held that the Act of 1784, abolishing survivorship, does not apply to choses in action, since they are not to be deemed within the meaning of the word "estate" as used in that statute. *Bond v. Hilton*, 51 N. C. 180.

Under the statute trustees are seized as to joint tenants and not as tenants in common. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, 7 L.R.A.(N.S.) 407; *Webb v. Borden*, 145 N. C. 188, 58 S. E. 1083 (semble).

It was held that a clause in a will made before the enactment of the Act of 1784, whereby the testator devised lands to his three named daughters "to be equally divided between them and their heirs, share and share alike" created a tenancy in common, in the daughters. *Den v. Hardison*, 7 N. C. 164. In *Campbell v. Herron*, 1 N. C. 381, it was held that a devise, after a life estate to the testator's wife, to the use of his three daughters, named, and to no other use or uses whatsoever, created in the three daughters a joint tenancy and not a tenancy in common. But the following note appears to the report of the case: "On the second [point] see Act of 1784 (1 Rev. Stat. ch. 43, sec. 1) by which the principle incident of joint tenancy, to wit, survivorship, is abolished."

32. NORTH DAKOTA.

The statute of North Dakota seems to reverse the common-law rule as to cotenancies by an affirmative definition of the estate of joint tenancy. It provides: "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." (Comp. Laws, § 5262.)

No cases within the scope of this note have been found which construe the foregoing statute.

33. OHIO.

It has been said that joint tenancy, with its concomitant of the *jus accrescendi*, is utterly inconsistent with the laws of Ohio. *Sergeant v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553; *Wilson v. Fleming*, 13 Ohio 68.

In *Wilson v. Fleming*, supra, the court said: "In *Miles v. Fisher*, 10 Ohio 1, this court held that estates in joint tenancy had no existence here. They are, in fact, no longer favorites of the common law in England; for, although they were, Lord Holt, in 1 Salk. 391, gives us the reason. It was the right of survivorship. Its policy was adverse to the division of tenures, because it tended to multiply feudal services, and weaken the efficacy of that connection. But Lord Hardwick, long after, in 1 Wils. 165, declared the reason had ceased with the abolition of tenures. We entertain no doubt that such estates, and their concomitant incident, the right of survivorship, are utterly inconsistent with the genius and spirit of our laws."

Therefore joint tenancy, the common-law estate with survivorship, has no existence in that state, not because it has been abolished by statute, but because it was never adopted from the common law. *Sergeant v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553; *Miles v. Fisher*, 10 Ohio 1, 36 Am. Dec. 61; *Wilson v. Fleming*, 13 Ohio 68; *Thompson v. Dingman*, 2 Ohio Dec. (Reprint) 711, 4 West. L. Month. 640. See also *Tabler v. Wiseman*, 2 Ohio St. 207. In *Sergeant v. Steinberger*, supra, the court said: "It has more than once been decided, by the supreme court, on the circuit, that estates in joint tenancy do not exist under the laws of Ohio. The reasons which gave rise to this description of estate in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits, and feelings of the people. We have no statute recognizing the existence of any such principle as the right of survivorship. But we have various statutory provisions inconsistent with it. The laws passed, both during the territorial government and since, authorize joint tenants, tenants in common, and coparceners, and in some cases, the executors, administrators, or guardians of such persons, to demand and have partition. It is from this evidence that the legislature have treated a joint tenancy as a tenancy in common." In *Thompson v. Dingman*, 2 Ohio Dec. (Reprint) 711, 4 West. L. Month. 640, the court said: "And because a technical joint tenancy, with the right of survivorship, alike with the *jus accrescendi*, are not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions, a devise to two persons and their heirs, in the absence of language necessarily creating a right of survivorship, or joint tenancy, vests the title in them as tenants in common, and not as joint tenants."

But although joint tenancy as such does not exist in Ohio, nevertheless a joint estate

with survivorship may be created by an express provision for survivorship. *Miles v. Fisher*, 10 Ohio 1, 36 Am. Dec. 61, wherein the court said: "The testator's words are to 'Fisher, Allen, and Shaw,' to the survivors or survivor, to hold as joint tenants, and not as 'tenants in common.' It is urged that where an estate is limited in joint tenancy, by express words, the common-law incident of survivorship attaches, and that in this case, on the death of Shaw, his share is held by his cotenants, as long as they hold their own. But it has long since been adjudicated that the estate of joint tenancy, as distinguished from a tenancy in common, has no existence in Ohio. 2 Ohio 306. Consequently this doctrine of survivorship cannot be used to protect this part of the title. Yet the testator intended to give the land to the survivor of the trustees, and every conveyance should be construed to carry the intention of the maker into effect, if made consonant with the principles and form of law. Laying out of view the doctrine of survivorship, resulting from joint tenancy, an incident of the estate depending upon the law, and not the act of the party, we find the testator, by express words, limiting the estate to the three trustees and the survivor. The estate well passes, by these words, to the survivor, for life."

34. OREGON.

Joint tenancy is abolished in Oregon by an Act of 1862, which provides: "A tenant in common may maintain any proper action, suit, or proceeding against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them in common; and joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common." (Laws, § 7175) But although that statute specifically abolishes joint tenancies, such estates where expressly limited are recognized and provided for by another statute, the Act of 1854, as follows: "Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to executors and trustees, as such, shall be construed to create a tenancy in common in such estate, unless it be expressly declared in such conveyance or devise that the grantees or devisees shall take the lands as joint tenants." (Laws, § 7108.) "And joint tenancy is specifically provided for in the case of trustees and executors." (Laws, §§ 7177, 7178.)

Under the provisions of the sections last cited it has been held that joint trustees hold in joint tenancy and that on the death of one the trust estate survives to the other. *Mattison v. Mattison*, 53 Ore. 254, 18 Ann. Cas. 218, 100 Pac. 4, 133 Am. St. Rep. 829,

wherein it was said: "The point further raised by plaintiff, that the power being conferred upon two, and one of the donees of the power has died, it cannot be exercised by the survivor, is not involved here as the terms of the will create a trust—not a mere power—and by the legislative act of 1905 (Laws 1905, p. 253) it is declared that trustees holding a trust in real estate hold as joint tenants, unless otherwise provided in the devise or deed, and therefore upon the death of one, the trust survives in the other."

35. PENNSYLVANIA.

a. In General.

By the Act of March 31, 1812, survivorship was expressly abolished as an incident of joint tenancy in Pennsylvania. Kennedy's Appeal 60 Pa. St. 311; *Yard's Appeal*, 86 Pa. St. 125; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24, 54 Atl. 487; *In re McCallum*, 211 Pa. St. 205, 60 Atl. 903; *Kollock's Estate*, 7 Pa. Co. Ct. 348. In *Redemptorist Fathers v. Lawler*, supra, it was stated: "The Act of March 31, 1812, 5 Sm. L. 395, expressly abolished the right of survivorship as an incident of joint tenancy, and provided that 'whatever kind the estate or thing holden, be, the parts of those who die first . . . shall be considered . . . in the same manner as if such deceased joint tenants had been tenants in common.' But it is not forbidden by this act, nor made illegal in any way, to create by grant or devise an estate with the same attribute of survivorship as joint tenancy at common law. Thus a grant to three for their joint lives with remainders to the survivors and survivor, and to the heirs of the survivor in fee would be unquestionably good and yet it would be practically a grant to the three in joint tenancy with survivorship as at common law."

The provisions of the statute heretofore referred to are as follows: "If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose, in the same manner as if such deceased joint tenants had been tenants in common: Provided always, that nothing in this act shall be taken to affect any trust estate." (*Bright v. Purd.* Dig. p. 1089.)

The Act of 1812 has been held to be constitutional and to have a retroactive effect,

being applicable to estates existing at the time of its enactment. *Bambaugh v. Bambaugh*, 11 Serg. & R. 191.

Previous to the enactment of the Act of 1812, instruments creating cotenancies were construed as at common law. *Davidson v. Heydom*, 2 Yeates 459 (1799). See also *Duncan v. Forrer*, 6 Bin. 193, which was a case decided in October, 1813, wherein the court applied the common law without referring to the Act of 1812.

But the Act of 1812 did not make it unlawful to create a joint estate with the same attribute of survivorship as joint tenancies had at common law. Such an estate may still be created in Pennsylvania by grant or devise, by the express language of the instrument or by necessary implication. *Everitt v. Duss*, 197 Fed. 401; *Arnold v. Jack*, 24 Pa. St. 57; *Kerr v. Verner*, 66 Pa. St. 326; *Jones v. Cable*, 114 Pa. St. 586, 7 Atl. 791; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24, 54 Atl. 487; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 38 W. N. C. 536; *McVey v. Latta*, 4 W. N. C. 524; *Lentz v. Lentz*, 2 Phila. 117, 13 Leg. Int. 148. See also *Harts' Estate*, 7 Pa. Co. Ct. 369. In *Arnold v. Jack*, supra, it was said: "The estate in controversy was devised by Henry Jack to his three brothers, Matthew, William and Wilson Jack, in the following words: 'As joint tenants and to the survivors and survivor of them, and the heir of said survivor, to be assignable by my said brothers or their survivors at any time or in any manner they may think proper, provided the said brothers or their survivors shall all, or both, if one be dead, assent to such assignment, but the survivor of them may assign, convey, or devise at his pleasure.' . . . There is but little if any difficulty in ascertaining how Henry Jack intended his estate to pass to and be enjoyed by his three brothers. He devises it to them first as joint tenants, and then expressly provides for what at common law was an incident of the tenancy, viz. the right of survivorship; making the right of disposition to depend upon the assent of all three whilst in full life; of two after the death of one; but the survivor to 'assign, convey, or devise at his pleasure.' And besides, the word of inheritance is only connected with the devise to the survivor. Is it not clear then that Henry Jack intended that his three brothers should take an estate for life with cross remainder in fee to the survivor, or in other words that the estate should be held and enjoyed by all during the life of all, by two after the death of one, and by the survivor in fee simple, subject to be disposed of at any time by the consent of the parties in interest? If such was the intention of Henry Jack, can it be carried into effect without violating any rule of law?

Was it a legal intention? It is not pretended that there is any prohibition either in the statute or common law against devising an estate for life to two or more, with remainder in fee to the survivor; but it is alleged that the devise here was to the three brothers as joint tenants, and that by the Act of 31st March, 1812, the 'jus accrescendi' or right of survivorship in joint tenancy is abolished; and that the limitation in the will to the survivors referred to those who survived the testator, and not to an indefinite survivorship. It is a question worthy of consideration whether the provisions of the Act of 1812 apply to a joint tenancy created by express words in a devise, or whether the operation of the act should not be confined to those technical joint tenancies arising from the unities of 'time, title, interest, and possession;' but conceding that the right of survivorship, as an incident of a joint tenancy, no matter how created, is gone, it by no means follows that this right may not be expressly given either by a devise in a will or by grant in a deed of conveyance. It may cease to exist as an incident, and yet be legally created as a principle. That it was created in the will under consideration is apparent when we consider the whole of the devise. Had the testator merely given the estate to his brothers as joint tenants, it may be that the Act of 1812 would have excluded the right of survivorship. Had it been devised simply to the three, the survivors or the survivor of them, it is probable that its true construction would have referred the time of survivorship to the death of the testator; but when we find that the devise is to the three brothers expressly as 'joint tenants, and the survivors and survivor of them, and the heirs of said survivor,' and that the right to transfer depends upon the assent of all, we cannot doubt but that the ultimate survivor was finally to be the recipient of the entire estate."

The result of the ruling in the case last quoted is that, practically, the Act of 1812 simply establishes a presumption in favor of tenancies in common, reversing the common-law presumption in favor of joint tenancy; and it becomes merely a question of whether in a particular case there has been a sufficient expression of an intent to create a joint tenancy to rebut the statutory presumption, this intent to be gathered from the whole will or deed. *Arnold v. Jack*, 24 Pa. St. 57; *Kerr v. Verner*, 66 Pa. St. 326; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24, 54 Atl. 487; *Lentz v. Lentz*, 2 Phila. 117, 13 Leg. Int. 148. See also *McKeever v. Patteson*, 2 Pa. Co. Ct. 304; *In re McCallum*, 211 Pa. St. 205, 60 Atl. 903; *McVey v. Latta*, 4 W. N. C. 524. In *Kerr v. Verner*, *supra*, the court said: "The whole tenor and scope

of this will shows in the clearest manner it was the express intent of the testator to confer an estate upon Christiana and Phoebe for their joint lives in such wise that the share of the one first deceased should inure on her death for the benefit of the survivor. I have quoted nearly the whole will, as this construction necessarily results from an implication pervading the whole will and clearly deducible from the spirit of its provisions." In *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24, 54 Atl. 487, it was held that the words "as joint tenants and not as tenants in common" were sufficient to rebut the statutory presumption. The court said therein: "Survivorship as an incident of an estate granted being still lawful, its creation becomes a question of intent. No particular form of words is required further than that they shall be sufficient to clearly express an intent in order to overcome the presumption arising from the statute. In the present case the grant was to four, to hold 'as joint tenants and not as tenants in common.' The only practical difference between the two estates was the right of survivorship in joint tenancy. The statute had abolished this and provided that the estate holden should be considered 'in the same manner as if . . . they had been tenants in common.' When therefore the grantor declared in his deed that his grantees should hold 'as joint tenants and not as tenants in common,' he made clear his intent not to follow the statute but to convey an estate subject to the right of survivorship, the distinguishing incident of joint tenancy at common law." In *Lentz v. Lentz*, 2 Phila. 117, 13 Leg. Int. 148, the court said: "Be this as it may, there is no doubt that the express intent of the testator may still confer an estate upon two for their joint lives, in such wise, that the share of the person first deceased shall inure on his death for the benefit of the survivor. And it is equally plain, that if this can be done by express words, it may equally result from an implication pervading the whole will, and clearly deducible from the spirit of its provisions. The object of the act was to cut off survivorship by operation of law, aside from or contrary to the meaning of the donor, and not to restrain or preclude any direction, which he may think fit to impress on the transmission of his property, within the limits prescribed by the law of perpetuities. Here the testatrix, after giving the house in which she resided to her daughters, Ann and Louisa, so long as they should remain single, goes on to provide that the same should be sold immediately upon their death or marriage, and the proceeds divided among her children, as afterwards designated; in which designation she includes Ann, Louisa, and four other chil-

dren, all then surviving, and the grandchildren of her son Jacob, who had died before the execution of the will. The meaning of the testatrix is not free from obscurity, especially on the point of what was to be done with the property in the event of the marriage of either Ann or Louisa, the other still continuing sole and unmarried. But looking at what she has said, we have no doubt, that her purpose was to provide a home or support her two unmarried daughters, so long as they continued in a condition to need it, nor that this would be frustrated by holding, that a sale should take place, and the proceeds be distributed among the whole, immediately upon the death of either, thus turning the other out of doors, and leaving her with what might be insufficient means of procuring another residence. And it would be no less contrary to the spirit of the will, than to a well-established rule of construction, to interpret it as leaving the share given to Ann undisposed of, during the interval between her death and that of Louisa, which would not only produce a partial intestacy, but defeat the object of making those who were evidently the primary objects of the testatrix's bounty, as comfortable as her somewhat limited means would permit. On the whole, we are of opinion, though not without difficulty, that the interest given to Ann vested on her death in Louisa, and consequently enter judgment on the case stated for the defendant."

It has been held that the mere words "joint tenancy" are not a sufficient expression of intent to make an estate a joint tenancy under the statute. *McKeever v. Patteson*, 2 Pa. Co. Ct. 304. But the words "as joint tenants and not as tenants in common" have been held to be sufficient. *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24, 54 Atl. 487.

Where, however, there is a grant by will or deed of an estate to two or more persons, and there is no expression of intention to create a joint tenancy or a right of survivorship, and where such an intention does not appear by necessary implication, the estate is a tenancy in common by virtue of the statute. *Seely v. Seely*, 44 Pa. St. 434; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 38 W. N. C. 536; *McVey v. Latta*, 4 W. N. C. 524; *Allison v. Kurtz*, 2 Watts 185; *Galbraith v. Galbraith*, 3 Serg. & R. 392; *Irwin v. Dunwoody*, 17 Serg. & R. 61; *Martin v. Smith*, 5 Bin. 16, 6 Am. Dec. 395; *McPherson v. McPherson*, Add. 327. In *Seely v. Seely*, supra, it was said: "The Act of Assembly of 31st March 1812, abolished joint tenancies in Pennsylvania, excepting only perhaps in cases expressly created by deed or will, as held in *Arnold v. Jack*, 24 Pa. St. 57, where a distinction is taken between

the creation of such an estate by express terms, and its existence as an incident of title. It was there held that it might be expressly created, but where it resulted as an incident from the form of the grant or devise, it was taken away by the act. We make no quarrel with this distinction now, for in this case a joint tenancy is not couched in express terms, so that the case cited, as well as the statute, is against its supposed existence. The court should not therefore have held that *Chloe Seely* was entitled by survivorship to her deceased sister's undivided moiety in the premises. What estate then did the will give to these two daughters? The Act of 1812 turns estates otherwise joint tenancies into tenancies in common, and this sufficiently answers the inquiry without more." In *McVey v. Latta*, 4 W. N. C. 524, the court held that an expression of survivorship used in the instant devise did not mean the survivorship of one of the devisees by the other, but had reference to their surviving the testatrix and that, consequently, this expression was not sufficient to show an intent to create a joint tenancy. It was said therein by the court: "It may be conceded, that, notwithstanding the Act of 31st March, 1812, an estate in joint tenancy may still be given either by a devise in a will, or by grant in a deed of conveyance. . . . Such an intent, however, is not to be inferred in the absence of apt words creating it; nor where the main intent of the testator is to make division. . . . Joint tenancies are not favored at law nor in equity. A construction ought to be favored that makes the estate vest absolutely at the earliest period possible. The intention of the testator, gathered from the whole will, is the great leading rule in the construction of a will. Except where the law overrules the intention it must control the construction. The testatrix gave to her two daughters 'jointly and equally' all her residuary estate. The will evinces no intention to give it to any other persons on any contingency. If, however, one should die, the survivor was to take the whole. Die when? We think the manifest meaning is, die during the life of the testatrix. This view appears to be sustained by *Fulton v. Fulton*, 2 Grant Cas. 28; *Johnson v. Morton*, 10 Pa. St. 245; *Caldwell v. Skilton*, 13 Pa. St. 152; *Cresson's Appeal*, 76 Pac. St. 19. No rule of law prevents giving full effect to this intention of the testatrix. As both daughters were living at the death of the testatrix, they took as tenants in common, and the heirs of the daughter who first died are entitled to recover."

It has been held that where there is a devise to two or more, nominatim, without the expression of a plain intent of the testator to vest the estate in the survivor, the

incident of survivorship is abolished, by a proper interpretation of the Act of 1812, from and after the date of the will, and not merely from the death of the testator. *Kennedy's Appeal*, 60 Pa. St. 511.

Before as well as after the enactment of the Act of 1812, a devise to several named children "to be divided in equal portions," created a tenancy in common. *Kollock's Estate*, 7 Pa. Co. Ct. 348.

In June, 1812, it was held that where several persons take out a warrant for land they take as tenants in common in the absence of an expression of a contrary intent. *Caines v. Grant*, 5 Bin. 119.

b. Personality and Trust Estates.

The Act of 1812 quoted in the preceding subdivision applies to personal property as well as to real property. *Yard's Appeal*, 86 Pa. St. 125, wherein the court said: "This question is really settled by the decision in *Kennedy's Appeal*, 60 Pa. St. 511. It is true the subject of discussion in that case was a devise of real estate, while that before us is a bequest of personality. But *Kennedy's case* was not rested on any difference between realty and personality, or a difference between the effect of a devise and a testament. The case was ruled upon the effect of the Act of 31st March 1812, abolishing the right of survivorship as an effect of joint tenancy. This act relates to personal as well as to real estate, and the policy which dictated its enactment seems to be equally applicable to each. The reasons, therefore, given in the opinion in *Kennedy's Appeal* apply with equal force to the bequest in this case. The Act of 1812 has become a rule of property, and as such it is better that its interpretation should be uniform, thereby producing certainty in the interpretation of wills, instead of giving a diversity of effect to the law, and thereby uncertainty and confusion in interpreting wills. Referring, therefore, to *Kennedy's Appeal* for the reasons there given, further discussion is unnecessary."

The Act of 1812 expressly excepts trust estates and, as regards such estates, the rule of the common law remains in force in Pennsylvania, that an estate to two or more, in the absence of an expression of a contrary intention, is a joint tenancy with survivorship. And any doubt which might have existed on that point has been allayed by the Act of May 3, 1855, which specifically provides for survivorship in trust estates. *Philadelphia, etc. R. Co. v. Lehigh Coal, etc. Co.* 36 Pa. St. 204, wherein the court said: "The Act of the 31st March 1812, excepted trust estates in its enactments against joint tenancy. The right of

survivorship, therefore, continued as to them as it had done at common law. It seems to me that the grant to the trustees in this case was as joint tenants; and being so, the title at once vested in the survivors on the death of Mr. White, and they could convey. But be this as it may, the Act of 3d May, 1855 comes in to relieve the subject of difficulty. It provides 'that whensoever any trust, power or authority shall be, in the manner provided for in the act to which this is a supplement (the act relating to assignees for the benefit of creditors and other trustees, P. L. 1836, p. 628), conferred on two or more persons by name, and one or more of them shall die, or renounce, or be legally discharged from fulfilling such trust, or exercising such power, the survivors or survivor, or remaining trustees, shall have and exercise all the title and authority which the whole might have done, unless the trust or power conferred shall require the whole number to act, in which case the vacancies shall be filled in the manner provided by the act to which this is a supplement.'"

36. RHODE ISLAND.

The following statute has been enacted in Rhode Island: "All gifts, feoffments, grants, conveyances, devises, or legacies, of real or personal estates, which shall be made to two or more persons, whether they be husband and wife or otherwise, shall be deemed to create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors or survivor of them, or to them as trustees or executors, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common." (Gen. Laws, c. 252, § 1) "Joint heirs shall be deemed tenants in common." (Gen. Laws, c. 252, § 2.) The foregoing provisions were contained in chapter 201 of the General Laws of 1896, which was itself a revision of chapter 172 of the Public Statutes of 1882. That chapter in terms applied only to estates in lands, tenements, and hereditaments, and was changed by the chapter of General Laws of 1896 so as expressly to include personality. The earlier statute was as follows: "All gifts, grants, feoffments, devises, and other conveyances of any lands, tenements, and hereditaments which shall be made to two or more persons, whether they be husband and wife or otherwise, and whether for years, for life, in tail or in fee, shall be taken, deemed, and adjudged to be estates in common and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees, or devisees shall have or hold the same lands, tenements, or heredita-

ments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises, or other conveyances that such lands, tenements, and hereditaments shall vest and be holden as joint estates and not as estates in common." That statute was a re-enactment of an Act of 1798. See *Randall v. Phillips*, 3 Mason 378, 19 Fed. Cas. No. 11,555.

The statute prior to 1896 applied only to real estate, having no application to personality. *Clarke v. Robinson*, 16 R. I. 180, 13 Atl. 124; *Gallagher v. Rhode Island Hospital Trust Co.* 22 R. I. 141, 46 Atl. 451. Therefore cotenancies in personality were, under the statute, still governed by the common-law rules of construction; and a gift of personality, by deed or will, to two or more persons, simply, without any expression showing an intention to create a tenancy in common, created a joint tenancy with survivorship. *Gallagher v. Rhode Island Hospital Trust Co.* 22 R. I. 141, 46 Atl. 451.

Before the revision of the statute there was no specific reference to trust estates, and in at least two cases the court, construing limitations to trustees, refused to decide whether that statute applied to trust estates or not, making the decision turn on other grounds. *Franklin Sav. Inst. v. People's Sav. Bank*, 14 R. I. 632; *Petitioner Bailey*, 15 R. I. 60, 1 Atl. 131. The Act of 1896 in terms, however, excludes trust estates.

Under the early statute it was held that a devise or deed to two or more created an estate in common, unless there were words manifestly showing an intent to have them take as joint tenants. *Randall v. Phillips*, 3 Mason 378, 19 Fed. Cas. No. 11,555; *In re Heath*, 12 R. I. 479; *Church v. Church*, 15 R. I. 138, 23 Atl. 302.

Under the present statute, if there is an expression, in a gift to two or more persons, of an intention that they shall take as joint tenants, the estate granted will be a joint tenancy and not a tenancy in common. *Industrial Trust Co. v. Scanlon*, 26 R. I. 228, 3 Ann. Cas. 863, 58 Atl. 786.

37. SOUTH CAROLINA.

The South Carolina statute abolishes survivorship in joint tenancies in the following terms: "Where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant, and shall be distributable as if the same were a tenancy in common." (Civil Code, § 2473.) *Haughabaugh v. Hon-*

ald, 1 Tread. Const. 90, 3 Brev. 97, 5 Am. Dec. 548; *McMeekin v. Brummet*, 2 Hill Eq. 639. The foregoing statute is a re-enactment of an Act of 1791, known as the Primogeniture Act. See *Haughabaugh v. Honald*, 3 Brev. 97.

The death of one joint tenant severs the joint tenancy, under the statute, and there is no jus accrescendi in favor of the surviving joint tenant or tenants. *McMeekin v. Brummet*, 2 Hill Eq. 638, wherein it was said: "As I have said the limitation is to the sons jointly, there is nothing to make a tenancy in common, and there is no doubt but in England, if one had died before the determination of the contingency, the other would have taken the whole by survivorship, as indeed if one had died after the determination and when the property had vested in possession. But under our statute of 1791, providing 'that where any persons shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant, and shall be distributed as if the same was a tenancy in common; and that in cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act,' I believe the construction of our courts has uniformly been, that any interest, of any sort, in which there may be a joint tenancy, shall be severed by the death of one joint tenant, and the share of the deceased to go to his legal representative."

Since the Act of 1781 relates to the case "where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy," it has no application to an interest which had not vested, and hence had not been "seized or possessed," by the owner or beneficiary of that interest before his death, and such a right will survive if it is such as, when vested, would have been the interest of a joint tenant at common law. *Herbement v. Thomas*, Cheves Eq. 21; *Bunch v. Hurst*, 3 Desaus. 273, 5 Am. Dec. 551; *Ball v. Deas*, 2 Strob. Eq. 24, 49 Am. Dec. 651; *Telfair v. Howe*, 3 Rich. Eq. 235, 55 Am. Dec. 637. In *Ball v. Deas*, supra, there was involved the construction of the following devise: "I give and bequeath all my estate, real and personal, to my sister Lydia Jane Waring, and her three children, John Ball Waring, Ann Simons Waring and Francis M. Waring, to their heirs and assigns," it appearing that Lydia Jane Waring, one of the devisees, died before the death of the testator. It was held that her share in the devise survived to the other named devisees. The court said: "The court of appeals held that the words above recited were such as would have created a joint tenancy at common law, one of the acknowledged inci-

dents of which was that upon the death of any of the tenants, either before or after the vesting of the right, the survivors would take the whole. Our statutes have not altered the principle as acknowledged at the common law, where the interest has not vested. And therefore, as Mrs. Waring died before the testator, and consequently before the interest could have vested, the principle of the common law must apply, and the right of survivorship take effect." In *Telfair v. Howe*, 3 Rich. Eq. 235, 55 Am. Dec. 637, the court said: "The common-law institutions of property have undergone many mutations in the progress of ages. Some of its harsher and most inconvenient rules have been abolished by the legislative power: and others have been gradually and insensibly modified by the course of judicial decisions, and moulded so as better to conform to the convenience and sentiments of modern society. The most prominent and I may say the most odious feature or incident of this estate (the right of survivorship) which in almost every instance defeats the intention of the testator, was abolished by our Act of Assembly of 1791. The act did not abolish joint tenancy itself, but only this feature of the estate. It provided, in substance, that where two or more persons are seized or possessed of real or personal estate in joint tenancy, and one of them dies, the right of survivorship should not be allowed, but the share or interest of the deceased joint tenant should go to his heirs at law or legal representatives. This left the rules of the common law in force where the deceased tenant for life had not been seized or possessed in his lifetime. In *Herbemont v. Thomas*, Cheves Eq. 21, the question turned upon the construction of the words 'seized or possessed,' which occur in the act. The testatrix had given a legacy to six persons (her nieces) in words which, at common law, would have constituted them joint tenants. It happened that some of the legatees had died in the lifetime of the testatrix: and the question was, whether the survivors took the whole legacy by virtue of the *jus accrescendi*, or whether the shares of the deceased joint legatees lapsed under the provisions of the Act of 1791 into the residuary estate. It was clear, that at common law, where a devise or bequest is given to two in joint tenancy, and the devise or bequest fail as to one, from its being originally void, or from its being revoked by the testator, or from the death of one of the devisees or legatees in the testator's life, the right of survivorship exists, and the survivor takes the whole as joint tenant. The decision of the court was that, as the will was ambulatory until the testatrix's death, and no right or title could vest in the legatees until that event had occurred, they could not be

considered as having been 'possessed' of any estate under the will, and the case by a fair interpretation of the act could not be regarded as embraced within its provisions. This decision has recently been followed by that in *Ball v. Deas*, 2 Strob. Eq. 24, 40 Am. Dec. 651, where the same construction prevailed. The act may, therefore, be considered as having received a settled interpretation in this particular. The Act of 1791, therefore, does not conflict with the claims advanced by the appellants."

It has been held that a corporation cannot hold as a joint tenant. *Telfair v. Howe*, 3 Rich. Eq. 235, 55 Am. Dec. 637, wherein it was said: "But there is another insuperable impediment in the way of law and authority to the success of this appeal. The Bible Society of New York is a corporate body. It is clear that, by the principles of the common law, none but natural persons can take in joint tenancy. A corporation cannot take this estate, either jointly with another corporation, or with a natural person. The reason assigned in the early writers is, that they hold in different capacities and in different rights. Lord Coke, in his commentary upon the passage quoted in the circuit decree from *Littleton*, gives, very clearly, his views as to the reasons which gave rise to the distinction between natural persons and corporate bodies in this particular. He says: 'The etc. in the end of this section implieth, that so it is, if any body politic or corporate, be they regular as dead persons in law (whereof our author here speaketh) or secular: as if lands be given to two bishops, to have and to hold to them two and their successors: albeit the bishops were never any dead persons in law, but always of capacity to take, yet seeing that they take this purchase in their politic capacity, as bishops, they are presently tenants in common, because they are seized in several rights: for the one bishop is seized in the right of his bishoprick of the one moiety, and the other is seized in the right of his bishoprick of the other moiety, and so by several titles and in several capacities: whereas joint tenants ought to have it in one and the same right and capacity, and by one and the same joint title.' (Co. Litt. Lib. 3, cap. 4, § 296.) . . . A modern writer (2 Crabb on Real Prop. § 2311, m. p. 945) says, the Queen cannot hold an estate in joint tenancy. She is not seized in her natural capacity, but in her royal and politic capacity, in *jure coronae*, which cannot stand in jointure with the seizin of the subject in his natural capacity. He asserts the same doctrine in regard to all corporate bodies. I doubt very much, if a single case, either English or American, can be adduced, where a corporation or body politic has been held

to be seized or possessed of an estate in joint tenancy."

38. SOUTH DAKOTA.

A South Dakota statute provides: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." (Statutes, § 3604.)

No decisions have been found interpreting this statute.

39. TENNESSEE.

A statute of Tennessee which was enacted in 1784 provides as follows: "In all estates, real and personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common." (Code, § 3677.)

The foregoing act has been held to be applicable to cases in which the interest of a joint tenant has not become vested as well as to cases in which he has actual possession. *Strong v. Ready*, 9 Humph. 168, wherein the court considered the effect of the death of a joint devisee before the death of the testator, and held that the interest of such devisee went to his heirs and did not survive to the other joint devisees, survivorship having been abolished by the Act of 1784. In that case it was said: "The true principle, as we think, is, that the act is general, extending to all cases, as well by devise as by deed, and cuts down and destroys the common-law doctrine of survivorship. So that, upon the death of Claiborne, nothing survived to Rush, save the one-half, to which the devise in joint tenancy entitled him. This being the case, the legacy to Claiborne lapsed and remained undisposed of by the will, he having no issue, and, therefore, our Act of 1842, ch. 177, sec. 3, having no application to the case, the heirs of Claiborne cannot take the estate, because the survivorship being cut down at his death, it remained undevise, and as such descended to the heirs of the testator at his death."

40. TEXAS.

The Act of March 18, 1848 of Texas, provides as follows: "Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall

not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained." (Sayles' Tex. Civ. Stats. art. 2471.)

The practical effect of that act has been to abolish the distinctions between joint tenancy and tenancy in common and to reduce all cotenancies to tenancies in common. *Ross v. Armstrong*, 25 Tex. Supp. 354, 78 Am. Dec. 574; *Pilcher v. Kirk*, 55 Tex. 208. In the case first cited, the court said: "By our law, the leading distinctive characteristics of those several kinds of estates have been abolished. By the Act of the 28th January, 1840, the right of survivorship between joint tenants was abolished, and it was provided that coparceners might maintain waste against each other. (Hart Dig. arts. 588, 589.) And, although the latter provision was omitted in the Act of the 18th March, 1848 (O. & W. Dig. art. 344, et seq.), which was intended as a substitute for the former law and repealed it, I apprehend the legislation upon the subject would not warrant the supposition that it was intended to preserve the common-law distinctions between an estate in coparcenary and other estates in joint ownership. . . . The effect of these provisions seems to be to destroy the numerous and important distinctions which existed between these several kinds of estates at the common law, and for all practical purposes to reduce them to one estate, namely, an estate in common, with, however, the rights and remedies that appertained to tenants in coparcenary at the common law. This is in harmony with the comparative simplicity of our law of realty in other respects, and is a great improvement upon the former state of the law. The refined and artificial distinctions which existed at the common law were calculated only to perplex and embarrass, without producing any corresponding benefits." In *Pilcher v. Kirk*, 55 Tex. 208, it was said: "All distinctions between the several tenancies known at common law have been destroyed by statute, and, for all practical purposes, are now in this state reduced to the same estate, namely, an estate in common, or part owners, unaffected by the technical rules of the common law."

41. UTAH.

The following statutory provisions are in effect in Utah. "Every interest in real estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared in the grant or devise to be otherwise." (Comp. Laws, § 1973.) "A devise or legacy given to

more than one person vests in them as owners in common." (Comp. Laws, § 2800.)

No judicial construction of these sections has been found.

42. VERMONT.

The provisions of the Vermont statute of 1797 are: "Conveyances and devises of lands, whether for years, for life or in fee, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it is expressed therein that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivors of them; but this provision shall not apply to devises or conveyances made in trust, or made to husband and wife, nor to a conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy." (Pub. Stats. § 2566.)

The foregoing statute was passed as an expression of the modern tendency in favor of tenancy in common, and in order to protect the individual interests of cotenants. *Spencer v. Austin*, 38 Vt. 258; wherein it was said by the court: "And among the incidents attending a joint tenancy is the doctrine or right of survivorship which does not exist in tenancy in common. The ancient English law was apt in its constructions of conveyances to favor joint tenancy rather than tenancy in common; but joint tenancies, for a long period of time, have been and still are regarded with so little favor in England and in this country, both in courts of law and equity, that whenever the expressions will import an intention in favor of a tenancy in common, such effect will be given to them. Our legislature, for the purpose of protecting the several interests of persons in the same land, and guarding them against the incidents attending a joint tenancy and the injustice which might result therefrom, has declared that all conveyances and devises of lands made to two or more persons (except conveyances and devises made in trust, or made to husband and wife) shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivors of them, or unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy. G. S. ch. 64, §§ 2 and 3."

In the absence of an expressed intention to create a joint tenancy, a grant of an estate in land to two or more persons creates a tenancy in common by virtue of the statute. *Gilman v. Morrill*, 8 Vt. 74; *Lamb v. Clark*,

29 Vt. 273. In the case last cited the court construed a deed whereby the grantor conveyed lands to his two sisters. It was said: "It is insisted that under that conveyance, the grantees took an estate in joint tenancy, and that upon the decease of Priscilla Lamb, which took place in March, 1851, the title to the whole premises vested in the plaintiff in severalty, by right of survivorship. Such would be the effect at common law, if a joint tenancy was created by that deed. The Comp. Stat. p. 382, secs. 2, 3, however, provides that all conveyances made to two or more persons shall be construed to create estates in common and not in joint tenancy unless it be expressed therein that the grantees shall take the land as joint tenants. It is also provided that the act shall not extend to conveyances where from the instrument a trust estate is created. There is certainly in this case no expressed intention to create a joint tenancy, and in no sense can this deed be regarded as a conveyance of these premises in trust. The premises were not conveyed to the grantees to hold in trust for the use and benefit of the grantor or of any other parties, but the use is expressly declared to be for the benefit of the grantees forever. The provision that the grantees shall pay the just debts of their grantor may operate as a defeasance or as a condition subsequent and their title to the land may be defeated, possibly, by a refusal to pay the debts; but the relation of trustee and cestui que trust is not created by that deed. It is a matter, therefore, of express provision in the statute, that the grantees in that deed take an estate as tenants in common, and not as joint tenants."

The statute has no application to estates in personal property, however, and instruments creating cotenancies in such property are construed as at common law. *Gilbert v. Richards*, 7 Vt. 203, wherein the court said: "The inquiry in the present case is, whether the testatrix intended to constitute the three sisters joint tenants, or tenants in common. If they were joint tenants, the *jus accrescendi* attaches by the operation of the law; and we are not at liberty to disregard the intention ascertained by the rules of law applicable to the case, for fear of consequences. If they were joint tenants, it is immaterial whether one or more of the legatees died before or after the death of the testatrix, the survivor at the death of the testatrix takes the whole. Among the rules laid down, we find none better established or more fully recognized than this, that when a legacy is given to two or more, and there are no words of severance, it is held to be a joint tenancy, subject, however, to certain exceptions; and although it is true, that courts will lay hold of almost any words to make

a tenancy in common where it is manifestly for the interest of the legatees, yet if there are no such expressions they must consider that a joint tenancy was intended. Now I do not know that we are at liberty to disregard the rules of common law on this subject upon principles of policy, or to say that they are contrary to the genius of our government; nor do I know that they are contrary either to policy or the genius of our government. If our legislature has altered the doctrine of the common law upon this subject in relation to real estate, a court may not go further, and alter it also in relation to any other estate. The legitimate rule upon this subject would be, that if the legislature has altered the common law in relation to real estate, and not as to personal, they were satisfied with the law as it was, in regard to personal estate. Words, by the common law, are construed to create an estate in joint tenancy, rather than in common; because it is considered as most beneficial to the tenants, and therefore they shall take a joint estate rather than an estate in common, unless words are introduced to manifest an intention to the contrary. And here, for the same reason, it is enacted that the same words shall constitute a tenancy in common. But the statute has gone no further, and has adopted no such principles for the construction of wills or other conveyances of personal estate."

By reason of the rule announced in the preceding paragraph, a bequest of personalty to two or more persons creates in them a joint tenancy with a right of survivorship, unless there is an expression of an intention to create a tenancy in common. *Gilbert v. Richards*, 7 Vt. 203; *Decamp v. Hall*, 42 Vt. 483.

43. VIRGINIA.

Survivorship between joint tenants was abolished in Virginia by the Act of 1787, which appears in substance in the present code as follows: "When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower, or distribution, as if he had been a tenant in common. And if hereafter any estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance." (Code 1849, p. 502, c. 116, § 18, now Code, § 2430.)

That statute has no application to cases in which the estate in joint tenancy has not

vested, and therefore where one of two or more joint devisees dies before the death of the testator, the share of the deceased passes to the survivor or survivors. *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

It appears that the estate of joint tenancy still exists in Virginia, though in spite of the fact that it has been stripped of its distinguishing characteristic, the *jus accrescendi*, for in *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613, the court said: "The law of the subject under consideration is discussed with a great wealth of learning by Mr. William Green in an appendix to the volume just cited [*Pendleton v. Hoomes*, Wythe 94] which is quoted in terms of high and deserved approbation in *Freeman on Co-Tenancy and Partition*, secs. 28 and 40. He reaches the conclusion arrived at by Mr. Minor, and shows that the common-law doctrine is still the law, notwithstanding our statute which abolishes the survivorship among joint tenants. With respect to that statute, he observes that, while it does away with the right of survivorship, it does not destroy joint tenancy. To use his own language: 'It does not annihilate the legal entity called a joint estate, so as to prevent any such estate from vesting, nor does it destroy the joint estate forthwith after it has vested. On the contrary, it permits the estate to subsist as joint, with all its former incidents, during the joint lives of all its owners; and if, in that time, partition be made, or a severance effected without partition, it is quiescent as a dead letter. It begins to operate at all, only when one of the joint tenants has died before partition or severance. And on the happening of that event, and from thenceforth, it directs that the part of the deceased shall be considered as if he had been a tenant in common, not from the beginning, but only when the event to which it refers happened. Where it applies, and to the extent of its application, it operates, in articulo mortis, a statutory severance; and that is all. It does not extirpate the quality of a joint estate, which make it produce, among other fruits, the *jus accrescendi*, but only destroys in the moment of production, or blights by anticipation in the bloom, that particular fruit. In this manner it modifies the nature of a joint tenancy by the common law, so far as to take away one of the incidents which the law has annexed to it, but leaves it in all other respects as it was. In short, since the statute, joint tenants seem to have an estate that is to all purposes joint, both in its inception and also in its continuance, until a destruction or severance thereof takes place; which latter, where an interest has become vested, is effectuated by the statute at the moment any of them dies, to the extent of his part; and henceforth that part is to be regarded

as it would have been (though the statute had never been enacted) if the joint estate had been to the same extent dissevered by any of the means which theretofore existed. And, if this be the sum of its efficacy, the consequence seems to be, that in regard to the lapsing of devises and legacies, and also in regard to the vesting of estates created or transferred by conveyances inter vivos, it has been productive of no change whatever."

In a case decided in 1798, it was held, without any reference to the statute, that an inclusive patent of lands to a father and his three sons created a joint tenancy therein. *Jones v. Jones*, 1 Call. (Va.) 458.

44. WASHINGTON.

The Washington statute provides as follows: "If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common: Provided, that community property shall not be affected by this section." (L. '86, P. 165, § 1; 1 H. C. § 1483.)"

It has been held that where two married men take out a patent for lands from the United States, they hold the lands as tenants in common and not as joint tenants with the right of survivorship. *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858.

45. WEST VIRGINIA.

The West Virginia statute is as follows: "When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution, as if he had been a tenant in common. And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy or dower, as the case may be." (Code, § 3037.)

That statute abolished survivorship in joint tenancies. *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 44 S. E. 508, 62 L.R.A. 562.

An expression of a manifest intention to create a joint tenancy with survivorship will, however, be given effect under the statute. *Greenbrier Bank v. Effingham*, 51 W. Va. 267, 41 S. E. 143, wherein it was held that where two persons in a joint deed gave to a third person all the personal property that they should have at the time of their death

and reserved to themselves the use and control thereof "so long as they both shall live," the reservation created in them a joint tenancy with survivorship. The court said: "The common-law rule of joint tenancy has been changed by section 18, chapter 71, Code, but it is expressly provided in section 19 that such change should not apply 'when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the survivor.' Had the grantors intended otherwise, it was easy to have so provided. The instrument speaks so plainly when it says: 'The party of the first part (being both the grantors) to have full use and control of all their personal property so long as they both shall live,' it is hard to see how it is possible to claim it is so ambiguous as to justify extraneous evidence in explanation thereof. The language used admits and creates a joint tenancy pure and simple not only at common law, but under the provisions of the statute referred to above."

It has been held that if there is a devise to two or more persons jointly and one of them dies before the testator, leaving issue who survive the testator, his share will not in that event go to the surviving joint tenant, but will go to such issue of the deceased joint tenant as survive the testator; but that if the predeceased devisee dies without issue living at the death of the testator then the devise inures to the surviving devisee or devisees. *Hoke v. Hoke*, 12 W. Va. 427.

46. WISCONSIN.

The Wisconsin statute provides as follows: "All grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common and not in joint tenancy, unless expressly declared to be in joint tenancy." And section 2069 provides that "the preceding section shall not apply to mortgages, nor to devises, or grants made in trust, or made to executors, or to husband and wife." (Stats. 1898, § 2068; which was R. S. 1849, c. 56, § 43.)

That statute abolishes joint tenancies except where the tenancy is expressly declared to be in joint tenancy. *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N. W. 1032, 7 L.R.A. (N.S.) 701.

The statute has no application to conveyances by way of mortgage, since they are expressly excepted, and a mortgage to two or more makes them joint tenants as at common law, unless there is something in the instrument to show an intent to make a tenancy in common. *Fiedler v. Howard*, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865.

The statute does not apply to personality, so where a man makes his wife and daughter

beneficiaries in a policy of insurance, they take as joint tenants and on the death of one her interest survives to the other. *Farr v. Grand Lodge*, etc. 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L.R.A. 249, wherein the court said: "This leads us to the consideration of our own statute on the subject of joint tenants. Our statute (sec. 2068, R. S.) provides that 'all grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common and not in joint tenancy, unless expressly declared to be in joint tenancy.' The following section is that 'the preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors or to husband and wife.' It will be seen that our statute makes many important exceptions, which save the doctrine of the common law in respect to the subjects named. This shows at least that there is nothing in our principles of government or policies of law opposed to the principle or doctrine of survivorship in joint tenancy in such cases. We are more immediately concerned with joint tenancy in devises. On the principle of analogy, if devises to joint tenants with the *jus accrescendi* are lawful, so are legacies of personalties. They are substantially alike, and within the same reason, and they have been decided to be within the doctrine of the common law. . . . We may say, therefore, that legacies come within the exceptions of our statute, and that, when made to two joint legatees, without any words to indicate a severance of their interests, if one die, the survivor takes the whole legacy. The analogy between legacies and the benefits secured by a certificate or policy of a benefit insurance company or of a common life insurance company when the insurance is payable to two or more persons jointly on the death of the assured, is still closer. The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death. He can change the direction of his bounty during his life. So far as the doctrine of joint tenancy and survivorship are concerned, they are strictly within the same reason. . . . And so we conclude that this insurance in joint tenancy with the right of survivorship is within the exception of our own statute, in analogy to devises, and that the doctrine of the common law governs it."

ALLEN ET AL.

v.

ALMY ET AL.

Connecticut Supreme Court of Errors—
December 20, 1913.

87 Conn. 517; 89 Atl. 205.

Wills — Construction in Favor of Vesting of Estate.

The law favors a testamentary construction which vests the estate.

Construction in Favor of Validity.

If one construction of a will will make a bequest illegal as a perpetuity, while another will render it valid, the latter will be accepted, if both constructions are permissible.

Construction of Term "Heirs."

In the absence of a contrary meaning shown by a will, the word "heirs" will be taken to be used in its primary meaning as designating those who, in the absence of a will, are entitled by law to inherit a decedent's realty.

[See generally Ann. Cas. 1914B 70; Ann. Cas. 1915D 1178.]

Time as of Which Heirship is Determined.

Where a testamentary limitation over is to the heirs of testator, that class is determined as of testator's death, in the absence of an intention to the contrary shown by the will.

[See generally Ann. Cas. 1917A 859.]

Same.

A will, after devising the property in trust for the life use of testator's widow in a third thereof, directed that the property be divided into certain equal parts, and gave three of such parts to trustees to hold the same and pay the income to testator's daughter during her life, "and at her decease to pay over and deliver the same to her issue; but in case of her death leaving no issue surviving her, then to my heirs at law, exclusive of my said daughter." Held, that the words "heirs at law" in the quoted part referred to those who were testator's heirs at his death, viz., his five children.

Language Importing Gift — "Pay Over and Deliver."

A provision of a will, that the testamentary trustees should "pay over and deliver" the property to a daughter's issue at her death, imports a gift.

Estate Created — Executory Devise.

Under a will giving a sum in trust to pay the income to testator's daughter, and at her death to pay over and deliver the same to her issue, but, if she died without surviving issue, then to testator's "heirs at law exclusive of my said daughter," the heirs take a vested interest by way of executory devise defeasible in the contingency of issue named; the limitation over having a double

aspect, and vesting alternative remainders with conditions subsequent.

Perpetuities — Defeasible Remainder.

A provision giving property in trust for a daughter for life, and at her death to pay over the same to her issue, but, if she left none surviving, then to testator's heirs at law, does not violate the statute against perpetuities; the remainders over vesting at testator's death, though defeasible in the contingency named.

Estates — Joint Tenancy or Tenancy in Common.

The law prefers to construe a gift to several as creating a tenancy in common instead of a joint tenancy.

[See note at end of this case.]

Same.

At common law the doctrine of survivorship as between joint tenants is repudiated in Connecticut.

[See note at end of this case.]

Same.

While a testamentary gift will be construed as creating a tenancy in common rather than a joint tenancy, unless a different intention appears in the will, the intention disclosed by the instrument will govern, whichever it creates.

[See note at end of this case.]

Same.

A will devising certain shares of the estate to trustees to pay the income to testator's daughter for life, and at her death to pay over and deliver the same to her issue, but, if she should die without surviving issue, then to testator's heirs at law, does not, by the intention disclosed, rebut the presumption that the heirs at law took as tenants in common rather than as joint tenants.

[See note at end of this case.]

Same.

Even at common law provisions of an instrument which contemplated a division of property were construed to create a tenancy in common rather than a joint tenancy.

[See note at end of this case.]

Case reserved from Superior Court, New London county: SHUMWAY, Judge.

Action by Wm. H. Allen et al., plaintiffs, against John T. Almy, executor, et al., defendants. Case reserved by Superior Court for decision of Supreme Court of Errors.
DECREE CONSTRUING WILL.

[519] Lorenzo Blackstone, late of Norwich, died in 1888, leaving a widow and five children, to wit, J. DeTrafford, William N., Louis L., Frances E., married to Frederick J. Huntington, and Harriet, married to Frederick S. Camp.

By his will he disposed of all the residue and remainder of his estate, after the satisfaction of certain bequests and legacies, and subject to a trust for the life use of his widow.

Ann. Cas. 1917B.—8.

ow in one third thereof, by directing its division into eighteen equal parts or shares, and disposing of those parts. Four of them he gave absolutely to his son William, one to DeTrafford, two to Louis, and one and one half parts to Mrs. Camp. The remaining parts were given to trustees to hold, three of them for the life use of DeTrafford, two of them for the life use of Louis, one and one half of them for the life use of Mrs. Camp, and three of them for the life use of Mrs. Huntington, with a limitation over in each case. The testator dealt with the one third in which his widow was given a life interest in a different paragraph of the will from that in which he disposed of the two thirds in which such life use was not reserved; but the practical effect was as stated.

The language defining the trust and the limitation over was in each instance the same. That which related to the share left for the life benefit of Mrs. Huntington reads as follows: "To said Edward N. Gibbs and George D. Coit, three of said shares, in trust, to receive and hold the same, and to pay over the net income arising therefrom, after deducting legal costs and charges from time to time, to my daughter Frances E. Blackstone, during her life, and at her decease to pay over and deliver the same to her issue; but in case of her death leaving no issue surviving her, then to my heirs at law exclusive of my said daughter."

The widow died in 1896. DeTrafford died in 1898, [520] leaving a widow, now deceased, and one son, who died in 1905, without issue. William died in 1907, leaving a widow, now living, but no issue. Louis died in 1892, leaving two children, now living. Mrs. Huntington died January 13th, 1912, leaving a husband, but no issue. Executors of the wills or administrators upon the estates of all of these deceased children of the testator and of the testator himself are parties to this action. Mrs. Camp survives, as do her three children.

The estate in the hands of the trustees forming the trust fund created by the will for the benefit of Mrs. Huntington consists of about \$200,000 in money and securities. It is this fund which is the subject-matter of this action. The Superior Court is asked to give its advice in answer to the following questions relating to its disposition: "1. To whom and in what amounts shall the present trustees pay over said trust funds? 2. What is the meaning of the expression 'heirs at law' in the provision relating to the final disposition of said trust funds after the death of said Frances E. Blackstone without issue, and are the persons thus described the heirs at law of the testator at his decease or at the decease of the cestui que trust? 3. Can this expression 'heirs at law' in this connec-

tion be construed as meaning children and if so is the reference to children living at the time of the testator's death or at the decease of the cestui que trust? 4. In the attempted final disposition of the principal of the several trust funds left for the benefit, during life, of the children of the testator, to wit: J. DeTrafford Blackstone, Louis L. Blackstone, Hattie B. Camp and Frances E. Blackstone, upon their decease, without issue, is there a violation of the statute against perpetuities existing at the time of the testator's death and if so to whom are said funds of the trust created for the benefit of the said Frances E. Blackstone now payable?"

[521] Certain of the parties contend that the gift over "to my heirs at law" exclusive of "my said daughter" is void as contravening the statute against perpetuities, and that the remainder thus attempted to be disposed of is intestate estate of the testator.

The children of Louis contend that the limitation over is to the heirs at law of the testator to be determined as of the time of Mrs. Huntington's death, and that such disposition was not repugnant to the statute against perpetuities properly construed. The claim in their behalf is that they are, between them, entitled to one half of the fund, and Mrs. Camp to the other half.

The representatives of Mrs. Huntington's deceased brothers claim that the gift over is a valid one to the heirs at law of the testator to be determined as of the time of his death, and that the estate of each of the deceased brothers is entitled to one fourth of the fund, Mrs. Camp being entitled to the remaining one fourth.

Mrs. Camp concurs with the representatives of her deceased brothers in claiming that the limitation over was not in contravention of the statute for the reasons urged by them, but says that it was a gift to a class with the incident of survivorship, so that she, as the sole survivor of the class, is entitled to receive the whole fund.

Wallace S. Allis for plaintiffs.

Morris W. Seymour for estate of Ella B. Huntington et al.

Edmund W. Perkins for Justine B. Perkins et al.

Charles E. Searls for John T. Almy, executor, et al.

William Waldo Hyde and *Jeremiah J. Desmond* for Harriet B. Camp.

[522] PRENTICE, C. J.—"The law favors vested estates." Connecticut Trust, etc. Co. v. Hollister, 74 Conn. 228, 231, 50 Atl. 750; Carpenter v. Perkins, 83 Conn. 11, 17, 74 Atl. 1062. "If two modes of construction are fairly open, one of which will turn a be-

quest into an illegal perpetuity, while by following the other it will be valid and operative, the latter mode must be preferred." Wolfe v. Hatheway, 81 Conn. 181, 185, 70 Atl. 645; Nicoll v. Irby, 83 Conn. 530, 534, 77 Atl. 957. "The word 'heirs,' in its primary meaning, designates those who in the absence of a will are by law entitled to inherit the real estate of a deceased." Nicoll v. Irby, 83 Conn. 530, 534, 77 Atl. 957; Perry v. Bulkley, 82 Conn. 158, 168, 72 Atl. 1014. "This is the meaning which is to be given to it in the construction and interpretation of wills, unless, when read in the light of the circumstances surrounding the testator, it clearly appears from the will itself that he used the words in a different meaning." Hartford Trust Co. v. Purdue, 84 Conn. 256, 258, 79 Atl. 581; Wilde v. Bell, 86 Conn. 610, 614, 87 Atl. 8. This is the rule of general recognition. Gardner, in his work on Wills, p. 447, states the pertinent phase of it as follows: "Where the limitation over is to the heirs of the testator, this class is determined as of the death of the testator, in the absence of a testamentary intent to the contrary." To the same effect, see Page on Wills, § 547. We adopted and applied this principle in Johnson v. Webber, 65 Conn. 501, 512, 33 Atl. 506.

This will furnishes no indication that the testator used the words "my heirs at law" in any other than their usual and normal signification. The only side light thrown upon the subject is that drawn from the [523] provision in connection with each of the limitations over, which excludes from the class entitled to share in the remainder the child who had enjoyed the life use. Evidently those whom he had described as his heirs at law in this connection were represented in his mind by the group as it should be when he should die—children presumably—and not by some group of uncertain size and membership which might be formed in the years during which some one of his children might be expected to live.

These recognized principles and conditions lead inevitably to the conclusion that the heirs at law designated by the testator as the recipients of the gift over in the event that Mrs. Huntington should die without issue were those who stood in that relation to him at his death, to wit, his five children. The language of the will, that the property should be paid over and delivered, imports a gift. Angus v. Noble, 73 Conn. 56, 64, 46 Atl. 278; Johnson v. Webber, 65 Conn. 501, 513, 33 Atl. 506.

The limitation over to them and each of them created a vested interest in the sense that each took an estate which was alienable and transmissible by inheritance. It does not militate against this result that the vesting

in enjoyment was postponed to some uncertain and future time, or that such vesting might be entirely defeated by the happening of the event that Mrs. Huntington should die leaving issue. The limitation over was one with a double aspect. *Thomas v. Castle*, 76 Conn. 447, 451, 56 Atl. 854; *Sumner v. Westcott*, 86 Conn. 217, 220, 84 Atl. 921. The donees of the remainder, in the event of the life tenant's death without issue, took a vested interest, defeasible in the contingency named. *Ingersoll v. Ingersoll*, 77 Conn. 408, 410, 59 Atl. 413; *Perry v. Bulkeley*, 82 Conn. 158, 169, 72 Atl. 1014; *Carpenter v. Perkins*, 83 Conn. 11, 17, 74 [524] Atl. 1062; *Sumner v. Westcott*, 86 Conn. 217, 220, 84 Atl. 921.

Testamentary provisions creating such limitations over vesting in interest immediately upon the death of the testator are not in contravention of the statute against perpetuities. See cases last cited.

The gift over to the heirs at law was one to a class in the sense that it was one to a group of persons designated, not by name, but by some general descriptive term. Mrs. Camp reasons from this that the members of the group or class took as joint tenants, and therefore with the incident of survivorship attached to their estates. This contention assumes two aspects, one as to the nature of the estate which vested in the heirs, and the other as to the incidents of that estate if found to be that of a joint tenancy.

Our law prefers a tenancy in common to a joint tenancy. *Bill v. Payne*, 62 Conn. 140, 142, 25 Atl. 354. In this respect we differ from the common law which favored joint tenancies. 2 *Blackstone's Commentaries*, 193. "There may be joint tenancies in this State, but survivorship as an incident thereto has never been recognized here. There is here practically no difference between a joint tenancy and a tenancy in common. Each tenant is seized of an undivided share of the whole, proportioned to the number of tenants, as was the case at common law in tenancies in common. But at the common law, in the case of a joint tenancy, each tenant is seized of the whole as well as of every part—*per my et per tout*—and it is to this seizin by each of the entirety that the incident of survivorship is due. Upon the death of one, the other or others remain seized of the whole. In this State, therefore, there can be no joint tenancy with the right of survivorship, unless such right is created by the will or other conveyance creating the tenancy. Whether it can be so created, we need not [525] in this case inquire." *Houghton v. Brantingham*, 86 Conn. 630, 636, 86 Atl. 664. As far back as 1769 the common-law doctrine of survivorship as between joint tenants was repudiated in this State. *Phelps v. Jepson*, 1 Root (Conn.) 48, 1 Am. Dec. 33.

The difference in the degree of favor with which joint tenancies and tenancies in common were recognized at common law, and are recognized with us, is one which carries with it important consequences in the determination of the character of the estate created where grants or gifts are made to several persons or to a class without other indication, or with only doubtful indication of the nature of the estate intended to be created. In the one case the presumption, in the absence of explanatory language manifesting the intent, would be naturally and logically in favor of joint tenancies, and in the other in favor of tenancies in common. And so we find that, while the rule of the common law was that a grant or gift to a class imported *prima facie* that it was to the members of the class as joint tenants, that principle, in those jurisdictions where, as with us, tenancies in common are favored, is reversed, and the presumption is one in favor of tenancies in common. The gift or grant will, in other words, be construed as creating a tenancy in common, unless a different intention on the part of the grantor or testator appears by the instrument of conveyance or will. 2 *Underhill on Wills*, § 539. The intention, however, if discoverable, will, of course, govern.

In the present instance there is nothing, either in the context, the nature of the gift, or the circumstances, to overcome the presumption that the heirs at law took as tenants in common. On the contrary, it is scarcely conceivable that the testator intended any other result from his gift than that his heirs at law, exclusive of the child benefited by the life use, should take the estate to [526] be at once divided between them. It is plain that the testator had no thought of providing for anything save an ownership in severalty through a distribution made immediately upon the vesting in possession and enjoyment of the remainder over to the heirs at law. Provisions looking to a division have always, even under the common-law rule, been regarded as sufficient to create a tenancy in common. *Perkins v. Baynton*, 1 Bro. C. C. (Eng.) 118; *Stones v. Heurtly*, 1 Ves. (Eng.) 165, 166; *DeLafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *Griswold v. Johnson*, 5 Conn. 363, 366.

As there is nothing in the will to create a joint tenancy in the heirs of the testator, we have no occasion to consider, further than we have already incidentally done, the claimed incident of survivorship.

The Superior Court is advised that by the expression "heirs at law," as used in the provision relating to the final disposition, upon the death of Frances E. Blackstone without issue, of the trust estate held for her benefit during her life, contained in paragraphs

fourth and fifth of the will, is meant the heirs at law of the testator determined as of the time of his decease; that Wallace S. Allis, as administrator d. b. n. of the estate of J. DeTrafford Blackstone, John T. Almy, as executor of the will of William N. Blackstone, William H. Allen, as administrator d. b. n. c. t. a. of the estate of Louis L. Blackstone, and Mrs. Harriet B. Camp, are each entitled to receive from the trustees of said trust estate a one-fourth part thereof; and that the third and fourth questions upon which advice is asked are to be answered in the negative.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other judges concurred.

NOTE.

In the reported case it is held that by a gift to several persons designated as members of a class and not by name, they take as tenants in common and not as joint tenants. The nature of the estate resulting from the creation of a cotenancy is treated in the note to *Withers v. Barnes*, reported ante, this volume, at page 55.

WOOD

v.

LOGUE ET AL.

Iowa Supreme Court—November 25, 1914.

167 Iowa 436; 149 N. W. 613.

Deeds — Interpretation — Inconsistency of Granting and Habendum Clauses.

While, if a deed clearly and by apt terms grants a title in fee simple, any limitation thereof in the habendum clause repugnant to or inconsistent with the estate so created is void, yet, in determining the intent the whole deed is to be looked to, and the granting clause, being merely "sell and convey . . . undivided one-third interest," and intention to create a joint tenancy with right of survivorship clearly appearing from the deed in its entirety, it is to be given that effect.

[See 8 Ann. Cas. 444; 111 Am. St. Rep. 772.]

Estates — Creation — Joint Tenancy or Tenancy in Common.

An estate of joint tenancy may be created by apt words; Code, § 2923, merely providing that a conveyance to several persons creates

a tenancy in common, "unless a contrary intent is expressed."

[See note at end of this case.]

Same.

A deed clearly showing intent to create a joint tenancy between the grantor and grantees, and by the last clause providing that the one of them last dying is to be the absolute owner of the property, the use of the word "inherit," with reference to acquirement by survivors of the title of one dying, will be considered merely an inaccurate application of it to acquirement of title by survivorship.

[See note at end of this case.]

Same.

A provision in a deed by which the owner of land conveys to each of two sisters a third interest in it that, while all three may occupy it as a home so long as they remain unmarried, one of them marrying, may not longer so occupy it, is not inconsistent with a joint tenancy so as to prevent the deed creating one. It does no more than provide a contingency on which such tenancy shall cease.

[See note at end of this case.]

Joint Tenancy — Survivorship — Rights of Creditors of Deceased.

On the death of the first of joint tenants, her creditors have no rights in the property as against the survivors, who take not from her, but directly from the grantor in the deed creating the tenancy.

Appeal from District Court, Mahaska county: WILLCOCKSON, Judge.

Action by Jerome Wood, administrator, plaintiff, against Alice Logue et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

Irving C. Johnson for appellants.
Reynolds & David for appellee.

[437] WEAVER, J.—On December 3, 1908, Daniel Logue, being the owner of a certain forty acres of land in Mahaska county, executed and delivered to his two sisters, Sarah Logue and Alice Logue, a deed, the material part of which reads as follows:

Know all men by these presents: That I, Daniel H. Logue (single), of the county of Mahaska and state of Iowa, in consideration of the sum of one dollar in hand paid, do hereby sell and convey unto Sarah Logue the undivided one-third interest in the property hereinafter described. I do hereby sell and convey unto Alice Logue the undivided one-third interest in the following described premises, situated and lying in the state of Iowa, Mahaska county, to wit: The northeast quarter of the northwest quarter of the southeast quarter of section 22, township 75, range 16 west of the fifth P. M. It is agreed

between the grantor and the grantees named in the deed that they all have the right to occupy the property so long as they remain single. If the grantor or either one of the grantees get married, the ones that are married cannot occupy the property, without the consent of those that are not married, so long as the grantor and grantees remain single, they can occupy the property as a house free of rent. In case of the death of the grantor, the grantees are to inherit the undivided one-third interest of the grantor, and in case of one of the grantees dying first, the grantor and the surviving grantee are to inherit that portion of the property that is owned by the grantor and grantee that are deceased. It is understood between the grantor and grantees herein that the one dying last is to be the absolute owner of the property herein described, and he or she may dispose of the entire property by will or in any other way that he or she may desire.

[438] In June, 1911, Sarah Logue died intestate, survived by both Daniel and Alice. The plaintiff is the duly appointed administrator of the estate of the deceased, and, acting upon the theory that his intestate died seised of an undivided one-third of the land, he petitioned the court for an order authorizing him to sell the same for the payment of debts and charges allowed against the estate. The petition sets out the deed by which it is alleged that such title was acquired, and avers that the conditions and stipulations following the granting clause are void and of no effect upon the character or quality of the title conveyed. Daniel Logue and Alice Logue, being made defendants, appeared, and demurred to the petition on the ground variously stated that the deed shows upon its face that the interest, right, and title acquired thereunder by Sarah Logue were that of a joint tenant, and that upon her death the whole estate immediately vested in the defendants by right of survivorship. The court, holding with the plaintiff upon the question thus raised, overruled the demurrer, and, defendants electing to stand thereon, the order prayed for was granted, and the defendants appeal.

In support of the ruling below appellee invokes the rule that, where a deed clearly and by apt terms grants or conveys a title in fee simple, any limitations thereof in the habendum clause repugnant to, or inconsistent with, the estate so created is void and of no effect. *Case v. Dwire*, 60 Ia. 442, 15 N. W. 265; *Teany v. Mains*, 113 Ia. 53, 84 N. W. 953. Of the soundness of the rule thus stated there can be no doubt, but the more serious question is whether the deed before us presents a case for its application. If we were to look alone to the words "I hereby sell and convey unto Sarah Logue the undivided one-

third interest in the property hereinafter described" as determinative of the nature and quality of the estate intended to be conveyed, the conclusion argued for by the appellee and reached by the trial court is inevitable. But such narrowness of construction is hardly consonant with that other well-settled principle [439] that, in construing a written instrument, the intention of the parties is to be looked for, and, when ascertained, is to be given effect, unless forbidden by some established rule of law. This rule of construction is no less applicable to deeds than to other instruments by which contract and property rights are created, limited, and defined. There is no rule which requires a court in construing a deed to read simply the technical words of grant, and shut its eyes to the meaning and effect of the habendum. Speaking upon this subject, we have said:

The repugnancy, to defeat the *habendum*, must be such that the intention of the parties cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect. If, from the entire instrument and attending circumstances, it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the *habendum* will control.

See *Beedy v. Finney*, 118 Ia. 278, 91 N. W. 1069, and cases there cited.

Referring to the same subject, the compiler of the article on "Deeds" in 13 Cyc. 618, after citing numerous authorities justifying his conclusion, says:

The strictness of the ancient rule as to repugnancy in deeds is much relaxed, so that in this, as in other, cases of construction, if clauses or parts are repugnant, the intention is to be gathered from the whole instrument, instead of from particular clauses.

This rule is too manifestly just to leave room for discussion, and we can conceive of no good reason for departing from it. If, then, upon examination of this deed in its entirety, both granting clause and subsequent clauses, it clearly appears that the parties intended to create a joint tenancy with right of survivorship, then there is no fatal repugnance in the terms of the instrument, and if such estate is not [440] forbidden by, or inconsistent with, the law of the state, it is the duty of the court to so declare and give it effect.

That an estate of joint tenancy may exist in this jurisdiction does not appear to be denied by counsel, and, indeed, could not well be. Estates of joint tenancy were well known at common law, and, though they have fallen into quite general disuse, are not entirely obsolete. Our Code, section 2923, which provides that conveyances to two or more persons in their own right create a tenancy in common, unless a contrary intent is expressed,

is a reversal of the effect of such conveyances at common law; the rule there being that under a deed to two or more, no other intent being indicated, the grantees take as joint tenants, and not as tenants in common. The qualifying words in the statute cited, "unless a contrary intent is expressed," would seem therefore to leave place in the law of the state for a joint tenancy, with its characteristic incident of survivorship, if the intent of the parties to the instrument to create it is clearly indicated by the language employed.

The deed now before us is not drawn with the technical nicety and exactness which might have been used by a learned professional conveyancer, but it has the virtue not always present in even more formal instruments of so expressing the purpose of the parties thereto as to leave its intended effect too clear for doubt. It is very manifest that the paramount or general intent of the transaction which is thus evidenced is to make the grantees joint owners of the land with the grantor, and to provide for the right of survivorship between them, or, to use the language of the deed, "the one dying last is to be the absolute owner of the property, and he or she may dispose of the entire property by will or in any way he or she may desire." It is true the word "inherit" employed in the deed is not technically correct as applied to the acquirement of title by survivorship, but, when read in connection with the entire instrument, it is clear that it was so employed by these parties. To hold [441] otherwise is to give no force or effect whatever to the last and, in some respects, most significant provision of the deed.

If it be said the limitation upon the right of occupancy by either tenant who should thereafter marry is inconsistent with a joint tenancy at common law, the objection is sufficiently answered by the suggestion that this provision does no more than provide for a contingency upon the happening of which the joint tenancy should cease. What their respective rights in the premises might have been had one of them married, whether upon such happening they would all become tenants in common, or the interest of the marrying tenant in the property become entirely extinct, we need not here consider or decide. Even at common law it is within the power of either tenant to sever the joint character of the title by conveying or otherwise disposing of his right or share to a third person. 2 Blackstone's Com. 192; Robinson v. Codman, 1 Sumn. 121, 20 Fed. Cas. No. 11,970; Simpson v. Ammons, 1 Bin. (Pa.) 175, 2 Am. Dec. 425. It can also be severed by agreement. Williams v. Hensman, 7 Jur. N. S. 771, 5 L. T. N. S. 203.

The provision referred to in the deed before us may well be treated as an agreement between the parties by which, under certain

circumstances, the unity of the tenancy should be considered severed. In this case no such severance occurred. Sarah Logue was the first of the tenants to die, and if the terms of the deed by which she acquired right in the property are valid, as we are disposed to hold, the brother and sister surviving may assert their title to the property as against her creditors. The survivors do not acquire title through the deceased, but by virtue of the deed. Before her death there was an equality and unity of right and title in the three tenants. Her death extinguished her right of survivorship, but left the unity of right and title unchanged in the other two tenants, and when one of them shall die, all rights of survivorship [442] provided for by the deed having become effective and having accomplished the intent of their creation, the joint tenancy will cease to exist, and the last survivor will be the sole and unqualified owner. As we have already suggested, neither of the successive survivors takes or receives anything from or through the deceased tenant for the title is derived directly from the grantor through the deed which created the tenancy. But, laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent? This grantor, as the owner of the land, had a right to devote it by appropriate action on his part to the purpose of making a home for himself and his two sisters. He might very reasonably believe that such end could be more nearly attained, and the comfort and support of the successive survivors be better assured, by creating a unity of title with right of survivorship than by a tenancy in common with the ordinary incidents to such an estate. And this is what he appears to have done in the deed in controversy. Such a disposition of property is not obnoxious to any statute of this state or to any recognized principle of common law, nor can we conceive of a good reason for holding it to be against any accepted rule of public policy. The creation of such an estate being lawful, and the doctrine of Beedy v. Finney, above quoted, being adhered to, there is no fatal repugnancy in this deed. All parts of it must be given effect according to its plain intent. It follows that Sarah Logue, being first of the grantees to die, did not die seized of any heritable interest in the land or of any right or interest therein which could be properly subjected to sale by the administrator of her estate. None of the cases decided by this court and cited by appellee are inconsistent with this conclusion.

The court erred in overruling the defendant's demurrer to the petition and in ordering a sale of the land, and said [443] order

and judgment are therefore reversed, and cause remanded, with directions to the trial court to dismiss the petition.

Reversed.

Ladd, C. J., and Evans and Preston, JJ., concur.

NOTE.

The reported case holds that despite a statute providing that a conveyance to two or more shall create a tenancy in common "unless a contrary intent is expressed," a deed providing plainly though not in technical language for a right of survivorship creates a joint tenancy. The cases dealing with the nature of the estate resulting from the creation of a cotenancy are reviewed in the note to *Withers v. Barnes*, reported ante, this volume, at page 55.

ATTORNEY GENERAL EX REL. TREASURER AND RECEIVER GENERAL

v.

CLARK.

Massachusetts Supreme Judicial Court—
November 29, 1915.

222 Mass. 291; 110 N. E. 299.

Estates — Creation of Joint Tenancy.

Where two sisters receive property by conveyance as joint tenants, and also make deposits in a savings bank for their joint use and benefit, and purchase certain securities which are issued to them as joint tenants, their estate includes the right of survivorship, and the estate in all the properties is a joint tenancy.

[See note at end of this case.]

Joint Tenancy — Termination.

A joint tenant may always terminate the joint tenancy by transfer or conveyance of his interest.

Joint Tenancy in Personalty.

A joint tenancy is not confined to real estate, but may also exist in personal property.

Fraud — Creation of Joint Tenancy.

Where a joint tenancy is created by contract, it is prima facie for valuable consideration, and in the absence of fraud or showing of bad faith such an agreement is valid.

Same.

Evidence held to show that the creation of a joint tenancy in two sisters was in good faith and without fraud.

Taxation — Inheritance Tax — Property Subject — Estate Passing by Survivorship.

The share which a joint tenant takes in the property on the death of the other joint tenant does not pass by the laws regulating intestate succession, so as to be subject to an inheritance tax, since taxation laws must be strictly construed, and the statute does not in express terms authorize the taxation of the interest accruing to a surviving tenant upon termination of the joint tenancy.

Joint Tenancy — Survivorship — Nature of Devolution of Title.

Upon the death of one joint tenant, the other takes the whole estate, not by descent as the heir at law of the other, nor under the laws regulating intestate succession, but as the sole surviving tenant.

Case reserved from Supreme Judicial Court, Suffolk county.

Action by Attorney General on relation of Treasurer and Receiver General, plaintiff, against Mary M. Clark, executrix, defendant. Case reserved for decision by full court. The facts are stated in the opinion. **DISMISSED.**

Henry C. Attwill and *Wm. Harold Hitchcock* for plaintiff.

Geo. P. Drury for defendant.

[292] CROSEY, J.—This is an information in equity brought in the Supreme Judicial Court at the relation of the Treasurer and Receiver General under St. 1909, c. 490, Part, Part IV. as amended by St. 1912, c. 678, § 1, to recover a succession tax. The case comes before us on a reservation made by a single justice,* which contains the agreed facts and certain stipulations made by the parties.

The record shows the following facts: That Elizabeth M. Clark, the deceased, and Mary M. Clark, the defendant, were sisters living together in Waltham in this Commonwealth on the real estate hereinafter referred to; that these sisters, being tenants in common of the real estate so occupied by them, obtained title thereto by inheritance, and also by deed from a third heir; that on November 11, 1907, they conveyed the real estate to a third person, and on the same day their grantee reconveyed the estate to them as joint tenants; that at different times since November 11, 1907, these sisters purchased with funds, of which each of them contributed one half, certain securities consisting of stocks and bonds which were all issued to them as joint tenants. These securities were kept in their joint possession until the death of Elizabeth, since which time such possession has continued in Mary, the survivor. It is also agreed that on or about January 2, 1908, these sisters opened two accounts in the Springfield Institution for Savings, one

in the name of "Either Elizabeth M. Clark or Mary M. Clark, or the survivor of either," and the other [293] in the name of "Either Mary M. Clark or Elizabeth M. Clark or the survivor of either." Each of them contributed one half of the total amounts so deposited, and there were no withdrawals "unless for their joint benefit." The total balance of these two deposits on September 10, 1912, the date of the death of Elizabeth M. Clark, was \$1,623.56. The value of the real estate, securities and deposits having been agreed upon by the parties, it is the contention of the Attorney General that one half of the total amount of such value became taxable upon the decease of Elizabeth M. Clark, one of the joint owners.

1. There can be no doubt that, after the transfer of the real estate and the issuance of the securities to these sisters in the manner above described, they thereafter held and owned such real and personal estate as joint tenants with all the incidents which govern such a tenure, including that of survivorship; and we think that the same is true as to the deposits in the savings bank. The words of survivorship, employed when the deposits were made and thereafter were held by the bank, were apt and sufficient to create a joint tenancy, and such obviously was the intention of the parties, especially when considered in connection with the estate in joint tenancy created by them in the real estate and the securities. The record shows that no withdrawals were made unless for their joint benefit, and it fairly may be inferred from all the facts and attendant circumstances that it was agreed between the sisters that neither of them should withdraw any of the deposits except upon their joint account and for their mutual use and benefit. Nor is this conclusion affected by the fact that either might have withdrawn the deposits contrary to such an agreement and thereby have destroyed the joint tenancy. A joint tenant, as an incident of his tenure, always may terminate the joint tenancy by transfer or conveyance of his interest. A joint tenancy is not confined to real estate, but may exist also in personal property. *Phelps v. Simons*, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; *Boland v. McKown*, 189 Mass. 563, 76 N. E. 206, 109 Am. St. Rep. 663.

2. The record shows that these two sisters intended to create an estate in joint tenancy both as to the real and the personal estate. They were equal owners in the real estate when their holdings therein were changed from that of tenants in common to joint tenants; so, too, each contributed one half of the purchase [294] price of the securities and one half of the amounts deposited in the savings bank. When they created an estate in joint tenancy in the real estate and personal

property above referred to, a contract was made between them for a valuable consideration, and in the absence of fraud or anything to indicate that it was not entered into in good faith, it constituted a valid agreement and must be recognized as such. There is no evidence of fraud or bad faith in creating the joint tenancy. It cannot be found that there was a gift of one half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statute because the joint tenancy was not severed during the lifetime of the tenants. Each sister contributed an equal amount for her interest in the real and personal property when the joint tenancy was created, and there is nothing to show that the right of survivorship was not as valuable to one as to the other. Each held subject to the limitations which such a tenure imposed upon them, and thereafter they held by but one title.

We are of opinion that the contract between the parties creating a joint tenancy in the property in question cannot be held under the circumstances to be a voluntary gift without consideration and so liable to a succession tax.

3. The only question remaining is whether an interest in property which, upon the death of one joint tenant passes by right of survivorship to his cotenant, so passes "by the laws regulating intestate succession" within the meaning of the statute. St. 1909, c. 490, Part IV. § 1. In ascertaining the intent of the Legislature in construing this statute, the established rules of construction are to be applied.

In *Martin L. Hall Co. v. Com.* 215 Mass. 326, 329, 102 N. E. 364, it was said: "Tax laws are strictly construed. If the right to tax is not plainly conferred by the statute it is not to be extended by implication." The statute under consideration authorizes the imposition of an excise tax. It is so imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of the beneficiary to receive such property. *Atty.-Gen. v. Stone*, 209 Mass. 186, 190, 95 N. E. 395; *Minot v. Winthrop*, 162 Mass. 113, 122, 124, 38 N. E. 512, 26 L.R.A. 259. The statute does not in express terms authorize the taxation of the interest accruing to a surviving tenant upon the termination of a joint tenancy by the death of [295] his cotenant. In England such interests are expressly made taxable by statute. St. 57 & 58 Vict. c. 30, § 2 (d). The words "intestate succession" are to be construed in accordance with their ordinary legal interpretation. We are of opinion that, as used in this statute, these words have the ordinary significance as applied to the subject matter, and mean succession by the laws

regulating the descent and distribution of intestate property. Intestate succession, we think, applies to cases where persons die intestate or leave no valid will, thereby requiring the descent and distribution of their estates in accordance with laws providing therefor. The word "succession" in its ordinary legal use has been described as "the devolution of title to property under the laws of descent and distribution." *State v. Payne*, 129 Mo. 468, 31 S. W. 797, 33 L.R.A. 576.

The descent and distribution of estates is regulated by statutes enacted from time to time and amended whenever deemed expedient. We think that the "laws" regulating intestate succession mean the statute laws relating to the descent and distribution of intestate estates, and do not include the succession of property which passes under the rules of the common law. Joint tenancy arises under the common law, and the doctrine of survivorship thereunder grows out of the application of common law principles wholly independent of statute. Joint tenants hold under the conveyance or instrument by which the tenancy is created. See *In re Headen*, 52 Cal. 294; *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; *In re Klatzl*, 216 N. Y. 83, 110 N. E. 181. See also *Palmer v. Treasurer*, 222 Mass. 263, 110 N. E. 283.

Mary M. Clark and her sister Elizabeth as joint tenants held under a tenure which would give the survivor the whole if there was no alienation thereof by either party. Upon the death of Elizabeth, Mary, as her survivor, took the whole estate, not by descent as the heir at law of her sister or under the laws regulating intestate succession, but as the sole surviving joint tenant.

In accordance with the stipulation of the parties, let the entry be

Information dismissed with costs.

NOTE.

In the reported case a transaction whereby two tenants in common convey to a third person who immediately reconveys to them is held to make them joint tenants. A like estate is also held to result from a joint purchase of securities and from a joint deposit of money in bank. The nature of the estate resulting from the creation of a cotenancy is discussed at length in the note to *Withers v. Barnes*, reported ante, this volume, at page 55.

EX PARTE ZUCCARO.

Texas Supreme Court—January 28, 1914.

106 Tex. 197; 163 S. W. 579.

Injunctions — Distinction between Restraining Order and Temporary Injunction.

Under the Texas practice, injunctions are classified: First, as a "restraining order," which is an interlocutory order made upon application for an injunction as a part of a motion for the preliminary injunction, by which a party is restrained pending the hearing of the motion; second, an order which operates, unless dissolved by an interlocutory order, until the final hearing; and, third, a perpetual injunction, which can only be ordered upon final decree.

[See note at end of this case.]

Same.

On January 27th an injunction suit was instituted by the county attorney praying for a temporary restraining order enjoining defendants from permitting moving picture shows being opened on Sunday, and that the cause be set for hearing, and that upon final hearing the temporary restraining order be made permanent, and the petition was presented on the same day to the judge of the district court, who indorsed thereon the following fiat: "Petition granted and clerk of district court directed to issue and direct to each and every defendant . . . an order enjoining, restraining, and prohibiting them and each of them from opening or permitting to be opened their theaters and moving picture shows on Sunday . . . until further orders of this court; this cause set down for hearing Saturday, February 3d." Held, that the order was only a temporary restraining order and expired on the date of the hearing, unless extended, and hence a judgment of contempt for its alleged violation after such date was void.

[See note at end of this case.]

Trial — Setting Case for Hearing.

Where a petition for an injunction was presented to the circuit court on January 27, 1912, the cause could not have come on for final hearing until the succeeding term unless an appearance was entered, so that where none was entered, it could not be set for final hearing on February 3, 1912, so that an order setting it for hearing on that date must be interpreted as having been intended to determine only whether a temporary injunction should be issued operative until final hearing.

Original habeas corpus proceeding. Andrew Zuccaro, relator, and W. M. Rea, defendant. The facts are stated in the opinion. RELATOR DISCHARGED.

Wray & Mayer and Baskin, Dodge & Eastus for relator.

[198] PHILLIPS, J.—The writ of habeas corpus was issued in this proceeding upon the application of the relator complaining that he was restrained of his liberty by the sheriff of Tarrant County in virtue of a commitment issued out of the District Court of that county upon a judgment convicting him of contempt of court in disobeying an injunction previously issued.

On January 27, 1912, the county attorney of Tarrant County instituted in the Sixty-seventh District Court of that county an injunction suit in behalf of the State of Texas against the relator and others, praying for the issuance of a temporary restraining order, enjoining the defendants from opening or permitting to be opened for amusement their theaters and moving picture shows on Sunday; that the cause be set down for hearing, and that upon final hearing the temporary restraining order be made permanent. The petition was presented on the same day to the Hon. W. T. Simmons, judge of the court, who thereupon indorsed thereon the following fiat:

"Petition granted and clerk of the District Court of Tarrant County, Texas, directed to issue and direct to each and every defendant named in this petition an order enjoining, restraining and prohibiting them and each of them from opening or permitting to be open their theaters and moving picture shows, respectively, on Sunday, for public amusement, from giving therein any performances for public amusement, and from charging a fee for admission thereto or from doing any of said acts until further orders of this court. This cause set down for hearing Saturday, February 3, 1912, at 2 o'clock p. m. and clerk directed to issue notice hereof to defendants and each of them."

A notice as provided in the fiat was issued and served upon the relator, but it appears that no other process has ever been issued in the cause.

On November 24, 1913, the Hon. Marvin H. Brown, judge of the court referred to, without any motion or complaint charging the relator with a violation of the alleged injunction, issued an order to the clerk of the court to cite the relator, among others, for contempt of court for violation of this injunction. Upon hearing, the relator was adjudged in contempt, a fine assessed against him, together with imprisonment in the county jail for three days and until the fine should be paid.

The relator has previously presented his petition for the writ to the Honorable Court of Criminal Appeals, which declined to entertain it upon jurisdictional grounds, whereupon on application to this court our jurisdiction being undoubted, it was ordered that the writ issue.

It appears from the record submitted to us that no other order in respect to the injunction has ever been made in the cause referred to than that embodied in the fiat of the judge above quoted; that no hearing was had on February 3, 1912, the date fixed in the fiat therefor; that the case has never been tried, and no other orders have ever been made therein. The fiat constitutes the sole basis for the injunction claimed to have been violated, and must alone be looked to for the purpose [199] of determining whether any injunction was in force, for the violation of which the contempt proceeding would properly lie.

If the order embodied in the fiat amounted only to a temporary restraining order, provisional in its nature and limited in its duration to the date appointed for a hearing, it is manifest that the relator could not be competently held in contempt for acts committed after such date. If the order, on the other hand, possessed the force of a continuing injunction, effective until final hearing of the cause unless dissolved in an appropriate proceeding, he, of course, remained subject to the restraints it imposed.

In the opinion of this court delivered by Chief Justice Gaines, in *Riggins v. Thompson*, 96 Tex. 154, 71 S. W. 14, the classification of injunctions under our practice is thus stated:

"1. A restraining order, which is defined to be: 'A restraining order is an interlocutory order made by a court of equity upon an application for an injunction and as part of the motion for a preliminary injunction by which the party is restrained pending the hearing of the motion.' 2. One which is intended to operate, and which does operate unless dissolved by an interlocutory order, until the final hearing; and, 3. A perpetual injunction which can be properly ordered only upon a final decree." In that case the district judge had ordered by fiat indorsed upon the plaintiff's petition that the defendants appear upon a date named to show cause why permanent injunction should not issue, and that a restraining order issue to the defendants as prayed for, pending such hearing. It was held that the order issued upon the authority of the fiat was only temporary in its character and expired upon the date appointed for the hearing. The fiat here involved is not in the same terms as the one considered in that case, but there can be no doubt under this authority that the only effect of the order was to temporarily enjoin the defendants, and, there having been no continuance of the injunction, it expired on the date appointed for the hearing.

The court appears to have been in session on January 27, 1912, the date the petition was presented and the order made. The cause

could not, of course, have come on for final hearing until the succeeding term, unless an appearance was entered, which was not done. Accordingly it was not subject to be finally heard on February 3, 1912; and in ordering that "this cause (is) set down for hearing" for that date, the judge could not have intended that any other hearing be had than one for the purpose of determining whether an injunction should issue, operative until the final hearing. This must be true since he was without authority to try the cause on that date, which was only seven days subsequent to the date of his order; and unless the hearing thus appointed was for the purpose stated, his ordering a hearing for such date was a vain act. If the hearing was fixed for the purpose of determining whether an injunction should issue, and such it seems to us is the obvious effect of the order, it is clear that the injunction originally ordered was provisional in its nature, and was intended to be operative [200] only until the date named for the hearing. Otherwise, there was no occasion for the hearing.

It is manifest under the record presented to us that the injunction expired on February 3, 1912. The judgment of contempt, based upon such injunction, for an alleged violation long subsequent to the date of its expiration, was therefore void and of no effect; and the relator should be discharged. It is unnecessary to consider the other questions presented under the application.

Relator discharged.

NOTE.

Distinction between Temporary Restraining Order and Temporary Injunction.

Generally, 123.

Duration of Order, 124.

Necessity of Notice, 126.

Necessity of Bond, 126.

Necessity of Subpoena, 126.

Generally.

There is a well-recognized distinction between a temporary restraining order and a temporary or preliminary injunction which may be stated as follows: A temporary restraining order is generally granted without notice to the opposite parties and is intended only as a restraint on the defendant until the propriety of granting a temporary injunction can be determined and it goes no further than to preserve the status quo until that determination. It is limited in its operation and continues only for such a

reasonable time as may be necessary to have a hearing on an order to show cause why a temporary injunction should not issue. On the other hand a temporary or preliminary injunction is rarely granted without notice, but when granted it is effective until the trial of the cause in which it is issued. *Houghton v. Meyer*, 208 U. S. 149, 28 S. Ct. 234, 52 U. S. (L. ed.) 432; *Moulton v. Cornish*, 33 App. Cas. (D. C.) 228; *Strickland v. Griffin*, 70 Ga. 542; *Purcell v. Hosey*, 44 Ind. App. 448, 89 N. E. 520; *Thompson Scenic R. Co. v. Young*, 90 Md. 278, 44 Atl. 1024; *Wetzstein v. Boston*, etc. Consol. Copper, etc. Min. Co. 25 Mont. 135, 63 Pac. 1043; *State v. Graves*, 82 Neb. 282, 117 N. W. 717; *Vornholt v. Gordon*, 4 Ohio Dec. 498; *Caswell v. Fundenberger*, 47 Tex. Civ. App. 456, 105 S. W. 1017; *State v. Lichtenberg*, 4 Wash. 407, 30 Pac. 716. And see the reported case, and the cases cited throughout this note. "The former [a temporary injunction] embodies a restraint which continues, unless modified by the court, until the hearing of the cause, and then it is made either permanent or discharged altogether; while the latter [a temporary restraining order] strictly speaking is not an injunction at all, but a writ of the court to compel parties to maintain the matters in controversy in status quo until the question of whether or not a temporary injunction ought to issue may be determined." *Ex p. Grimes*, 20 Okla. 446, 94 Pac. 668.

In *Houghton v. Meyer*, 208 U. S. 149, 28 S. Ct. 234, 52 U. S. (L. ed.) 432, the court stated the distinction between a temporary restraining order and a temporary injunction as follows: "The restraining order issued in the case was authorized by § 718 of the Revised Statutes of the United States, which is as follows: 'Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.' Rev. Stat. § 718. Under this section, originally passed June 1, 1872 (§ 7, c. 255, 17 Stat. 196, 197), a restraining order with features distinguishing it from an interlocutory injunction was introduced into the statutory law. In the prior act of Congress of March 3, 1793 (c. 22, 1 Stat. 334, 335), it was provided in § 5: 'Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.' By force of § 718 a judge may grant a restraining order in case it appears to him there is danger of irreparable injury, to be in force 'until the

decision upon the motion' for temporary injunction. Thus by its very terms the section (718) does not deal with temporary injunctions, concerning which power is given in other sections of the statutes, but is intended to give power to preserve the status quo when there is danger of irreparable injury from delay in giving the notice required by equity rule 55, governing the issue of injunctions. While the statutory restraining order is a species of temporary injunction, it is only authorized, as § 718 imports by its terms, until the pending motion for a temporary injunction can be heard and decided." And in *U. S. v. Baltimore, etc. R. Co.* 225 U. S. 306, 32 S. Ct. 817, 56 U. S. (L. ed.) 1100, in answer to the contention that a certain order was improperly granted in that it was a temporary restraining order and the statutory requirements as to such order in that particular instance had not been complied with, the court, holding the order to be a temporary injunction, pointed out the distinguishing characteristics between the two as follows: "The statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the interstate commerce commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction pendente lite, which, to quote the words of the statute, may be granted by the court, to 'restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit;' third, in the nature of things a perpetual injunction upon the entry of the final decree. The order in this case, made after notice and hearing, suspending the force and effect of the order of the commission until the further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction pendente lite and not of the power to allow a temporary restraining order embraced in the first of the classes stated."

Construing a statute relative to injunctions (Georgia Code, § 3211) providing for the issuance of a temporary restraining order without notice in certain cases, the court, in *Strickland v. Griffin*, 70 Ga. 542, said: "It is apparent from the words of this section of the code that the judge cannot issue an injunction at all. He may, when the application is made, if it appear from the sworn allegations in the bill, or the affidavit of a competent person, that the injury apprehended will be done if an immediate remedy is not afforded—then, i. e., upon that condition and upon that alone, he may grant, instantan, a restraining order (not an in-

junction) against the party complained of, until the hearing or the further order of the court, and this restraining order shall have the force of an injunction, until rescinded or modified. Upon the hearing, which must take place under existing rules of law, the injunction may be granted or refused, on the terms required by law."

It has been held that if the effect that should be given to an order is doubtful, or if the language of the court will admit of such a construction, it should be considered as a temporary restraining order only. *State v. Graves*, 82 Neb. 282, 117 N. W. 717.

However, while a temporary restraining order is more temporary in its character than a temporary injunction, it is equally as binding while it is in effect. *State v. Werner*, 80 Kan. 222, 101 Pac. 1004, wherein it was said: "The temporary restraining order allowed by the probate judge is more temporary in character than a temporary injunction, but it is as imperative and binding while it is in force as any other injunction, and a violation of the order is as marked a case of contempt as would be the violation of a perpetual injunction."

In *Hurt v. Ches, etc. Co. (Ky.)* 111 S. W. 285, it was held that where the court continued in force until the final hearing of the case a temporary restraining order granted by the clerk, it thereby in effect granted a temporary injunction.

Duration of Order.

It may be said that the chief distinguishing characteristic between a temporary restraining order and a temporary or preliminary injunction consists in the duration or extent of its effectiveness, the former continuing in force only until such a fixed time as is ordered for the hearing as to whether a preliminary injunction shall be granted, when its force automatically ceases.

United States.—*Fenwick Hall Co. v. Saybrook*, 66 Fed. 389; *Barstow v. Beckett*, 110 Fed. 826; *Pack v. Carter*, 223 Fed. 638, 139 C. C. A. 184; *Fanshawe v. Tracy*, 4 Biss. 490, 8 Fed. Cas. No. 4,643.

California.—*Cohen v. Gray*, 70 Cal. 85, 11 Pac. 508.

Illinois.—*Anderson v. Hultberg*, 117 Ill. App. 231.

Indiana.—*Wallace v. McVey*, 6 Ind. 300; *Cincinnati, etc. R. Co. v. Huncheon*, 16 Ind. 436.

Kansas.—*State v. Johnston*, 78 Kan. 615, 97 Pac. 790; *In re Luttgerding*, 83 Kan. 205, 40 Pac. 95; *In re Sharp*, 87 Kan. 504, Ann. Cas. 1913E 460, 124 Pac. 532.

Nebraska.—*State v. Wakeley*, 28 Neb. 431, 44 N. W. 488; *State v. Greene*, 48 Neb. 327, 67 N. W. 162; *Trester v. Pike*, 60 Neb. 510,

83 N. W. 676; *State v. Graves*, 82 Neb. 282, 117 N. W. 717.

New Jersey.—*Central R. Co. v. Standard Oil Co.* 33 N. J. Eq. 372.

Oklahoma.—*Ex p. Grimes*, 20 Okla. 446, 94 Pac. 668; *Smith v. State*, 159 Pac. 941.

Texas.—*Riggins v. Thompson*, 96 Tex. 154, 71 S. W. 14; *McWilliams v. Commissioners' Ct.* 153 S. W. 368; *Cole v. Forto*, 155 S. W. 350; *Holman v. Cowden*, 158 S. W. 571; *Hartzog v. Seeger Coal Co.* 163 S. W. 1055; *Soto v. State*, 171 S. W. 279. And see the reported case.

Utah.—*Miles v. Sheep Rock Min. etc. Co.* 15 Utah 438, 49 Pac. 536.

Washington.—*Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953.

"It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation." *State v. Wakeley*, 28 Neb. 421, 44 N. W. 488.

In *State v. Johnston*, 78 Kan. 615, 97 Pac. 790, the court said: "Temporary injunction' and 'restraining order' are often used synonymously. Our statute and the better usage limits the meaning of 'restraining order' to such an order as is operative only until a hearing can be had upon an application for an injunction, and of 'temporary injunction' to an order operative usually until the final hearing of the case in which it is used. . . . The restraint which the order purports to impose, and not the name given to it, determines its true name and character. The order of the probate court enjoined the appellant until the further order of the district court or the judge thereof in the premises. It required no revocation, but expired upon the making of an order by the district court or judge. It was simply a restraining order, and within the jurisdiction of the probate judge." And in *Wallace v. McVey*, 6 Ind. 300, it was said: "The restraining order contemplated by this section is limited in its operation, and extends only to such reasonable time as may be necessary to notify the adverse party. Temporary injunctions are usually granted in vacation, and in terms they continue in force until the further order of the court, which is frequently several months."

It is generally held that the words "until the further order of this court," contained in an order restraining the defendants until a hearing can be had and requiring the parties to show cause why a temporary injunction should not issue, do not have the effect of changing the order into a temporary injunction. *Curtiss v. Bachman*, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111; *Ex p. Grimes*, 20 Okla. 446, 94 Pac. 668. In the

case last cited the court said: "It is the fundamental inherent difference in the character of relief granted in a restraining order from that granted in a temporary injunction which causes the courts, notwithstanding the fact that the other contains provisions similar to 'until the further orders of this court,' and like clauses, to adhere to the restraining character of the order and deny it the force and vigor of an injunction." In *Hicks v. Michael*, 15 Cal. 107, discussing an order restraining the commission of certain acts "until the hearing of the whole matter" it was said: "The restraining order expired by its own limitation. It was issued under the provisions of the one hundred and sixteenth section of the practice act, and was intended only as a restraint upon the defendants, until the propriety of granting the provisional remedy of a temporary injunction could be determined, after hearing the parties. The concluding words of the order do not operate to change it into an injunction pending the suit. They only refer to the whole matter on the motion, and not to the whole matter in controversy."

An injunctive order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction. *State v. Baker*, 62 Neb. 840, 88 N. W. 124; *State v. Graves*, 82 Neb. 282, 117 N. W. 717; *State v. Dungan*, 89 Neb. 738, 132 N. W. 305. In *State v. Baker*, supra, it was said: "The order does not by its terms indicate or contemplate that a further hearing on the application was to be had before the application was finally acted upon; and herein, in our judgment, lies the chief distinguishing characteristics between a 'temporary order of injunction' and a mere 'restraining order' until the application is fully heard. There is nothing to indicate that he deemed it proper that the defendants should be heard before granting the injunction; no order or direction that any notice be given to such party to attend for the purpose of hearing the application; no time or place mentioned for such hearing; nor does the wording of the order itself indicate that it was to operate as a restraint on the defendants 'in the meantime,' and only until such hearing should be had."

An order restraining and enjoining the defendant "until the final determination of this action" has been held to be a temporary injunction rather than a mere restraining order. In *re Sharp*, 87 Kan. 504, Ann. Cas. 1913E 460, 124 Pac. 532. And it has been held that where an order restrained the parties "pending the further order of this court" and set no time for a hearing or at which the restraining order should expire it was to all intents and purposes a temporary injunction. *Houston Ice, etc. Co. v. Clint* (Tex.) 159 S. W. 409.

Necessity of Notice.

A temporary restraining order is generally granted without notice to the defendant and in this it differs materially from a temporary injunction which the courts seldom allow without notice and hearing. *Chicago, etc. R. Co. v. Burlington, etc. R. Co.* 34 Fed. 481; *Pressed Steel Car Co. v. Chicago, etc. R. Co.* 192 Fed. 517, 113 C. C. A. 73; *Cincinnati, etc. R. Co. v. Huncheon*, 16 Ind. 436; *Pleasants v. Vevay, etc. Turnpike Co.* 42 Ind. 391; *Terre Haute, etc. R. Co. v. St. Joseph, etc. R. Co.* 155 Ind. 27, 57 N. E. 530; *Mason v. Milligan*, 114 N. E. 3. In *Terre Haute, etc. R. Co. v. St. Joseph, etc. R. Co.* supra, the rule was stated as follows: "The infallible distinction between a temporary restraining order and a temporary injunction is that the former issues without notice on a showing of emergency and the latter issues only after notice and hearing."

An *ex parte* injunctive order is called a restraining order to distinguish it from a preliminary injunction, which is the order made after hearing. *Whitmer v. Whitmer* (Del.) 98 Atl. 940. But after a hearing on a motion to dissolve a restraining order and an order refusing to dissolve and continuing the order, it becomes in effect a temporary injunction. *Western Union Tel. Co. v. U. S. etc. Trust Co.* 221 Fed. 545, 137 C. C. A. 113. In that case the question arose as to the appealability of an order continuing a restraining order after hearing, and in answer to the contention that the order was merely a restraining order and therefore not appealable, the court said: "Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character. The order refusing to dissolve and modifying the restraining order was made upon a hearing upon an application of the telegraph company to dissolve it, and in the later order the former was by the court itself called 'a restraining order and injunction,' so that the second order falls, not only within the true interpretation, but within the terms of the statute, and the appeal from it invokes a review of the order of the day before which conditioned its issue."

Necessity of Bond.

As a rule the courts are prohibited by statute from issuing a temporary injunction unless a bond is given, but it is generally left to the discretion of the court whether

it shall require a bond on the issuance of a temporary restraining order. *San Diego Water Co. v. Pacific Coast Steamship Co.* 101 Cal. 218, 35 Pac. 651; *In re Mitchell*, 1 Kan. (Dass. Ed.) 643; *In re Luttgerding*, 83 Kan. 205, 110 Pac. 95; *State v. McQuillin*, 260 Mo. 164, 168 S. W. 924. Compare *Akin v. Rice*, 137 Mo. App. 147, 117 S. W. 655.

In *San Diego Water Co. v. Pacific Coast Steamship Co.* supra, it was said: "The restraining order is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction but discriminates between it and an injunction. It is a restraint pending the consideration of the court as to whether the party is entitled to a preliminary injunction. The statute does not expressly require an undertaking as a condition for a restraining order, although this court has said one ought to be required. Such undertaking is expressly required as a condition for a preliminary injunction which does not become operative until the bond is given."

It has been held that the fact that a bond was required and was given did not in itself change the character of a restraining order to that of a temporary injunction. *Ex p. Grimes*, 20 Okla. 446, 94 Pac. 668. In that case it was said: "The court may direct a reasonable notice to be given to the party against whom an injunction is sought, and may in the meantime restrain him; and this either with or without a bond in its discretion, and in either event the character of the order remains the same."

Necessity of Subpoena.

The fact that no subpoena is required to be issued on the granting of a restraining order was pointed out in *Allman v. United Brotherhood, etc.* 79 N. J. Eq. 150, 81 Atl. 116, affirmed in 79 N. J. Eq. 641, 83 Atl. 1118, as a further distinction between such an order and a preliminary injunction. In that case it was said: "Upon the authorities, therefore, my conclusion is, that a subpoena is not required to be taken out with a restraining order which commands the defendant to appear on the return day and show cause why an injunction should not issue, but that when a preliminary injunction issues *ex parte* upon the filing of a bill without any order to show cause being made, as it sometimes does, it runs—to use its language—until the defendant 'shall have fully answered the bill of complaint, and our said court shall make other order to the contrary;' and if the defendant would seek to have the restraint removed, he must answer (unless the chancellor shall allow the motion to be heard on affidavits under rule 123), and he can be compelled to answer only by the service of subpoena for that purpose."

STATE

v.

CHAVEZ ET AL.

New Mexico Supreme Court—August 17,
1914.

19 N. Mex. 325; 142 Pac. 922.

**Trial — Continuance — Denial Held
Harmless — Facts Proved without
Absent Witness.**

Sections 2986 and 2987, Comp. Laws 1897, require a continuance of a cause for absence of a witness only in case the applicant has "no other witness by whom such facts can be fully proved." Where, after the overruling of a motion for continuance, the desired fact is fully proved by other witnesses, the ruling of the court in denying the continuance, even if technically erroneous when made, is rendered harmless.

Appeal — Assignments of Error Insufficient.

Assignments of error held not available upon well-established rules of practice.

Instructions — Statement that There Has Been Perjury at Trial.

An instruction that "there has been manifest perjury by witnesses who have testified in this case, as counsel for both sides have claimed in their argument. They, of course, differ as to which witnesses have testified falsely. It is for you to determine from all of the evidence, which includes the appearance of the witnesses when testifying as well as what they said, what evidence you credit"—held erroneous, as violative of section 2994, Comp. Laws 1897, which forbids comment by the court upon the weight of the evidence.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Sierra county:
MECHAM, Judge.

Criminal action. Eduardo Chavez et al., convicted of assault with deadly weapon and appeal. The facts are stated in the opinion.
REVERSED.

Isaac Barth for appellants.

Ira L. Grimshaw for appellee.

[327] PARKER, J.—Appellants were convicted of the crime of assault with a deadly weapon.

They assign error upon the refusal of the court to grant a continuance. The same was sought on the ground of the absence of three witnesses. As to the testimony of one of them, the court required the State to admit that the absent witness, if present, would

testify as outlined in the affidavit in support of the motion, but as to the other two witnesses, he did not so require. Three other witnesses were produced by defendants, who testified to the identical facts in substance which it was alleged the absent witnesses would testify to. The sole defense of defendants was that of alibi, and all of the witnesses, both those who testified and those who were absent, were relatives of the defendants and who were absent, were relatives of the defendants and lived at the same place, and some of them in the same houses, with the two absent witnesses. The witnesses who testified fully covered the whereabouts of the defendants during the whole of the time of the occurrence of the alleged crime, and some of them covered all or nearly all of the identical facts set up in the affidavit for continuance as the proposed evidence of the two absent witness. Our statute requires an affidavit in support of a motion for continuance that the defendant "knows of no other witness by whom such facts can be fully proved." Section 2986 C. L. 1897. This was done in this case. But the essential fact to be proved was the absence of defendants from the scene of the alleged crime at the time it was committed. This was fully shown by the evidence of the defendants' witnesses and the admission by the State as to the evidence of the one witness. Under such circumstances it is clear that the affidavit of defendants was not true in substance, although it may have been technically so, owing to allegations of some more minute details therein as to the proposed testimony of the absent witnesses, and which details may [328] not all have been shown by the other evidence. Under such circumstances, the overruling of the motion for continuance, even if technically erroneous at the time it was done, becomes harmless at the later stage of the trial.

Counsel for defendants assign error because the court did not compel the State to admit the truth of the proposed testimony of the one absent witness as outlined in the affidavit for continuance, but instead only required it to admit that the witness would testify if present. In other words, counsel attacks the constitutionality of our statute, which was literally followed by the court. Sec. 2987, C. L. 1897. The answer to this assignment is twofold. First, no such question was presented to the trial court at the time the requirement was made. Second, counsel argues an entirely different question in the brief, viz.: that it is a violation of defendants' rights to compel them to go to trial without a witness, notwithstanding the admission by the State that the witness, if present, would testify as outlined in the affidavit. Both the assignment and the argument, therefore, must fail.

Counsel for defendants assign error upon the failure of the court to submit to the jury the question of the guilt of defendants of simple assault. This assignment is likewise not available to raise the question. The exceptions to the instructions in the lower court raised no such question, but went simply to the proper definition of assault. No request for the submission of simple assault to the jury was made by counsel for the defendants.

Counsel urges that there is a fatal variance between the allegations and the proof in this, that the charge is assault with a deadly weapon and the proof shows an ordinary assault and battery and nothing more. At the close of the case for the State, defendants' counsel moved the court to direct a verdict for defendants as to the second count of the indictment, (assault with deadly weapon) on the ground "that the proof of a completed assault—that is—the completed act of beating or striking—does not support an allegation of an assault, and is an entirely separate and [329] distinct offense." This motion in no way called to the attention of the court the alleged error set out in the assignment. Nor was it called to the attention of the court in the motion for a new trial. The objection, therefore, is not available in this court.

We may say, however, in passing, that the proof amply supports the charge of assault with a deadly weapon.

A question is raised, however, by the fourth assignment of error. It is this: the court in its sixteenth instruction used the following language, "There has been manifest perjury by witnesses who have testified in this case, as counsel for both sides have claimed in their argument. They, of course, differ as to which witnesses have testified falsely. It is for you to determine from all of the evidence, which includes the appearance of the witness when testifying as well as what they said, what evidence you credit."

Counsel for appellants raise a question which seems to be properly saved below, as to whether this instruction is not a comment on the weight of the evidence within the prohibition of Section 2994, C. L. 1897. It appears from the recital in the instruction that counsel for the State charged the defendants' witnesses with perjury, and that counsel for defendants charged the witnesses for the State with the same offense. Without intimating to the jury with which statement by counsel the court agreed, he did state in effect that he agreed with one of them, and asserted that perjury had been committed. It is true that he left it entirely to the jury to determine which set of witnesses was guilty of the offense. But he found as a fact, and so stated to the jury, that one set of witnesses had committed perjury. He

thus took from the jury one phase of their province, viz., to determine the weight and credibility of the evidence of each and every witness. Just what effect this may have had on the minds of the jury it is impossible to say. Of course, the issue was very narrow, it was as to where the defendants were at the time of the occurrence. But the jury were, by the instruction, debarred [330] from giving to the testimony of each witness such weight as, under all the circumstances, it was entitled to. The possibilities of honest error or mistake on the part of the witnesses were eliminated, and the jury were told in effect that if a witness testified one way it was perjury, and if he testified the other way, it was the truth. This was error.

The Attorney General attempts to justify the instructions under the doctrine that where a fact is admitted by both parties, it is not error for the court to assume the fact in an instruction. The doctrine has no application. If counsel for plaintiff asserts that A, a witness for defendant, has committed perjury, and counsel for the defendant asserts that B, a witness for the plaintiff, has committed perjury, there is no admitted fact. Besides, the doctrine relied upon is applicable, so far as we are advised, only when the admitted fact is one involved in the controversy under investigation, and which relates to the merits of the controversy. It is not applicable to a question of the credibility of witnesses.

For the reasons stated, the judgment of the lower court will be reversed, and the cause remanded with instructions to award a new trial, and, it is so ordered.

NOTE.

Propriety of Instruction or Comment by Court to Effect that Perjury Has Been Committed at Trial.

Perjury Not Expressly Imputed to Either Side.

The court in the reported case holds that it is error for a trial judge to instruct the jury to the effect that perjury has been committed at the trial, although the testimony is in sharp conflict and no designation is made of the side considered guilty, for the reason that it is within the province of the jury to determine the weight of the evidence, which involves the power of attributing error to honest mistake instead of to perjury. A like decision was rendered in *People v. Brow*, 90 Hun 509, 35 N. Y. S. 1009. An additional ground for such a holding would appear in the possibility that the remarks of the trial judge, while ostensibly impartial, may be understood by the jury as referring to the witnesses of a particular party. Thus in

Hunt v. Baker, 173 App. Div. 9, 160 N. Y. S. 45, the court said: "We think that there is a substantial basis for the defendant's complaint in this respect, and that the learned trial judge, by inadvertence, gave expression to views outside the latitude of judicial discretion. We realize that judges are human, and not infallible, and we realize the possibility that the learned trial judge may have suffered annoyance in the course of the trial of this case. At the same time we cannot overlook the difficulty referred to. Although there are other portions of the charge which are not free from criticism, we base our disapproval upon this language: 'But, gentlemen, men cannot differ as to whether a conversation occurred of this kind (referring to the alleged talk over the telephone) and what the subject of that conversation was and be honest. There cannot be any doubt about that. One side or the other—and I do not attempt to say where the truth lies at all—one side or the other is coming into court and telling something and telling it deliberately which is not true. One side or the other in this case, the people on one side or the other of this case, are absolutely unfit to associate with decent, honest, reputable people. You have got to go out and determine who it is, because one side or the other are not fit to do business with business men and do business on a level and be honest about it. And it is a disheartening thing, gentlemen, to think that anybody is coming into a court of justice and have a difference of opinion over their legal rights, not differing as to the law that governs them, but coming here and deliberately falsifying, that may seek something or defend something which is wrong.' What preceded and followed these remarks might well have led the jury to believe that the criticism was directed against the witnesses for the defense. . . . We do not think the record justified the learned judge in his characterization of those witnesses regarded by him as the offending witnesses. We think the court might have said that a verdict could be rendered either for the plaintiff or defendant without a finding on the part of the jury that any witness was 'unfit to associate with decent, honest, reputable people.'"

But where a judge gives no intimation as to the side on which he considers perjury to have been committed, it has been held that an expression of the opinion that one side or the other has committed perjury, while improper, is not ground for a new trial. *Horn v. State*, 102 Ala. 144, 15 So. 278; *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684; *Schafer v. Gilmer*, 13 Nev. 330. Thus in *Horn v. State*, supra, the court said: "While delivering the general charge *ex mero motu* to the jury, the presiding judge made certain

Ann. Cas. 1917B.—9.

statements of fact to them to which the defendant reserved exceptions. Among other things, he said this: 'Gentlemen of the jury there is great conflict in the testimony in this case, and in fact downright contradiction; and in my own opinion there has been a great deal sworn on the stand in this case that is untrue.' This statement is borne out by the transcript. There was much of conflict and 'down right contradiction' in the evidence, and there can be no doubt that 'a great deal sworn to on the stand' in the case was untrue. The conflict and contradiction were such as to admit of no reconciliation. There was no room for the jury to reconcile all the evidence and to believe it all. The only thing open to the jury was to determine what was true and what was false in the mass of evidence, a great part of which was, in the nature of things, untrue. On this state of case, the statement of fact by the judge being unquestionably correct, and his conclusion therefrom being inevitable, it is not conceivable how the expression of his opinion as to the untruth of a great deal of the testimony could have prejudiced the defendant, since there is nothing whatever in this part of the charge which indicates in the remotest degree what part of the evidence the judge thought to be untrue, or whether he had indeed any opinion that any particular part was untrue, or which tends to at all infringe upon the jury's undoubted right to find the truth upon either side of the conflict in respect of any point. While, therefore, this part of the court's remarks to the jury is out of the common and is not to be commended, since the general charge as well as special instructions should be strictly confined to statements of propositions of law arising upon or applicable to the evidence adduced in the case, no error of law or fact is involved in what was said, we do not think the jury could have been misled thereby to the defendant's prejudice, and we will not disturb the judgment on account of it." And in *Schafer v. Gilmore*, 13 Nev. 330, it was said: "In this case there is plain perjury on one side or the other. Either the plaintiff Henry Schafer, committed perjury or the witness Wadleigh, and one or the other of them ought to be in the penitentiary instead of being in this court room.' This charge was given to the jury before any of the written instructions were read. The objections urged by appellants' counsel are to that portion charging perjury. It will be observed that there is no intimation from the court as to which party it deemed guilty of the offense. It was left to the jury to determine the truth or falsity of the respective statements sworn to by the witnesses, Schafer and Wadleigh. These witnesses had solemnly testified diametrically opposite. In reply to the ques-

tion asked by the court, 'Did the stage tip over that day, between Robinson and Cherry Creek?' Wadleigh answered: 'I swear positively that it did not;' Schafer answered: 'Yes, sir; I am positive it did.' The court, in charging the jurors that there was false swearing 'on one side or the other,' only told them what they already knew, or ought to have known. Such remarks do not entitle a party to a new trial. (*State v. Glover*, 10 Nev. 24.) Perhaps it would have been better for the court to have withheld its opinion that either Schafer or Wadleigh ought to be in the penitentiary. But it is apparent that the remarks of the court were only intended, and could only have been understood by the jury, as placing the seal of its condemnation upon the crime of false swearing, and to impress upon the minds of the jurors that it was their duty to determine which one of the witnesses had sworn falsely." In *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684, the court said: "The only remark that we feel especially called upon to criticize is that made during the examination of Mrs. Taylor, the second witness for the defendant. The defendant was attempting to prove an alibi. The evidence for the People tended to show that the alleged offense was committed between seven and eight o'clock. This witness stated that she was at the house of defendant's mother and saw him eating breakfast as late as eight o'clock, and that he was about the house a short time after that. At the close of her evidence the court remarked, 'Somebody is lying about this.' We are not unmindful of the fact that this evidence discloses a very sharp conflict, and that it was apparent to any listener, and no less to the court, that it was not possible to reconcile this testimony with that given by the witnesses for the People; yet, however much the court may have felt the force of such situation, he was certainly not warranted in making such a declaration. We are not, however, able to say the conclusion necessarily or reasonably follows that the jury did or could infer from this remark that the expression of the court indicated his belief that the witness just leaving the stand was the one to whom that charge could be laid. If, upon the whole record, we entertained any doubt of the guilt of the plaintiff in error, arising from the closeness of the facts, we would deem it incumbent upon us to reverse this case."

Perjury Imputed to Particular Witness.

The general rule is that a trial judge commits error where he instructs or comments to the jury to the effect that a certain witness at the trial has given false testimony. *People v. Willard*, 92 Cal. 482, 28 Pac. 585;

Perkins v. Kinsey, 204 Ill. 275, 68 N. E. 486; *Swenson v. Erickson*, 90 Ill. App. 358; *Kinter v. State*, 45 Ind. 175; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673; *Bowman v. State*, 19 Neb. 523, 28 N. W. 1, 56 Am. Rep. 750 (judge in presence of some of jury who afterward sat in trial of cause said that defendant's affidavit for continuance was false); *Bonner v. State* (Tex.) 32 S. W. 1043 (requested charge that testimony of certain witness was false properly refused). Thus in *Kinter v. State*, supra, the trial judge stopped the cross-examination of one of the defendant's witnesses and remarked, "I have serious doubts whether that witness ought not to be recognized to answer for perjury." The court said: "The action of the court is defended by the counsel for the appellee on the ground of the improbability of the testimony of the witness, arising out of the facts narrated by him, and his deportment on the stand. We do not think the action of the court can be sustained on that ground, or on any ground. The question whether the witness was worthy of credit or not was a question for the jury, and the defendant was entitled to have that question go to them without the remarks from the court disparaging or destroying the force to his testimony and showing that in the opinion of the court the witness had committed perjury. Had the court made use of the remarks in question in a formal instruction to the jury, no one could doubt, we think, as to its impropriety. We think it was equally improper for the court to make the remark when and in the manner made."

The error of such a remark cannot always be cured by an instruction to the jury to disregard it. *Swenson v. Erickson*, 90 Ill. App. 358, wherein the court said: "Bernard Muehrcke, the constable who executed the writ of attachment, was a material witness for plaintiffs in error. Being questioned in regard to the restaurant of defendant in error, the following occurred: 'Q. What kind of place was it? A. It was one of those cheap restaurants where they serve ten and fifteen cent meals. Mr. Cox: Q. How do you know? Did you ever buy any meals there? A. No, sir. The Court: Evidently, sir, this man is making this testimony out of whole cloth.' The attorney for plaintiffs in error excepted to the remark of the court. That the remark was well calculated to discredit the witness with the jury, and was consequently prejudicial to plaintiffs in error, is, we think, too clear to admit of discussion. . . . The court instructed the jury that they should not be influenced by any remark of the court touching the credibility of any witness, but we cannot think that the instruction cured the error. The remark was made

near the commencement of the examination of the witness; he testified afterward at great length, and it would be only natural, if the jury after hearing such a remark by the court, would give but little, if any, attention to the testimony of the witness, or disregard it altogether. At least such might be the effect of the court's remark."

But the error of the trial judge in expressing the opinion that a certain witness has not told the truth is sometimes not sufficient to overthrow the verdict. *State v. Burwell*, 52 Kan. 686, 35 Pac. 780; *Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71. In the case last cited the court said: "The record shows that D. M. Carlton was examined by both plaintiff and defendant at different times, and his testimony introduced in the form of depositions at the trial. The statements of the witness in the two depositions were very conflicting, and would impress even a casual observer with the idea that the witness was far from reliable. When the second deposition given by Carlton was offered at the trial, the court asked the question, 'Whose deposition is that?' and, upon being informed that it was the deposition of the witness Carlton, made use of the following expression: 'He must be an awful liar.' There can be no doubt that a remark of this character was extremely reprehensible, and tended to detract from the dignity of the court and the entire proceeding. No court can expect the litigants, the bar or the public to retain respect for its proceedings when the court itself is lacking in the dignity which should attend the trial of causes; but it is not every expression of the court, however reprehensible it may be, that will work the reversal of a judgment. The remark made by the court in this case applies as fully to the testimony of the witness offered by the plaintiff below as it did to the testimony of the same witness offered by the defendant below. In the case of *The State v. Burwell*, 52 Kan. 686, a witness was personally giving testimony before the jury, and, in response to an objection made to an inquiry, the trial court remarked, 'It seems to me that the state could just let this witness go right on with his romance.' This was a remark touching the testimony of a witness introduced by the defendant alone, and upon trial of a felony case; and while the supreme court, in passing upon the remark of the trial court, criticised its action quite severely, yet it declined to reverse the judgment on account of such a remark. In this case, then, had the remark not been made which was made by the trial court, the jury must have been impressed with the fact that the witness, Carlton, did, either in the one deposition or the other, testify falsely upon the material facts at issue, and we apprehend it could have

given neither deposition much weight in the determination of the case. We cannot see that the plaintiff in error was prejudiced by the remark of the court, and therefore the judgment will not be reversed on account of such remark."

In *Pennsylvania* it has been held that if the trial judge leaves to the jury the determination of the facts, he commits no error in calling the attention of the jury to false testimony and in expressing his opinion that it is false, where such a conclusion is justified by the state of the evidence. *Price v. Hamscher*, 174 Pa. St. 73, 34 Atl. 546; *McClintock v. Pennsylvania R. Co.* 21 W. N. C. 133.

LEE

v.

STATE.

Arizona Supreme Court—December 29, 1914.

16 Ariz. 291; 145 Pac. 244.

Extortion — Sufficiency of Indictment — Particulars of Threat.

Under Pen. Code 1913, § 943, providing that an information is sufficient if it states the act charged as the offense clearly and distinctly in ordinary and concise language, so as to enable a person of common understanding to know what is intended, and with sufficient certainty to enable the court to pronounce judgment, and which contains the formal allegations of the necessary jurisdictional facts, an information for extortion by threat to accuse another of a crime as defined by Pen. Code 1913, §§ 512, 513, which charges that the defendant threatened to accuse another of grand larceny, is sufficient without alleging the particulars of the larceny.

Proof of Other Offenses.

In a prosecution for extortion by threatening to accuse another of the larceny of a cow, where the theory of the prosecution was that defendant compelled the prosecuting witness to kill a cow belonging to another so that defendant and his confederates could accuse him of the crime, and then extorted money from him to forego making the accusation, evidence that the defendant pointed a gun at the witness, and thereby forced him to kill the cow, is admissible as part of the transaction, although it tends to show the commission of another crime by defendant.

[See generally 105 Am. St. Rep. 976.]

Same.

Evidence that tracks were found leading to the place where the cow was killed is also

admissible as tending to corroborate the testimony of the prosecuting witness.

Instructions — Defining Unrelated Crime.

In a prosecution for extortion by a threat to accuse another of a crime as defined by Pen. Code 1913, § 513, subd. 2, it is error for the court to read to the jury subdivisions 1, 3, and 4 of that section defining extortion by other threats.

Same.

The error in such instruction is harmless where the only evidence of threats is a threat to accuse the other of grand larceny, especially where the court, after reading subdivision 2 of the section, states that that is the one under which the prosecution is brought.

Same.

In a prosecution for extortion by threatening to accuse another of grand larceny, it is error to read to the jury all of Pen. Code 1913, §§ 481, 483, 484, defining grand larceny, and not to confine the instruction to the particular kind of larceny to which the threat referred.

Extortion — Threat to Accuse of Crime.

One who extorts money from another by a threat to accuse the other of a crime is guilty of extortion, whether the other is in fact guilty or innocent of the crime referred to in the threat.

[See note at end of this case.]

Appeal from Superior Court, Graham county: McALISTER, Judge.

Criminal action. Robert E. Lee convicted of extortion and appeals. The facts are stated in the opinion. **AFFIRMED.**

John McGowan for appellant.

G. P. Bullard and *Leslie C. Hardy* for respondent.

[292] Ross, J.—This appeal is prosecuted from a judgment of conviction of the crime of extortion. Complaint is made of errors (1) in overruling a demurrer to the information for insufficient facts to constitute the offense of extortion; (2) the admission of evidence over objection; and (3) the giving of erroneous instructions to the jury. We will consider these assignments in their order.

The charging part of the information is as follows:

"The said Robert E. Lee, on or about the 7th day of November, 1912, and before the filing of the information in the county of Graham, state of Arizona, did willfully, knowingly, unlawfully and feloniously obtain certain personal property, to wit, \$1,600 lawful money of the United States, from one H. E. Smith, then and there being with his said H. E. Smith's consent, which said consent was then and there induced by wrongful

use of force and fear by and upon the part of said Robert E. Lee, defendant, to wit, by a threat then and there made and communicated to said H. E. Smith by said defendant, to accuse him, the said H. E. Smith, of having committed a crime, to wit, the crime of grand larceny in said county of [293] Graham, and said personal property then and there being the property of said H. E. Smith."

Extortion is defined by the Penal Code of 1913, section 512, as follows:

"Extortion is the obtaining of property from another with his consent induced by wrongful use of force or fear or under color of official right." The "fear" mentioned "may be induced by a threat . . . (2) to accuse him . . . of any crime." Id. 513.

The appellant contends that the information is defective in that it fails to describe sufficiently the crime of which accusation was threatened, and he insists that the information, to be good, should set forth the particulars of the crime threatened. In other words, he says that the allegation that defendant threatened to accuse Smith with the crime of "grand larceny" is a mere conclusion of law, and that it cannot be made to take the place of the facts constituting the accusation. The offense with which appellant is charged is extortion, and the gist of it is the obtaining the property of another with his consent induced by fear of a threatened prosecution for a crime. For some cases the description of an offense by its generic name will indicate all the essentials of such offense. That is true of such well-known offenses as arson, burglary, larceny and murder. *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99.

If the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the rights of the case, and contains the formal allegations of jurisdictional facts, the information is sufficient. Section 943, Pen. Code 1913. Tested by this statutory rule, it seems to us that the information is sufficient. That it is not necessary in an indictment or information of extortion to give a technical description of the accusation threatened against the prosecutor is supported by *Com. v. Philpot*, 130 Mass. 53; *State v. Lewis*, 96 Ia. 286, 65 N. W. 293; *Com. v. Murphy*, 12 Allen (Mass.) 449; *State v. Stewart*, 90 Mo. 507, 2 S. W. 790; *Williams v. State*, 13 Tex. App. 285, 46 A.M. Rep. 237; *Cohen v. State*, 37 [294] Tex. Crim. 118, 38 S. W. 1005; *State v. Robinson*, 85 Me. 195, 27 Atl. 99. It is sufficient to

charge that defendant threatened to accuse the prosecutor of a specified crime. *Com. v. Goodwin*, 122 Mass. 19; *Com. v. Moulton*, 108 Mass. 307; *Com. v. Dorus*, 108 Mass. 488; *Com. v. Murphy*, 12 Allen (Mass.) 449; *Com. v. O'Brien*, 12 Cush. (Mass.) 90; *Moore v. People*, 69 Ill. App. 398; *People v. Gardner*, 73 Hun 66, 25 N. Y. S. 1072. See note, 9 Ann. Cas. 196.

To properly understand the other two assignments of error, it is necessary to epitomize the facts as developed at the trial. The prosecuting witness Smith testified that defendant and three confederates enticed him, by representing to him that one of his cattle was down, to go to an out-of-the-way place near his ranch, and that upon his arrival there he was commanded by the defendant, who pointed a gun at him to enforce his orders, to take an ax that was given him and kill a cow that defendant and confederates had tied to a tree; that he did as directed; that after the animal was killed he asked defendant, "What he meant by pulling a gun on me and making me kill that cow." The defendant answered, "He wanted a hundred head of cattle or \$3,000." "I told him I couldn't give him \$3,000, nor a hundred head of cattle." "He said he would take the hide to Foster and Marshall (who were the owners), and he and what others he had on the hill there would swear against me and stick me." "I told him I couldn't get him \$3,000, and he says: 'If you will give me what Foster and Marshall are giving me, \$2000, I will let you off.'" That the defendant compelled him to help skin the animal, and said, taking the hide, "If I would pay him \$200 the next morning he would keep the hide and not present it to Foster and Marshall." The prosecutor paid the \$200 the following morning by check at defendant's home, and four days later gave defendant \$1,600, and received the hide from defendant. The defendant's testimony differs from that of the prosecuting witness, in that he says he knew the prosecutor was going to kill the animal at the time and place named, and that he knew that Foster and Marshall were offering a reward for the apprehension of persons stealing their cattle, and, knowing these facts, he laid for Smith and caught him; that Smith begged him not to divulge to Foster and Marshall [295] his crime, and voluntarily gave him \$1,800 to keep the crime a secret.

The evidence objected to by defendant, and the admission of which he assigns as error, was evidence given by the prosecuting witness of the defendant's pointing a gun at him, and of tracks leading to where the animal was killed. He says he was charged with extortion induced by use of threats: that the information does not charge the wrongful

use of force; and that the state was permitted by such evidence to prove another and different offense than the one alleged in the information. The rule invoked by the appellant is not applicable to the facts of this case. The state was entitled to prove all the facts of the transaction, even though they did disclose another and different crime than that laid in the information. In his case, on the theory of the prosecution, it was evidently the plan or scheme of appellant to compel the prosecuting witness, by the assault with a gun upon him, to kill the animal, and then charge him with larceny and by superior numbers prove the charge, unless silence was purchased by the payment of \$2,000. Indeed, the plan or scheme, if true, embraced three crimes, larceny of the animal, assault with a deadly weapon, and extortion, all involved in the one transaction. *Jones*, Commentaries on Evidence, sec. 145. *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286.

Proof of the tracks leading to the place where the animal was killed was also competent and relevant as corroborating the testimony of the prosecuting witness.

The court in instructing the jury as to what constituted "fear," instead of confining itself to the specific charge in the information, read all of section 513 of the Penal Code of 1913. It is contended by appellant that this was prejudicial error. Subdivisions 1, 3 and 4 of that section, defining fear induced by threats, should not have been read to the jury for the reason that the state did not rely upon the kinds of fear therein mentioned, but relied upon a fear induced by a threat to accuse the prosecuting witness of a crime. The definition given to the jury should have been restricted to the charge. The injection of the other circumstances constituting fear, under the facts of the case, were mere abstract propositions of law, and without place in the instruction.

[296] But as the evidence was all of the fear of being accused of grand larceny, it does not seem possible that the jury could have been misled or influenced in its verdict by this instruction in the form in which it was given, especially in view of the fact that the court in reading section 513, after subdivision 2, said: "This is the subdivision under which this action is brought." *Simons v. State* (Tex.) 34 S. W. 619; *Hargrave v. State* (Tex.) 30 S. W. 444.

The court submitted to the jury the question as to whether what was said and done by defendant in his threat constituted a threat to accuse the prosecuting witness of the crime of grand larceny, and in that connection defined larceny by reading sections 481, 483 and 484, Penal Code of 1913. What we have said concerning the instruction be-

fore this is applicable to this instruction. The court should have restricted its instruction to defining the kind threatened to be charged and proved on the trial.

The appellant complains of the court's instructions wherein the jury were told "that even though Smith was actually guilty of stealing the cow, and was caught in the act of butchering her, if the defendant, because of the fear that Smith had of being prosecuted, did use that as a means of frightening Smith into the payment of the money, and actually did frighten him into paying the money, and afterward did receive the money of Smith, the defendant would yet be guilty of extortion, and it would be your duty to so find him guilty." This is a correct statement of the law. *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *Kessler v. State*, 50 Ind. 229; *State v. Debolt*, 104 Ia. 105, 73 N. W. 499; *State v. Waite*, 101 Ia. 377, 70 N. W. 596; *People v. Eichler*, 75 Hun 26, 26 N. Y. S. 998; *People v. Wickes*, 112 App. Div. 39, 98 N. Y. S. 163.

In *People v. Eichler*, supra, the court said:

"The fact that the person who, in writing or orally, makes such a threat for such a purpose believes or even knows that the person threatened has committed the crime of which he is threatened to be accused, does not make the act less criminal. The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. [297] The intent is the same in both cases, to acquire money without legal right, by threatening a criminal prosecution. But threatening a guilty person for such a purpose is a greater injury to the public than to threaten an innocent one, for the reason that the object is likely to be attained and the result is the concealment and compounding of felonies to the injury of the state."

The judgment of the trial court is affirmed, and it is accordingly so ordered.

Franklin, C.J., and Cunningham, J., concur.

NOTE.

Threat to Accuse of Crime as Criminal Offense.

It is intended in this note to consider the recent cases discussing the question whether a threat to accuse another of crime constitutes a criminal offense. For a review of the earlier cases see the notes to *State v. Louanis*, 9 Ann. Cas. 194, and *State v. Coleman*, 116 Am. St. Rep. 457.

In most jurisdictions, statutes, substantially similar in their terms, provide in effect that it shall be a criminal offense for any person to solicit money or other valuable thing, or attempt to gain any advantage over another, by threatening, either verbally or in writing, to accuse him of any crime. *State v. Browning*, 153 Ia. 37, 133 N. W. 330; *Matter of Hart*, 131 App. Div. 661, 116 N. Y. S. 193; *Jones v. State*, 7 Ohio Cir. Dec. 716, 14 Ohio Cir. Ct. 363; *In re Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761, 40 L.R.A.(N.S.) 801; *Williams v. State*, 51 Tex. Crim. 1, 100 S. W. 149. See also *Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571. And see the reported case. Thus in *State v. Browning*, supra, the court said that a threat to accuse another of crime unless he paid a sum of money or did something else against his will for the purpose of extortion was a malicious threat, though it was followed by an arrest. In the case of *Matter of Hart*, 131 App. Div. 661, 116 N. Y. S. 193, it was held that the service of a magistrate's summons procured by an attorney engaged to prosecute a civil action for assault on a young girl by the person served, while not the actual commencement of a criminal prosecution, amounted to a threat of such a prosecution. The court said: "It was at least as effective, if not more so, than a letter threatening a prosecution would have been, and from the whole evidence we cannot escape the conviction that the service of the summons from the magistrate's court was intended merely as a threat of a criminal prosecution made in order to force a settlement of the civil action which was contemplated and prepared for before the criminal summons was taken out, and that the respondent never actually intended to prosecute Crane criminally. If this be so, there can be no doubt that the respondent acted illegally, improperly and unprofessionally." In the case of *Matter of Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761, 40 L.R.A.(N.S.) 801, it was held that the fact that the respondent, who was an attorney at law, was not seeking to obtain property for himself, and would not be benefited by obtaining it, was immaterial. The court said: "If, as claimed by the respondent himself, these letters were written by him with the full knowledge of his client, the respondent, in assisting her, by advising and writing the letters to carry out the scheme, rendered himself jointly guilty with her of the crime of extortion if, under such facts, she would be guilty."

It has been held to be a crime to threaten to accuse a person of fornication or adultery. *People v. Gillette*, 140 App. Div. 27, 124 N. Y. S. 470, reversing order 66 Misc. 516, 124

N. Y. S. 420; *State v. Barr*, 67 Wash. 87, 120 Pac. 509. Thus in *People v. Gillette*, supra, the indictment accused the relator and another of the crime of attempting to commit extortion by obtaining a sum of money by a verbal threat to accuse a married man publicly of the crime of having had sexual intercourse with a woman not his wife. Holding that a verbal threat was sufficient to constitute the felony, the court said: "The special county judge holds that, if the threat in extortion is verbal merely, it is only a misdemeanor; that in order to be a felony it must be a written threat, as well as the threat in blackmail. It seems to us this will not answer. If the legislature intended to provide that the threat must be written in order to constitute extortion, it would have so provided. Extortion and blackmail are punishable to the same extent, fifteen years. In extortion property must be actually obtained. In blackmail there need not be any property secured at all. The severity of the crime as regards the threat is in the fact of its being written instead of verbal."

It is immaterial whether the person against whom the threat is directed is guilty or innocent of the crime of which he is threatened to be accused. *Matter of Hart*, 131 App. Div. 661, 116 N. Y. S. 193; *In re Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761, 40 L.R.A. (N.S.) 801; *Rex v. Odell*, 22 Can. Crim. Cas. 39. And see the reported case. Thus in the case of *In re Sherin*, supra, the court said: "It might be claimed that, inasmuch as the charges contained in such letters were true, no crime was committed by respondent. The offense before us lies, not in making the charges of wrongdoing upon the part of C and his paramour, but in making threats of prosecution based upon such charges. The fact that they were guilty of the crimes charged would not render the writing of the letters less criminal."

Under some statutes it has been held that the gist of the offense is the obtaining of money or other valuable thing by means of a threat. *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039; *Rex v. Odell*, 22 Can. Crim. Cas. 39.

In *State v. Nethercutt*, 48 Wash. 105, 92 Pac. 938, it was held that a complaint charging the defendant with unlawfully, feloniously, wilfully, maliciously and verbally threatening another of having committed the crime of bribery with the intent to extort money and other pecuniary advantage did not charge a common-law offense.

STATE

v.

GISH.

Iowa Supreme Court—December 18, 1914. --

168 Iowa 70; 150 N. W. 37.

Automobiles — Operation of Automobile without Number Plates — Official Delay in Furnishing Plates.

Acts 34th Gen. Assem. c. 72, regulating automobiles, by section 3 requires the owner to register his machine with the secretary of state; and section 6 declares that on the filing of an application, and the payment of the fee, the secretary shall assign a number and without expense to the applicant issue and deliver, or forward by mail or express to such owner, a certificate of registration, and two number plates. Section 12 declares that no person shall operate a motor vehicle on the highways of the state after July 4, 1911, unless the vehicle shall have a distinctive number assigned to it by the secretary of state, and two number plates with numbers corresponding to those of the certificate of registration, conspicuously displayed, front and rear, section 22 declaring that a violation of sections 3-15, inclusive, of the act shall constitute a misdemeanor punishable by a fine. Held, that the gist of the offense was not the operation of a motor vehicle, but rather the failure to attach and display the number plates while so operating; and hence, where defendant had properly re-registered his machine for the year 1913, with the secretary of state, been assigned a number, and had paid the necessary license fee, but because of inability of the secretary to furnish plates, none had been received by defendant, his operation of his automobile with the plates for the previous year attached, by which it was properly identifiable until those for the year 1913 could be obtained, did not constitute a violation of the statute.

[See note at end of this case.]

License Tax — Validity.

A reasonable fee may be imposed by statute as an incident to the exercise of the state's police power to regulate the use of highways by motor vehicles.

[See generally Ann. Cas. 1912D 239; Ann. Cas. 1914D 483.]

Violation of License Law — Proof of Venue Insufficient.

Where defendant, a resident of Hamilton county, while driving his automobile in Hardin county, was arrested for operating the same without having number plates for the current year displayed, and it did not appear that he had ever operated the machine in Hardin county prior to that date, the fact that he may have operated it in Hamilton county while he was in default will not justify his conviction in Hardin county, under an information charging the commission of the offense in that county.

Appeal from District Court, Hardin county: ALBROOK, Judge.

Criminal prosecution. B. H. Gish convicted of violation of motor vehicle statute and appeals. The facts are stated in the opinion. REVERSED.

Wesley Martin for appellant.
George Cosson for appellee.

[72] EVANS, J.—The information charged the defendant with the violation of Secs. 7, 8, and 12, of Chapter 72 of the Acts of the 34th General Assembly, in that on May 29, 1913, he operated upon the public highway his motor vehicle, without having displayed thereon registration numbers, as required by the statute. That the defendant was operating his motor vehicle upon the public highway on the date named and that no number plates for 1913 were displayed thereon was and is conceded. His denial of guilt was predicated upon his inability to obtain from the secretary of state his official number plates, he himself having complied with every prerequisite of the statute to entitle him to such number plates. He offered evidence tending to prove that more than one month prior to May 29, he had properly re-registered his motor vehicle with the secretary of state and had paid the full fee required therefor; and also tending to show that the re-registration had in fact been entered by the secretary of state and a 1913 number assigned to the defendant, and that the re-registration receipt, including the number, had been received by the defendant; that the defendant failed to receive his number plates and that such failure was through no fault on his part. This line of evidence was all rejected on the ground that the sole question to be tried was whether the defendant operated his motor vehicle upon the public highway at the time alleged without displaying the required number plates. Upon this holding the defendant was necessarily convicted, regardless of the reason for the failure to display number plates and regardless of the question of his own default in relation thereto. We are first confronted, [73] therefore, with the necessity of construing the statute upon which the prosecution is based.

The information charged the violation of sections 7, 8, and 12 of Chapter 72 of the Acts of the 34th General Assembly "and amendments thereto." This chapter was amended by chapter 130 of the Acts of the 35th General Assembly. By this amending chapter, substitutes were enacted in lieu of sections 7 and 8 of the previous statute. Such substitutes, however, made no changes in sections 7 and 8 that bear upon any question involved in this case. For the conven-

ience of this discussion, therefore, we will take no account of the amending Chapter 130, Laws Thirty-fifth General Assembly, and will refer to the sections as numbered in the previous statute. The evidence on the trial disclosed no violation of Secs. 7 and 8. The only offense contended for by the state was the violation of Sec. 12, which is as follows:

"Sec. 12. No person shall operate or drive a motor vehicle on the public highways of this state after the fourth of July, nineteen hundred eleven, unless such vehicle shall have a distinctive number assigned to it by the secretary of state, and two number plates with numbers corresponding to that of the certificate of registration conspicuously displayed, one on the front and one on the rear of such vehicle, each securely fastened so as to prevent the same from swinging."

Section 3 of the act in question puts the duty of initiative upon the owner of a motor vehicle and requires him to register such vehicle with the secretary of state and to furnish certain data in his application for such registration. Sections 7 and 8 provide for the payment of the annual fee to the same officer. Section 5 lays upon the secretary of state the duty to make the registration in a public record and to assign to the vehicle a "distinctive number." Section 6 provides as follows:

"Sec. 6. Upon the filing of such application and the payment of the fee hereinafter provided, the secretary of state [74] *shall* assign to such motor vehicle a distinctive number and, without expense to the applicant, issue and deliver or forward by mail or express to the owner a certificate of registration, in such form as the Secretary of State shall prescribe, *and two number plates.*"

When the owner has complied on his own part with every requirement of the statute necessary to *entitle him to receive* the number plates from the secretary of state, and he fails to receive the same only because such official is unable to furnish them, is this a lawful excuse for his failure to display such number plates upon his motor vehicle? And in such case, is it a violation of Sec. 12 to operate such vehicle upon the public highway without displaying such number plates?

To put it in another way, what is the gist of the offense defined in such section? Is it the *operation* of the motor vehicle? Or is it the *failure to attach and display the number plates* while operating the vehicle?

It will be noted that Sec. 12, above quoted, in terms prohibits the operation of a motor vehicle upon the public highways "unless such vehicle shall have a distinctive number assigned to it by the secretary of state and two number plates . . . conspicuously displayed, etc." Construing this section alone without regard to any constitutional limita-

tion and without regard to the alternating duties of the owner and the secretary of state as specified in the preceding sections already referred to, it would bear the construction put upon it by the trial court. According to such construction, the operation of the vehicle is absolutely prohibited if number plates cannot be obtained, regardless of any fault on the part of the owner. This construction has its analogy in the construction adopted by us of the statutes relating to the sale of intoxicating liquors and to permits and consents to sell. The reason of such construction of such statutes is that absolute prohibition of the sale of intoxicating liquors is the rule in this state and that [75] such prohibition is not lifted except by the full performance of the necessary conditions precedent.

These statutes and our construction thereof rest upon the undoubted legislative authority to enact absolute prohibition of the sale of intoxicating liquors. If the legislature has authority to enact absolute prohibition of the use of motor vehicles, it might afford a reason why an analogous construction should be put upon Sec. 12 above quoted as is put upon such statutes relating to sales of intoxicating liquors. But counsel for the state do not claim so broad a legislative authority. Doubtless no one will contend that the legislature can absolutely prohibit the use of motor vehicles without transcending its constitutional limitations. It may regulate their use; but it can no more prohibit such use than it could prohibit the use of lumber wagons. The right of regulation rests upon its own peculiar ground, and is free from constitutional objection. As a means of such regulation, there may be imposed upon the owner reasonable duties which shall be performed by him as a condition precedent to his use of the vehicle.

Taking the entire legislative act now under consideration, it is manifestly a regulation of the use of motor vehicles and not an attempted prohibition thereof. It ought, therefore, to be construed consistently with its character in that regard. The gist of the violation, therefore, must be not the mere use of the motor vehicle by the owner, but the failure of the owner to perform the statutory duties laid upon him as conditions precedent to its use. In order that the owner may be constitutionally precluded from the use of his vehicle, he must himself be found in default in the performance of some statutory duty imposed upon him as a condition precedent to its use.

Turning now to Secs. 3, 7, and 8 of the act in question, we have already noted that they require a registration, or application for registration, and the payment of the required fee by the owner of the vehicle. There-

upon Secs. 5 and 6 of the act define the duties of the secretary of state in relation to [76] such registration. These duties include that of forwarding to the owner, without expense, "two number plates."

These number plates being furnished, Sec. 12 casts upon the owner the duty to attach them to his vehicle "conspicuously displayed." If, in the case before us, the number plates had been received by the defendant and he had failed to use them in the manner specified, he would be clearly guilty of violating Sec. 12. Assuming, however, as the rejected evidence tended to show, that the secretary of state failed to forward the number plates, manifestly the defendant could not be in default for failure to attach them. He could neither supply them himself nor substitute others for them. Section 12 must be construed in the light of Sec. 6. Section 6 in terms undertakes that number plates shall be furnished to the owner. The mandate of Sec. 12 that such number plates shall be attached to and conspicuously displayed upon the vehicle necessarily rests upon the implication that the requirements of Sec. 6 shall have been first duly performed. Counsel for the state do not contend for any power in the legislature to penalize the owner of a vehicle for failure of the state official to furnish the number plates. Their contention is that he is subject to penalty for using his vehicle before getting the number plates. To put it in another way, that he is subject to penalty for not desisting from the use of his vehicle until he shall receive the number plates, however long the delay. But to compel the owner to desist from the use of his vehicle for an indefinite length of time because of the inability of the official machinery of the state to furnish him the number plates, as contemplated by the statute, would of itself amount to a very practical penalty which might operate more seriously upon him than the maximum fine imposed by the statute. If the legislature is without power to impose upon him a direct penalty for the mere default or failure of another, the statute ought not to be construed so as to impose an indirect penalty upon him under the same circumstances and without any default on his own part. The owner's right to the use of his [77] vehicle after complying with the statutory duties imposed upon him is a substantial property right. It is common knowledge that the daily business of thousands of people in the state is dependent upon the daily use of such vehicles. It is a matter of public notoriety, also, that the machinery provided by the state for the furnishing of number plates has sometimes proved inadequate to meet the demands upon it; and that the secretary of state, without fault on his own part, has been unable some-

times to furnish number plates to those entitled to them without long delay. The construction of the statute which is contended for by the state would require many thousands of vehicles to stand unused waiting for some belated factory to perform its broken contract with the secretary of state. These considerations should not be overlooked in ascertaining the legislative intent, because these are conditions which arise naturally out of the practical operation of the law.

It is urged by counsel for the state that if the secretary of state failed to send to defendant his number plates, then such official is himself liable for violation of the statute, and that defendant has his remedy against him for such breach of duty. We see no substantial aid to the prosecution in this suggestion. It may be conceded that under a strict and literal construction of this act the secretary of state would be liable to punishment thereunder for his failure to send the number plates, however helpless he might be to do so. The penal provision of the act is Sec. 22, as follows:

"Sec. 22. The violation of any of the provisions of sections from three to fifteen both inclusive, of this act shall constitute a misdemeanor punishable by a fine not exceeding fifty dollars."

This argument only emphasizes the absurdity of result to which we would be logically led by adopting the construction of the act thus contended for. It is practically inconceivable that the legislature intended to punish a state official [78] for failing to perform an official act which for the time being was impossible. It is quite as inconceivable that it should intend such failure to result in penalty to a private citizen who was himself helpless either to prevent or to supply such failure.

Assuming, as we must, that the defendant could have proved the facts which his offered evidence tended to prove and that he could have shown himself free from all default in the performance of the precedent duties imposed upon him by the statute, it is repugnant to every sense of justice that he should be punished for his mere inability to obtain from the state the number plates due him. No statute ought to be construed to such a result if it will fairly bear a different construction. The purpose, of course, of statutory construction is to ascertain and declare legislative intent as expressed in the statute. It has often been held, however, that where a literal construction of a statute leads to absurdity or to manifest injustice or oppression, the court will not be bound by literal terms, but will seek a construction consistent with a sense of justice, if possible, and will presume such to have been the intent of the legislature. The following excerpts

from some of the cases sufficiently support this proposition:

"'Acts of Parliament are to be construed as no man that is innocent or free from injury or wrong be by a literal construction punished or endangered.' *Margate Pier Co. v. Hannam*, 3 B. & Ald. (Eng.) 266 [5 E. C. L. 278]. 'If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.' *State v. Clark*, 29 N. J. L. 96. 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *U. S. v. Kirby*, 7 Wall. 482, 19 U. S. (L. ed.) 278. 'It is [79] a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers. This is not a substitution of the will of the judge of that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include the act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words makes it unreasonable to believe that the Legislature intended to include the particular act.' *Holy Trinity Church v. U. S.* 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226. 'A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' *Jackson v. Collins*, 3 Cow. (N. Y.) 89. See also *Ryegate v. Wardsboro*, 30 Vt. 746; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Whitney v. Whitney*, 14 Mass. 88; *Pierce v. Emory*, 32 N. H. 508; *Austin v. State*, 22 Ind. App. 221, 53 N. E. 481." *State v. O'Neil*, 147 Ia. 513, 533, Ann. Cas. 1912B 691, 126 N. W. 454, 33 L.R.A. (N.S.) 788.

The manifest purpose of requiring registration and the display of official number plates is (1) to accomplish in advance the collection of the license or registration fee, and (2) to furnish a means of identification of the vehicle.

The pre-eminent purpose, however, of requiring annual re-registration and annual number plates (which is the requirement involved in the case at bar) is to accomplish the collection of the annual fee. Identification is not aided by mere re-registration or by a change of numbers or plates.

According to the offered evidence in the case at bar, the re-registration was made; the annual fee was paid. There was no *evasion* of means of identification. On the contrary, the defendant carried on display his 1912 number plates as such. No better means of identification were available. Having responded to the purpose and spirit of the law, and having [80] performed its letter as to every duty precedent imposed upon him, the defendant is hailed for punishment only because the official machinery of the state temporarily failed to perform the impossible task laid upon it.

We reach the conclusion, therefore, that Sec. 12 must be read as pursuant to Sec. 6. If the owner of a motor vehicle is otherwise free from default, his duty to attach and display his number plates as provided in Sec. 12 cannot arise until such number plates due him shall have been furnished by the secretary of state, as required by Sec. 6, and implied by such Sec. 12 as a fact accomplished. This duty imposed upon the owner by Sec. 12 arises out of, and follows after, the performance of the requirements imposed upon the state official by Sec. 6. It is therefore necessarily in abeyance until such antecedent requirement be performed. Any other construction would impose upon him an impossible duty. It is an old legal maxim, applicable to criminal cases especially, that there can be no obligation to perform the impossible: *Impossibilium nulla obligatio est*. For an application of this maxim, see authorities cited in 21 Cyc. 1741. It follows, therefore, that defendant's offered evidence tended to prove that on May 29, 1913, he was not himself in default as to any regulatory condition precedent to his right to use his vehicle. Granted that his use of the vehicle without displaying the number plates was sufficient *prima-facie* evidence against him as tending to show his default, we hold that he was entitled to show affirmatively as a defense that he had complied with all the requirements of the statute on his own part and had failed to receive his number plates through no fault of his own.

This construction saves the spirit of the act and perhaps its validity. If there is any evasion of the letter of the act, it is only because "the letter killeth," as it is sometimes wont to do.

2. Considerable attention has been devoted by appellant's counsel to the constitutionality of the act as a whole. The [81] main ground of attack has been upon that feature of the statute which imposes a registration fee in lieu of all others forms of taxation. The argument is that this adopts a special method of taxation for this particular property and a special method of distribution of the taxes thus collected, so as to deprive cer-

tain municipalities from all benefits of such taxation. The objectionable features of the statute in this regard are all contained in Sec. 9. This section provides for the cancellation of all assessments of motor vehicles upon the assessors' books, and provides for an exemption from all taxation except the registration fee. If appellant's contention were sustained in this regard, it would avail him nothing in this case. Our pronouncement, therefore, would be mere dictum. The statute in question involves not only the taxing power, but the police power of regulation as well. If we were to strike down Sec. 9, which section alone involves the exercise of the taxing power, it would still leave the remainder of the act quite intact and independent and involving only an exercise of the police power. That a reasonable fee may be imposed as an incident to the exercise of the police power of regulation is too well settled to require citation of authorities. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 U. S. (L. ed.) 1197; *Engel v. O'Malley*, 219 U. S. 128, 31 S. Ct. 190, 55 U. S. (L. ed.) 128; *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340.

Appellant does not assail the registration fee as being excessive. His own position is that he paid it and without protest. To strike out Sec. 9, therefore, would open no door of escape to the defendant, but on the contrary would subject his motor vehicle to assessment and taxation by the regular taxing officials.

3. The dissenting opinion filed herewith renders it necessary that a few further facts be detailed. The emphasis of the dissent seems to be put upon the suggestion that the date of the offense as alleged in the information, viz., May 29, 1913, was not material and that the defendant might have been found guilty for violation of the statute as of April 26, 1913. The defendant [82] himself testified: "I didn't start using my machine until the twenty-sixth day of April." Granting the foregoing to be sufficient to permit the affirmative inference that the defendant did use his vehicle on that date, there was no claim in the trial below that the state was entitled to a conviction for such offense, nor would the evidence in the record before us sustain a conviction as for an offense committed on any other date than May 29, 1913.

The defendant was arrested at Iowa Falls in Hardin County on the evening of May 29, 1913, under an information charging him with the violation of the statute on such date in Hardin County. He was convicted before a justice of the peace and appealed to the Hardin District Court. The defendant was not a resident of Hardin county. He was a resident of Blairsburg in Hamilton County. On May 29, he came in his vehicle

to Iowa Falls to attend a funeral. While there he was arrested, as already indicated. There is no suggestion of evidence in the record that the defendant had ever operated his vehicle in Hardin County prior to that date. If he was not guilty of committing the offense on May 29, then, under the evidence, he was not guilty of any offense at any time within the jurisdiction of the Hardin County courts. If it were true, therefore, that he had operated his vehicle on April 26 in his home county while he was in default in the payment of his annual registration fee, this would not justify his conviction in Hardin County under this information.

The significance of these dates is that the defendant offered to prove that on April 26, 1913, he remitted to the secretary of state the full registration fee of \$12.96 by bank draft drawn to the order of the secretary of state. The cancelled draft bearing such date was offered in evidence and was ruled out on the objection of the state. The defendant also offered in evidence the receipt of the secretary of state for such fee, such receipt being as follows:

[83] "State of Iowa, Department of State, W. S. Allen, Secretary. C. G. Watkins, Deputy. R. S. Hayward, Chief Deputy. Motor Vehicle Department. Certificate No. 52607. Fee Paid \$12.96.

"Des Moines, Iowa, May 27, 1913. This is to certify that B. H. Gish of Blairsburg, Iowa, has registered an Automobile described in application on file in this department and has paid the fee required by law for the period ending December 31, 1913.

"W. S. Allen, Secretary of State.

"By K.

"Number assigned 52607."

The state objected to this evidence on the ground that "the sole and only question being tried in this case is the question whether the defendant operated a motor vehicle on the public highway of this state on May 29, 1913, without it having on a registration plate for the year 1913, and for the reason that Exhibit 'B' is incompetent and immaterial."

The question was thus squarely presented whether it was open to the defendant to prove that he was free from default on his own part in that he had complied with all the requirements of the statute on his part within such time as to have entitled him to the receipt of the number plates from the state official prior to May 29, the date of his arrest in Hardin County. The adverse ruling closed this door. We hold that such fact, if proved, was available to him and that the proffered evidence should have been received.

Whether the defendant was necessarily in default prior to April 26, by his failure to

pay the registration fee prior to such date and while his vehicle was not in operation, is a question not material to our present consideration. He terminated such default, if any, by payment on such date. Previous default would not render him a permanent outlaw. Even though in default, he was under continued obligation to pay. By performing his obligation on that date, he discharged [84] it in full. He became thereby entitled to his number plates within a reasonable time and in the ordinary course of mail or express.

We shall not be swift to find any obstacle at any time to the diligent enforcement of the statute under consideration. It goes without saying that every person liable thereunder for registration fees should be required to pay the same and should be punished for operating a car without such payment. Where a defendant is found guilty in a prosecution under this statute, it is provided that judgment shall be entered against him not only for the fine imposed, but also for the amount of the registration fee due from him. The amount of such registration fee thus collected is to be thereupon remitted to the secretary of state. This proviso of the statute rests upon the assumption that failure to pay the registration fee may be deemed as of the very gist of the offense charged thereunder. However, to punish an owner for alleged violation of this statute when his money has lain for weeks in the office of the secretary of state and while he himself has fully performed every act which the statute requires or permits him to do as a condition precedent to the receipt of his number plates, is not an enforcement of the statute in any just sense. To enter judgment against him for a registration fee which had already been receipted for by the secretary of state would be mere travesty.

We hold, therefore, as already indicated, (1) That where the owner of a motor vehicle has fully complied with all the requirements of Secs. 3, 7, and 8 of the statute so as to entitle him to receive number plates from the secretary of state as provided by Sec. 6, and where he fails to receive his number plates within a reasonable time through no default of his own, then he is not guilty of violation of the statute by a mere failure to attach such number plates. In such case, the duty to attach the plates as required by Sec. 12 can only arise after the requirements of Sec. 6 shall have been performed by the secretary of state. In such case, also, the failure of the [85] secretary of state to comply with the requirements of Sec. 6 cannot operate as a bar against the operation of the vehicle by the owner.

(2) That the proffered evidence rejected by the court below was competent and material in support of the defense herein considered, and it should have been received.

The judgment below is therefore reversed. Reversed and remanded.

Ladd, C. J., Weaver, Preston, Gaynor and Withrow, JJ., concur.

DEEMER, J. (*dissenting*).—The majority have, in my opinion, made the case turn upon a proposition not contended for in argument, and one not fairly arising on the record. As I understand the printed record it shows that defendant purchased and began using his automobile in the year 1911. He paid his taxes thereon for that year, and also for the year 1912; but did nothing toward paying his taxes and securing his number plates for the year 1913 until April 26, of that year. Appellant told at least two witnesses that he had been running his car during the whole of the year 1913, down to the time of his arrest on May 29th, with no other than his 1912 number plates on. Defendant himself admitted on the witness stand that he started using his machine with the 1912 number plates on, on April 26, 1913, which was the very day he sent his money to the secretary of state, without giving the state officials any time to accept the amount sent, to send the official receipt, or the number plates for 1913.

It is true that the secretary of state did not send an official receipt until May 27, 1913, and there is no showing as to when it reached the defendant. It is also true that defendant was arrested on May 29th and that the information filed against him alleged his violation of the law as on May 29, 1913.

The statute upon which the charge was based is both a revenue measure and a police regulation. Unless it be so construed, it is, in my opinion, unconstitutional; for construed [86] as a police regulation the fee charged is so large as to wholly defeat the law. So far as material, it reads as follows:

"Sec. 3. Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state shall, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state, a verified application for registration on a blank to be furnished by the secretary of state for that purpose, containing: (a) a brief description of the motor vehicle to be registered, including the name of the manufacturer and factory number of such vehicle, the character and, if the motive power be derived from the products of petroleum, the amount of the motive power stated in figures of horse power in accordance with the rating established by the Association of Licensed

Automobile Manufacturers, and the number of cylinders, bore and stroke of each; (b) the name and post-office address with street number if in a city, including county and business address of the owner of such motor vehicle.

"Sec. 5. Upon receipt of an application for registration of a motor vehicle, as provided in this act, the secretary of state shall file such application in his office and register such motor vehicle with the name, post-office address and business address of the owner, manufacturer or dealer, as the case may be together with the facts stated in such application, in a book or index to be kept for the purpose, under the distinctive number assigned to such motor vehicles by the secretary of state, which book or index shall be open to public inspection during reasonable business hours.

"Upon the filing of such application and the payment of the fee hereinafter provided, the secretary of state shall assign to such motor vehicle a distinctive number, and without expense to the applicant, issue and deliver or forward by mail or express to the owner a certificate of registration, in such form as the secretary of state shall prescribe, and two number plates. In the event of the loss, mutilation or destruction of [87] any number plate, the owner of a registered motor vehicle, or manufacturer or dealer, as the case may be, may obtain from the secretary of state a duplicate thereof upon filing in the office of the secretary of state an affidavit showing such facts and the payment of a fee of one dollar; duplicate certificates of registration may be issued by the secretary of state, in like cases, without the payment of any fee therefor.

"Registration shall be renewed annually in the same manner and upon the payment of the annual fee as provided in section eight (8) for registration, to take effect on the first day of January in each year; provided, that the secretary of state shall withhold the re-registration of any motor vehicle the owner of which shall have failed to register the same for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. All certificates of registration issued under the provisions of this act shall expire on the last day of the calendar year in which they were issued.

"The following fee shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle in accordance with the provisions of this act; eight dollars (\$8.00) upon the registration of a motor vehicle having a rating of twenty (20) horse power or less; and for each such vehicle which shall exceed twenty (20) horse

power in rating, the owner shall pay at the rate of forty (40) cents per horse power; provided, that if a motor vehicle shall have been licensed for four separate successive years under the laws of this state, and for which there shall have been paid four registration fees as provided by statute therefor, or any motor vehicle which shall have been in use for a period of not less than four years prior to August first of such registration period for which registration is about to be made, the annual registration fee thereafter shall be one-half that amount; and further provided, that the annual fee for the registration or re-registration of any electric or steam motor vehicle in accordance with the provisions of this act shall be fifteen (\$15.00) [89] dollars; . . . and provided further, that the fee for registering any theretofore unregistered motor vehicle under the provisions of this act, which motor vehicle shall be purchased on or after August first of any year, shall be one-half of the annual fee therefor, for the remainder of that calendar year; and provided further, that each manufacturer or dealer selling or otherwise disposing of motor vehicles, theretofore unregistered in this state, to residents of this state shall report to the secretary of state each such sale made on or after August first of each calendar year; such reports shall be made on blanks to be furnished by the secretary of state upon request, and shall be made in such manner as he may direct; and provided further, that no motor vehicle shall be registered for less than the annual fee because of its having been purchased on or after September first until such manufacturer's or dealer's report shall have been filed as herein provided.

"The registration fees imposed by this act upon motor vehicles, other than those of manufacturers and dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject. It shall be the duty of the county auditor of each county to cancel all assessments entered upon the assessor's books against automobiles for 1911, and no assessments upon automobiles, as made by assessors for 1911, shall be carried upon the tax lists.

"Upon the sale or transfer of a motor vehicle registered in accordance with the provisions of this act, the vendor shall immediately give notice thereof with his name, post-office address and registration number, and the name and address of the vendee, to the secretary of state, and the vendee shall, within ten days after the date of such sale or transfer, notify the secretary of state thereof upon a blank furnished promptly by him for that purpose, stating the name, post-office address, and business address of the previous owner, the number under which

such motor vehicle is registered, and the name, post-office address, with street number if in a city, including county and business address, of the vendee. Upon filing such statement [89] duly verified such vendee shall pay the secretary of state a fee of one dollar, and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership.

"Upon the sale of a motor vehicle, by a manufacturer or dealer, the vendee shall at once make application by mail or otherwise for registration thereof, after which he may operate the same upon the public highways without its individual number plates thereon for a period of not more than fifteen (15) days, providing that during such period the motor vehicle shall have attached thereto, in accordance with the provisions hereof, metal number plates to be furnished by the secretary of state to the dealer as provided in Sec. 15 bearing the registration number of the manufacturer or dealer under which it might previously have been operated for demonstration purposes; and provided further, that no manufacturer or dealer shall permit the use of his demonstration or registration number by such vendee until application for registration be so made as aforesaid, and it shall be his duty to assist the vendee in making out and filing his said application for registration, and for that purpose to keep on hand a supply of blanks to be furnished by the secretary of state upon request.

"No person shall operate or drive a motor vehicle on the public highways of this state after the fourth of July, nineteen hundred eleven, unless such vehicle shall have a distinctive number assigned to it by the secretary of state, and two number plates with numbers corresponding to that of the certificate of registration conspicuously displayed, one on the front and one on the rear of such vehicle, each securely fastened so as to prevent the same from swinging.

"Registration provided for in section fifteen (15) shall be renewed annually in the same manner and on the payment of the same fee as provided in section fifteen (15) for original registrations, such renewal to take effect on the first day of January of each year. The provisions of section seven (7) [90] relating to renewals and duration of renewals under this act shall apply to registrations and re-registration under this section. Within sixty (60) days after the first of January annually, the secretary of state shall prepare and forward to the county attorney of each county a list of the owners of motor vehicles in said county, who may have failed or neglected to pay the registration fee required by this act, whereupon the county

attorney shall immediately proceed to enforce the provisions of this act, as herein provided.

"The violation of any of the provisions of sections from three to fifteen, both inclusive, of this act shall constitute a misdemeanor punishable by a fine not exceeding fifty dollars; provided, that on conviction for a violation of sections eight and twelve hereof, or either of them, in case such motor vehicle shall not have been registered as required by this act, the court shall enter judgment against and collect from the person or persons so convicted, in addition to the penalty hereinabove provided, such sum as may be sufficient to pay the proper registration fee for said motor vehicle so unlawfully driven or operated, and forward such fee to the secretary of state at once, for the proper registration of such motor vehicle." (Acts Thirty-fourth General Assembly, Ch. 72, as amended by Acts Thirty-fifth General Assembly, Ch. 130.)

Provisions are also made for the suspension and revocation of the privilege granted under these and other sections, and penalties are imposed for the violation of other provisions of this act. The sections quoted, with others for the distribution of the funds, clearly indicate that this is a revenue measure, as well as a police regulation, and that the fiscal year begins on the first day of January. As I read the law, if one was the owner of an automobile on the 31st day of December, 1912, it was his duty on or before that day to send in his application, especially if he expected to operate his machine during the coming year, 1913. The tax was due January 1st, and became delinquent not later than sixty days after that [91] time; for at the expiration of the sixty days after January 1st, the secretary of state was required to send a list of all automobile owners who had not paid their license (or tax) to the county attorneys of the respective counties, which attorneys are required to enforce the provisions of the act.

Although not in my opinion necessary to a proper decision of this case, I am disposed to think that this tax may be collected by the county attorney after the expiration of the sixty days, from every owner of an automobile on January 1st of each year, although he may not expect to use his machine that year at all. Automobiles are not exempted from taxation either by this act or any other. A specific tax is fixed in lieu of all others, and this tax is collected by a different administrative body and distributed in a different manner from other taxes on personal property; but it is none the less a tax, and the tax is not, I think, imposed on the use of the machine but on the ownership thereof. All personal property should bear its just proportion of the taxes, whether used

or not, and I do not see any evidence of an intent on the part of the legislature to exempt automobiles which remain inactive for any portion or the whole of a year, from the burdens of taxation. If such be the intent, then one owning a machine on the first day of January may permit it to remain idle until after July first, and then make his application and pay but one-half the tax, although he had been the owner of the machine for the entire year. Moreover, he may buy a machine after July first, and if he does not run it during the remainder of the season, he is exempt from all taxes the remainder of that year.

If the taxing feature is upon the operation rather than on the ownership of the machine, what becomes of Sec. 16 of the act, requiring the county attorney to collect taxes from the owners of automobiles in his county who have not complied with the provisions of the act? It seems to me, further, that automobiles are only exempt from the general tax in the event the owners pay the taxes imposed under the new law, or, speaking more accurately, that these taxes are in lieu of all [92] others. The greater part of the money collected is redistributed to the counties, and is used as a tax and it seems to me that this tax is and must be collectible in some manner, and doubtless by an action at law against the party in default. When the tax is once paid, the machine may be registered by a purchaser from the owner during the fiscal year at an expense of but one dollar, and it is incumbent upon the vendor to give notice of his sale or transfer. However, I do not, as already stated, regard this as a controlling feature of the case.

As to the police features of the case, the provision as to display the number of plates, with the annual change in color, it seems to me that this is not only for the purpose of identifying the owner, but also a method whereby the local taxing officials may know that the owner has paid his tax. Why the change of color of the plate each year save as a means of enforcing the payment of the tax?

It is said that the defendant did all that was required of him, and that he was therefore entitled to run his machine, after sending a draft to the secretary of state, although he had not received his number plates, and was operating in plain violation of the statute. The reasons given for this conclusion are that any other construction of the statutes would make them absurd, and also because it required of defendant the performance of the impossible. The majority uphold the constitutionality of the law in all its particulars, and the defendant escapes punishment for the sole and only reason that he was

not in default; that he had done everything required of him, and that the blame was wholly with the secretary of state, or with some of the employees in that office.

It is conceded that the defendant did not pay his tax, or offer to do so, until April 26th; that he commenced running his machine on the very day he sent his draft to the secretary of state; and that he did not have the 1913 number plates on his machine as required by law, at any time prior to his arrest on May 29th.

Under these concessions, to say nothing of admissions [93] made by the defendant, which were undenied, that he had been operating his machine during the whole of the year 1913, down to May 29th, with none but his 1912 number plates displayed, I think he was clearly guilty of the offense charged against him, and that we should not search for some method of escape for him. Under no construction of the law would he be permitted to operate his machine from the day he sent his draft to the secretary of state. The latter official would have a reasonable time to acknowledge the receipt, assign the number, and send number plates, and during this reasonable time, which would necessarily be dependent upon the circumstances of the office and other things indicative of the reasonableness of the delay, the defendant would not be justified in operating his machine in violation of the statute.

Impossibility of performance is quite as available to the secretary of state as to the defendant, and just as much an excuse for him. Indeed, I doubt if there is any question of impossibility of performance in the case. It was quite possible for defendant to have ceased operating his machine until the law was complied with. He did not have to operate his machine at all, much less to operate it without the required number plates. Had he kept his machine in the barn or garage he would not have been arrested for violation of the police feature of this act. He chose to take his chances on violating it, and the most that can be said of his case is that he is compelled to rely upon the default of another as an excuse for his act. This I do not think he is legally entitled to do.

The statute is not absurd even if it be construed as the state contends it should be. It may be burdensome; but that is no reason for setting aside a valid police regulation. All police regulations are more or less burdensome, and interfere with what some men think is there personal liberty, but this is no reason for setting them aside or declaring them invalid. Police regulations are for the common good, and although burdensome on the individual, the greater good to all is deemed paramount to individual convenience. Better allow these [94] dangerous machines

to remain in their stables for a time, even if the secretary of state be somewhat negligent, than to endanger life and property.

It is said the old number would sufficiently identify the defendant. If so, why require a change of number and a change of color each year? To such identification it would be necessary for one desirous of identification to notice not only the number, but the color or shape of the plate or perhaps both, and this although the night might be dark and the color obscured by dust. At any rate, the law prescribed what the identification plates shall be for each year, and the owner or driver has no power to substitute another, even though it might be his name and address in large letters or figures, conspicuously painted or displayed. The doctrine of impossibility is not in the case, and the statute is not unreasonable in its terms.

The secretary of state is not relieved of liability to one injured in any way for the nonperformance of his duties, and he cannot, in my opinion, either by action or inaction, intentional or unintentional, relieve another from his duty to observe a proper police regulation of the state.

But aside from all of this, and as completely answering, to my mind, every claim made for and on behalf of the defendant, whether in argument of his counsel or otherwise, is the fact, conceded of record, that defendant himself was at all times at fault, and therefore in no position to take advantage of any delay, if there was any, on the part of the secretary of state. His re-registration was due not later than January 1st, 1913, and he did not make application until April 26th. His taxes were delinquent, under the old law, thirty days after January 1st, and under the new, sixty days after January 1st. His name, if the secretary of state did his duty, was in the hands of the county attorney on February 1, 1913, and the county attorney should have proceeded to collect his tax or require re-registration at once. Giving the defendant even the sixty days of grace, to wit, until March 1, 1913, he did not [95] do anything until April 26th, which was nearly two months after the taxes should have been apportioned by the secretary of state and sent to the county treasurers of the several counties. Giving the defendant the benefit of every doubt, it does not appear, nor did he offer to prove, that had he made timely application he would not have received his number plates by the time he desired, as he says, to run his car. Had he complied with the law on his part, it is entirely problematical, so far as this record is concerned, whether he would have received his official receipt and number plates within time to answer his purposes or not. Being a long time in de-

fault himself, he is not, in my judgment, entitled to now rely upon what he claims was the subsequent default of another. It was easy for defendant to comply with the law as to re-registration. He did not do so, and it is a familiar principle of law that one cannot profit from his own wrong or complain of the neglect of another when he himself is also in default.

What exceptions might be made by judicial construction to the rule of the statute were the defendant himself not in default, there is no occasion now to decide, and indeed I think we should not decide it until a proper case arises. According to defendant's own admission, he was guilty of a violation of the law, because he commenced running his machine on the day he sent his draft to the secretary of state, without waiting to know whether it would be accepted or not. In such circumstances, particularly where, as here, he was himself in default, for many weeks if not months, I do not feel that we should set aside a statute by introducing questionable exceptions to the rules therein provided for the general good of all.

It is an old maxim, and a true one, that "hard cases are likely to make bad laws," but to my mind this is not a hard case. It is one arising solely, so far as this record is concerned, out of defendant's own default. It is entirely probable that had defendant made his application in time, it would have received prompt attention; and not a violent presumption to indulge that there was an adequate force in the office of the [96] secretary of state from January down to the time these matters were turned over to the county attorneys, to have reasonably taken care of all applications. Surely there is no proof to the contrary, and every presumption is indulged in favor of the acts of a public official.

Moreover, after these matters are turned over to the county attorneys there is an implication, at least, that they are to collect the taxes or re-registration fees (doubtless with some compensation for their work) and if money is thereafter sent to the secretary of state, he would of necessity have to be given time to investigate and to take the matter up with the county attorney interested, if for no other reason than to adjust his compensation. Again, we may well assume that after these matters are turned over to the county attorneys the office force in the automobile department of the secretary's office might be materially decreased. All of these things should, under any theory, be given weight; but according to the majority opinion, as I understand it, defendant practically goes acquit, because he was not required to do the impossible, that is, to run his automobile according to law.

Ann. Cas. 1917B.—10.

As already indicated, I would not be so much concerned over the rule announced by the majority were it not for the fact that, so far as this record shows, the defendant himself brought about the very things of which he complains; was himself in default without any shadow of excuse, and persisted in running his machine contrary to a valid police regulation of the state. I would affirm the judgment on defendant's own statement of the facts.

NOTE.

Right of Person Entitled to License or Evidence Thereof to Do Act for Which License Is Required.

License Granted but Not Delivered.

The reported case arose under a statute making it an offense to operate a motor vehicle on the public highways of the state without registering the vehicle and displaying the distinctive license number assigned to it by the secretary of state for the current year. The defendant was prosecuted for driving his motor vehicle bearing 1912 number plates after the time for the display of 1913 number plates. He defended on the ground that he had in due time made application, paid his fee, and done all that was necessary on his part to entitle him to his license numbers and had received a certificate of registration and been assigned a license number, but that, through the inability of the secretary of state to furnish the plates, he had not received them. It is held that he had committed no offense under the statute; that the purpose of the statute was twofold, identification and revenue; that in the instant case both those purposes had been fulfilled, since the defendant had paid his fee and was sufficiently identified by his 1912 plates, and that to give a literal interpretation to the statute would be to deprive the defendant of the valuable property right of driving his machine, and to reduce the statute to an absurdity.

A similar decision was made in *U. S. v. The Planter*, Newb. Adm. 262, 27 Fed. Cas. No. 16,054, wherein it was held that where the owners of a ship had executed the bond required by law, had applied for a license, and the license had been made out, signed, sealed, dated and numbered, but had not been delivered because of the temporary inability of the owners to ascertain the amount of hospital fees due, and where they had been given oral permission by the licensing surveyor to make voyages, the ship could not be libeled for making unlicensed voyages, since delivery of the license, or the evidence thereof, was not essential to its validity. The

court said: "The libel was for running the boat without a license. The answer of the owners set up and exhibited a license upon its face, good in all respects. It appeared in proof that the owners had executed their bond according to law, and applied for license after the enrolment of their boat, which license was made out on the books of the office, by the surveyor and inspector, signed, sealed, dated and numbered; and the same on a separate sheet, also signed, sealed, dated and numbered. When the owners called at the office afterwards, it appeared that there had been no account or payment of the hospital dues; that the account could not at that time be made out, as the boat had, a short time before, been sold and transferred to the present owners, who did not know how many hands had been employed by the former owners, nor how long the boat had run, both of which it was necessary to know and state in writing; that a person rendering a false account was subject to a fine; that the former owners were absent, and therefore the information could not be obtained. Under these circumstances, the surveyor declined handing over the paper made out on the separate sheet, but gave the owners permission verbally to make the voyage they were prepared for; and on their return, the former owners being still absent, they made another voyage. For these two voyages this libel suit was commenced. . . . A deed is an instrument executed by a private citizen, and is or was formerly only known to be his act and deed; because he delivered it as such. He has no public seal by which it can be known, and anciently when this law was established, not one person in a hundred, perhaps, could write his name; and his private seal was the impression of his tooth, or some other impression equally unknown to the public. Delivery is therefore essential to give it validity; and it takes effect only from delivery. 2 Black. Com. 306. It is not thus in regard to the acts of public officers, attested by public seals, and recorded in public records in public offices. Where is the law to make delivery essential to their validity? I confess I have never seen such law, and certainly none was produced or cited. In the case of *Marbury v. Madison*, 1 Cranch 177 [2 U. S. (L. ed.) 73]; 1 Cond. Rep. 273, the Supreme Court of the United States says: 'But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidence of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions the sign manual of the president and the seal of the United States are those solemnities. This objection does not touch the case.' This was said by the court in answer to an objection that delivery was es-

sential to give validity to a commission. I have not been able to discover any difference which can be material in this respect, between a commission and a license; neither of them is a deed made by a private citizen, which can only be known to be his act, by his having delivered it as such. Both are acts of public officers, in their official capacity; both have their sign manual and public seals, and both are recorded in public records in public offices; both are letters patent, or of the nature of letters patent. Blackstone (2 Com. 346) speaking of letters patent, says: 'These grants, whether of lands, honors, liberties, franchises or aught besides, are contained in charters or letters patent, literal patentees, so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom, and are usually directed or addressed by the king to all his subjects at large.' This is precisely the case with commissions and licenses. They are both grants. A commission grants the right to hold and discharge the duties of a certain office. A license grants authority to do a particular thing—in this case to carry on the coasting trade. They are both open letters addressed to everybody and under public seals."

It has been held that a mere oral vote of renewal of a theatre license is sufficient justification for the operation of the theatre, although formal written evidence of the license has not been received. *Boston v. Schaffer*, 9 Pick. (Mass.) 415.

It has been held, however, by the New York supreme court, that in an action to recover penalties for maintaining an electric sign without license it was no defense to show that the defendant diligently endeavored to procure a license but was delayed through the stupidity or laziness of employees of the license board. *New York v. 503 Fifth Ave. Co.* 90 Misc. 277, 153 N. Y. S. 7, wherein the court said: "In an action to recover penalties for violating a city ordinance requiring a license before certain acts may be lawfully done, it is no defense to show that the defendant diligently endeavored to procure a license but was delayed through the stupidity or laziness of employees in the license bureau. If such a 'defense' may prevail, the city ordinances are so much waste paper. With a valid ordinance such as this, the only issue in a suit for a penalty is whether the ordinance was violated. . . . The comment of the appellate division in *New York v. Hewitt*, 91 App. Div. 446, is pertinent: 'If, then, this judgment can be sustained at all, it must be upon the ground that the court may, as matter of benignity, suspend the operation of the ordinance against an individual. The court has no power of dispensation.'"

Where a statute specifically provides that the license under which an agent is doing business shall be in the possession of the person while doing the business required to be licensed, it is not sufficient that the taxes have been paid and the license actually mailed to the agent, and if he does business, therefore, without having the license in his actual possession, he is guilty of a violation of the law. *Lewis v. Dugar*, 91 N. C. 16, wherein it was said: "At first we were strongly inclined to think that the principals of the defendant having paid the taxes required, and the license having been granted and mailed to the defendant at Enfield before he sold the goods, he had not incurred the penalty prescribed. But upon more matured reflection, we are satisfied that such a construction of the statute would not effectuate the legislative intent. The language of the statute is, that 'any person violating the provisions of this paragraph,' etc. Now, one of its provisions is, that 'the license issued under this section shall not be transferable, but may be used by one agent in the service of the principal, and not more than one person at one time, and shall be in possession of the person while doing business under this section in this state to secure his protection.' This is a very material clause; it contains substantial and essential provisions. Among other things, it requires that the license 'shall be in the possession of the person while doing business.' This does not imply merely a constructive possession, but an actual possession of the license at the time of the sale, or offering to sell, the purpose being by having the license present to cut off, as far as practicable, the possibility that two or more agents might at the same time sell goods under the same license at different places and escape the penalty. But for this requirement that the party selling shall have actual possession of the license, it would be practicable for two or more agents to use the license for selling goods at the same time at different places. If the person or firm obtaining a license should have two or more agents, each might fraudulently employ it for 'his protection.' Thus, upon demand of the sheriff or other officer, to see the license, the agent then selling, or offering to sell, might say that he had a license; that he had by inadvertence or accident, left it at a distant point on a railroad; that he would get it by the next post and exhibit it as required; a second agent might sell, or offer to sell goods, and say and do likewise towards another officer; a third might do the same thing, and all three might sell or offer to sell goods, and in a few hours after such sales, each might be able to show the sheriff or other officer the license for 'his protection,' granted to

his employer. . . . Looking at this case as presented by the record, we are impressed with the belief that the defendant and his principals acted in good faith, but this does not excuse or relieve him from the penalty. He had no right to sell goods as he did without having the license in his actual possession; this was as necessary for 'his protection,' as the license itself. He ought to have delayed selling the goods until he got actual possession of the license."

Refusal to Grant License.

The cases are in direct conflict as to the right of a person to do an act for which a license is required when he has done all that is necessary on his part to entitle him to a license, but the licensing officer wrongfully refuses to issue the license.

The rule has been laid down that where an applicant for a license has done all that is necessary to entitle him thereto, but the license is withheld by the licensing officer wrongfully, although mandamus is a proper remedy to compel the officer to issue the license, nevertheless the applicant need not resort to that remedy but has the right to proceed to do the act for which the license is required. *Royall v. Virginia*, 116 U. S. 572, 6 S. Ct. 510, 29 U. S. (L. ed.) 735; *Fossett v. Rock Island Lumber, etc. Co.* 76 Kan. 428, 92 Pac. 833, 14 L.R.A. (N.S.) 918. In the case first cited there was involved a law of Virginia which forbade any person to practice law without a license and further provided that every attorney at law, in addition to being licensed, sworn, and admitted to the bar, should obtain a revenue license and should not practice without such license. It appeared that a regularly admitted attorney applied for the revenue license, tendering a state coupon therefor, and that the officer refused to deliver the license because, under his interpretation of the law, a coupon was not a sufficient tender, and that the attorney proceeded to practice law without the revenue license. It was held by the United States Supreme Court, overruling the supreme court of appeals of Virginia, that the coupon was a sufficient tender and that the attorney was justified in practicing without the license. Mr. Justice Matthews said, delivering the opinion of the court: "It is doubtless true, as a general rule, that where the officer, whose duty it is to issue a license, refuses to do so, and that duty is merely ministerial, and the applicant has complied with all the conditions that entitle him to it, the remedy by mandamus would be appropriate to compel the officer to issue it. That rule would apply to cases where the refusal of the officer was wilful and contrary to the statute under which he was commissioned to act. But here

the case is different. The action of the officer is based on the authority of an act of the general assembly of the state, which, although it may be null and void, because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal; and, although at the election of the aggrieved party the officer might be subjected to the compulsory process of mandamus to compel the performance of an official duty, nevertheless the applicant, who has done everything on his part required by the law, cannot be regarded as violating the law if, without the formality of a license wrongfully withheld from him, he pursues the business of his calling, which is not unlawful in itself, and which, under the circumstances, he has a constitutional right to prosecute." In *Fossett v. Rock Island Lumber, etc. Co.* 76 Kan. 428, 92 Pac. 833, 14 L.R.A. (N.S.) 918, suit was brought by a lumber company for goods sold, and the defense was set up by the defendant, plaintiff in error, that the lumber company could not recover because it had been engaged in business without a license required by ordinance. The lumber company replied that it had tendered to the city treasurer the amount of the license tax, but that the latter had refused to accept it and that the city officials had not been enforcing the tax for some years. It was contended that the lumber company had no right, under those circumstances, to engage in business without a license. The court said: "There are authorities which support this contention. Some of them we do not regard as squarely in point, for they arose over disputes as to the character and legality of the tender. Such is *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143. The person applying for the license tendered the officer the state tax and refused to pay the county tax. The court, after deciding the county tax illegal, held that appellant was not justified in continuing in business without a license, but should have resorted to mandamus to compel the officer to issue a license. So, in *East St. Louis v. Wider*, 46 Ill. 351, payment of the license fee was tendered in city orders instead of cash and the tender was refused. On a prosecution for doing business without a license it was held that defendant's remedy was by mandamus, and the refusal to issue the license no defense." And, holding that the lumber company had a right to proceed in business without the license, the court further said: "Nor can we believe after the lumber company had tendered the fee and demanded a license, which the officers refused, it was compelled to mandamus the officers before it could lawfully transact any business of the character in which it was engaged. At all events its

failure to follow up the tender and demand by mandamus should not be held to work a forfeiture of its right to recover for merchandise, and thus inure to the benefit of a private individual who was in no respect prejudiced thereby but who retains the consideration."

But in other cases it has been held that when a license is refused by the licensing officer, although the applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; *State v. Jamison*, 23 Mo. 330; *State v. Myers*, 63 Mo. 324; *Kansas v. Flanders*, 71 Mo. 281. See also *East St. Louis v. Wider*, 46 Ill. 351. In *Phoenix Carpet Co. v. State*, supra, it was held that if an officer improperly refuses to issue a license the remedy of the applicant is mandamus to compel its issuance, and that he has no right to continue or justification in continuing to do the act for which the license is required without having obtained the license. The court said: "Authority is not conferred by the statute to add a county tax to the specific tax imposed on the franchises of corporations doing business within the state, and the judge of probate was in error in demanding the payment of a county tax as a condition upon which he would issue license to the appellant. The error should have been corrected by mandamus, compelling the issue of the license—it affords to the appellant no excuse, or justification for continuing to do business without the license and without the payment of the tax." In *State v. Jamison*, 23 Mo. 330, it was said: "The indictment is sufficient, and it is no defense that the county court improperly refused the defendant a license when he applied for it. It is the granted license that justifies a party in carrying on the business of a 'dram-shop keeper,' and therefore, even although the county court ought to have granted it notwithstanding the remonstrance of the inhabitants (about which we express no opinion), yet, as they did not, the defendant had no authority to engage in the prohibited trade. It may be that it was improperly withheld, but it is enough here that it was withheld, and whether rightfully or wrongfully, is not now material. In either event, the defendant was guilty if he engaged in the prohibited traffic." In *State v. Myers*, 63 Mo. 324, wherein it does not clearly appear whether the applicant was lawfully entitled to the license, the court said: "The defendant was indicted for dealing in bills of exchange, etc., etc. without having obtained a license so to do. He was convicted of the charge, and now relies for reversal on the point that the court improperly excluded evi-

dence offered by him, to show that he had made due application to the collector in the manner required by law and had tendered him the requisite sum of money, but the officer refused to issue a license as it was his duty to do. There was no error in rejecting such evidence. The law (Wagn. Stat. § 1, p. 247) applies to all who carry on the business of dealing in, or buying, or selling, or shaving any kind of bills of exchange, checks, drafts, etc., etc. . . . 'without a license for that purpose continuing in force,' and punishment must follow an infraction of the law, regardless of the reason which prevented a license from being obtained or the motive actuating the officer who, in dereliction of his duty, refused to grant it." In *East St. Louis v. Wider*, 46 Ill. 351, it was held that mandamus was the only remedy and that the applicant had no right to proceed to act without a license; but in that case the applicant was not actually entitled to the license because his tender was insufficient, and for that reason the case is not strictly within the scope of this note.

HARRIS

v.

CITY OF LOUISVILLE.

BUCHANAN

v.

WARLEY

Kentucky Court of Appeals—June 18, 1915.

165 Ky. 559; 177 S. W. 472.

Constitutional Law — Police Power — Extension by Modern Conditions.

The advance of civilization and consequent extension of governmental activities has resulted in lessening the dominion of individuals over their property and strengthening the state's regulation thereof, until all private property is now held subject to the right of the state to impose on the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare.

Municipal Corporations — Segregation of Races — Validity.

The race segregation ordinance of the city of Louisville which prohibits any colored person from occupying as a residence or place of assembly for colored people a building in any block in which the greater part of the houses are occupied by white persons, and vice versa, but which provides that it shall not affect the location of residences

or places of assembly made previous to its enactment, nor prevent any person who has theretofore acquired a building for a residence or place of assembly from exercising such right, does not take away the right of alienation, but is merely a restriction on alienation by taking away the probability of alienation to certain classes of purchasers, and, as such, cannot be held to deprive the owner of a vested right.

[See note at end of this case.]

Same.

That ordinance does not conflict with the Bill of Rights, Const. § 1, recognizing inherent and inalienable rights, section 2 providing that absolute power over the life and property of a man does not exist in a republic, and section 26 providing that the rights secured by the Bill of Rights shall remain inviolate, or Const. U. S. Amend. 14 providing that no person shall be deprived of liberty or property without due process of law, since all these guaranties are not absolute, but are subject to the right to impose reasonable restraints on the use of property.

[See note at end of this case.]

Same.

The fact that the ordinance would have the effect of excluding colored people from the more desirable parts of the city does not deprive them of liberty or property without due process of law contrary to the Fourteenth Amendment, since they can improve their sections of the city until they are equal to those of the whites.

[See note at end of this case.]

Same.

That ordinance is a valid exercise of the police power of the municipal legislature as a reasonable measure for the public welfare, in view of the settled public policy of the state to secure the separation of races.

[See note at end of this case.]

Appeals from Circuit Court, Jefferson county.

Arthur Harris convicted of violating city ordinance and appeals. Action by C. H. Buchanan, plaintiff, against William Warley, defendant. Judgment for defendant. Plaintiff appeals. Appeals heard together. The facts are stated in the opinion. **AFFIRMED.**

Logan N. Rock and W. H. Wright for appellant Harris.

Blakey, Quin & Lewis for appellant Buchanan.

Stuart Chevalier and Pendleton Beckley for appellees City of Louisville and Warley.

[560] HANNAH, J.—These two appeals involve a common question—the validity of the following ordinance enacted by the council of the city of Louisville:

"An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the

public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.

"Be it ordained by the General Council of the City of Louisville:

"Section 1. It shall be unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

"Section 2. It shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people.

"Section 3. The word 'block' as the same is used in this ordinance shall be construed to mean that portion of any street or public alley upon both sides of the [561] same between two adjacent intersecting or crossing streets or public alleys, or between such streets or alleys, if extended. In determining the boundary of any given block for the purpose of complying with the provisions of this ordinance, there shall be taken as a basis of measuring the length of such block, the space between the intersecting streets or public alleys on that side of the street or alley on which the house numbers are even, if that side of the street be divided into blocks; otherwise, the block on the opposite side shall be taken as the basis. A 'residence' or 'place of abode' or 'place of public assembly' shall be counted in that block on which it faces and has its main entrance.

"Section 4. Nothing in this ordinance shall affect the location of residences, places of abode or places of public assembly made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences, places of abode or places of public assembly, by white or colored servants or employees of occupants of such residences, places of abode or places of public assembly on the block on which they are so employed; nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of

assembly, from exercising such a right. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of public assembly for colored persons, from continuing to rent, lease or occupy such residence, place of abode or place of public assembly for such persons, if the owner shall so desire; but, if such house should, after the passage of this act, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of Section One hereof. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of assembly for white persons, from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such purpose, if the owner shall so desire; but if such house should, after the passage of this act, be at any time leased, rented or occupied as a [562] residence, place of abode or place of assembly for colored persons, it shall not thereafter be so used for white persons, if such occupation would then be a violation of Section Two hereof.

"Section 5. Any person intending to build or erect for himself, or as agent for another, any building to be used as a residence, place of abode or place of public assembly, upon property situated on a block on which there are no buildings used as a residence, place of abode or place of public assembly, shall, in the application for a permit to the Building Inspector, declare for what purpose said proposed building for which the permit is asked is to be used, whether as a residence or place of abode or place of public assembly for white persons or for colored persons. Upon the filing of said application, the Building Inspector shall, as soon as practicable thereafter, cause to be published twice a week for two successive weeks in one German and in one English daily paper of the city of Louisville, and at the cost of said applicant, the fact that a building of the character described is proposed to be built at the place indicated in the permit and to be used or occupied as a residence, place of abode or place of public assembly, as the case may be, for white or colored people; and he shall cause to be posted at some convenient place on or near the lot where such building is proposed to be erected a similar statement; and unless within five days after the date of the last publication thereof, protest be made in writing to the Building Inspector by those owning more than fifty per cent of the foot frontage of said block against the use mentioned in said application, the permit desired shall, in all other respects said appli-

cation be in conformity with the ordinances of the city, be granted. Thereafter, all buildings erected for residences, places of abode or places of public assembly on said block, and all buildings erected on said block for other purposes, but which it may be desired thereafter to use as residences, places of abode or places of public assembly, shall be so used either for white persons or for colored persons respectively, as may be determined by the permit granted in the manner hereinabove provided. If, however, the owners of more than fifty per cent of the foot frontage on said block in which the proposed building is to be erected and for which a permit is asked, shall protest against such building in the manner above provided, [563] then in such case no permit shall be issued on said application for the erection of a building for the use set out therein. Whenever a protest is filed under the provisions of this ordinance, those signing the protest shall state the exact number of feet of their respective property that front on the block in question, and each signature to such protest shall be acknowledged before a notary public; and any signature not so acknowledged shall be disregarded by the Building Inspector.

"The provisions of this ordinance are intended to provide a method by which a block which is vacant may be improved and by which its use for either white persons or colored persons may be determined, but shall not be construed to abridge unlawfully any constitutional right which any owner of property may possess to use or occupy his property, subject to reasonable police regulations.

"Section 6. No person shall be granted a permit by the Building Inspector for the construction of any house or other building intended to be used as a residence, as a place of abode, or as a place of public assembly, unless he state in his application for a permit whether the house or building to be constructed is designed to be occupied or used by white or colored people; and if upon the completion of said building, or any time thereafter, the owner shall permit said building to be occupied in any manner other than as stated in said application, he shall at once file with the Building Inspector an affidavit stating the change in the manner of use or occupancy. Whenever the use or occupancy of any building as a residence, place of abode or place of assembly for white or colored people, whether erected before or after the passage of this ordinance, is changed from white to colored, or from colored to white, after the passage of this ordinance, the owner of said building shall at once file with the Building Inspector a sworn statement of such change. If the owner of any building used or occupied as a residence, place of abode or place of assembly, shall permit its use or

occupation before there is a compliance with the provisions of this section, he shall be fined for each day of such use or occupation, not less than five dollars nor more than fifty dollars. But no permit issued by the Building Inspector shall authorize any person to use or occupy any property in violation of any section of this ordinance.

[564] "Section 7. It shall be the duty of the Building Inspector, as soon as practicable after the passage of this ordinance, to prepare and preserve for inspection in his office, maps of such blocks in the city of Louisville as are now occupied as residences, places of abode and places of assembly for both white and colored people, and shall continue to make such maps from time to time as will enable his office and the public to determine the character of use or occupancy of any given block in the city. Such map so prepared and properly certified shall be *prima facie* evidence of the facts shown thereby. Any owner of property in the city of Louisville, or any agent thereof, or any occupant thereof, who shall refuse, upon request, to furnish to the Building Inspector, or any one whom he may appoint to gather such information, with such information as such owner, agent or occupant may possess, necessary to make up such map and to revise it from time to time, or who shall furnish any knowingly false information as to the character of use or occupancy of any residence, place of abode or place of assembly in the city of Louisville, shall be subject to a fine of not less than five dollars nor more than fifty dollars for each offense. But the failure of the Building Inspector to comply with the provisions of this section shall not operate to exempt or excuse any person from complying with the terms of this ordinance.

"Section 8. Any person who shall violate this ordinance either by himself or through his agent, or any agent for another violating any provision of this ordinance for which a penalty is not otherwise provided, shall be liable to a fine of not less than five dollars nor more than fifty dollars for each offense. Each day that property is occupied in violation of this ordinance shall constitute a separate offense for the purposes of this section.

"Section 9. The invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof which can be given effect without such invalid part.

"Section 10. This ordinance shall take effect from and after its passage." (Approved May 11, 1914.)

We may say at the outset that the cases here presented involve only the first four sections of the ordinance.

[565] Upon behalf of the appellants who are attacking the ordinance it is contended

that it is not a valid exercise of the police power.

The effort to relieve the situation caused by the close association of the races under the congested conditions found in modern municipalities, has resulted in the legislation here involved. "Municipal Segregation Ordinances," as they are termed, have been enacted in and passed upon by the appellate courts of but three States so far as we have been able to learn; and these we shall consider in their order.

A municipal segregation ordinance was enacted by the city council of Baltimore, and passed upon by the Maryland Court of Appeals, in *State v. Gurry*, 121 Md. 534, 88 Atl. 546, Ann. Cas. 1915B 957, 47 L.R.A. (N.S.) 1087.

Unlike the Louisville ordinance here involved, the Baltimore ordinance did not undertake to legislate on what were "mixed blocks"—those occupied by members of the two races—but simply prohibited a white person from moving into a block inhabited solely by colored persons and prohibited colored persons from moving into a block inhabited solely by whites.

And, unlike the ordinance here involved, it contained no reservation in protection of vested rights, existing at the time of the enactment of the ordinance. The effect of that ordinance is shown in the following excerpt from the opinion:

"If the traverser (a colored man), for example, on May 15, 1911, when the ordinance was passed, owned a dwelling in what was made a white block, he could not, under the ordinance, move into it, although it was perfectly lawful for him to own it when he became the owner, and to use it as a dwelling. He might be unable to rent it to a white person, and as a colored person was prohibited from moving into it, he could not rent it to a colored person; and he could not under the ordinance move into it himself. The result would be that the house would remain idle unless he could sell it, which, under the circumstances, would likely be at a great sacrifice, although when he acquired it he had the right under the Constitution and laws of Maryland to occupy it as a dwelling, or to rent it to any person, while or colored, for legitimate purposes."

The Louisville ordinance is not subject to this criticism, for in Section 4 it is provided that nothing "herein [566] contained shall be construed to prevent any person who at the date of the passage of this ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of assembly, from exercising such right."

Another criticism of the Baltimore ordinance by the Maryland court is as follows:

"Or, it might be that a white person had a valuable and attractive house in a block which was otherwise occupied by colored people. Yet, if at the date of the passage of the ordinance, it happened to be unoccupied as a dwelling, he could not, under the ordinance, move into it or rent it to a white person. To deny him such right would be a practical confiscation of his property, for his house might be of such a character he could not rent it to a colored person, and if he could not use it himself, he would be deprived of not only the income from it, but of such use of it as is guaranteed to every owner of property by the Constitution and laws of the land. Of course, the same conditions might exist when the owner of one house was colored and the other residents of the block white, although probably not so likely to happen."

But, as heretofore seen, these criticisms are all provided against in the Louisville ordinance here under consideration.

Upon a consideration of the ordinance enacted in Baltimore, the Maryland court, without committing itself upon the question of whether it would be possible for the legislature of the State to take away such vested rights, held that the attempted exercise of the police power was of such character as to preclude the court from assuming that the legislature intended to confer on the municipality the power to affect vested rights in the manner sought by the ordinance.

The municipal legislature of the city of Winston, North Carolina, adopted a municipal segregation ordinance, which was passed upon by the Supreme Court of North Carolina, in the case of *State v. Darnell*, 166 N. C. 300, 81 S. E. 338, 51 L.R.A. (N.S.) 332. The ordinance is not copied in the opinion, but it is apparent that it, like the Baltimore ordinance, contains no saving provision in protection of vested rights existing at the time of the adoption of the ordinance.

The opinion is notable in that the court seems to have been impressed by the time-worn sophistry (always advanced [567] when legislation of this character is being attacked), that if the power exist to segregate whites and blacks, then the power must likewise exist to segregate Republican and Democrat, persons of Irish descent and those of German descent, Protestant and Catholic, and so on. This argument was advanced and answered by this court in the *Berea College* case, 123 Ky. 209, 13 Ann. Cas. 337, 94 S. W. 623, 124 Am. St. Rep. 344, and conclusively disposed of by the Supreme Court of the United States in *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256. To give ear to this kind of reasoning is to close one's mind to the gravity of the race problem as it exists in our country today, and especially to those phases of it most

intimately concerned with congested municipal conditions.

The opinion is also notable in that the court for the time being apparently forgetful that congested municipal conditions and rural conditions are not identical, seems impressed with the argument that if segregation may be enforced in a city, it may be enforced in rural communities as well.

But after a consideration of the matter, the court said that "Whether if the general assembly had passed a statute conferring on town or county commissioners the authority to make such an ordinance as this, it would have been constitutional, is not now before us. We simply hold that an act of this broad scope, so entirely without precedent in the public policy of the State and so revolutionary in its nature, cannot be deemed to have been within the purview of the legislature from the use of the words 'conferring authority to make ordinances for the general welfare.'"

The municipal legislature of Atlanta enacted a segregation ordinance which was passed upon by the Supreme Court of Georgia on February 12, 1915, in the case of *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, L.R.A. 1915D 684.

The ordinance there involved, like the Baltimore ordinance above mentioned, failed to contain any saving clause in protection of vested rights acquired before the passage of the ordinance. The court had before it the two opinions above mentioned, and interpreted the Maryland opinion as recognizing that *jus disponendi* (right of disposal) is a right within the protection of the Constitution, and denied by the ordinance, although indicating a disposition to hold the ordinance void because it ignored vested rights existing at the time of its passage.

[568] There is also quoted from the North Carolina case the following language: "Besides an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property, from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having the power to take away."

The Georgia court then adopts as its theory for denying the validity of the ordinance its operation in denying to the owner the right to use, control or dispose of his property; the court holding that the ordinance destroys the right of the individual to acquire, enjoy and dispose of his property, and that it was therefore void as being in contravention of the Due Process Clause of the Federal Constitution.

However, Lumpkin, J., in an able "special-concurring" opinion, said: "It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of an owner to use his property is important, but it is not so absolute that he may at all times and under all circumstances use it as he pleases, regardless of the public welfare, morals or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes." After further discussion of the matter, Judge Lumpkin said: "Suppose that an owner of property in the best residential portion of a city should claim the right to build upon his lot a large boarding-house or rooming-house in which he should receive indifferently boarders of both races and sexes, producing a situation of great irritation and calculated to bring about unfortunate results. It is quite possible that the sacred right of property might be subject to regulation for the public safety (which has been declared to be the supreme law) by a reasonable *pre-existing* ordinance." The writer of the concurring opinion then joins in holding the ordinance unconstitutional, but upon the ground that the ordinance delegated to individuals the right to say how property might be occupied, a point not involved upon the appeal here under consideration.

[569] Judge Lumpkin, in closing his concurring opinion, said that while he agreed with the majority of the court in declaring the ordinance unconstitutional, he thought the line of reasoning adopted by them may carry them too far; and in this statement we are heartily disposed to join him.

The *jus disponendi* has but little place in modern jurisprudence. The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the State in respect thereof, so that today all private property is held subject to the unchallenged right and power of the State to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare.

There is nothing in the ordinance here under consideration which takes away from any person the right to acquire property anywhere in the city; but the ordinance does prohibit the occupancy of property under certain circumstances, by an owner who acquires same after the adoption of the ordinance; and such restraint upon the use of property acquired with notice of a regulatory

ordinance is valid as a competent declaration of the municipal legislature.

If it be conceded that the right of alienation is a vested right which cannot be taken away altogether by legislation, still such is not the effect of the ordinance. An indirect restriction upon the right of alienation, resulting from the denial of the probability of alienation to certain classes of purchasers, cannot be held to be a complete destruction of the power to alienate or deprivation of a vested right, violative of the constitutional guaranties. So much for the *jus disponendi*.

Appellants claim the protection of the constitutional guaranties preserved in Sections 1, 2 and 26 of the Bill of Rights included in the Constitution of Kentucky, in Article 1, Section 1, Sub-section 1 of the Constitution of the United States, and in the Fourteenth Amendment thereto; and assert that the ordinance under consideration is violative thereof.

[570] But the principle above stated is so well settled that no extended discussion is necessary to establish that reasonable restraints upon the use of private property and upon the liberty to contract, are not subversive of the constitutional limitations mentioned, and that such restraints do not constitute a deprivation of "life, liberty or property without due process of law" within the meaning and purview of the Fourteenth Amendment.

These constitutional guaranties are not absolute guaranties, but are subordinate to the paramount right of government to impose reasonable restraints thereupon when the public welfare renders such legislation expedient. *Crowley v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 U. S. (L. ed.) 620; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 U. S. (L. ed.) 205.

But, it is contended that the ordinance is violative of the Fourteenth Amendment because it will prevent the residence of negroes in the more desirable portions of the city.

If such should chance to be its practical effect (though there is nothing in the ordinance itself which warrants the conclusion), we do not understand how this could be construed to be a denial of the equal protection of the law. The enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty; and if such separation should result in the members of the colored race being restricted to residence in the less desirable portions of the city, they may render those portions more desirable through their own efforts, as the white race has done. Economic equality is not created by statutory declaration nor guaranteed by the Fourteenth Amendment.

Nor are we disposed to concede that the ordinance here involved transcends the au-

thority of the municipal legislature, or to doubt that it constitutes a valid exercise of the police power and a reasonable and expedient measure for the public welfare.

The public policy of this State in respect of the separation of the races has long been exhibited in legislation. By legislative mandate, the races have been separated upon public conveyances where by virtue of necessity they must otherwise have been associated; by legislative mandate, they have been separated in the public schools; and, notwithstanding the fact that attendance upon private schools is purely a matter of individual volition, by legislative mandate, the races have [571] been separated therein; and the use of private property for the maintenance of a school wherein students of both races are taught together, is, by legislative mandate, prohibited. See *Berea College v. Com.* 123 Ky. 209, 13 Ann. Cas. 337, 94 S. W. 623, 124 Am. St. Rep. 344, affirmed in 211 U. S. 45, 29 S. Ct. 33, 53 U. S. (L. ed.) 81.

In view of the fact that this legislation is upheld partly in recognition of the peril to race integrity induced by mere propinquity, we see but little difference in the prevention by law of the association of white and colored pupils in the schools of the State and in the prevention of their living aside by side in their homes. It is said by appellant that "in a man's house no such association and contact is necessary" as in the schools or on public conveyances. But the court will not close its eyes to the fact that under the congested conditions of modern municipal life, there is practically as much, if not a greater degree of association among the children of white and colored inhabitants when living side by side than there would be in mixed schools under the direct observation of teachers.

In the *Berea College* case this court, in its opinion, written by Judge O'Rear, said: "If, then, it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum—the purity of racial blood. . . . A separation of the races under certain conditions is, therefore, enforced where it is believed that their mingling would tend to produce the very conditions which it is found lie at the base of the trouble. In its application, it becomes all the more necessary that the overmastering principles included in the police power of the government be firmly recognized, so that a clashing of race prejudice, or race destruction may be lawfully averted." And, citing from *West Chester, etc. R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 747, it was further said:

"The tendency of intimate social intermixture is to amalgamation, contrary to the law of the races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as divisible in the providential arrangement of the earth as that of heat [572] and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself and not to compel them to intermix contrary to their instincts."

The subject is so fully and ably discussed in the opinion in the Berea College case that it needs no extended argument at this time to demonstrate that this State is fully committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare; not to segregation as a measure imposing stigma, for none is thereby imposed, but in order to prevent such conflicts as are shown by this record to have resulted in Louisville from the racial discord consequent upon the close association of the races; and in order that the solidarity of the races may be preserved; and, finally, that in a spirit of mutual helpfulness and racial friendship, each race may attain those heights of human development which are its to be won, and may aid in bringing to this State and Nation of ours all that the undreamed future has in store for us.

Much has been done in the years gone by, much is being done today by the white people of the Nation for the uplift of the colored race. But those who have studied the future of the race (and, in fact, its leading member in the country today), declare that he must ultimately rise largely through the co-opera-

tion, the [573] earnest efforts and the loyal service of his own more fortunate and more enlightened brothers.

For those of the race who are doing their full duty in this respect, municipal segregation will simplify the problem; and, if there be those more fortunate members of the race who in the day of their good fortune would abandon their less fortunate fellows and be false to the duties and responsibilities laid upon them by virtue of their own success, municipal segregation will indirectly enforce their acceptance of those responsibilities and coerce their performance of the duties thereby imposed; and thus, in the end, it will justify that enlightened civic spirit by which it is demanded.

The first four sections of the ordinance are valid. The judgments are affirmed; the whole court sitting.

NOTE.

The reported case holds that an ordinance segregating the white and colored races for residential purposes is a valid exercise of the police power, the restraint on the right to dispose freely of property thereby imposed being justified by the resultant public benefit in preventing the racial discord consequent on the close association of the races. The validity of a statute or ordinance providing for the segregation of persons in different residential districts is discussed in the note to *State v. Gurry*, Ann. Cas. 1915B 957. See also *Carey v. Atlanta*, Ann. Cas. 1916E 1151.

FREMD

v.

HOGG ET AL.

Florida Supreme Court—November 24, 1914.

68 Fla. 331; 67 So. 75.

Executors and Administrators — Presentation of Claims — Necessity — Debt Secured by Mortgage.

A mortgage by an intestate not presented to the administrator within the statute of nonclaim, is barred in the absence of payment of interest or other act of estoppel.

[See note at end of this case.]

Assets — Construed as Including Land.
Real estate is an "asset" of the estate of a decedent.

Appeal from Circuit Court, Palm Beach county: PERKINS, Judge.

Action by A. Y. W. Hogg et al., executors and administrators, etc., plaintiffs, against William Fremd, administrator, defendant. Judgment for plaintiffs. Defendant named appeals. The facts are stated in the opinion. REVERSED.

H. L. Bussey for appellant.

F. L. Hemming for appellees.

[331] COOKRELL, J.—A bill to enforce a mortgage lien was filed in March, 1914, by the personal representative of Annie K. Hogg, deceased, against the heirs and administrator of the estate of David Thomas, deceased. The heirs did not defend and decree *pro confesso* was entered against them. The administrator pleaded the statute of nonclaim and appealed from an order overruling this plea.

It is admitted that the plea should have been sustained if the decision by this court in *Bush v. Adams*, 22 Fla. 177, is still the law of this State. We there ruled that "when by law lands are assets of an estate and the mortgagor dies without having disposed of the parcel mortgaged, and it is a part of his estate, the statute of nonclaim, [332] as usually framed, is as applicable in its requirements to the preservation of the lien of the mortgage against the parcel of land as it is to the preservation of the claim against the general assets in case the mortgage security would prove inadequate. . . . The statute applies to all 'debts and demands of whatever nature against the estate or any testator or intestate,' and the notice is to all 'creditors,' etc. The fact that a particular portion of the land of the decedent's estate has been pledged by him in his life to the payment of a debt or demand has not been made an exception upon the requirements of the statute as to presentation. . . . If it applies to judgments which are a lien upon all the real estate, as it does (citing authorities) we cannot see why it should not hold as to a lien upon a part of the land. The policy of the legislature requires action upon the part of the creditor to preserve his claim."

It may be observed that by statute, a mortgage is both at law and in equity, a mere lien and passes neither title nor possession.

It is argued, however, that this decision is at variance with the majority of holdings of the courts of the various States, and that there has been such a change in the statute since that decision, as to require or at least justify us in going over with that majority.

Prior to the adoption of the Revised Statutes of 1892, it was the law of this State that the administrator became as such entitled to the possession of the real estate of the intestate, and was the necessary party defendant in suits for the enforcement of mortgage liens, and further that he could in

his own name maintain ejectment. By Section 1917 of that Revision it was enacted: "Real estate shall be liable for the debts of a decedent, but shall descend to the heir or devisee of such decedent, and remain [333] in his possession until the executor or administrator shall take possession of or sell the same, under the order of the court, for the payment of debts, or until the same shall be sold under execution by any creditor of the decedent."

Real estate of a decedent, however, continued to be equally liable with personal property to levy and sale under an execution upon any judgment against the estate, in other words an "asset" of the estate, as it was at the time *Bush v. Adams* was decided. The material change is that a court order is necessary to place the personal representative in the possession of the realty, and therefore until that is done, the heirs or devisees are the necessary parties in actions or suits dependent upon possession and legal title. The salient feature of the *Bush v. Adams* decision that a mortgage is a debt or demand against the estate within the nonclaim statute, is not affected by the later statute.

The bill in this case shows that the mortgage was given in 1898, payable three years after date, and that no interest had been paid thereon; or any part of the principal debt; that the mortgagor died in 1906; that Fremd was appointed administrator in 1907, and had never been discharged. There is no suggestion of estoppel by the heirs in payment of interest or otherwise keeping the lien alive, and the plea shows that no presentation was made and that the lands embraced in the mortgage are necessary to the payment of the debts of the estate, other than this mortgage claim.

In the language of *Bush v. Adams*, the failure to present the claim does not merely postpone its payment to those claims presented, but it virtually destroys it and operates *pro tanto* to the advantage of the beneficiaries of the estate.

[334] The plea presented a defense to the suit and should have been sustained.

Order reversed.

Shackleford, C. J., and Taylor, Hocker and Whitfield, JJ., concur.

NOTE.

Presentation of Claim as Condition Precedent to Enforcement of Mortgage against Decedent's Estate.

Enforcement against Mortgaged Property:

Majority Rule, 157.

Minority Rule, 159.

Rule in California, 160.

Effect of Filing Claim, 162.

Enforcement against General Assets, 162.

Enforcement against Mortgaged Property.

MAJORITY RULE.

In the great majority of jurisdictions it is well settled that the presentation and proof of a mortgage debt or claim within the time provided by statutes regulating the presentation and proof of claims against the estates of deceased persons is not a condition precedent to the enforcement of the mortgage lien against the estate of the decedent to the extent of the property mortgaged.

Alabama.—Doe v. McLoskey, 1 Ala. 708; Inge v. Boardman, 2 Ala. 331; Smith v. Gilliam, 80 Ala. 296. See also Locke v. Palmer, 26 Ala. 312; Mahone v. Haddock, 44 Ala. 92.

Arkansas.—Pope v. Boyd, 22 Ark. 535; Haskill v. Sevier, 25 Ark. 152; Hall v. Denckla, 28 Ark. 506; Nicholls v. Gee, 30 Ark. 135; Simms v. Richardson, 32 Ark. 297; McClure v. Owens, 32 Ark. 443; Culberhouse v. Hawthorne, 107 Ark. 462, 156 S. W. 421; Rhodes v. Cannon, 112 Ark. 6, 164 S. W. 752; Hicks v. Hicks, 113 Ark. 598 mem. 167 S. W. 95; Hodges v. Taylor, 13 S. W. 129. *Compare* Mueller v. Light, 92 Ark. 522, 31 L.R.A. (N.S.) 1013 (decided under statute of 1889 which provided that the barring of the claim also barred the right to foreclose. That statute was repealed in 1911).

Colorado.—Reid v. Sullivan, 20 Colo. 498, 39 Pac. 338; Sullivan v. Sheets, 22 Colo. 153, 43 Pac. 1012; Townsend v. Thompson, 24 Colo. 411, 51 Pac. 433.

Connecticut.—Beard's Appeal, 78 Conn. 481, 62 Atl. 704. See also Turner v. Laird, 68 Conn. 198, 35 Atl. 1124.

Delaware.—Dayett v. Willits, 74 Atl. 689.

Illinois.—Mulvey v. Johnson, 90 Ill. 457; Kittredge v. Nicholes, 162 Ill. 410, 44 N. E. 742, *affirming* 60 Ill. App. 604; Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 197.

Indiana.—Cole v. McMickle, 30 Ind. 94; Noble v. McGinnis, 55 Ind. 528; Bell v. Hobaugh, 65 Ind. 598; McCallam v. Pleasants, 67 Ind. 542; LaPlante v. Convery, 98 Ind. 499; St. Joseph County Sav. Bank v. Randall, 37 Ind. App. 402, 76 N. E. 1012.

Iowa.—Allen v. Moer, 16 Ia. 307; Moores v. Ellsworth, 22 Ia. 299; In re Brackey, 166 Ia. 109, 147 N. W. 188.

Kansas.—Crooker v. Pearson, 41 Kan. 410, 21 Pac. 270; Andrews v. Morse, 51 Kan. 30, 32 Pac. 640.

Michigan.—Clark v. Davis, 32 Mich. 154; Williard v. Van Leeuwen, 56 Mich. 15, 22 N. W. 185.

Minnesota.—Hill v. Townley, 45 Minn. 167, 47 N. W. 653.

Mississippi.—Jefferson College v. Dickson, Freem. Ch. 474; Miller v. Helm, 2 Smedes &

M. 687; Miller v. Jefferson College, 5 Smedes & M. 651.

Missouri.—Tucker v. Wells, 111 Mo. 399, 20 S. W. 114; Cowan v. Mueller, 176 Mo. 192, 75 S. W. 606; Holland Banking Co. v. Sec, 146 Mo. App. 269, 130 S. W. 354.

Nebraska.—Null v. Jones, 5 Neb. 500; Jones v. Null, 9 Neb. 57, 1 N. W. 867; Schade v. Connor, 84 Neb. 51, 120 N. W. 1012.

Nevada.—Rickards v. Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702; Kirman v. Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

New Jersey.—Smith v. Wilson, 79 N. J. Eq. 310, 81 Atl. 851.

New York.—Matter of Eadie, 39 Misc. 117, 78 N. Y. S. 967.

Ohio.—Fisher v. Mossman, 11 Ohio St. 42; Gary v. May, 16 Ohio 66.

Oklahoma.—International Bank, etc. Co. v. Tolbert, 28 Okla. 595, 115 Pac. 601; Fawcett v. McGahan-McKee Lumber Co. 39 Okla. 68, 134 Pac. 388. See also Brocker v. Stallard, 34 Okla. 612, 126 Pac. 781.

Oregon.—Verdier v. Bigne, 16 Ora. 208, 19 Pac. 64; Teel v. Winston, 22 Ore. 489, 29 Pac. 142.

Pennsylvania.—In re Ross, 9 Pa. St. 17. See also In re Smith, 194 Pa. St. 259, 45 Atl. 82.

South Dakota.—Purdin v. Archer, 4 S. D. 54, 54 N. W. 1043; Kelsey v. Welch, 8 S. D. 255, 66 N. W. 390.

Vermont.—Putnam v. Russell, 17 Vt. 54, 42 Am. Dec. 478; Grafton Bank v. Doe, 19 Vt. 463, 47 Am. Dec. 697; Richmond v. Aiken, 25 Vt. 324; Pelton v. Johnson, 52 Vt. 138.

Washington.—Scammon v. Ward, 1 Wash. 179, 23 Pac. 439; Reed v. Miller, 1 Wash. 426, 25 Pac. 334; Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533; McDonald v. O'Shea, 58 Wash. 169, Ann. Cas. 1912A 417, 108 Pac. 436. See also Casey v. Ault, 4 Wash. 167, 29 Pac. 1048.

Wisconsin.—Edgerton v. Schneider, 26 Wis. 385. And see Schmidt v. Grenzow, reported in full, post, this volume, at page 163.

Wyoming.—O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525.

The rule was stated in Teel v. Winston, 22 Ore. 489, 29 Pac. 142, as follows: "The death of the mortgagor and the proceedings in the probate court do not change or suspend the remedy of the mortgagee to enforce his lien on the mortgaged lands, and as a consequence no presentation of the claim for allowance to the administrator or executor is necessary before bringing suit, nor does section 377, Hill's Code, have any application to proceedings of this kind. This doctrine seems to be amply supported, and the general rule is, that the failure to present to an executor or administrator for allowance a claim secured by mortgage, only operates to prevent a judgment for any deficiency that

might remain after exhausting the mortgaged property, but does not affect the right to a foreclosure where no recovery is sought beyond the proceeds of the mortgaged lands.

As a reason for the rule it has been said: "Such claims cannot in any just sense be considered as claims against the estate, but that the right to subject specific property to the claim arises from the contract of the debtor, whereby he has during life set aside certain property for its payment, and that such property does not belong to the estate, and that the instrument being of record is notice to all the world of the contract." *Reid v. Sullivan*, 20 Colo. 498, 39 Pac. 338. And the difference between a mortgage claim and a claim contemplated by the statute of nonclaim was further pointed out in the case of *In re Eadie*, 39 Misc. 117, 78 N. Y. S. 967, as follows: "Claims against a deceased's estate, as understood by the law, mean obligations owing by the deceased which have not been reduced to judgment, or which are not specific liens upon any portion of his estate, and which require to be proved in order to be allowed. A bond and mortgage is an instrument under seal. The bond imports consideration, and is the evidence of the debt, and the mortgage is a direct lien upon the real estate of the deceased. They were therefore good as to all the world until they were set aside by a decision of a court of equity in an appropriate proceeding brought for that purpose, and the executor was not required to prove the same in the ordinary method, as required of claims against a deceased's estate."

The fact that it is not sought to subject the personal assets of the estate to the mortgage lien has been given as a further reason why it is unnecessary to present the claim to the executor or administrator in order to have the benefit of the lien. Thus in *Jefferson College v. Dickson*, *Freem. Ch. (Miss.)* 474, it was said: "If the complainants' claim is discharged, it must be because the law imposed upon them the unconditional necessity of presenting it to the personal representatives of the mortgagors, and of receiving payment at their hands out of the personal assets. How stands the law upon this subject? It is a well-settled rule of pleading, that in a bill for foreclosure it is not necessary to bring the personal representatives of the mortgagor before the court. . . . This could not be the rule if the mortgagee were bound to seek the personal estate, or to look to the personal representatives. Indeed the very reason of the rules it stated to be, that the mortgagee is under no obligation to intermeddle with the personal assets or to seek an account thereof. If then the creditor in such case is not bound to seek the personal assets for the satisfaction of his debt, there

can be no reason for requiring him to present the claim to the personal representative, who has nothing to do with the real estate of the deceased, upon which the payment of the debt stands charged by virtue of the mortgage. It is true that at common law the personal property of a deceased person is the primary fund for the payment of his debts; but this is a question exclusively between the heir and the personal representative; in such a controversy the latter may be compelled to apply the personalty in exoneration of the realty. . . . This doctrine does not, however, affect the right of a creditor who holds an incumbrance upon the realty as a specific pledge for the payment of his debt, to pursue that fund alone, if he shall so elect. I hence conclude, that it was only intended by the statute to 'discharge' such estate as properly comes to the hands of the personal representatives, to be administered, and that it is only upon that class of creditors whose proper resort is to the personalty that the duty of presenting their claims is devolved."

In *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533, it was said: "A mortgage, while it is but a mere lien, and is but ancillary to the debt which it is given to secure, is capable of enforcement against the mortgaged property, though the mortgagor be deceased, in a direct suit brought for that purpose against the heirs of the mortgagor, or, rather, the person or persons in whom the legal title to the mortgaged property is vested at the time of the foreclosure; that is, it is not necessary in order that the mortgaged property may be subjected to the payment of the debt it is pledged to secure, that a probate procedure be instituted, and the debt be presented to the executor or administrator, before a suit can be instituted to foreclose the mortgage."

In *Null v. Jones*, 5 Neb. 500, a similar line of reasoning was followed, the court saying: "It is evident that section 226, which provides that all claims 'against a deceased person, proper to be allowed by the judge or commissioners,' which shall not be exhibited to them for allowance within the time limited by the court, 'shall be forever barred,' was not intended to apply to claims secured by mortgage, unless the holder expects to look to the assets in the hands of the executor or administrator for payment. The legislature could not have intended that the mere failure of the holder of a claim, secured by mortgage duly recorded, to present the same for allowance, should bar him of his action against the security. We are of the opinion, however, that if such a claim be not exhibited for allowance, the holder is confined to the property covered by his mortgage, and cannot, should that prove insufficient for that purpose, resort to the general assets for payment."

In answer to the contention that the administrator is entitled to notice of mortgage claims in order to administer properly the estate it has been said: "If it be said that liens also must be presented, the answer is, that liens are always in a state of presentation, at least those which are of record. The object of the statute, we have said, is, that the administrator may be informed of the condition of the estate; now, if the claim be of such a nature, that he must be informed of its existence, is not the object of the law accomplished? Suppose, then, that a creditor holds a mortgage on property of the estate, which could not take effect without being recorded; the record is constructive notice to everybody. The law supposes that every one has a knowledge of its existence. Now, could the administrator be better informed by the actual presentation, than the law supposes him to be by the record? He could not; for all legal purposes, he is as fully informed by the one as by the other." *Miller v. Helm*, 2 *Smedes & M. (Miss.)* 687.

And in *Cole v. McMickle*, 30 *Ind.* 94, it was said: "The administrator is presumed to be cognizant of mortgages executed by the decedent in his lifetime upon his real and personal property, and they are not barred by a failure to file a statement of them within the time limited by section 62. Such claims do not come within the purview of that section, and cannot be affected by it."

In *Edgerton v. Schneider*, 26 *Wis.* 385, the court, declaring that the failure to present a mortgage claim for allowance against an estate did not bar the holder's right to pursue his remedy by foreclosure, and to enforce his specific lien on the property subject to the mortgage, stated the reason for the rule as follows: "We hold this upon the ground that, even though such debts are subject to the general limitation provided in respect to claims against the estates of deceased persons, as contended by the appellant, yet the bar occasioned by such limitation should have no other or greater effect than would the bar under the general statute of limitations in favor of a living person. And in respect to that it has been settled by this court, in accordance with what was considered the result of the authorities, that the fact that the note is barred does not prevent the foreclosure of the mortgage. . . . There is no reason why the bar under the limitation as to presenting claims against estates should have any different effect, or why the decision of the one question does not dispose of the other."

MINORITY RULE.

In Florida and Texas the contrary rule is maintained, the courts holding that the lan-

guage of the general statutes of nonclaim is sufficiently comprehensive to include every species of claim against a decedent's estate, and that a failure to present and prove a mortgage debt in accordance with the terms of the statute bars forever the debt as well as the right to foreclose the mortgage. *Bush v. Adams*, 22 *Fla.* 177; *Graham v. Vining*, 1 *Tex.* 639, 2 *Tex.* 433; *Duty v. Graham*, 12 *Tex.* 427, 62 *Am. Dec.* 534; *Gaston v. Boyd*, 52 *Tex.* 282; *Buchanan v. Wagnon*, 62 *Tex.* 375; *Wilson v. Harris*, 91 *Tex.* 427, 44 *S. W.* 65, *affirming* 40 *S. W.* 868; *Tiboldi v. Palms*, 97 *Tex.* 414, 79 *S. W.* 23, *affirming* 34 *Tex. Civ. App.* 318, 78 *S. W.* 726; *Degetau v. Mayer (Tex.)* 145 *S. W.* 1054. See also *Lafon v. Phillips*, 2 *Mart. N. S. (La.)* 225; *Bradford v. Knowles*, 86 *Tex.* 505, 25 *S. W.* 1117; *Whitmire v. May*, 96 *Tex.* 317, 72 *S. W.* 375; *Taylor v. Williams*, 101 *Tex.* 392, 108 *S. W.* 815; *Clarke v. Dallas First State Bank (Tex.)* 150 *S. W.* 203. And see the reported case. *Compare Cole v. Robertson*, 6 *Tex.* 356, 55 *Am. Dec.* 784.

In *Graham v. Vining*, 1 *Tex.* 639, 2 *Tex.* 433, the Texas rule was stated as follows: "The language of the 17th section, 'That no bearer of a claim for money against a succession administered by an executor or administrator, shall commence an action against such succession, before presenting his claim to such executor or administrator;' . . . is sufficiently comprehensive to embrace every claim for money, of whatever grade, upon which suit was necessary to its assertion in a court of law. A debt secured by a mortgage on specific property forms no exception. If presented, allowed, and placed on the tableau of acknowledged debts, it can have all the benefits of its specific lien, without the necessity of suit. Should the funds of the estate be sufficient, it will be paid out on the general funds: if not sufficient without sale, the sale will be ordered by the court on the application of the executor or administrator, or, on their failure to make such application on the creditor; and in making the order of sale, the judge will have regard to the nature of the claims."

And in *Tiboldi v. Palms*, 34 *Tex. Civ. App.* 318, 78 *S. W.* 726, *affirmed* in 97 *Tex.* 414, 79 *S. W.* 23, it was said: "The object of the statute in requiring all creditors of an estate to present their claims against the estate and have same adjudicated in the court in which the administrator of the estate is pending is to enable that court to adjust and fix the rights of all the creditors as well between themselves and the heirs as between each other. It would be impossible to accomplish this result if a creditor who had failed to present his claim in the administration of the estate was permitted after the close of said administration to establish and foreclose liens upon property of the estate which

had been disposed of by order of the court in the administration."

Nor does the fact that the mortgage contains a power to sell relieve the mortgagee from the necessity of presenting his claim. *Robertson v. Paul*, 16 Tex. 472; *Blair v. Thorp*, 33 Tex. 38; *McLane v. Paschal*, 47 Tex. 365; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866. In *Robertson v. Paul*, supra, it was said: "That the mortgage contains a power to sell, does not change its essential character. It is still a security, and nothing but a security for the payment of a debt. The debt is the principal thing; the mortgage is but an incident. The debt remains as a demand against the estate of the same, and no higher grade, in consequence of the power contained in the mortgage. It comes within the letter and policy of the law, which requires the presentation of the claim; and which postpones its payment to other preferred claims. To permit its enforcement otherwise than as the statute prescribes, would be to defeat the express requirements, and the manifest policy of the law."

But where the grantor in a deed of trust conveys his interest and afterwards dies insolvent it has been held to be unnecessary to present the claim against his estate. *Miles v. Coleman Nat. Bank*, 37 Tex. Civ. App. 73, 84 S. W. 284, wherein it was said: "At the time the deed of trust was foreclosed, and the Coleman National Bank became the purchaser, the estate of Bowen had no interest in the property, as Bowen had sold it to the vendor of appellant long prior to the time of his death. His death did not abate the lien created by the deed of trust, and his estate not being interested in the property in question, it would not interfere with the policy of the administration of the probate law so far as concerned his estate, that the claim or the trust lien should not have been presented to the administrator of his estate for allowance."

However, it has been held that the presentation of the note secured by the mortgage is sufficient without presenting the mortgage itself. *Danzey v. Swinney*, 7 Tex. 617; *Simpson v. Reily*, 31 Tex. 298; *Cundiff v. Simpson*, 32 Tex. 144; *Cannon v. McDaniel*, 46 Tex. 303.

And it seems that payments on the mortgage debt by the administrator are sufficient to show a presentation of the mortgage claim within the statutory period. *Miller v. Crosby*, 68 Fla. 365, 67 So. 76.

RULE IN CALIFORNIA.

Under the California statute (Code of Civ. Proc. § 1500) holders of mortgage claims against estates of deceased persons are al-

lowed to enforce them without presentation and proof as required of other claims, provided all recourse against any other property of the estate is expressly waived in the complaint. *Security Sav. Bank v. Connell*, 65 Cal. 574, 4 Pac. 580; *Dreyfuss v. Giles*, 79 Cal. 409, 21 Pac. 840; *Sonoma County Bank v. Charles*, 86 Cal. 322, 24 Pac. 1019; *Anglo-Neveda Assur. Corp. v. Nadeau*, 90 Cal. 393, 27 Pac. 302; *German Sav. etc. Soc. v. Fisher*, 92 Cal. 502, 28 Pac. 591; *Sibernia Sav. etc. Soc. v. Wackenreuder*, 99 Cal. 503, 34 Pac. 219; *Heeser v. Taylor*, 1 Cal. App. 619, 82 Pac. 977. See also *Hibernia Sav. etc. Soc. v. Hayes*, 56 Cal. 297. Compare the following cases decided under prior statutes: *Ellissen v. Halleck*, 6 Cal. 386; *Willis v. Farley*, 24 Cal. 490; *Ellis v. Polhemus*, 27 Cal. 350; *Pitte v. Shipley*, 46 Cal. 154; *Harp v. Calahan*, 46 Cal. 222.

In *Hibernia Sav. etc. Soc. v. Wackenreuder*, 99 Cal. 503, 34 Pac. 219, it was said: "The object of this section is not only to give to the holder of such a mortgage, or other lien, the right to maintain an action against the representative of the estate to enforce the same, without presentation of the claim upon which the action is founded, when the waiver provided for is made, but also to relieve the estate from the payment of counsel fees stipulated for in the mortgage, and from the payment of any deficiency judgment, when the mortgagee elects to proceed under it."

But where it appears that the mortgage existed at the time the decedent acquired the property the statute does not apply and the mortgagee may enforce his claim even though he makes no waiver. *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891, wherein it was said: "The objection that the complaint should have averred either a presentation of a claim against the estate of appellant's intestate, or an express waiver of any recourse against the general estate is not well taken. Section 1500 of the Code of Civil Procedure has no application to the facts of this case. The note and mortgage sued on were not in any sense a claim against the estate of said intestate. The latter was not the maker of the note or mortgage, nor did a demand of any character exist thereunder against the estate. The representative was made a party defendant solely by reason of the fact that subsequently to the making of the mortgage in suit the mortgaged land was purchased by said intestate in his lifetime, and the title thereto rested in his estate at his death, subject to the mortgage lien. It was necessary to make his representative a party only for the purpose of foreclosing the rights of the estate in the land and for that purpose alone. The estate of said intestate was in no way holden for any deficiency that might arise out of a sale of the property, nor was any

such relief asked or taken. There was, therefore, no claim to be presented against said estate. The section referred to applies only to instances where the note and mortgage constitute a claim against the estate of the deceased."

Likewise, it has been held that the statute is inapplicable where it appears that the mortgage was given to secure the debt of a third person, as this does not constitute a debt against the decedent. *Sichel v. Carrillo*, 42 Cal. 493; *Hibernia Sav. etc. Soc. v. Conlin*, 67 Cal. 178, 7 Pac. 477.

However, where the mortgage is on the homestead the claims secured thereby must be presented and allowed as other claims against the estate (Code Civ. Proc. § 1475). *Camp v. Grider*, 62 Cal. 20; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375; *Mechanics' Bldg. etc. Assoc. v. King*, 83 Cal. 440, 23 Pac. 376; *Hearn v. Kennedy*, 85 Cal. 55, 24 Pac. 606; *Rosenberg v. Ford*, 85 Cal. 610, 24 Pac. 779; *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064; *Hibernia Sav. etc. Soc. v. Thornton*, 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52; *Hibernia Sav. etc. Soc. v. Laidlaw*, 4 Cal. App. 626, 88 Pac. 730. In *Camp v. Grider*, supra, the court stated the purpose of the act requiring mortgage claims against the homestead to be presented as follows: "The purpose of the legislature in providing, by section 1475, that if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead if possible. That purpose is as clearly shown as can be by the language employed in the section: 'If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with other claims allowed;' and this is followed with the express declaration that 'the liens or incumbrances on the homestead only be enforced against the homestead for any deficiency remaining after such payment.'"

But where the homestead is not set apart until after the husband's death, it has been held that the rule requiring the presentation of mortgage claims does not apply. *McGahey v. Forrest*, 109 Cal. 63, 41 Pac. 817; *Browne v. Sweet*, 127 Cal. 332, 59 Pac. 774.

And so where the mortgage is given on the homestead which is the separate property of the wife, it has been held that, as it is not a part of the estate of the decedent, it is unnecessary to present the mortgage claim. *Schadt v. Heppie*, 45 Cal. 433; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

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Nor does the statute requiring the presentation of a claim secured by lien or incumbrance on the homestead apply to a deed of trust containing a power of sale. *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128; *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706; *Athearn v. Ryan*, 154 Cal. 554, 98 Pac. 390. In *Weber v. McCleverty*, supra, the court pointed out the distinction and applied the rule in the following language: "The application of this section to the estate of a trustee, holding under a trust deed made to provide for the payment of a debt of the deceased due to a third person, by virtue of a power of sale for that purpose conferred upon the trustee by the terms of the deed, primarily depends upon the question whether or not the trust deed, or the estate and power thereby vested in the trustee, can be considered a 'lien or incumbrance' on the land conveyed to the trustee by the deed, in the sense in which those words are used in the section. If it is neither a lien nor an incumbrance, then that statute has no application to this case. . . . In legal effect, a deed of trust does not create a lien or incumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt. It is consequently legally impossible for the trustee, in his fiduciary capacity, to hold a lien or incumbrance on the land which is the subject of his trust. . . . A mortgage or other incumbrance on land does not transfer the title, but leaves it vested in the mortgagor or owner. A homestead attaches to whatever estate in the land may be vested in one or both of the spouses. Consequently, when declared on land previously mortgaged or encumbered, it attaches to the legal title, which then becomes the homestead interest, and the mortgage or incumbrance may properly be said to be a subsisting lien or incumbrance on the homestead, and as such it would be governed by section 1475. But it is not so with a deed of trust. It transfers the legal title to the trustee, and, as the homestead applies only to the title vested in one or both of the spouses, and does not affect titles vested in third persons, it follows that the legal title thus vested in the trustee forms no part of a subsequently de-

clared homestead, and that the deed of trust, or the title of the trustee, is not a subsisting lien or incumbrance on the homestead interest."

As to the effect of an unnecessary filing of the claim, see the following subdivision of this note.

EFFECT OF FILING CLAIM.

It is generally held that the mere fact that a mortgagee has presented and proved his claim against the decedent's estate does not affect in any way his right to enforce his mortgage lien against the specific property covered. *Schuelenburg v. Martin*, 2 Fed. 747, 1 McCrary 348; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6; *Castle v. Haneberg*, 20 Hawaii 123; *People v. Phelps*, 78 Ill. 147; *Clarke v. Henshaw*, 30 Ind. 144; *Moore v. Ellsworth*, 22 Ia. 299; *Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640; *Larzeler v. Starkweather*, 38 Mich. 96; *Putnam v. Russell*, 17 Vt. 54, 42 Am. Dec. 478; *Walker v. Baxter*, 26 Vt. 710. *Compare* *In re Smith*, 194 Pa. St. 259, 45 Atl. 82.

In *Schuelenburg v. Martin*, 2 Fed. 747, 1 McCrary, 348, it was said: "The fact that plaintiffs proved their entire debt as against the estate of Kullak, and received two dividends thereon from the assets of said estate, does not extinguish their rights under the mortgage. The sum collected from the estate upon that portion of the debt which is secured by the mortgage must, however, be credited thereon." And in *Moore v. Ellsworth*, 22 Ia. 299, the court stated the rule as follows: "We can perceive no reason why the allowance of a claim secured by mortgage, although duly filed and proved before the county court against the estate of deceased, should constitute a waiver of the right subsequently to foreclose the mortgage. It is a well understood rule of law that a mortgage lien continues until the debt, to secure which the same was executed, shall have been paid or extinguished. Such filing, proof and allowance were simply a notice and the establishment of a claim, agreeably to the provisions of the administration laws, which the executors were authorized to pay. If it was not paid, it was competent for the plaintiffs in this case, under sections 2419, 2420 of the Revision, either to cite the administrators before the county court and obtain judgment against them, if no cause to the contrary is shown, or, at their election, to institute a proceeding to foreclose their mortgage, as they have done in this case."

Enforcement against General Assets.

Where it is sought to subject the general assets of the estate to the payment of the mortgage debt, either in full, or to make up

any deficiency, the authorities are agreed that the presentation and proof of the debt is a necessary condition precedent to participation in the distribution of the estate.

Alabama.—*Doe v. McLokey*, 1 Ala. 708; *Smith v. Gillam*, 80 Ala. 296.

Illinois.—*Roberts v. Flatt*, 142 Ill. 485, 32 N. E. 484; *Waugh v. Bartlett*, 165 Ill. 124, 46 N. E. 197.

Indiana.—*St. Joseph County Sav. Bank v. Randall*, 37 Ind. App. 402, 76 N. E. 1012 (prior to the Act of 1883, § 2405; *Burns* 1901, under which this case was decided, it was held that the mortgagee might proceed against the general assets even though he had failed to present his claim, as any deficiency remained a part of the mortgage debt); *Cole v. McMickle*, 30 Ind. 94; *LaPlante v. Convery*, 98 Ind. 499; *Swift v. Harley*, 20 Ind. App. 614, 49 N. E. 1069.

Iowa.—*Colby v. King*, 67 Ia. 458, 25 N. W. 704; *In re Brackley*, 166 Ia. 109, 147 N. W. 188.

Kansas.—*Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640.

Michigan.—*Clark v. Davis*, 32 Mich. 154; *Willard v. Van Leeuwen*, 56 Mich. 15, 22 N. W. 185; *Osmun v. Oakland Circuit Judge*, 107 Mich. 27, 64 N. W. 949.

Minnesota.—*Hill v. Townley*, 45 Minn. 167, 47 N. W. 653.

Mississippi.—*Jefferson College v. Dickson*, *Freem. Ch.* 474.

Missouri.—*Tucker v. Wells*, 111 Mo. 399, 20 S. W. 114.

Nebraska.—*Null v. Jones*, 5 Neb. 500; *Jones v. Null*, 9 Neb. 57, 1 N. W. 867.

Nevada.—*Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090. See also *Rickards v. Hutchinson*, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New Jersey.—*Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146; *Smith v. Crater*, 43 N. J. Eq. 636, 12 Atl. 530; *Smith v. Wilson*, 79 N. J. Eq. 310, 81 Atl. 851. *Compare* *Terhune v. White*, 34 N. J. Eq. 98, and *Feild v. Thistle*, 58 N. J. Eq. 339, 43 Atl. 1074, wherein it was held that a claim for a deficiency, being contingent until the fact of its existence was established, need not and could not be proved before that time.

Oklahoma.—*Fawcett v. McGahan-McKee Lumber Co.* 39 Okla. 68, 134 Pac. 388.

Oregon.—*Teel v. Winston*, 22 Ore. 489, 29 Pac. 142.

South Dakota.—*Kelsey v. Welch*, 8 S. D. 255, 66 N. W. 390; *Thurber v. Miller*, 11 S. D. 124, 75 N. W. 900.

Vermont.—*Grafton Bank v. Doe*, 19 Vt. 463, 47 Am. Dec. 697; *Pelton v. Johnson*, 52 Vt. 138; *Hurlburt v. Hinde*, 86 Vt. 517, 86 Atl. 739.

Washington.—*Scammon v. Ward*, 1 Wash. 179, 23 Pac. 439; *Reed v. Miller*, 1 Wash.

426, 25 Pac. 334; Macdonald v. O'Shea, 58 Wash. 169, Ann. Cas. 1912A 417, 108 Pac. 436.

Wisconsin.—Pereles v. Leiser, 119 Wis. 347, 96 N. W. 799. And see Schmidt v. Grenzow, reported in this volume post, this page.

Wyoming.—O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525.

In *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197, the rule was stated as follows: "The right to file and have allowed a claim of this character, under the statute relating to the administration of estates, is only an additional remedy afforded the holder of a note secured by a real estate mortgage, and where he may desire to secure judgment over for any deficiency which may result after the sale of the specific property in which he has a lien or where he may desire to hold liable a surety on the note. The mortgagee's right to a prompt foreclosure of his mortgage is not, however, to be in any manner impeded by compelling him to first resort to any personal remedy. . . . If he desires any judgment for deficiency, or recourse to any security not specifically pledged, he must proceed within the two years, in conformity with the statute."

So, a judgment of foreclosure, which included an order for a deficiency judgment, although the mortgage claim had not been presented against the estate as provided by the statute, was held to be erroneous in *Pereles v. Leiser*, 119 Wis. 347, 96 N. W. 799. In that case it was said: "The vital question on this appeal is, Was plaintiff entitled to recover on the note against the appellant as executor of this estate on August 24, 1900, when this action was commenced which resulted in this judgment of foreclosure and for deficiency in plaintiff's favor. Sec. 3844, Stats. 1898, provides: 'Every person having a claim against a deceased person proper to be allowed by the court who shall not after notice given as required by section 3840 exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever.' It was held, under this statute, that all claims against a decedent which can properly be presented against his estate must be filed for allowance with the county court upon due notice, and all claims not presented as required by sec. 3844 are absolutely barred, and thereby the remedy is cut off and the right of action is extinguished. . . . In this case the limitation for exhibiting a claim on this note against the estate of Sarah Leiser, deceased, had run against it before this action was commenced. Hence, there can be no judgment over for any deficiency against the appellant as the executor of her estate. The question is well settled under repeated

decisions in this state, which declare, in positive terms, that after such an extinguishment of a claim no foundation for a personal judgment remains on the note, though the right to a judgment of foreclosure of the mortgage to enforce the lien still existed, and therefore the power to render a personal judgment in the foreclosure action cannot be exercised, because there is no longer anyone personally liable to satisfy the conditions of the statute."

SCHMIDT ET AL.

v.

GRENZOW ET AL.

Wisconsin Supreme Court—February 1, 1916.

162 Wis. 301; 156 N. W. 143.

Executors and Administrators — Presentation of Claims — Claim Secured by Mortgage.

An indebtedness secured by a real estate mortgage is not "contingent" within St. 1915, § 3858, though not due at the time of administration; therefore, where it was not duly presented as a claim against the estate, the mortgagor on subsequent foreclosure is not entitled to a deficiency judgment over against distributees after a complete administration of the estate.

[See note at end of this case.]

Appeal from Circuit Court, Green county: GRIMM, Judge.

Action by Adam Schmidt, et al., plaintiffs, against Louis Grenzow et al., defendants. From judgment rendered, defendants appeal. REVERSED.

[301] Action to foreclose a real-estate mortgage of \$6,000 securing two notes of \$5,000 and \$1,000, each, executed by one E. O. Grenzow, since deceased.

Administration on the estate of the mortgagor had been completed before this action was begun, and the sum of \$1,762.27 out of his personal estate was assigned to each of the four appellants. At the time of administration the mortgage indebtedness was not due and plaintiffs filed no claim against the estate. The plaintiff Schmidt owns the note of \$5,000 and the plaintiff Babler is the owner of the \$1,000 note. The defendant Mary Legler is liable as an indorser of the \$1,000 note and does not appeal. In the usual foreclosure judgment the court also ordered a judgment for a deficiency, if any should arise,

against the four heirs to the extent of \$1,762.27 each. From that part of the judgment they appeal.

Sprague & Jenks for appellants.
J. L. Sherron for respondents.

[302] VINJE, J.—This case presents the question whether a judgment for a deficiency in a foreclosure action can be properly entered against the heirs of a deceased mortgagor where complete administration of his estate has been had and no claim has been filed by the mortgagee in the administration proceedings. The question was answered in the negative in *Pereles v. Leiser*, 119 Wis. 347, 96 N. W. 799. The only difference between that case and this is that there the indebtedness was due at the time of administration and here it was not. But a fixed amount due at a definite time in the future is not a contingent claim within the meaning of sec. 3858, Stats. 1915. Hence, the only contingency in this case is whether or not there will be a deficiency after sale. That was the only contingency in the *Pereles* Case and it was argued that such contingency made the claim a contingent one. But the court held that it did not. It is evident that the contingency of a deficiency is no greater where the note is not due than where it is due.

If a mortgagee deems himself insecure he can file his claim against the estate. If he does not do so he must be held to rely solely upon the security.

The case of *Pereles v. Leiser*, 138 Wis. 401, 120 N. W. 274, is relied upon as authority for the right to a deficiency judgment. In that case the judgment of the circuit court against the executor for a deficiency had to be treated as a valid judgment because unappealed from for two years, and it was held that the allowance of such valid judgment against the estate by the county court after the time for filing claims had expired was not error, as it was only another way of collecting [303] the judgment. The decision in *Pereles v. Leiser*, 119 Wis. 347, 96 N. W. 730, rules this case.

BY THE COURT.—That part of the judgment appealed from is reversed.

NOTE.

The reported case is in accord with the majority of the authorities in holding that a mortgagee may enforce his lien against the estate of a decedent without presenting the claim for allowance, but that if he fails to present his claim he is confined to the property covered by the mortgage, and cannot, should that prove insufficient, resort to the general assets for payment. For a general

discussion of this subject see the note to *Fremd v. Hogg*, reported ante, this volume, at page 155.

DABOLL

v.

MOON ET AL.

Connecticut Supreme Court of Errors—July 13, 1914.

88 Conn. 387; 91 Atl. 646.

Marriage — Conditions in Restraint — Legacy Conditioned on Obtaining Divorce.

While a condition, attached to a legacy, in restraint of marriage generally is invalid as against public policy, a condition that the legatee shall not marry a certain person, or a legacy to a widow to divest if she marries, is valid.

[See note at end of this case.]

Same.

The condition of a legacy to testator's son to be paid to him on the death of his present wife, or if he should obtain a divorce from her, or should become separated from her, or if within a year after divorce or separation he should become married to a good respectable woman, is not contrary to public policy as a restraint of marriage.

[See note at end of this case.]

Case reserved from Superior Court, New London county: REED, Judge.

Action by Charles H. Daboll, administrator de bonis non and trustee of will of John Moon, deceased, plaintiff, against Jesse A. Moon et al., defendants. Case reserved by superior court. The facts are stated in the opinion. DECREE CONSTRUING WILL.

Perry J. Hollandersky for plaintiff.

Abel P. Tanner and *Nathan Belcher* for Willard B. Moon.

William J. Brennan for Jesse A. Moon.

[388] THAYER, J.—The plaintiff is administrator *d. b. n.* with the will annexed of the estate of John Moon, who died in 1898, leaving real and personal estate and three sons, John H. Moon, Jesse A. Moon and Willard B. Moon. One half of the testator's estate is given by the will to Jesse A. Moon upon a condition relating to the son John H., which is now unimportant, as the latter died in 1899. The other half of the estate was

disposed of by the following provisions of the will: "Upon the death of the present wife of said Willard B. Moon, or if he shall obtain a divorce from her or shall become separated from her, at the end of a year from said divorce or separation, or if within said year he shall become married to a good respectable woman, then in either of said events the said Willard B. Moon shall be entitled to and shall receive the income and profit from said trust fund after the payment therefrom of one dollar and fifty cents per week to said John H. Moon, but if said Willard B. Moon shall ever return to live with his present wife his interest in said trust shall be divested and he shall not be entitled to receive any of the benefits thereof. It is my will that my said trustee may if he deem it best use and expend a part of the whole of the principal of said trust for the benefit of said Willard B. Moon, or for any [389] of the purposes of this trust, giving him full power to use his discretion in the management, interpretation and administration of this trust. . . .

Upon the death of said Willard B. Moon the trust shall continue for the benefit of said John H. Moon as aforesaid, if he still be living, and the funeral expenses of said Willard B. Moon shall be paid out of the same, and if said Willard B. Moon shall have married a good respectable woman as aforementioned, and shall have had issue by her, the income and profit of said trust that would have gone to said Willard shall be expended by my trustee for the benefit of said issue, but if said John H. Moon be then dead, and in any event upon the death of both Willard B. Moon and John H. Moon, after the payment of their funeral expenses said trust shall divest and whatever of said trust fund then be remain—I give, devise and bequeath to the issue of said Willard B. Moon if have any other than from his present wife and failing them, to said Jesse A. Moon his heirs and assigns forever."

Jesse A. Moon was named as executor and qualified as such, and as trustee under the provision quoted. He afterward resigned as executor and trustee, and the plaintiff was appointed trustee in his place.

Willard B. Moon and his wife, referred to in the will, are both living, and he has never separated from her by divorce or otherwise, and he has no children. He claims that the condition, upon which the testator made the gift to him of the income of the trust fund depend, was illegal as against public policy, as encouraging a separation by him from his wife, and therefore void, and that the gift of the income was therefore absolute, and that he is entitled to it as it accrues.

Cases can be found which hold, and perhaps the weight of authority supports the view, that a gift or [390] legacy made upon

a condition which constitutes an inducement to a married person to obtain a divorce, or to live separate from the other spouse, is void as against public policy. *Conrad v. Long*, 33 Mich. 78, 79; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391. So, it is said, are conditions in restraint of marriage. But the rule in the latter case is qualified, and there are exceptions to it. The condition must be in restraint of marriage generally. A condition that the legatee shall not marry a certain person is valid. A legacy to a widow, conditioned to divest if she marry, is valid. *Chapin v. Cooke*, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139. *Bigelow*, in a note to *Jarman on Wills* (6th ed. vol. 2, p. 49, s. p. 886), says: "If the question were open, there might be ground to inquire whether conditions in restraint of marriage generally are contrary to public policy."

The present case is not one where the condition is in restraint of marriage, although somewhat akin to it. The separation, which it is claimed that the condition in question tends to promote, offers no encouragement to celibacy on the part of the donee. The condition rather encourages a new marriage, for an early remarriage advances the time at which the income is to be paid to him if the condition is fulfilled. The marriage here was a fact at the time the will was made and went into effect. The gift was to vest in the donee upon the death of his wife, upon his divorce from her, or if he permanently separated from her. We are asked to say that the condition upon which the legacy was to vest is void as against the public policy of this State, and that the result of this is to make the gift absolute, so that it vests in the donee without performance of the condition.

It is clear from the language of the will that the result claimed would be directly contrary to the expressed intent of the testator. He did not intend that the income [391] should vest in Willard if he should not become separated from his wife by her death, a divorce, or in some other way. The cardinal rule in the interpretation of wills is to seek and carry out the testator's intent. *Wolfe v. Hatheway*, 81 Conn. 181, 184, 70 Atl. 645. This rule is in direct conflict with the one which is urged upon us by counsel for the donee, namely, that as the condition is unlawful the law understands that it is impossible of performance and that this impossibility is the equivalent of performance. We are not required to attempt a reconciliation between these rules in the present case, the conclusion to which we have come upon the other branch of the case rendering it unnecessary.

Upon the facts appearing in this record it cannot be said that the condition, upon which the income of this trust fund was bestowed,

was against public policy. It has never been the policy of this State, as it formerly was the policy of the church, to compel people married to each other to continue for life in that relation and cohabit together regardless of their inaptitude for such cohabitation and however unfitted they may be in disposition and temperament to mutually perform the duties of the marriage relation. The State does not favor divorces, but it allows them for several causes, because it believes that the interests of society will thereby be better served and that its own prosperity will thereby be promoted. *Dennis v. Dennis*, 68 Conn. 186, 197, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L.R.A. 449. So, too, the State deems it to be in the public interest that husband and wife, in some cases, shall live separate and apart, although not divorced. In 1895, before the will under consideration took effect, a law (now General Statutes, § 1354) was passed making the marrying, or living together as husband and wife, of any man and woman, one of whom is epileptic, imbecile, or feeble-minded, a criminal offense [392] punishable by imprisonment in the State prison. This law, as to one class of persons with whom it deals, was sustained as constitutional by this court as legislation in the interest of the public health. *Gould v. Gould*, 78 Conn. 242, 245, 61 Atl. 604, 2 L.R.A.(N.S.) 531. To condition a gift upon the doing of what the State treats by its legislation as promotive of the public interest and its own prosperity, or what it requires to be done in the interest of the public health, cannot be against public policy. To make the condition void as against public policy, it must appear from the language of the will alone, or in connection with extrinsic facts, that the testator in the particular case in question conditioned his gift upon an illegal divorce or separation. Numerous cases are to be found which support the view that where a gift is upon condition that the donee shall obtain a divorce, or live separate from husband or wife, the condition is valid when it appears from the will, in connection with the surrounding circumstances, that a legal divorce or separation was intended, or where a separation already existed, or a suit for divorce was pending at the time that the will was made. *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L.R.A. 577; *Cowley v. Trombly*, 173 Mass. 393, 397, 53 N. E. 886, 46 L.R.A. 164; *Coe v. Hill*, 201 Mass. 15, 21, 86 N. E. 949; *Thayer v. Spear*, 58 Vt. 327, 329, 2 Atl. 161; *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L.R.A. 526; *Cooper v. Remsen*, 5 Johns. Ch. (N. Y.) 459.

Where it is possible that the condition may be legally performed, it will not be presumed that the testator intended an illegal performance. The present gift was upon alternative conditions, one of which was the death of Willard's wife. It will not be presumed that the testator, in the absence of express language so directing, intended that his son should procure his wife's death. His counsel admit that if the wife's death had been the only condition of the vesting in him of the [393] income, the condition would have been valid. But the will holds out the same inducement to him to procure her death which it does to procure an illegal divorce or separation from her. In *Cowley v. Twombly*, 173 Mass. 393, 397, 53 N. E. 886, 46 L.R.A. 164, where the facts were somewhat similar to those in this case, the court said: "The scheme of the trust no more tended to induce the son to improperly procure a divorce between himself and wife, than to induce him to procure her death." Upon the face of the will, therefore, the condition upon which the income was to vest in Willard was not void, and he has not shown any facts extrinsic of the will which compel a construction which will make it void as against public policy.

There was no occasion for the plaintiff, as administrator or as trustee, to bring this action. There is no one at present to demand the distribution of the corpus of the trust estate. The son Willard is claiming only the income. The disposition of the corpus of the estate is in no way affected by the validity or invalidity of the condition upon which the gift of the income is limited. The only question which the plaintiff has now to consider, either as trustee or administrator, is whether Willard is now entitled to receive the income. Before the time arrives for the distribution of the body of the estate there may be issue of Willard, either by his present or another wife, to make their own claims as to its distribution. The only question between the parties now being whether Willard is entitled to the income, it could have been settled in an action at law brought by Willard against the present plaintiff as trustee, and such an action should have been brought instead of bringing the present apparently amicable suit.

The Superior Court is advised to render judgment that the condition, upon which the gift of the income [394] to Willard B. Moon is made, is not void as against public policy and good morals.

No costs will be taxed in this court in favor of either party.

In this opinion the other judges concurred.

NOTE.**Validity of Legacy or Devise Conditioned on Recipient Obtaining Divorce or Separating from Spouse.****General Rule.**

The general rule is that when a legacy or devise is given on the condition that the recipient shall obtain a divorce or separation from the spouse, the condition is void as being against public policy and good morals. *Tennant v. Braie*, Tothill 78, 21 Eng. Rep. (Reprint) 128; *Brown v. Peck*, 1 Eden 140, 28 Eng. Rep. (Reprint) 637; *Wren v. Bradley*, 2 DeG. & Sm. 49, 64 Eng. Rep. (Reprint) 23; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *In re Moore*, 39 Ch. D. 116; *Winn v. Hall*, 1 Ky. L. Rep. (Abstract) 337; *Witherspoon v. Brokaw*, 85 Mo. App. 169; *Snorgrass v. Thomas*, 186 Mo. App. 603, 150 S. W. 106; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Potter v. McAlpine*, 3 Dem. (N. Y.) 108; *Whiton v. Harmon*, 54 Hun 552, 8 N. Y. S. 119; *O'Brien v. Barkley*, 78 Hun 609 mem., 28 N. Y. S. 1049; *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. S. 61; *Matter of Haight*, 51 App. Div. 310, 64 N. Y. S. 1029; *Mores v. Gwynne*, 33 Ohio Cir. Ct. Rep. 463. See also *Conrad v. Long*, 33 Mich. 78; *Cooper v. Remsen*, 3 Johns. Ch. (N. Y.) 382, 521, 5 Johns. Ch. 459; *Paider v. Suchy*, 159 App. Div. 230, 144 N. Y. S. 252.

In *Wren v. Bradley*, supra, it appeared that the testator left certain property in trust, a portion of the income to be paid as follows: "To my daughter, Ann Jeffries Wren, the wife of Abraham Wren, in case she shall be living apart from her said husband, the said Abraham Wren, and shall continue so to do during the lifetime of my said wife, an annuity of £30. . . . And I do hereby further direct that if at any time the said Ann Jeffries Wren shall cohabit with the said Abraham Wren, the said annuity hereinbefore given to her shall during the time she shall cohabit, absolutely cease and determine." The daughter and her husband were living separate on the date of the execution of the will, but they were living together at the testator's death. It was held that the testator intended to obstruct a reconciliation, and that the daughter was entitled to the legacy. In *Wilkinson v. Wilkinson*, supra, the evidence showed that the testator bequeathed property to her niece on the condition that the niece would cease to reside in Skipton. The niece's husband was working in Skipton and could not reside elsewhere. To comply with the condition, the niece would be compelled to separate from her husband. The condition was held to be void.

In the case of *In re Moore*, supra, the facts were that the testator left a legacy of £2 10s.

per week while the legatee should be living apart from her husband. At the death of the testator the legatee had never been separated from her husband, but a separation occurred about one year later. It was held that the condition sought to cause a separation of the parties, and was void.

In *Winn v. Hall*, 1 Ky. L. Rep. (Abstract) 337, the will under consideration provided that the legatee should receive one thousand dollars "whenever she should become free from the power of" her husband. At that time a divorce suit was pending between the legatee and her husband. It was held that because it was against public policy to encourage divorces, the intention of the testator would be presumed to be to give the daughter the money as a provision for herself. The court said: "The manifest design of the testator was to give to the daughter the amount of money mentioned as a provision for herself. The literal import of the words used is to give it to her whenever she becomes free, or sui juris and the fact that a divorce was contemplated at the time the codicil was made ought not to alter the construction because such a construction is not within the letter of the will; and, second, because it is against public policy to encourage a dissolution of the marital relation, and it, therefore, will not be presumed that such was the intention of the testator."

In *Conrad v. Long*, 33 Mich. 78, it appeared that the testator left lands to his brother and sister, share and share alike. The sister's portion was conditioned as follows: "I give and bequeath to my sister Elizabeth Long, upon this condition: if at any time subsequent she should conclude not to live with her present husband, Henry Long, as his wife. But if she continue so to live as the wife of the said Henry Long until her death, then, in that case I give and bequeath all my property, real and personal, . . . to my aforesaid brother Frederick S. Conrad." The court said: "That the condition is void is admitted. It is contrary to the plainest principles of public policy to stipulate or provide in this way for a separation of husband and wife as a condition to the enjoyment of an estate. No separation against their will, except by divorce, is consistent with the nature of the marriage contract, which is of public as well as of private concern."

In *Witherspoon v. Brokaw*, 85 Mo. App. 169, it appeared that certain property was given to the devisee "so long as she may live separate and apart from her husband, Herbert Witherspoon, and no longer, and upon her reunion with him to vest, freed of this devise, in my son Charles D. Brokaw. Upon the death of said Herbert Witherspoon, before the termination of the above interest, the said . . . property shall vest in said

Emma Witherspoon [devisee] in fee simple absolute." The intention of the testator was presumed to be to insure the continuance of the separation, and not merely to assist the devisee during the separation, and the condition was held to be void. The court said: "It appears that Emma was married to Herbert Witherspoon and that they separated and that she returned to live with her aunt, the testatrix, bringing with her the child, Ora. And that she shortly afterwards obtained a divorce on account of desertion and nonsupport. Nothing has been heard from Herbert Witherspoon, though it does not appear that he is dead. If we view the will as giving the property to plaintiff Emma absolutely separated she remained separated from her husband as therein contemplated, it was a void condition and the property would be Emma's absolutely, freed from any condition. The condition would be void as against public policy. . . . If a separation had already taken place, or was in contemplation of being presently carried out, between Emma and her husband, and the will merely provided for her support or gave her property absolutely to sustain her so long as she should thus be deprived of the support of her husband it would be a valid will. The object being not to bring about the misfortune, but to provide for one who is in such an unfortunate condition. . . . But where the condition of the will shows by its terms and provisions that it is intended as a premium on the separation, and its object is to prevent a resumption of the marriage relation, it is void. We so regard the present will. It is apparent from the face thereof that the object of the testatrix was to make the separation final and that a reconciliation would be punished by a failure of the legacy."

In *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106, the evidence showed that the testator left property in trust for his daughter. There was a provision in the will as follows: "It is further my will that if my said daughter shall lose her husband" then the property should pass to the daughter absolutely. This provision was interpreted as meaning a loss by divorce as well as by death. While the condition was sustained on the ground that the testator did not intend to induce a separation but merely provided for the daughter in case a separation should come about, the court said: "The law zealously guards the marriage relation and if we thought the will in hand was designated to hold an inducement to plaintiff to obtain a divorce from her husband we could condemn the provision creating the trust as contra bonos mores. But we find no evidence in the will of such intention. Certainly a father acts within the scope of his parental right in protecting a devise, or bequest, to his

child against the possible depredations of her husband and in providing for the vesting of the absolute estate in the child on the cessation of the cause of the protective measures, that is to say, on the termination of the marriage relation, the father should be deemed to have been actuated by the praiseworthy motive of making suitable provision for possible future contingencies rather than by the reprehensible motive of attempting to impair the domestic happiness of his child by inciting her to a separation from her husband."

In *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391, it appeared that before the final execution of a will, a legatee was married to a woman to whom the testator was opposed. The will provided that if at the end of the ten years immediately subsequent to the testator's death, the legatee had severed all relations whatsoever with his wife, the executors should transfer the property to him. This condition was held to be void because it was in restraint of the continuation of the marriage relation.

In *Potter v. McAlpine*, 3 Dem. (N. Y.) 108, the evidence showed that the condition in the will was that a certain fund should be paid to the legatee when the legatee should "not live with or at any time contribute in any manner to the support or maintenance of his present wife." The condition was held to be illegal and void because contrary to public policy and good morals, the court saying that if the legatee complied with the condition, he would become liable to imprisonment for a violation of the laws of the state.

In *Whiton v. Harmon*, 54 Hun 552, 8 N. Y. S. 110, the facts found were that the testatrix devised all her realty to her son "for and during the term of his natural life, or while he shall live separately from his present wife." The son and his wife were separated at the time of the testatrix's death, and the condition was held to be void.

In *O'Brien v. Barkley*, 78 Hun 609 mem. 28 N. Y. S. 1049, it appeared that the testator left property in trust for his daughter, the income from which was to be paid to her during her natural life on the express condition that "she do not, at any time after my decease, associate, cohabit, or live with one James O'Brien." The will also provided that "in case she shall at any time after my decease, associate, cohabit, or live with the said James O'Brien," then the property was to be divided between other specified legatees, and further declared that "if the said James O'Brien shall depart this life, or otherwise lawfully cease to be the husband of my said daughter, and she shall at no time after my decease have associated or cohabited or lived with him, the said James O'Brien," then the property should be forthwith transferred to

the daughter. This condition was held to be void and unlawful because *contra bonos mores*.

In *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. S. 61, the evidence showed that the testatrix left property in trust for her daughter, the income from which was to be paid to her provided that during the life of her husband, a resident of New York, she should travel in Europe, should be divorced absolutely from her husband and should remain so divorced. The condition was held to be void because it tended to induce a separation. The court said: "The condition, being imposed only during the lifetime of her husband, or until she obtains a divorce from him, is a direct inducement to the daughter to procure such divorce. The separation of husband and wife impairs the peace of families, seriously affects the offspring of the marriage, and is at war with the best interests of society. The courts have uniformly held all contracts and provisions tending to induce a husband and wife to live separate or be divorced void as against public policy and good morals."

In the case of *Matter of Haight*, 51 App. Div. 310, 64 N. Y. S. 1029, it appeared that the testator left property in trust, the income from which was to be paid to his son during his natural life, subject to the following condition: "It is my will that so long as the present wife of my said son shall be living, and he shall be lawfully bound to her as a husband, the income to be paid to my said son shall not exceed the sum of two thousand dollars in any one year; and that in case of the death of said wife, or in case of his ceasing to be bound to her as a lawful husband, then the whole of said income is to be paid over to my said son during his natural life." The condition was held to be void as against public policy and good morals in that it tended to destroy the legatee's matrimonial union. The reasons for the decision were given as follows: "The appellant insists that the provision of his father's will which makes his enjoyment of the whole of the income dependent on the termination of his marriage relations is void, as in contravention of good morals and public policy, and that he may now raise the question, notwithstanding the decree of November 10, 1880. I have concluded that he is correct on both points. As to the first point, the condition must be held void if its manifest object was to induce Benjamin Haight to take such steps as might be necessary in order that he should cease to be lawfully bound to his wife as a husband; in other words, to obtain, or provoke, and so occasion, a legal divorce or separation, either in this state or in some other jurisdiction. If any other and innocent construction can be placed upon the condition, it is, of course,

to be adopted. But the will was made directly after the marriage of testator's son, and the condition must be regarded as made in hostility to that union, and in the hope of destroying it, in so far as that object could be accomplished by offering money by way of a premium or reward. It is true the condition is not in so many words that the son shall procure or suffer a divorce in order to entitle him to the entire income, but the precise effect of such an express condition is produced by a provision which gives him the entire income when such a divorce is procured or suffered. If the former offends public morals and contravenes public policy, it is difficult to see why the latter does not also. . . . I can but conclude that there is no difference in spirit and principle between a gift made expressly dependent upon the procurement of a divorce and one which is made payable only in the event of a divorce. The one invites the divorce directly and in terms, while the other incites it by the offer of a premium. The end desired by the donor is the same, viz., to induce the separation or divorce, and the means employed must be regarded as objectionable, whatever form or language may be employed, so long as it is apparent that the sole object of the donor is to encourage that result, and the means employed are calculated to promote it."

In *Moore v. Gwynne*, 33 Ohio Cir. Ct. Rep. 463, the evidence showed that a testatrix's will contained the following clause: "The remaining half of the residuum of my property shall be invested in a fund, the income of which shall accumulate from year to year and be added to the principal thereto for and during the natural life of Lenore Boyer Viers, or so long as she remains the wife of my brother, Basil W. Viers; then at her death, if my brother Basil W. Viers be living, or at her legal separation from my brother Basil W. Viers, if such occurs, my brother . . . shall receive the accumulated income of this one-half of the residue of my estate absolutely, and thereafter shall receive the income of this said fund for and during his natural life." The condition was held to be void. The court said: "By the provisions of this clause Basil W. Viers can only receive the legacy therein given upon the happening of one of two events, that is to say, at the death of his wife or his separation from her. She must either die or he must get a divorce. He is offered a pecuniary inducement to separate from her. A condition in a will designed to effect the separation of husband and wife is contrary to public policy and is absolutely void."

Qualifications of Rule.

A devise or legacy conditioned on a divorce or separation is valid if it is made by way

of provision for an existing or anticipated separation or for any other reason does not operate as an inducement to a separation. Thus, in *Shevell v. Dwaris*, 70 Eng. Rep. (Reprint) 384, it appeared that the testatrix left property to her nephew if he should be living with his wife at the time of the testatrix's death, but if he should not be living with his wife at that time, then he was to receive only one-half of the property and the wife was to receive the remaining portion. It was held that since the condition would be performed at the time of the death, it could not influence the conduct of the legatees. Likewise, in *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L.R.A. 526, the will under consideration gave the income from or the use of lands to the devisee until he should become sole and unmarried; and on the happening of that event, the devisee was to receive the lands in fee simple. If he should die without having divorced his wife, Julia, the lands should be held in trust for other devisees. At the time of making the will, there was a divorce suit pending between the devisee and his wife. They were separated and remained so for a number of years. It was held that the testamentary provision did not, therefore, incite the devisee to a separation, and the condition was upheld. The court said: "While it is of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld, it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interests of their donees. On the whole case, we are inclined to the view that the condition in this will should not be held as contrary to public policy and void." In *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949, there was involved a gift of property to be held in trust for the testator's daughter until her legal separation from her husband, on which event the whole fund was to vest in her. While it was said that if this provision was purposed to induce a separation, it would be void because antagonistic to public policy, it was held that the testator's intention was to provide for his daughter in case she should become a widow or should secure a separation based on her legal rights, and the validity of the condition was therefore sustained. The reasons for the decision were given by the court as follows: "In its conservation the law has steadily refused to sanction the validity of testamentary provisions founded upon conditions precedent to their enjoyment by the legatee, which are intended to bring about the separation of husband and wife.

If the testator's purpose was to induce a future separation or divorce of his daughter from her husband, upon the happening of which the fund with accrued income would immediately become payable to her, the condition for this reason would be void. . . . But, while the testator's intention is the only test, the language he employed is to be construed in the ordinary sense, and for this purpose the condition, which is made dependent upon either one of two contingencies, is to be treated as a whole. If this is done, then, upon either the death of the husband or upon a divorce between them, whether obtained by her or by him, the fund vests in possession, but it would be a plain perversion of words to say that the testator meant or intended that, in order to accelerate the enjoyment of the property, the petitioner should procure either her husband's death or a divorce. The testator refers only to a separation, which, under the laws of his domicile, whose provisions he may be presumed to have in mind, could be grounded by her only on the husband's misconduct. He speaks of its permanency in the sense that the marriage status was to be ended, not by a breach of marital obligations, but by an irrevocable decree for an absolute divorce. It is as if, in making provision for her future welfare, he had said, 'If my daughter becomes a widow,' or 'If because of her husband's marital misconduct she lawfully obtains an absolute divorce, then the trust as to her is to be terminated, and she is to have her share of the property.' The voluntary exercise by a legatee of a right which the law confers is not against public policy, and does not avoid a testamentary gift, the language of which may show the testator had in mind that such a contingency might arise." Similarly, in *Dusbiber v. Melville*, 178 Mich. 601, 146 N. W. 208, 51 L.R.A.(N.S.) 367, it appeared that a will provided that if the legatee could not live with her husband because of his cruelty, and if for that reason she should be compelled to support herself, then she was to have a legacy of two thousand dollars. The executor was empowered to determine whether the legatee could live with her husband. At the time of the execution of the will divorce proceedings were pending. The condition was held to be valid in view of the fact that the legatee was not to determine the possibility of living with her husband. In deciding the case, the court said: "The testator knowing that the inevitable was near, made this provision for Mrs. Melville only eight days before he passed away. At the time he made the will he was cognizant of the fact she was living separate from her husband, and that she had begun divorce proceedings against him. It is not unreasonable to suppose that he felt that he owed her

some duty to provide for her if she could not live with her husband after he was gone. If she could and did live with him again, she would be provided for, and would be in no need of his bounty. If she could not, she would then need the legacy which he gave to her. Considered from this viewpoint, I am impressed that the condition is not an unreasonable one, especially in view of fact that she is not to be the judge as to whether she can live with her husband, but that determination lies with the executor. She might decide that she could not; but that would not entitle her to the legacy. The executor might conclude otherwise, and, if he did, she could not get it, even though she actually lived away from her husband."

Two New York decisions have sustained provisions that property should vest if the legatee should be separated from her husband, but in each case the court declared that if the condition was designed to induce a separation, it would be void. In *Cooper v. Remsen*, 5 Johns. Ch. 459, the provision was as follows: "I do give and bequeath to her [the legatee], during her separation from William Cooper, her present husband, one thousand dollars a year." The separation was already existing. The condition was held to be lawful. The court said: "There is a wide difference between a bequest to a daughter during her separation from her husband, when the separation was then actually existing, without being procured by the testator, and a legacy to her, if she lived apart from her husband; for that would be to hold out a temptation to a separation which would be contra bonos mores. The legacy would be simple and pure in the latter case . . . but in the former case the legacy depends upon the fact of separation then already commenced, and was in that event, a kind and charitable provision." In *Paider v. Suchy*, 159 App. Div. 230, 144 N. Y. S. 252, the evidence showed that the testator left property in trust, the income thereof to be payable to his daughter in case she should be a widow or should not be living with her husband. The daughter was confined in an insane asylum and was thus living apart from her husband. The provision was construed to mean such a separation as was then taking place, and the condition was held to be valid. It was said that if the provision was construed as offering a premium for separating from the husband, the condition would be void because against public policy, but that the circumstances did not warrant such an interpretation.

In some cases the validity of a condition that a legacy or devise shall not vest unless the party shall obtain a divorce seems to rest on the intention of the testator rather than on the existence of an actual inducement

to end the matrimonial union. In *re Gunning*, 234 Pa. St. 139, 83 Atl. 60, 49 L.R.A. (N.S.) 637; *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31; *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161; *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106. In the case of *In re Gunning*, supra, it appeared that a testatrix's will contained the following clause: "The income of the balance to be given to Karl F. Miller, provided he is not living with the woman he married in 1899—one Jane Wilson, should she die, or he be divorced from her—that is finally divorced—he is to be given absolutely one-half of the principal, and the interest of the other half as long as he lives." The condition was sustained. It was held that the condition was intended merely to keep the wife from receiving any benefit from the money and that there was no inducement to cause a separation. In *Ellis v. Birkhead*, supra, the evidence showed that under the will the property was kept in trust for a daughter of the testator. But if she outlived her husband or if she should be divorced from him, then the legal title to a life estate would vest in her. Although there was evidence of strained relations between the testator and the husband, the court construed the condition as not having been made to induce a divorce but to provide for the daughter in case she should be needy. The will was held to be valid. The reasons for the decision were given as follows: "While it may be readily conceded that conditions in a will manifestly intended to bring about a separation or divorce are void, we think they should be clearly so before the courts, by decree, nullify the expressed will and purpose of the testator, for our statutes on the subject, as well as sound considerations of public policy, dictate that those having testamentary capacity shall have the greatest freedom, consistent with public safety, in the disposition of their estate by will, and the importance of this right should not be ignored. In our judgment, the will before us should not be construed as manifestly intended to incite a divorce between appellees, but, rather, that the testator merely intended to provide for his daughter in the contingency named, and to protect her in the meantime from the improvidence of her husband." In *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161, it appeared that the testatrix bequeathed to her daughter the income of the estate so long as she remained married to her then husband; but if the daughter should become a widow, or for any cause should cease to be the wife of her then husband, her ownership was to become absolute. The provision was held to be valid, because the testatrix did not intend to induce a separation from the husband, but to provide for the daughter in case she should be deprived of her husband's care. In

speaking of the condition, the court said: "It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income, only, was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate."

While no other decision goes as far as does the reported case in sustaining a gift conditioned on the obtaining of a divorce, several courts base their holdings on a similar argument, i. e., that the condition involves only the exercise of a right granted by law. In *Cowley v. Twombly*, 173 Mass. 393, 53 N. E. 886, 46 L.R.A. 164, the will under consideration provided that the property should be held in trust so long as the testator's son should remain the husband of his then wife. On the death or divorce of the wife, the trust was to cease, and the son would hold the property in his own right. It was held that it was not against public policy to make a devise contingent on the devisee's obtaining a divorce, because a divorce was a legal right and obtainable only for cause. The court said: "The scheme of the trust no more tended to induce the son improperly to procure a divorce between himself and his wife, than to induce him to procure her death. Either event would give the son an estate which otherwise he could not have. But the testator was under no obligation to give property to his son, and had full right, if he chose, to give it to the defendant, his niece. There is here no gift to the son upon a condition that the son should lose the benefit of the gift if he should not separate from his wife, as in *Wren v. Bradley*, 2 DeG. & Sm. 49, and in *Conrad v. Long*, 33 Mich. 78. What the testator has done is to provide that, upon the son's death, the property shall go to the defendant, unless before the son's death the woman who when the will was made was the son's wife had ceased to be such by reason of death or divorce. That a devisee of a contingent remainder will benefit by the death of the life tenant does not make such a devise void as against public policy, because tending to induce the remaindermen to compass the death of the life tenant. The separation of husband and wife, the marriage continuing, is against public policy. Hence conditions annexed to limitations by settlements or wills, providing that a husband or wife shall lose the benefit of an estate unless they live separate, have been held void. . . . But while the separation of persons who are husband and wife is against public policy, divorces are provided for, sanctioned and regulated by law. There is no more likeli-

hood or presumption that a divorce will be wrongfully brought about by one of the parties to a marriage in order to secure property, than that a death will be so occasioned. A testator no more offends public policy by simply making his bounty contingent upon the occurrence of a divorce than of a death." In *Boon v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L.R.A. 577, it appeared that by the will property was left to trustees, the income from which was to be equally distributed quarterly among the children. It was provided that "in the event of any of my said daughters becoming a widow, or otherwise becoming lawfully separated from her husband," then that daughter was to receive immediately her portion of the principal of the estate. One daughter divorced her husband and was assigned her undivided interest in the realty. The other daughter contended that the condition of the will was void in that it was against public policy and *contra bonos mores*, because it incited an encouraged the daughters to separate from their husbands. But the validity of the condition was sustained, on the ground that it merely incited the daughters to do a lawful act in a lawful way. The separation would have to be passed on by a court. The court said that such a provision was not only valid, but under certain circumstances was commendable.

RILEY ET AL.

v.

LITCHFIELD ET AL.

Iowa Supreme Court—December 19, 1914.

168 Iowa 187; 150 N. W. 81.

Names — Presumption that Letter Constitutes Name.

A person's name is composed of the Christian name and a surname, and a Christian name may consist of letters only, and there is no presumption that letters are not themselves Christian names, and where a letter or letters appear before a surname they are treated, in the absence of any showing to the contrary, as the Christian name assumed by the person.

[See note at end of this case.]

Disregarding Middle Name or Initial.

Where two or more Christian names are used, the middle name or names or letter is generally disregarded.

[See 15 Ann. Cas. 117; Ann. Cas. 1912B 601.]

Same.

Where a given name is written, the middle name or letter may be disregarded in identifying the person.

Intoxicating Liquors — Consent to Sale — Signatures — Identity with Poll List.

Where poll lists contained the Christian names of electors, while the names to a statement of consent to the sale of intoxicating liquors contained only the letters of the Christian names, the signatures to the statement were not signatures of names of persons appearing on the poll books, and must be disregarded.

Same.

Where names signed to a statement of consent to the sale of intoxicating liquors were spelled differently from the names in the poll books, but the names would be pronounced the same, the doctrine of idem sonans will apply, and the names must be counted.

Proceeding for Permission to Sell — Nature of Proceeding.

A proceeding under the mulct law for permission to sell intoxicating liquors pursuant to a statement of consent, though special, is at law.

Mode of Trial.

Code, § 2450, providing for the filing of statements of consent to the sale of intoxicating liquors, and authorizing any aggrieved party to appeal from the decision of the board of supervisors to the district court, where the matter shall be tried de novo, requires a trial in the district court as though not previously heard.

Review of Finding.

A finding by the district court, on appeal from a finding of the board of supervisors, that a statement of consent to the sale of intoxicating liquors is insufficient, will not be disturbed on appeal where there is room for reasonable minds to differ as to the facts.

Consent to Sale — Signatures — Conformity to Poll Book.

Where the names on a statement of consent to the sale of intoxicating liquor and on the poll books are the same, the identity of the signers with the electors whose names are on the poll books is presumed, but the presumption may be overcome.

Signature by Incorrect Name.

Where persons signing a statement of consent to the sale of intoxicating liquor testified that the names signed by them were not their true names, but that the change in the signatures was to make the names conform with those on the poll books, and not to deceive, but there was nothing to show that other persons resided in the city bearing the names appearing on the poll books, the names must be disregarded in determining the number of signers on the statement.

Same.

Where "C. A. Oppelt" signed a statement of consent as "E. A. Oppelt," the name appearing on the poll book, and he testified to

having resided in the city and to having voted at the last preceding election and that there was no one living in the city by the name of "Oppelt" excepting himself and son, and that the son had never voted, but did not know whether a person by the name of "E. A. Oppelt" voted, the person signing as "E. A. Oppelt" was "C. A. Oppelt," and his name must be counted.

Same.

Where persons signing a statement of consent to the sale of liquor testified that the names signed by them were not their true names, evidence that the change in signatures was to make the names conform with those on the poll books and not to deceive, and that all of them were registered in their true names, but none of their true names appeared on the poll books, is admissible as against the objection that the evidence varied or explained the names on the poll books.

Same.

Where electors signing a statement of consent to the sale of liquor, on discovering that their true names were not on the poll books, signed the names to the statement corresponding with those on the poll books, supposed to have been written for them by the judges of election, pursuant to advice of canvassers to procure signatures to a statement of consent, the canvassers are not chargeable with inducing electors to sign names other than their own.

Affidavit to Signatures — Knowledge of Affidavit.

The purpose of Code, § 2452, declaring that the signing of a name of another to any statement of consent shall be punishable as forgery, and every statement shall be accompanied by affidavit of some reputable person showing that these persons personally witnessed the signing of each name thereon, and any false statement in the affidavit shall be punishable as perjury, is that each signer shall be identified as the person named, so that a genuine statement may form the basis of subsequent proceedings, and a canvasser who procured over 200 signatures to which he made affidavit, and who admitted that he did not know over half of them, and had never seen them before or since the signing of the petition, and only knew their names because attached to the statement, is guilty of perjury in the performance of his work and is not a reputable person, and the signatures procured by him must be excluded.

Effect of Death or Removal of Signer.

Code, §§ 2448, 2452, providing that a statement of consent to the sale of intoxicating liquors signed by a majority of the voters as shown by the poll list shall, if found sufficient, be effectual, and that no name shall be counted that is not signed within thirty days prior to the filing of the statement, imply that all signing within thirty days prior to the filing shall be counted, and fixed the period during which signatures may be procured, and the thirty days mentioned is that period, and a name signed within that

time and while a resident of the municipality must be counted, though he has since that time removed from the city or has died.

Qualification of Signers — Right to Vote — Poll Book — Conclusive.

The poll list of the electors is conclusive evidence of those who voted at the election in determining whether a statement of consent to the sale of liquor has been signed by the requisite number of electors, and the law does not contemplate an investigation as to who had the right to vote, but it is sufficient that the name appeared on the poll lists.

Withdrawal of Signature — Revocation of Withdrawal.

Electors signing a statement of consent may revoke withdrawals not filed, and may file revocation of withdrawals prior to the taking effect of withdrawals.

Appeal from District Court, Black Hawk county: DUNHAM, Judge.

Action by J. H. Riley et al., plaintiffs, against H. L. Litchfield et al., defendants. From judgment rendered, all parties appeal. The facts are stated in the opinion. **AFFIRMED.**

[190] Appeal from a judgment of the district court declaring the statement of consent to the sale of intoxicating liquors in the city of Waterloo insufficient, thereby affirming a like finding of the board of supervisors of Black Hawk County. The appeal is by both parties, that of those presenting the statement being first perfected. **Affirmed.**

W. N. Birdsall, H. B. Boise and J. T. Sullivan for appellants.

Wirt P. Hozie, Reed & Tuthill and Court-right & Arbuckle for appellees.

LADD, C. J.—A written statement of consent to the sale of intoxicating liquors in the city of Waterloo purporting to be signed by 3,917 persons who had voted at the last preceding election at which 6,795 votes had been cast was filed with the county auditor, December 17, 1912. Of these, 402 subsequently were withdrawn, 18 names were twice signed, 9 were forgeries, 2 improperly witnessed, 2 were names of nonresidents, and 4 did not appear on the poll books. In addition to these, 36 were not counted because of difference in names on statement from those appearing on the poll books, 23 owing to difference in initials and 26 being declared fictitious names. Deducting these, or 522 names, from the 3,917 appearing on the statement of consent, there remained but 3,395 or 3 less than a majority of the electors voting at the last preceding election.

The appeal by those presenting the statement of consent will be considered first.

I. Thirty-six names attached to the petition of consent were not counted because different from any appearing on the poll books and the correctness of this ruling as to the following names is challenged by appellants: [191]

Ward.	Precinct.	Name.	Poll No.	Name.
2d	1st	Robert Thorn	307	R. Thorn
2d	1st	Hiram B. Colvin	415	H. B. Colvin
2d	1st	John R. Armstrong	741	J. R. Armstrong
3d	2d	Will G. Lusthoff	288	W. G. Lusthoff
4th	1st	Lee Lovelett	422	L. Lovelett

A person's name is the mark or *indicium* by which he is distinguished from other individuals. By universal practice or custom, the designation is composed of the christian or given name and a surname. The one is given at birth or at baptism, the other is the patronymic derived from the common name of parents. The Christian or first name is in law, and is denominated the proper name. Surnames do not appear to have come into use in England until the middle of the fourteenth century and were not considered of controlling importance until the time of Queen Elizabeth. Because of the given name being conferred by the religious rite of baptism, it was deemed of the more importance, whereas the surname was then usually assumed by the individual or given him by others because of some characteristic or peculiarity. Snook Petition, 2 Hilt. (N. Y.) 566.

Some Christian names were often borne by several individuals, and so the use of the surname was adopted in order to better distinguish the one from the other. Such distinctions were often made by the name of the estate or place where born or of abode or from whence the individual came, or by occupation. The Christian or given name may consist of letters only, though this does not frequently happen,—and there is no presumption that letters stand for other names and are not themselves the Christian name of the party. Hinkle v. Collins, 113 Mich. 105, 71 N. W. 481; Andrews v. Wynn, 4 S. D. 40, 54 N. W. 1047; State v. Cameron, 86 Me. 196, 29 Atl. 984; Tweedy v. Jarvis, 27 Conn. 42; King v. Hutchins, 28 N. H. 561, 578; State v. Webster, 30 Ark. 166; Minor v. State, 63 Ga. 318; Charleston v. King, 4 McCord L. (S. C.) 487; Lomax v. Landells, [192] 6 C. B. 577, 60 E. C. L. 577; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71; Note to Lafin, etc. Power Co. v. Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L.R.A. 690.

Possibly a single letter may have become so commonly used as an abbreviation for the Christian name that in view of other circumstances it will be recognized as such. Thus "J" before the surname was held in

Claffin v. Chicago, 178 Ill. 549, 53 N. E. 339, to be the abbreviation of John. But generally where a letter or letters appear before the surname they are treated, in the absence of any showing to the contrary, as the Christian name, assumed by the party; for, as parents are under no legal obligation to baptize their children, the first name may be assumed and consist only of a letter or letters. Tweedy v. Jarvis, 27 Conn. 42; Charleston v. King, 4 McCord L. (S. C.) 487; Reg. v. Dale, 15 Jur. (Eng.) 657; Lomax v. Landells, 6 C. B. 577, 60 E. C. L. 577.

Where two or more Christian names are used, the middle name or names or letter is quite generally disregarded, though the rule appears otherwise in Massachusetts. Parker v. Parker, 146 Mass. 320, 15 N. E. 902.

The middle name or names, letter or letters cannot well be said not to constitute a part of the name, as some decisions declare, but merely are not essential to the identification of the person.

Where the given name is written, then the middle name or letter may be disregarded in identifying the individual and where only a letter or letters precede the surname such letter or letters, in the absence of any showing to the contrary, are to be treated as the given or proper name. It should be added that differences in spelling are of no consequence if this makes no difference in the sound when correctly pronounced.

These rules were recognized in Wilson v. Bohstedt, 135 Ia. 451, 100 N. W. 898, and Porter v. Butterfield, 116 Ia. 725, 89 N. W. 199, and it need only be added that the ruling of the court, in holding the above names not the same, was not erroneous.

[193] II. A considerable number of names spelled differently on the statement of consent and in the poll books were counted because of sounding the same. The doctrine of *idem sonans* was held not applicable to seventeen names. As to two of these, we have no difficulty in disagreeing with the district court. One of these appeared on the petition as Arthur Rohweder, and on the poll book as Arthur Rohwweder. Spelled either way, the surname would be pronounced the same. Indeed, it would be difficult to so pronounce the two as to render the sounds distinguishable. E. F. Goodell was spelled alike on both petition and poll book.

As to some of the other names, there is a difference of opinion, but as, on other grounds, we find the statement of consent insufficient, it is unnecessary to review in detail the remaining fifteen. For a collection of authorities, however, see 29 Cyc. 272 et seq.

III. The court's finding as to the manner in which the above names and some others were spelled on the poll books is challenged. We have examined these names on the poll books and are inclined to the opinion we ought

not to interfere. Were the matter before us for hearing as an equitable action, the writer would be inclined to hold that several of the names rejected were identical with those on the statement of consent. This is true, to illustrate, of O. H. Sossaman, A. C. Sorensen, H. S. Caward and Matt Geib. The second letter of each of the first two on the poll book might well have been read "o" instead of "a" and in the third "a" instead of "o". But the second letter in Caward's name seems almost exactly like the second letter in the others. Had those making affidavits to signatures to the statement of consent appreciated their purpose as being to identify these as the signatures of those signing, some help might have been derived from this source. This is especially true in the case of Matt Geib. His given name on the statement was found [194] to be Watt though the affidavit described him as Matt and the name so appears on the poll book. Persons examining these reach different conclusions and would be as likely, perhaps more likely, to agree with the conclusion reached by the district judge than otherwise. As persons other than the elector enter his name on the poll books, some liberality is desirable in making comparisons to the end that, while none but electors may be included as signing the statement of consent, as few as possible be denied an expression of their wish without their fault, because of mistakes or oversights of election officers. However, there was room for the findings of the trial court, and, as minds might well differ, such findings must be accorded the effect of a verdict and cannot be disturbed. The proceeding, though special, is at law. Dye v. Augur, 138 Ia. 538, 110 N. W. 323; Porter v. Butterfield, 116 Ia. 725, 89 N. W. 199; Green v. Smith, 111 Ia. 183, 82 N. W. 448.

True, section 2450 of the Code provides that in the district court the matter shall be tried *de novo*. This means no more than that it shall be tried not as before the board of supervisors or on the record there made, but again and as though not previously heard. An analogy is found in appeals from justices of the peace which are tried in the district court anew but always at law precisely as special proceedings, in the absence of any provision contrary, are there tried. No provision respecting appeals in such matters to this court are to be found and therefore these must be on errors as in other law actions. If then, in examining the names on the poll books and comparing them with those on the statement of consent, minds might reasonably differ as to their being the same or different, the finding of the trial court must be accorded the force of a verdict of the jury. For this reason we are not disposed to disturb the findings of the trial court.

IV. Where the names on the statement of consent and the poll books are the same, the identity of the signers with the [195] electors whose names are on the poll books is presumed. To overcome this presumption, twenty-three electors were called by contestants and testified that the names by them signed were not their true names. On cross-examination, proponents elicited that the change in signature was to make the names conform with those on the poll books and not to deceive. This was objected to for the reason that the poll books were the exclusive evidence of who had voted. Appellees insist also that the evidence failed to identify these witnesses with those who had voted under the particular names appearing on the poll books. All of them were registered in their true name and none of their true names appear on the poll books. But for all that appears save as to the witness referred to further on, none knew whether other persons resided in the city bearing the names appearing on the poll books. This being so, it could not well be inferred that these witnesses were the persons intended rather than others, especially since they may as well have been given other initials or names in the poll books. It was a mere guess or surmise and not sufficient on which to base a finding. Had others of the same surname who had voted at the election been called and showed that they voted under other names appearing on the poll book, then there would have been room for the inference that the particular person's name was as written therein, especially if it were shown that no other of that name resided within the precinct. That the elector knew of no one of that name was of little significance unless a showing were made that he probably would have known if there were such. In *Taft v. Snouffer*, 157 Ia. 461, 137 N. W. 922, the identity of the person signing with him whose name was written on the poll book was conceded. Here the proof was insufficient to do more than show that the particular elector voted and that a name something like his appeared on the poll book and that he knew of no one in the precinct bearing such name. It is needless to say that this [196] was not conclusive and in any event did not preclude a finding to the contrary. As to one only was the evidence of this character. C. A. Oppelt, who signed the statement of consent as E. A. Oppelt, the name appearing on the poll book, testified to having resided in Waterloo, to having voted at the last preceding election, that there was no one living in Waterloo by the name of Oppelt except himself and a son by that name, and his son had never voted, but that he did not know whether a person by the name of E. A. Oppelt voted.

In the light of this evidence and in view of the fact that but one Oppelt voted in the

precinct, there is but one inference reasonably to be drawn from this evidence and it is that Oppelt was the identical person whose name appeared on the poll book as E. A. Oppelt. All this evidence was objected to as tending to vary or explain the names on the poll books, but such was not its design. The witnesses having been asked by appellees whether their names were as actually signed to the statement of consent and it appearing that they were not, this evidence was adduced to show that, although different, they were not forgeries or fictitious names but those of the identical persons who had voted and their names entered in the poll books precisely as they had signed them to the statement of consent. For this purpose, the evidence was admissible.

V. On the appellees' appeal they contend that the evidence disclosed that several of the canvassers were not reputable persons in that (1) they were guilty of perjury; (2) induced electors to sign names other than their own; and (3) made affidavits to signatures of electors unknown to them. Disposing of the second of these first, it is to be said that a number of electors, upon discovering that their true names were not on the poll books, signed the names to the statement corresponding with those on the poll books which were supposed to have been written for them by the judges of election. This was in pursuance [197] of the advice of those in charge of the campaign and was approved in *Taft v. Snouffer*, supra, and therefore the action of those making affidavit thereto cannot well be criticized.

The first and third grounds may be considered together. Section 2452 of the Code declares that, "The signing the name of another to any statement of general consent provided for in the sections of this chapter relating to the mulct tax, shall be punishable as forgery, and every such statement shall be accompanied by the affidavit of some reputable person showing that said person personally witnessed the signing of each name appearing thereon, and any false statement contained in such affidavit shall be punishable as perjury." The manifest design of this statute was that each signer be identified as the person named, to the end that a genuine statement form the basis of subsequent proceedings.

As said in *re Intoxicating Liquors*, 120 Ia. 680, 95 N. W. 194, "the object of the legislature in adopting this provision was to secure a genuine statement—that is, one signed by the requisite number of qualified persons—and to furnish the board of supervisors a *prima facie* showing by way of affidavit that the signatures relied on are genuine." The notion of an attesting witness is that a person other than the one signing place his name on the paper or instrument for the purpose

of making an implied or express statement thereby that it was then known by him to have been signed or executed by the purported maker. 11 Wigmore on Ev. Sec. 1292.

And this was the interpretation of the statute by those preparing the form of affidavit used in which the affiants deposed that the person named therein signed "the foregoing statement of consent in my presence and that I personally witnessed his signature thereto." It was not essential that the canvasser make the affidavit; any reputable person may do so provided he is able to identify the individual signing the statement as the person of the name signed. Were less exacted, the making of the affidavit would be an idle and useless [198] formality. Several of the canvassers made affidavit to signatures without knowing who made them. One of them estimated that one-third of those signing were strangers and another thought one-half had never been seen by him before or since. Another declared that he did not give the question of identity of the persons with the names signed any consideration whatever.

One B. D. Ryan testified that he procured 200 to 225 signatures to which he made affidavit; that he did not know all of them, probably not over half and never saw them before or since and only knew their names from these being attached to the statement. He had been acquainted with E. F. Patterson, residing at 901½ Sycamore Street, and employed by the Independent Electric Company, for three or four years and had requested him to sign the statement of consent two or three times, but Patterson refused and never did sign it. Nevertheless, Ryan made affidavit that E. F. Patterson signed the statement and that he personally witnessed such signing, and his explanation was that a person whom he did not know and who gave his residence as at a transient hotel signed that name. No reason for thinking such person E. F. Patterson appeared and there is no escape from the conclusion that Ryan was guilty of wilful perjury in making the affidavit. In the instance of Seeland, the evidence is not so conclusive, though he gave no attention whatever to the identity of the person signing the name, and his affidavits to signatures purporting to be those of Albrecht, Neith and Case, none of whom ever attached his name to the statement, were false. Other forgeries were shown and in view of the carelessness of the canvassers, still others may not have been detected. Whatever may be said as to the showing against Seeland, that against Ryan was conclusive and no argument is essential to sustain the conclusion that a person guilty of perjury in the performance of the work under investigation is not a reputable person. Not being such, the signatures witnessed by

him should have been rejected. Taft v. Snouffer, 157 Ia. 461, 137 N. W. 922; Foster v. Crisman, 165 Ia. 189, 144 N. W. 1021.

[199] VI. After signing the statement and before it was filed, several of those who signed died and others removed from the city before the statement was filed and it is insisted by appellees that the names of these should not have been counted on the petition.

The statute provides that as a condition to the taking effect of the mulct law, "A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided." Section 2448.

Section 2452 of the Code provides that "No name shall be counted that was not signed within thirty days prior to the filing of said statement of general consent." This implies that all signing within the thirty days prior thereto shall be counted and the statute quoted plainly means that the persons signing the statement shall be residents of the city at the time of signing. Some period must necessarily be fixed during which signatures may be procured and we think the thirty days mentioned is that period and that the name having been signed within that time and while a resident, it should be counted.

VII. It appears that some electors voted without being registered. They made the proper affidavits on the day of election and received certificates which were presented to the judges of election at the time of voting but the register was not signed, and for this reason, the appellees contend that they voted illegally and that their names ought not to have been counted. We have repeatedly held that the "poll list of the said electors" is conclusive evidence [200] of who voted at the election and those so voting are entitled to sign the petition and be counted. The law does not contemplate the investigation as to who had the right to vote, it being sufficient that his name appeared on the poll lists. The point is not well taken.

VIII. Some 14 electors who had signed the statement of consent executed withdrawals thereof, but subsequently, and before the withdrawals had been filed, executed revocations of the withdrawals and filed such revocations with the county auditor prior to the filing of the withdrawals with that officer. As the withdrawals had been revoked prior to their taking effect, there can be no doubt

but that the revocations were effective and that the names were properly counted.

The complaint of appellants that withdrawals filed after the names undertaken to be withdrawn from the statement of consent had been counted is not borne out by the record before us and for that reason is not considered.

It will be observed that the margin of difference between the names on the statement of consent conceded to have been correctly counted, leaving out those procured by Ryan, and the majority of the electors at the last preceding election, is narrow, being but eighty-five, in a city having 8,795 electors. Rejecting the names appearing on the statement of consent witnessed by Ryan, there is left considerably less than a majority, and therefore, the district court rightly held the statement to have been insufficient.

On the grounds stated, we are able to agree that the judgment of the district court should be and it is

Affirmed.

All Justices concur.

NOTE.

The reported case holds that where a single letter is prefixed to a surname the presumption is that the letter constitutes the given name of the person designated and not that it is an abbreviation standing for the given name, "for, as parents are under no legal obligation to baptize their children, the first name may be assumed and consist only of a letter or letters." Accordingly it is held that there is no presumption that a person designated in a "poll book" by a given name and surname is the same as a person signing a petition with the same surname to which is prefixed the initial letter of the given name appearing in the "poll book." The presumption that a letter constitutes a name is discussed in the note to *People v. Reilly*, Ann. Cas. 1914A 1112.

SCOVEL ET AL.

v.

SHADYSIDE COMPANY, LIMITED.

Louisiana Supreme Court—October 19, 1914.

137 La. 918; 69 So. 745.

Fixtures — Gas and Electric Light Accessories.

Combination gas and electric light chandeliers and brackets, mantels, stationary

washstands, bathtubs, etc., attached to a building by the owner thereof for the service and exploitation of said building, are immovable by destination, and pass with the house when it is mortgaged or sold, if not reserved by the owner.

[See note at end of this case.]

Statutory Enumeration of Fixtures — Effect.

The instances given in article 468, Civil Code, of immovables by destination are merely illustrative, and are not restrictive.

Intent in Attaching Property — Change of Intent.

After movables have become immobilized by destination the mere change of mind on the part of the former owner cannot, of itself, deimmobilize them as against a purchaser without notice. It is the same with reference to a mortgage.

Manner of Attachment as Controlling Intent.

Whilst the purpose for which things are placed, by the owner, on "a tract of land," ordinarily determines whether or not they acquire the immobility of the land, the immobility vel non of things placed in a tenement or building (other, perhaps, than a manufacturing establishment which, legally speaking, has become part of the tract of land upon which it is erected) depends, finally, upon the manner in which they are attached thereto.

Gas or Electric Light Plant and Accessories.

Combination gas and electric light chandeliers and brackets which form parts or accessories of gas and electric light plants established, the one, in the cellar of the residence on a plantation, and the other, in the sugar house, and without which those plants would be unable to render the service for which they were established, partake of the immobility of the plants, and cannot be reclaimed by the vendor of the plantation, on the ground that they are not permanently attached to the house, but may be unscrewed without injury to it or themselves.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Civil District Court, Parish of Orleans: KING, Judge.

Action by Mrs. Isabel Scovel et al., plaintiffs, against Shadyside Company, Limited, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

Brook & Himel and *H. G. Bloch* for appellants.

Foster, Milling, Brian & Saal for appellee.

[920] *SOMMERVILLE, J.*—Mrs. Barnett was one of the original plaintiffs in this cause; but, having died, her three sons and sole

heirs, who were coplaintiffs with her, have been made parties in her place.

J. W. Barnett, the husband and father of plaintiffs, erected a building upon Shadyside plantation, in the year 1898, in which he and his family lived. The house was very complete in all of its parts, and was elegantly furnished. He mortgaged all of the property and its appurtenances; and subsequently he sold the plantation, together with the residence, in 1903, to the Shadyside Sugar Company, of which he and his family were the principal stockholders. That company also mortgaged the property and its appurtenances. It became involved, and was placed in the hands of a receiver, a sale took place under an order from the federal court, and the whole property was adjudicated to C. A. Farwell, who subsequently sold it to the Shadyside Company, Limited, defendant in this cause, April 7, 1904. Mr. Barnett died August 7, 1904.

The mortgages and sales referred to were made by Mr. Barnett without reserving to himself the household fixtures sued for by his heirs in this case.

Mrs. Barnett and some of her sons continued to live in the house until September, 1910. Subsequently they made demands upon the defendant company to turn over to them combination gas and electric light chandeliers and brackets which were in the house, together with bathtubs, toilets, stationary washstands, a complete double outfit for heating purposes, a complete gas outfit, mantelpieces, and certain grillwork. This suit was instituted therefor November 2, 1911.

[921] Defendant answered, denying that the articles referred to were the personal effects of plaintiffs, and alleged that they, the articles, had been permanently attached to the house, for the service and improvement thereof, by the owner, and that they were parts of the building, and that the building, as a residence, would be incomplete without them.

Since the filing of this suit the Legislature has declared that the things here sued for are immovable by their nature. Act No. 51 1912, p. 60.

The evidence shows that the articles mentioned were placed in the house at the time it was erected by Mr. J. W. Barnett; and it is clear that his intention was that they should be permanently attached thereto for the service and convenience of the house and its occupants.

Article 468, C. C., is as follows:

"Things which the owner of a tract of land has placed upon it for its service and improvement, are immovable by destination. . . . All such movables as the owner has

attached permanently to the tenement or to the building, are likewise immovable by destination."

And article 469 provides:

"The owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster, or mortar, or such as cannot be taken off without being broken or injured, or without breaking or injuring the part . . . to which they are attached."

In considering the two articles just quoted, in the case of *Mackie v. Smith*, 5 La. Ann. 717, 52 Am. Dec. 615, we hold that two valuable mirrors found in one of the rooms of a dwelling house, which had been sold in that case, were immovable by destination.

We there say that the only matter before the court to decide is whether or not the mirrors had been attached permanently to the building by the deceased. If they had been, the purchaser of the house had acquired them. It was shown that they were not affixed to the building with plaster or mortar, and that they could be moved without [922] being broken or injured. It was contended by the appellee that the mirrors might have been removed without breaking or injuring the parts of the building to which they were attached, and that, as the case would come under none of the provisions of the Code, the judgment in her favor should be affirmed. We there hold that the cases specified in article 469 do not limit the general disposition contained in article 468. Article 468 provides that all such movables as the owner has placed for the service and improvement of the land and those which are attached permanently to the building are immovable by destination; it embraces all cases in which the movable has been placed by the owner *ad integrandum domum*; and, when none of the presumptions established by article 468 exist, the fact may be shown by any competent evidence. 2 Toullier, No. 16; 4 Duranton, p. 63, No. 68.

In the *Mackie* Case it was shown that after the owner of the property purchased the mirrors recesses 4½ inches deep were cut in the walls of the room to receive them; that they were placed in these recesses and secured in their places by means of architraves or large wooden frames, which were nailed to plugs of hardwood fastened to the wall. The frames of the mirrors had grooves in them corresponding to a tongue in the architrave, and nails were driven from one to the other to make the glasses more secure. The recesses were left rough and unfinished: the glasses and architraves being clearly intended as a permanent finishing of the walls. It is difficult to conceive a case more strictly within the letter and spirit of article 468 of the Code.

And it is shown in this case that Mr. Barnett, in having bathtubs, toilets, stationary washstands, radiators, mantelpieces, and grillwork placed in the house which he was then erecting, caused holes to be made in the ceilings, walls, and floors for the introduction [923] of gas, water, and waste pipes with the view and intention of attaching all the fixtures, permanently to the building, thereby, in the language of the Code, making them immovable by destination. The evidence further shows that the moldings in the rooms were cut for the placing of the stationary washstands; that the mantelpieces were made of wood and tiles; that the removal of these things would not only leave holes in the walls, ceilings, and floors, but that the rooms would be left rough, unfinished and in an injured condition; and that repairs would have to be made to the house. The same is true of the grillwork, claimed by the plaintiffs, and which was put in the openings or doorways leading from one room into another throughout the house, for the purposes of ornamenting and beautifying the same.

The complete double outfit for heating purposes and the complete gas generating outfit are established under the building, several feet below the surface of the earth. They were clearly placed there for the service of the house, and were connected with the fixtures in the house, and were to be used therewith permanently or so long as they might last. They were attached permanently to the building, and they are declared to be immovable by destination.

The combination gas and electric light chandeliers and brackets fall within the same category as do the other things mentioned above. It is argued on behalf of plaintiffs that gas chandeliers have been held by the court to be movables, and that they do not usually form part of the premises in which they have been hung. Reference is made to the decision of the court in *L'Hote v. Fulham*, 51 La. Ann. 780, 25 So. 655. The evidence in that case showed that the chandeliers were only used for lighting by gas, and that they were screwed on the gas pipes, as was usual and customary in [924] the city of New Orleans, and that they were capable of being detached by being unscrewed and taken away without breaking or taking away the pipe or injuring the ceiling of the house. And we there hold that gas chandeliers, so far from being attached to pipes and to the walls of buildings, with reference to their remaining there permanently, are placed with direct reference to the facility of detaching and removing; that the chandeliers themselves, the pipes with which they are connected, and the walls through which the pipes are passed are not in the slightest degree

injured by their removal. But in the instant case the evidence shows that the chandeliers and brackets are combination gas and electric light chandeliers and brackets, and that they were not prepared with direct reference to facility of detachment and removal. On the contrary, it is testified on the trial of this case that the electric wires which connect these chandeliers and brackets to the motor for generating electricity located in or near the sugar house on the plantation would have to be cut or broken to remove said articles; and this would leave exposed electric wires and holes in the ceiling and walls which would have to be repaired and the places be repapered to make the house safe, complete, and comfortable. It is quite evident to our minds that the owner in this case had these fixtures permanently attached to the building in which he and his family were to live, and did live, and that he designed them for the service and improvement of the building.

The views which we have here expressed are in line with the French authorities, and were adopted in the case of *Morton Trust Co. v. American Salt Co.* 149 Fed. 540. We quote from this last decision, in part, as follows:

"There are two, and only two, ways in which an immovable by destination may be created:

"(1) Without any physical attachment to the fundus, but merely by the dedication of the [925] movable to the service of the fundus. See Civil Code Louisiana, art. 468.

"(2) By means of a physical attachment affixing the movable permanently—a *perpetuelle demeure*. See Civil Code La. last paragraph of article 468."

"The above is an extract from *Plainol, Droit Civil* (Paris Ed. 1904) vol. 1, p. 703.

"These two kinds of immovables by destination are plainly shown by Civil Code Louisiana, art. 468 (459), in which instances of both kinds are given. See that article cited in full, *supra*. It may be well to say here that the instances given in that article are clearly not restrictive."

The court then proceeds to quote from *Baudry-Lacantinerie, Droit Civil, Des Biens* (Paris Ed. 1890) vol 5, p. 59, as follows:

"All the objects attached to a fundus by the owner for its service and exploitation are by that fact alone immovables by destination, whether they are placed there forever or not. . . . All movable objects so become immovables by destination, which an owner has attached to his fundus forever in another interest [the author meaning an interest other than the service and exploitation of the fundus]; such, for instance, as a purpose of utility to or of ornamentation of the fundus. Therefore perpetuity does not seem necessary except when the immobilization takes place

in an interest other than the agricultural or industrial benefit of the fundus.'

"The same author, same work, and volume (page 56) states the essentials of immobilization to be: '(1) That the immovable was placed on a fundus, that is to say, an immovable by nature [either land or a building]; for the movable can only become an immovable by destination as being an accessory to the fundus. (2) That the movable was placed there in the interest of the fundus, that is to say, for its service, its exploitation, its utility or its ornament. (3) That it was placed there by the owner of the fundus. Immobilization by destination necessarily supposes the act of the owner. It could not result from the act of a lessee, a renter, or even a usufructuary. The reason is that immobilization by destination takes place in the interest of the fundus, and the owner is the sole representative of that interest.'

We agree with the judge of the district court that the things sued for in this case were permanently attached to the house by the owner thereof for its service and improvement, and that they are therefore immovable by destination.

Judgment affirmed.

O'Neill, J., dissents, and files reasons. See 69 South. 748.

[926] ON REHEARING.

(October 18, 1915.)

MONROE, C. J.—By the terms of the order granting the rehearing, the present inquiry is restricted to the question of the status of the combination gas and electric light fixtures. Counsel for defendant call attention to the following admission, made on behalf of plaintiffs, which appears of record, to wit:

"It is admitted that these fixtures, all of which are being sued for in this action, were installed in the house, by the owner thereof, for the service of the house and the use of the occupants."

And it is argued that, the meaning of the admission being that the fixtures were installed by the owner, for the service of the house and the use of the occupants, whether owner, vendee, or tenants, the effect is to give to the fixtures the status of immovables by destination, no matter whether they are attached to the house, permanently or otherwise. Considering the fixtures by themselves, however, it is not altogether clear that the argument is well founded. Reproducing article 468 of the Civil Code, for the purposes of the present inquiry, it will be seen that it reads as follows:

"Art. 468. Things which the owner of a tract of land has placed upon it for its service and improvement are immovable by destination.

"Thus the following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to wit: Cattle intended for cultivation. Implements of husbandry. Seeds, plants, fodder, and manure. Pigeons in a pigeon house. Beehives. Mills, kettles, alembics, vats, and other machinery made use of in carrying on the plantation and works. The utensils necessary for working cotton and saw mills, taffia distilleries, sugar refineries and other manufactories."

"All such movables as the owner has attached permanently to the tenement or to the building are likewise immovable by destination."

(Italics by the court.)

It will be observed that the article begins with the declaration that, "Things which the owner of a tract of land has placed upon it for its service and improvement are immovable [927] by destination;" that the word "things" is used without qualification as to the character of the things, and the word "placed" with no other qualification than that the "things" are to be placed upon "a tract of land," by the owner of the land, for its service and improvement. And the idea thus conveyed is emphasized in the second paragraph of the article, which purports, not to limit, but merely to illustrate, the character of the things contemplated by the first paragraph, and repeats the declaration that they "are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land."

The next paragraph seems, however, to provide an exception to the comprehensive rule established by those which precede, for, notwithstanding that it follows the words "Thus," and "to wit," which are contained in the second paragraph, and would otherwise be governed by the rule applied to the "things" which are therein mentioned, it contains the specific declaration, "All such movables as the owner has attached, permanently, to the tenement or to the building are likewise immovable by destination," which is equivalent to saying that the preceding declarations, though apparently broad enough to include anything placed on a tract of land, in any manner, by the owner of the land, for its service and improvement, and certainly broad enough to include any "machinery made use of in carrying on the plantation and works," and any "utensils necessary for working cotton mills . . . and other manufactories" so placed by the owner, was not intended to include movables which the owner has attached "to the tenement or to the building," and which become immovable by destination only when attached "permanently" to such "tenement" or "building." The word "tenement," as thus used, is readily

understood. The meaning of the word "building" is not so clear, and [928] may have been used either as a synonym for "residence," or as applicable to any building other than the mills, distilleries, refineries, and other manufactories mentioned in the preceding paragraph.

The lawmaker then specifies the circumstances under which the owner shall be considered to have attached, permanently or "forever," movables to his tenement or building so as to make them immovable by destination, viz.:

"Art. 469. The owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster, or mortar, or such as cannot be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached."

Another exception to the general rule enunciated in article 468 is declared in article 476, as follows:

"Art. 476. Materials arising from the demolition of a building, those which are collected for the purpose of raising a new building, are movables, until they have been made use of in raising a new building. But if the materials have been separated from the house or . . . edifice, only for the purpose of having it repaired or added to, and with the intention of replacing them, they preserve the nature of immovables, and are considered as such."

From which it follows that, whilst old material intended for the service and improvement of the land in the reconstruction of an old building is immovable by destination, new material intended for the service and improvement of the land in the erection of a new building does not acquire that status until actually used in the building.

In *Mackie v. Smith*, 5 La. Ann. 717, 52 Am. Dec. 615 (as appears from the opinion handed down), it was held that mirrors which had been set in recesses cut 4½ inches deep in the walls, and the removal of which would have left the recesses rough, unfinished, and at variance with the obvious design of the architect, constituted the permanent finish of so much of the walls, and hence were parts of the house. The court said:

[929] "The plaintiff alleges and has shown that at a previous sale of the movable effects of the succession the mirrors were adjudicated to her, but, as the knowledge of that fact is not brought home to the defendant, we have only to inquire whether, under article 459 [now article 468] of the Code, they had been attached permanently to the building by the deceased. If they were, the defendant [who purchased the house] acquired them."

In *Folger v. Kenner*, 24 La. Ann. 436, it was held that an iron safe that had been built as part of the house had become immovable by destination, and that plaintiff had no more right to remove it than to remove "a mantelpiece from the drawing room."

In *L'Hote v. Fulham*, 51 La. Ann. 780, 25 So. 655 (also considered in the opinion handed down), the sole question decided was that gas chandeliers and brackets had not become immovables by destination. The court, after reviewing the facts and conclusions stated and reached in *Mackie v. Smith*, said:

"The facts of the cited case were much stronger for the purchaser than are those of the present one. The mirrors as placed in the rough recesses made in the wall were practically embodied in and formed part of the building itself, and the court not only reached that conclusion, but also the conclusion that such had been the intention of Mr. Story, that he had not contemplated a removal of the mirrors from their assigned place, but fixed them there as a permanency. We do not think there is a fair parallelism between that case and the one at bar, either as to the intentions of the owner in placing the movables in the building, in the mode [in] which they were attached thereto, or their situation after they were so attached. Chandeliers and brackets, so far from being attached to gas pipes and to the walls of buildings, with reference to their remaining there permanently, are prepared with direct reference to facility of detachment and removal. It is true that, when there are gas pipes connected with a building, and the occupants . . . desire to make use of the same, some means have to be resorted to to make use thereof, but chandeliers are not the only means of doing so, and when they are used they are so arranged as to be susceptible of easy change or alteration. Neither the chandeliers themselves, the pipes with which they are connected, nor the walls through which the pipes are passed are in the slightest degree injured by their removal. The only object for their attachment to the pipes to which they are joined is to enable them to [930] be utilized for the time being, just as fastenings of various kinds have to be resorted to to hold different movable objects temporarily in position for present use."

In considering the conclusion thus reached, however, we must assume that the chandeliers and brackets to which the court refers were independent articles, having no connection with anything else that the owner had put into the house save the pipes, from which they could be unscrewed; whereas in the instant case those things, in so far as they were intended for the illumination of the house by the use of gas, were component parts of a plant established in the cellar of

the house for the manufacture of gas, and, in so far as they were for the use of electricity, were accessories of the electric light plant established by the same owner in the nearby sugar house, and with reference to which he had established them in the house. Those plants were indisputably immovables, and it does not appear to us that it would be reasonable to hold that they can be dismembered and their utility destroyed by the withdrawal, on the ground that they are movables, of those parts through which, alone, they can render the service for which they were established. As well might it be said that the cocks can be removed from the water pipes, or the steam and water gauges from the engine which supplies the house with heat, or that any other essential part of a plant the whole of which is an immovable can be converted into a movable merely because it can be unscrewed.

"The obligation of delivering the thing," says the Civil Code, "includes the accessories and dependencies, without which it would be of no value or service, and likewise everything that has been designed to its perpetual use." C. C. art. 2490.

The doctrine of the case of Receivership of the Augusta Sugar Co. 134 La. 971, 64 So. 870, is without application here. The question there was whether a vendor could enforce his lien upon particular pieces of [931] machinery which he was able to identify, but which had become immovable by destination, and which could not be withdrawn without disabling the sugar factory of which they had become parts. The majority of the court conceded that the machinery had become immovable by destination, but were of opinion that the right of the vendor to enforce his privilege was not thereby affected. The question here is, whether the vendor of immovable property, or those claiming under him, can recover from his vendee an essential part or accessory of that property on the ground that it was not included in the sale. Our conclusion is that he cannot.

It is therefore ordered that the decree heretofore entered in this case be reinstated and made the final decree of the court.

O'Neill, J., dissents.

NOTE.

Gas or Electric Light Plant or Accessories as Fixtures.

Plant, 183.

Accessories:

In General, 185.

As between Mortgagor and Mortgagee, 185.

As between Grantor and Grantee, 187.

As between Landlord and Tenant, 188.

Plant.

In the reported case the court considers the status as fixtures of accessories attached to a gas generating plant and an electric light plant which were installed in a private residence. While the court does not pass directly on the status of the plants themselves it is said obiter that the plants were indisputably "immovables" and a holding that the accessories were fixtures is put on the ground that they were so attached as to form integral parts of the plants.

The New Jersey cases have consistently held that gas generators or dynamos for generating electricity are fixtures and are included by a mortgage ordered of the realty. *Keeler v. Keeler*, 31 N. J. Eq. 181; *Security Trust Co. v. Temple Co.* 67 N. J. Eq. 514, 58 Atl. 865; *Temple Co. v. Penn Mut. L. Ins. Co.* 69 N. J. L. 36, 54 Atl. 295; *Prudential Ins. Co. v. Guild* (N. J.) 64 Atl. 694. But the view seems to have been taken that such a piece of apparatus does not become a fixture so as to prevent a tenant who has attached it to the landlord's realty from removing it during the term of the lease. *Hays v. Doane*, 11 N. J. Eq. 84. In *Prudential Ins. Co. v. Guild* (N. J.) 64 Atl. 694, a generator or dynamo installed in a factory for supplying it with electric light was held to be a part of the realty since it met the following requirements: "(1) Actual annexation to the freehold; (2) application to the uses for which the real estate was appropriated; and (3) erection or annexation with the intention of making a permanent accession to the freehold, by their use for an indefinite period in connection with the building." In *Keeler v. Keeler*, 31 N. J. Eq. 181, it was held that apparatus for generating gas situated in a building especially erected therefor and separated from the mill for which it was to manufacture gas was a part of the realty. In *Temple Co. v. Penn Mut. L. Ins. Co.* 69 N. J. L. 36, 54 Atl. 295, dynamos for lighting installed in a theatre were held to be fixtures since in addition to being annexed to the freehold they were fitted for and applied to the use to which the real estate was appropriated.

But in *New York L. Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229, it was held that dynamos and engines constituting the lighting plant of a theatre did not pass under a mortgage thereof, the court saying: "The trial judge instructed the jury, in substance, that the dynamos and their connections were chattels, not fixtures, and that the engines and their connections were chattels, not fixtures, unless they found that they were to some extent a part of the heating system of the building, and if they so found they were fixtures. The dynamos and engines were not especially adapted for use in

this particular building, were susceptible of use either singly or jointly with their connections in any other building or place where such machines are operative, and could be removed without difficulty and without any injury to the building or themselves. The circumstances that the building was prepared to be lighted with gas, that its electric lighting system was prepared for connection with the street supply, and that the dynamos and engines were introduced into the building upon considerations of temporary economy, and not of necessity, are quite controlling. We are satisfied that in his instructions to the jury in regard to the dynamos, the engines, and their connections, the trial judge committed no error of which the defendant had a right to complain." And in *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. 138, 19 Am. St. Rep. 598, the engine, dynamo and appliances constituting the electric lighting plant of a factory and by which electric power was supplied to a theatre across the street were held not to pass with the realty on foreclosure sale, no matter how securely fastened, for the intention rather than the method of attachment governed and the jury having found no intention to make the annexation permanent their verdict was controlling.

In *Liebe v. Nicolai*, 30 Ore. 364, 48 Pac. 172, dynamos and electric light machinery installed for use in a hotel by a tenant who agreed to "surrender all future erections and additions to or upon the same" were held, having been annexed for purposes of trade, to be removable at the option of the tenant. The court said: "The harsh doctrine of the common law in relation to the respective and reciprocal rights, duties, and obligations of a landlord and tenant has been very much ameliorated by modern adjudications, and it is now universally conceded, in enlightened countries, that the tenant has risen above the relation of a mere vassal to his lord, and now enjoys many privileges heretofore denied him. Among these may be classed the right to remove during the term of his lease all trade fixtures annexed to the demised estate, and, in the absence of any stipulation to the contrary, he may also remove, during the same period, erections and additions made by him upon the premises which hitherto had been considered paramount fixtures. In view of this modern doctrine, as announced in the opinion just quoted, we cannot think the dynamos and other electric light machinery are to be classed as erections or additions made to or upon the leased premises, and hence the defendants' claim to the same under this clause of the lease is without merit."

In *Morrison v. Berry*, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446, it was held that a gas machine installed in a house owned by

the wife of the man who contracted therefor became a part of the freehold, so that a refusal by the wife to allow the removal thereof by the person who installed the machine on the premises could not be treated as a conversion of personal property.

Electric wires and poles used in connection with a public power plant for the transference of current are fixtures and pass under a mortgage of the plant. *Fechet v. Drake*, 2 Ariz. 239, 12 Pac. 694; *Southern Electrical Supply Co. v. Rolla Electric Light, etc. Co.* 75 Mo. App. 622. Thus in the case first cited it was held that the wires used in connection with an electric light plant formed an integral part of the machinery situated on the premises, and passed as fixtures to the mortgagee under a mortgage of the premises which contained the clause, "together with all machinery, including the boiler, engine and dynamo now situated on said land, and together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining." And in *Southern Electrical Supply Co. v. Rolla Electric Light, etc. Co.* 75 Mo. App. 622, it was said: "Applying the ordinary tests in determining what is a fixture or an appurtenance, unquestionably the wires belonging to an electrical plant would be regarded as an integral part of the plant or machinery however far they might be extended from the lot upon which the plant is situated." In *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860, a dynamo and exciter together with belts used in operating the same, all installed in a public plant subsequent to the giving of a mortgage thereon and so firmly attached to the realty that they could not move from their positions when used, were held to be a part of the realty since they were actually annexed to the realty, were adapted to the use to which the realty was devoted, and had been annexed with the intention of making them a permanent accession to the freehold.

It has been held that where service gas pipes leading from the mains in the street to a house are laid by a gas company through another's land, they retain their character of personalty and the gas company has control over them. *Laclede Gas Light Co. v. Gas Consumers Assoc.* 127 Mo. App. 442, 106 S. W. 91. In *Poughkeepsie Gas Co. v. Citizens' Gas Co.* 20 Hun 214, it appeared that the plaintiff gas company had laid a pipe for the purpose of furnishing gas to a row of dwelling houses, the property of a single owner, across the land in front thereof. After the sale of the property to various owners, a rival gas company on the written consent of the purchasers disconnected the pipe from the plaintiff's main in the public

street and attached it to its own. In an action for injunction the court held that the pipe remained personalty and could be considered as having been laid and maintained under a license from the original and subsequent owners.

Accessories.

IN GENERAL.

While there is some conflict of authority on the point, by the weight of authority, gas or electric appliances or so-called fixtures installed in a house do not become a part of the realty. See the cases cited in the following subdivisions of this note.

In *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353, it appeared that a person in possession of certain property under a contract for the purchase thereof installed gas fixtures and having defaulted on the contract, before vacating sold the fixtures to another. It was held that the purchaser was entitled to remove the fixtures as against the owner as they did not become a part of the realty. The court said: "Gas fixtures, whether in the form of chandeliers suspended from the ceiling at the top of the room, or projecting as brackets from the perpendicular walls, though attached to the gas pipes by screws, and made tight by cement, are in the nature of furniture, and do not lose their character as chattels by reason of the manner in which they are affixed." In *Andrews v. Powers*, 66 App. Div. 216, 72 N. Y. S. 597, a gas grate and fixtures together with other articles installed in a house by a vendee in possession under a contract of sale were held to be a part of the realty in an action to recover their value by the seller thereof from the vendor of the house who had taken possession on the vendee's default in fulfilling the terms of the contract. It appeared that the removal of the articles would leave the house in bad condition and put the vendor to considerable expense to repair the damage resulting from the severance. In *McFarlane v. Foley*, 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. Rep. 264, it was held that chandeliers and bracket lights which had been installed in a house by a contractor were realty on which the contractor was entitled to a mechanic's lien. In *British Economical Lamp Co. v. Mile End. Empire*, 29 Times L. Rep. (Eng.) 386, it appeared that the plaintiff company had let certain electric filament lamps to the lessees of a theatre and that they were attached to the brackets in the customary and usual way. The defendants, on the lessees' default in payment of rent, having taken possession of the premises, the plaintiff claimed the ownership of the lamps. It was held that no recovery could be had.

AS BETWEEN MORTGAGOR AND MORTGAGEE.

It is the more generally accepted rule that gas and electrical appliances or accessories commonly known as fixtures attached to the realty in the usual and customary manner of making annexation or in such a way that detachment can be made without injury to the realty do not become a part thereof but retain their character of personalty, and therefore are not included in a mortgage of the realty. *New York L. Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229 (switchboards, chandeliers and appurtenances in theatre); *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582 (gas chandeliers and burners); *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299 (gas fixtures); *McKeage v. Hanover F. Ins. Co.* 16 Hun 239, *affirmed* 81 N. Y. 38, 37 Am. Rep. 471 (gas fixtures); *Cosgrove v. Troesch*, 62 App. Div. 123, 70 N. Y. S. 764 (gas fixtures); *Columbia Ins. Co. v. Kneisley*, 9 Ohio Dec. (Reprint) 432, 13 Cinc. L. Bul. 437 (chandeliers and other gas fixtures); *Penn. Mut. L. Ins. Co. v. Thackara*, 10 W. N. C. (Pa.) 104; *Montague v. Dent*, 10 Rich. L. (S. C.) 135, 67 Am. Dec. 572 (chandeliers and pendant gas burner); *Hall v. Law Guarantee, etc. Soc.* 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935 (globes for electric and gas lights and gas and electric light fixtures). See also *Condit v. Goodwin*, 44 Misc. 312, 89 N. Y. S. 827, *affirmed* 108 App. Div. 360, 95 N. Y. S. 1122 (gas fixtures). In *New York L. Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229, it was said: "While the wiring of an electric lighting system would be a part of the realty, the chandeliers and their appurtenances not permanently affixed to the building would be chattels, and not realty. On the same principle the other contrivances constituting a part of the lighting apparatus, not specially adapted to the particular building, but susceptible of use elsewhere as well, and readily detachable, would not be fixtures. The fact that the electroliter was a chandelier of exceptionally large dimensions is immaterial. The electric signs were no more a part of the building than are ordinary signs when not affixed as permanencies. If the letters with which they were supplied had been merely capable of advertising the name of the particular theatre, a different conclusion would be reached." In *McKeage v. Hanover F. Ins. Co.* 16 Hun 239, *affirmed* 81 N. Y. 38, 37 Am. Rep. 471, the court speaking of gas fixtures said: "The articles in question were not put in the house when it was built, and the house was not erected to receive them, but, on the contrary, they were put up in the house to be used there as chattels. There was no permanent attachment of the things to the freehold, and there

was no difficulty in removing them from this house and putting them up in another. These are some of the tests recognized in the law by which to determine whether a chattel retains its character of personal property and as they are in favor of the latter position, we think the articles in question retained that character." In *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582, it was said: "During all of said time these gas fixtures were screwed to the ends of the gas pipes projecting from the walls and ceilings, and can be readily unscrewed. It is held by the great weight of authority that, under such circumstances, such gas fixtures are not a part of the realty, even as between vendor and vendee or mortgagor and mortgagee; that they are merely a part of the furniture of the room,—a substitute for the lamps and lamp holders, candlesticks and chandeliers, formerly used to hold candles. . . . While this doctrine is rather doubtful in principle, it is too well established as the law of the country generally to be now overturned." And in *Montague v. Dent*, 10 Rich. L. (S. C.) 135, 67 Am. Dec. 572, the court said: "The elementary idea is, that the article claimed as part of the freehold must be in some way fixed, in the soil or part and parcel of that which is. . . . Now the articles embraced by this case seem to want this necessary condition to make them fixtures. The ease or difficulty with which an article may be detached may not be a satisfactory criterion, and it is not; but the effect of its detachment upon itself or some portion of what is the realty or part and parcel of it, is a matter that enters into the question. As to this consideration the defendant has the advantage in the present case, for admitting the gas pipe to be part of the realty purchased, the removal of the chandeliers and the pendant gas burner did not disorder that pipe, did not mutilate it as a conduit, did not diminish or waste any gas, nor were the articles detached less perfect. Then these chandeliers, etc., were not necessary to the enjoyment of the freehold, for the use of the gas itself does not deserve to rank in that category. It is much more matter of convenience than of necessity, or even serious importance. A fortiori, may this be said of the mere terminating joints, as it were, of the gas pipe; things including the exercise of taste and ornament, withdrawn and replaced at pleasure, substituted by others affording more or less light, as economy or the reverse, or convenience, may dictate."

In other jurisdictions gas and electric light accessories installed in a building have been held to pass by a mortgage of the premises. *Johnson v. Wiseman*, 4 Metc. 357, 83 Am. Dec. 475 (gas chandeliers); *Cunningham v. Seaboard Realty Co.* 67 N. J. Eq. 210, 58

Atl. 819 (gas logs and gas chandeliers): *Security Trust Co. v. Temple Co.* 67 N. J. Eq. 514, 58 Atl. 865; *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858 (electric light fixtures). And see the reported case which distinguishes *L'Hote v. Fulham*, 51 La. Ann. 780, 25 So. 655. In *Security Trust Co. v. Temple Co.* supra, gas fixtures though merely screwed on the gas pipes were held to be a part of the realty since they were as firmly attached to the freehold as many other articles considered a part thereof, since the building could not be efficiently used for the purpose for which it was appropriated without the use of the articles so attached, and since there appeared an intention to make the annexation a permanent one. And in *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858, the view was taken that it was of no consequence that the appliances could be removed without injury to the freehold since they should be governed by the general rule that whatever is physically annexed to the realty becomes a part thereof as between vendor and vendee or mortgagor and mortgagee. The court said: "Adopting the general rule, then, as we do, that, as between the vendor and vendee of real estate, whatever has been physically annexed or affixed thereto by the owner, under the conditions aforesaid, becomes part and parcel thereof and passes with the conveyance of the estate, it follows that the electric light fixtures in question, which take the place of and serve the same purpose as ordinary gas fixtures, passed to the defendant by the conveyance [on foreclosure sale] referred to, and hence that the ruling complained of was erroneous. We can see no reason whatever why such fixtures are not as much a part of the realty as radiators, water faucets, set-tubs, bath tubs and bowls, portable furnaces connected with hot-air pipes for heating the building, storm doors and storm windows, window blinds, whether inside or outside, firegrates, pumps, mantels, and such other things as are annexed to the freehold with a view to the improvement thereof. All of these things, though mere chattels before their annexation to the freehold, are no longer such after their annexation, any more than the other materials which go to make up the house, but then become part and parcel of the real estate. And the mere fact that they can be removed therefrom without physical injury to the freehold does not change their character as between the vendor and vendee of the realty."

Where a house is fitted with gas and electric fixtures of a uniform design according to a decorative scheme or where the fixtures have been attached with the evident intention that they shall adequately serve the uses of

one particular building and no other, they become a part of the realty and pass with a mortgage thereof. *Berliner v. Piqua Club Assoc.* 32 Misc. 470, 66 N. Y. S. 791; *Newman v. Montrose Realty Co.* 92 Misc. 182, 155 N. Y. S. 253.

In *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853, it was held that sets of gas light switches, gas piping and an electric switchboard annexed to a theatre passed with a mortgage thereof. The court said: "The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. Within this rule, we are of opinion that all, or nearly all, of the articles above referred to are fixtures, and a part of the realty."

AS BETWEEN GRANTOR AND GRANTEE

It has been held that gas or electric accessories do not pass by a deed of the realty. *Shaw v. Lenke*, 1 Daly (N. Y.) 487 (gas brackets and chandeliers); *Kirchman v. Lapp*, 19 N. Y. S. 831 (gas chandeliers); *McLean v. Palmer*, 2 Kulp (Pa.) 349 (gas pendants); *Taylor v. Lee* (Tex.) 139 S. W. 908 (chandeliers). See also *Vaughan v. Haldeman*, 33 Pa. St. 522 (chandeliers and side brackets); *Jarechi v. Philharmonic Soc.* 79 Pa. St. 403, 21 Am. Rep. 78; *Heysham v. Dettre*, 89 Pa. St. 506 (gas fixtures). Compare *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544 (gas piping). In *Shaw v. Lenke*, supra, the court said: "The adjustment of the bracket or chandelier to the gas pipe is not such actual annexation to the freehold as is contemplated by law. The fixture itself, though employed for a useful purpose, and often highly ornamental, is not indispensable to the enjoyment of the realty. It forms no part of the soil by annexation, actual contact, or otherwise. It is not fastened to the wall, and it can be removed without injury either to the wall, freehold, or pipe to which it is attached. In addition to this, it may be said with propriety that it has become by usage and general concession, as much an article of furniture as a mirror or carpet, although not so universally owned. Without pursuing the subject further, however, and without reviewing the numerous cases on the subject of fixtures, and which relate in a great majority to improvements made for the purposes of trade or manufacture, it is sufficient to say that the articles claimed by the plaintiff are not fixtures, and part of the realty, within the rule

established by any case decided in this state." In *Jarechi v. Philharmonic Soc.* 79 Pa. St. 403, 21 Am. Rep. 78, it was said: "The fixtures [gas] are put up in more or less expensive style, according to the taste and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied that as between him and the landlord they are his, and he may remove them, or they may be sold as his personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them."

Other cases take a contrary view and hold that gas and electric fixtures constitute a part of the realty and pass under a deed thereof. *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251 (gas fixtures in hotel); *Atkinson v. Noad*, 14 L. C. Rep. 159 (gas pipes); *Stack v. T. Eaton Co.* 4 Ont. L. Rep. 335, 1 Ont. W. Rep. 511 (gas and electric fittings). See also *Dorey v. Gray*, 42 Nova Scotia 259 (electric light fittings). In *Fratt v. Whittier*, supra, it appeared that an agreement had been made to convey a certain hotel with the appurtenances and improvements thereunto belonging "with a reservation of the right to remove furniture, carpets and pictures, but none of the permanent fixtures or appurtenances." It was held that the gas fixtures were essential to the purpose for which the building was occupied and that title thereto passed by the deed of conveyance in the absence of an express reservation negating that intention.

In *Funk v. Brigaldi*, 4 Daly (N. Y.) 359, it was held that certain chandeliers and brackets were a part of the realty where the owner as an inducement to make the sale represented that those appliances were to be instructed in the sale. In *Central Trust, etc. Deposit Co. v. Cincinnati Grand Hotel Co.* 11 Ohio Dec. (Reprint) 348, 26 Cinc. L. Bul. 149, it was held that the title to chandeliers designed especially for a particular building and placed therein with the clear intention of having the same become part of the realty passed on the sale of the building. In *Sewell v. Angerstein*, 18 L. T. N. S. (Eng.) 300, it was held that where on the sale of a lease it was covenanted that all fixtures were conveyed, the title to "gasliers" fastened to gas pipes by screws and removable without injury to the freehold passed under the lease. In *L. & M. Mercantile Co. v. Wimer*, 94 Kan. 573, 146 Pac. 1162, it was held that the trial court had properly charged that a "gas light system" was realty and passed under a deed if it was "permanently affixed to

the building by nails, bolts or screws" with the intent that it "be permanently used in carrying out the purpose for which the building was designed."

AS BETWEEN LANDLORD AND TENANT.

It has been held that gas or electric accessories placed in a building by a tenant do not become a part of the structure, but are removable by the tenant. *Raymond v. Strickland*, 124 Ga. 504, 52 S. E. 619, 3 L.R.A. (N.S.) 369 (chandelier and annunciator); *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64 (gas pipes attached by brackets, in tavern); *Guthrie v. Jones*, 108 Mass. 191 (gas fixtures). See also *Elliott v. Bishop*, 10 Exch. (Eng.) 496 (grates and gas fittings). In *Raymond v. Strickland*, supra, the court said: "A further indulgence is allowed the tenant in removing such . . . domestic fixtures as may be annexed to the premises by the tenant for the more advantageous use thereof, provided no material injury results to the realty or to the substantial characteristics of the articles themselves. Domestic fixtures have been held to include ranges and stoves fixed in brick work, furnaces, gas fixtures, pumps, clocks, window blinds, bathtubs, and other chattels annexed for convenience. . . . With regard to domestic . . . fixtures, it is very generally held that they may be removed by the tenant, and are to be considered personalty even though annexed; and that any wrongful act or refusal on the part of the landlord with respect to the removal of the tenant's fixtures amounts to a conversion for which an action will lie. . . . In the case in hand, the annunciator and chandelier are easily classified as domestic fixtures; the evidence shows that both could be removed without injury to the ceiling or walls of the house. They were the personal chattels of the tenant, and she had the right of removal during her tenancy and possession." In *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64, it was said: "In order to determine, whether in any particular case chattels annexed to the freehold come within these classes, so that the tenant has the right to remove them, several considerations are to be regarded. One of the chief of these is the mode of their annexation to the building; that is, whether they are annexed to the fabric of the house, and the extent to which they are so united, and whether they can be taken down and removed . . . without substantial injury to the building or to themselves. Another important consideration is the intention with which they were annexed by the tenant, and the purposes which they were designed to answer; that is, whether they were intended for a permanent and substantial improve-

ment to the realty, . . . or whether they were put up and used for a temporary object, or for the more convenient occupation and enjoyment of the premises for the particular purpose for which the tenant used them, so that they were useful and necessary rather to the comfortable and convenient occupation of the building than to the building itself. . . . The application of these rules and principles to the case at bar is decisive of the nature and character of the articles which were removed from the demised premises by the tenants. They were but slightly annexed to the building, and were removed without any substantial damage to the building, and without essential injury to themselves. The premises were intended for and demised as a tavern and boarding-house. The articles were themselves of a mixed nature, and may well be regarded as combining the qualities of both domestic and trade fixtures. They were designed by the tenants to be used in carrying on the business for which the premises were occupied, and they were also adopted for the more easy and comfortable use and enjoyment of the building. They were useful and convenient, rather than essential and permanent additions to the premises. At the time of the demise, the house was . . . furnished with light by other means. The pipes were not necessary therefore to the complete enjoyment of the premises. They were only added to subserve the domestic purposes to which they were applied, and to render the premises more suitable for the particular use to which they were appropriated." In *Guthrie v. Jones*, 108 Mass. 191, the court said: "They [gas fixtures] are in their nature articles of furniture, and the fact that they were fastened to the walls, for safety or convenience, does not deprive them of their character as personal chattels and make them a part of the realty. . . . The nature of the articles, the circumstances under which they were placed in the building, the mode of their connection, and the relation which they bear to the use of the freehold, are not such as to give them the character of fixtures or additions to the real estate."

Particularly, it has been held that gas or electric accessories are not a part of the realty, but rather movables, where they have been installed by the tenant for trade purposes. *Lovett v. Birmingham-Seaman-Patrick Co.* (Mich.) 158 N. W. 881 (gas lights in office and shipping room); *Lawrence v. Kemp*, 1 Duer (N. Y.) 363 (gas fixtures in store); *Livingston v. Sulzer*, 19 Hun (N. Y.) 375 (gas fittings in saloon); *Webber v. Franklin Brewing Co.* 123 App. Div. 465, 108 N. Y. S. 251, *affirmed* 198 N. Y. 509, 92 N. E. 1106 (window chandeliers with gas and electric fixtures in saloon); *Excelsior Brew-*

ing Co. v. Smith, 125 App. Div. 668, 110 N. Y. S. 8, affirmed 198 N. Y. 519, 92 N. E. 1084 (combination gas and electric chandeliers in saloon); Argles v. McMath, 26 Ont. 224 (gas fixtures in store); Dunn v. Garrett, 7 N. Bruns. 218 (gas fittings in shop). And title to the chattels is not lost by a failure to remove them before the termination of the lease. Lawrence v. Kemp, 1 Duer (N. Y.) 363, wherein it was said: "Such articles [gas fixtures] when placed by a tenant in a demised building during his term are his property. If not removed by him during the term, they do not, for that reason, cease to be his property. He may remove them after his term expires without subjecting himself to any damages for such removal, even though he be liable to an action of trespass for an entry on the demised premises." Compare Dunn v. Garrett, 7 N. Bruns. 218.

Const. § 157, limiting municipal indebtedness; and, where the debt created exceeds the debt limit, any holder of the bonds cannot recover from the city thereon.

[See note at end of this case.]

Provision for Debt Limit — Notice of Provision Imputed.

One dealing with a municipality must take notice of its debt limit provision.

[See 44 Am. St. Rep. 242.]

Appeal from Circuit Court, Kenton county, Common Law and Equity Division.

Action by German National Bank of Covington, plaintiff, against City of Covington, defendant. From judgment rendered, plaintiff appeals. **AFFIRMED.**

S. D. Rouse, R. C. Simmons and H. B. Mackoy for appellant.

Frederick W. Schmitz for appellee.

**GERMAN NATIONAL BANK OF
COVINGTON**

v.

CITY OF COVINGTON.

Kentucky Court of Appeals—April 23, 1915.

164 Ky. 292; 175 S. W. 330.

Municipal Corporations — Debt Limit — Improvement Assessed against Property Benefited.

Contracts for local improvements, the cost of which is to be borne wholly by the property benefited, do not create any "municipal indebtedness" within Const. § 157, limiting municipal indebtedness.

[See note at end of this case.]

Same.

Where street improvement bonds are not payable wholly out of a special fund from assessment on the property benefited, but the faith and credit of the city are pledged for their payment, they are within Const. § 157, limiting municipal indebtedness.

[See note at end of this case.]

Same.

Where a city having power to make a street improvement, but without power to have the cost assessed against the abutting property in excess of fifty per cent of the value thereof, contracted for street improvements, the cost of which exceeded fifty per cent of the value of the abutting property, and issued bonds for the cost of the work and pledged its credit for their payment, and the bond issue was taken over by the contractor, who completed the work, the obligation incurred by the city is an indebtedness within

[293] SETTLE, J.—Cities of the fourth class are authorized to improve streets at the cost of the abutting property, and to issue street improvement bonds (Sections 3572-7, Kentucky Statutes), but have no authority to assess the abutting property in excess of one-half the value thereof after the improvements are made (Section 3578, Kentucky Statutes). Cities of the second class are also authorized to improve streets on the ten-year bond plan, and to issue the bonds of the city, secured by liens on the abutting property, and also to pledge the faith and credit of the city for the payment of the bonds. Section 101, Kentucky Statutes.

Prior to July 29, 1909, Latonia was a city of the fourth class. During the period immediately preceding that date, it ordered the improvement of a number of its streets on what is known as the ten-year bond plan. On the above date, the City of Latonia was annexed to the City of Covington, a city of the second class. Some of the streets under course of construction at the time of the annexation were subsequently completed and the cost provided for by the City of Covington. Among the streets so improved is Randall Avenue. The cost of the improvement was \$2,962.48, which sum was assessed on eight lots of the Green subdivision. After the street was so improved, it developed that these lots were worth only \$2,338.94, and could be put in lien for only one-half that amount, or \$1,169.47. The cost of the improvement, therefore, exceeded fifty per cent of the value of the property to the extent of \$1,793.01. The City of Covington issued bonds for the cost of the work, and pledged for the payment thereof not only the special fund accruing from the collection of the ac-

assessment of the abutting property, but also the faith and credit of the city. The issue of bonds was taken over by the contractor, and subsequently a number of these bonds were sold to various parties, including the German National Bank.

This action was brought by the German National Bank to recover on three of these bonds. A personal judgment was sought against the city. The city defended on the ground that no vote of the people authorizing the indebtedness was ever had, and that the indebtedness exceeded the revenue and income for the year for which it was incurred, and was therefore void [294] under Section 157 of the Constitution. On final hearing the trial judge gave judgment for plaintiff for the amount collected, and to be collected, from assessments on the abutting property, but declined to give any personal judgment against the city for that portion of the bonds not secured by liens on the abutting property. From that judgment the bank appeals.

Section 157 of the Constitution provides in part as follows:

"No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

It is admitted in this case that the indebtedness was not authorized by a vote of the people and that it exceeds the revenue and income provided, or that it could be provided, for the year in which it was incurred.

We have frequently held that contracts for local improvements, the cost of which is to be borne wholly by the property benefited, form no part of the indebtedness of the municipality within the meaning of Section 157 of the Constitution. The reason for the rule is that the contractor or holder of the bond must look alone to the fund created by the collection of the assessments on the abutting property and the city is a mere agency for collecting the assessments and custodian of the fund when the assessments are collected. *Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064, 25 Ky. L. Rep. 163; *Adams v. Ashland*, 26 Ky. L. Rep. 184, 80 S. W. 1105; *Guilfoyle v. Maysville*, 129 Ky. 532, 125 S. W. 666; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L.R.A. 681. On the other hand, the fact that local

improvement bonds are to be paid out of assessments which are made a lien upon the property benefited does not render them legal on the theory that they do not create an indebtedness against the city where the bonds provide for the pledging of the faith of the city for the payment of the principal and interest thereon. *Covington v. McKenna*, 99 Ky. 508, 36 S. W. 518; *Covington v. Nadaud*, 103 Ky. [295] 445, 45 S. W. 498, 20 Ky. L. Rep. 151; *Gedge v. Covington*, 26 Ky. L. Rep. 273, 80 S. W. 1160. Here the improvement bonds are not payable wholly out of a special fund derived from the assessment on the property benefited. The faith and credit of the city are pledged for their payment. They are, therefore, a personal obligation of the city, and since they represent an indebtedness in excess of the revenue and income for the year in which the indebtedness was incurred without a vote of the people, they come within the inhibition of the Constitution and are null and void.

The above propositions are conceded, but counsel for the bank insist that the city is liable for the deficiency on an entirely different theory. Briefly stated, their position is this: Where the city has the power to make the improvement, but none to charge it upon the abutting property, the city itself becomes liable. *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115; *Caldwell v. Rupert*, 10 Bush (Ky.) 179; *Louisville v. Nevin*, 10 Bush. (Ky.) 549, 19 Am. Rep. 78; *Craycraft v. Selva*, 10 Bush (Ky.) 696. The constitutional provision applies only to a contractual indebtedness. *O'Bryan v. Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800; *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L.R.A. (N.S.) 433; *Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195. It does not apply to an obligation imposed by law. 28 Cyc. 1541. Here the city had the power to make the improvement but no power to assess the cost thereof against the abutting property in excess of 50% of its value. That being true, the case falls within the rule laid down in the above cases. The law itself imposes upon the city the obligation to pay, and that being true, the debt limit provision of the Constitution does not apply. There are authorities which tend to support this position. Thus in the case of *Addyston Pipe, etc. Co. v. Corry*, 197 Pa. St. 41, 46 Atl. 1035, 80 Am. St. Rep. 812, the city entered into a contract for the construction of a sewer for the price of \$57,000.00. Of this sum \$9,300.00 was to be paid out of the general sewer fund and the remainder to be assessed upon the property benefited. The city paid its part of the cost; the remainder was assessed on the property benefited, including abutting and

non-abutting property. All of the assessments on the abutting property were paid; the assessments on the non-abutting property were held invalid. The city was held liable for the deficit, although [296] the indebtedness exceeded the constitutional limit. The court said:

"In the present case the City of Corry provided the contract price of the sewer by an appropriation of money which, as already said, we must assume to have been in the treasury, and by assessments upon the property benefited. There is nothing to indicate that these assessments were not in good faith and reasonable expectation supposed to be adequate to produce the required fund and offered and accepted by the contracting parties in the mutual belief in their validity. So far as they were upon abutting property they fulfilled their intended purpose. The distinction in regard to non-abutting property had not then been made, and was not in contemplation of either side. When it was determined that this part of the agreed means of payment would be unavailable, the loss should in equity and justice fall on the city which has received the full consideration stipulated for, and to this extent paid nothing.

"The cases on this subject are conflicting. See *Dillon on Municipal Corporations* (4th Ed.) Secs. 480-482 and notes. They show that there is no disposition of the question which is wholly free from difficulty. We have preferred to follow the line which we think not inferior in just legal reasoning, while clearly superior in the honesty and justice of the result reached."

Following the rule above laid down, the same court held in the case of *Gable v. Altoona*, 200 Pa. St. 15, 49 Atl. 367, that where a city in good faith provides that bonds for street paving shall be payable out of assessments on property, and it turns out that such assessments are illegal because of the improper manner in which the ordinances authorizing them were enacted, the city is liable for the bonds although at the time of their issue they increased the debt beyond the constitutional limitation.

In the case of *Ft. Dodge Electric Light, etc. Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7, the court held that where a municipal contract for street improvements provided that the contractor should receive the special assessment certificates in payment, the city's liability for damages resulting from an erroneous assessment upon property not liable is not an incurring of indebtedness, so as to fall within the prohibition of Constitution, Article 11, Section 3, prohibiting municipal corporations from becoming indebted to an amount in excess of 5 per cent of the value of its taxable property, since the con-

stitutional [297] provision did not apply to a liability arising from a wrongful act. The ground on which the decision is rested is shown by the following quotation from the opinion:

"It was not by any voluntary act of the contractor that the city became indebted to him, and it was not contemplated by the contract that in this respect the city should become his debtor; but, by its own negligence in failing to perform a duty which it had lawfully assumed, a claim against the city in favor of the holder of these certificates has arisen. It does not matter whether this breach of duty was a tort, in the technical sense of the term, or not. The constitutional limitation does not make any such distinction. Nor do we think that it is conclusive to say that the obligation is one arising by implied contract. No doubt, some obligations arising by implied contract are within the prohibition of the constitutional clause. If the city should direct the improvement to be made without any express contract therefor, and without any arrangement for payment by assessment on abutting property, the obligation to make payment of the reasonable cost to one who should perform the work would be an obligation by implied contract; but it would be an obligation voluntarily assumed, as between the city and the contractor, and would create an indebtedness, within the terms of the constitutional provision. The liability of the city here is one growing out of negligent omission to do that which the city had the right to do, and which, if done, would not have involved any creation of indebtedness, and therefore we think the constitutional limitation does not apply."

In the case of *Little v. Portland*, 26 Ore. 235, 37 Pac. 911, it was held that a stipulation in a contract with a city for a public improvement that the contractor should look for payment to a particular fund to be raised by assessment, did not relieve the city from liability for negligently delaying to raise such fund, and that the city was liable even though its limit of indebtedness had been reached.

Without approving the doctrine laid down in the above cases, it seems to us that they are clearly distinguishable from the case under consideration. Indeed it is plainly pointed out in the Iowa case that the city did not become indebted to the contractor by any voluntary act on the part of either. The liability of the city was based solely on its negligence in failing to perform [298] the duty which it had lawfully assumed. Here the indebtedness was created by the voluntary action of both debtor and creditor. The city agreed to issue its bonds and did

issue them. The contractor agreed to accept the bonds and did accept them. The obligation thus imposed by the voluntary act of both parties exceeded the constitutional debt limit and was, therefore, void. Here the contractor looked to the bonds for payment. The bank took the place of the contractor; relying on the faith and credit of the city it made the purchase. The suit itself is to recover on the bonds. Whatever liability the city incurred was merged in the bonds. In our opinion, it would be a mere jugglery of words to say that the bonds are invalid because they exceed the debt limit and yet allow a recovery based on the fact that the city did not have the power to assess the abutting property in excess of 50% of its value. We often find courts saying that a certain decision, which has the effect of annulling debt limit provisions, is in the interest of honesty and justice. In laying down a just rule in such cases, however, two parties are to be considered: the contractor, on the one hand, and the taxpayers on the other. In order to apply justice in a particular case we should not announce a rule of law that will lead to great injustice in the future. That this would be the effect if the contention of the bank were sustained cannot be doubted. In every case municipalities could make public improvements without the power of assessing the cost thereof against the abutting property and thus clearly violate the provisions of the Constitution by imposing unlimited burdens on the people. It is true that the rule herein announced may lead to occasional hardship. If so, it is largely of the contractor's own making, for there is no proposition better settled than that one dealing with a municipality must take notice of its debt limit provision. We, therefore, conclude that in the long run the safer plan is to give effect to the constitutional provision and not permit it to be evaded by any refined distinction which has no substantial basis.

Judgment affirmed.

NOTE.

Right of Municipality to Contract for Local Improvement with Special Assessment against Persons Benefited Where Cost Exceeds Authorized Debt Limit.

General Rule.

Contracts by a municipality for local improvements, the cost of which is to be borne by the property benefited, form no part of the indebtedness of the municipality within a constitutional limitation thereof. Therefore the municipality has a right to contract

for the improvements although their cost added to existing indebtedness exceeds the debt limit.

United States.—*Denny v. Spokane*, 79 Fed. 719, 25 C. C. A. 164; *Coleman v. New Kensington*, 140 Fed. 684; *Mankato v. Barber Asphalt Pav. Co.* 142 Fed. 329, 73 C. C. A. 439.

Arkansas.—*White v. Loughborough*, 188 S. W. 10.

Georgia.—*Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71.

Idaho.—*McGilvery v. Lewiston*, 13 Idaho 338, 90 Pac. 348.

Illinois.—*Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970; *People v. Honeywell*, 258 Ill. 319, 101 N. E. 571. See also *Lobdell v. Chicago*, 227 Ill. 218, 81 N. E. 354.

Indiana.—*Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L.R.A. 682; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768. See also *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

Iowa.—*Davis v. Des Moines*, 71 Ia. 500, 32 N. W. 470; *Tuttle v. Polk*, 92 Ia. 433, 60 N. W. 733; *Clinton v. Walliker*, 98 Ia. 655, 68 N. W. 431; *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532; *Ft. Dodge Electric Light, etc. Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7; *Corey v. Ft. Dodge*, 133 Ia. 666, 111 N. W. 6.

Kansas.—*State v. Neodesha*, 3 Kan. App. 319, 45 Pac. 122.

Kentucky.—*Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064, 25 Ky. L. Rep. 161; *Guilfoyle v. Maysville*, 129 Ky. 532, 112 S. W. 666; *Adams v. Ashland*, 80 S. W. 1105, 26 Ky. L. Rep. 184. And see the reported case.

Missouri.—*Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860.

Montana.—*Atkinson v. Great Falls*, 16 Mont. 372, 40 Pac. 877.

New York.—*Baldwin v. Oswego*, 1 Abb. App. Dec. 62.

North Carolina.—See *Charlotte v. American Trust Co.* 159 N. C. 388, 74 S. E. 1054.

North Dakota.—See *Vallely v. Parks Com'rs*, 1 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61.

Oklahoma.—*Compare Martin v. Territory*, 5 Okla. 188, 48 Pac. 106; *Spencer v. Gray*, 5 Okla. 216, 48 Pac. 110.

Oregon.—*Little v. Portland*, 26 Ore. 235, 37 Pac. 911.

Pennsylvania.—*Addyston Pipe, etc. Co. v. Correy*, 197 Pa. St. 44, 46 Atl. 1035, 80 Am. St. Rep. 812.

Texas.—*Beaumont v. Masterson*, 142 S. W. 984.

Washington.—*Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. See also *Austin v. Seattle*,

2 Wash. 667, 27 Pac. 557; State v. Superior Ct. 42 Wash. 521, 85 Pac. 256.

In *Little v. Portland*, 26 Ore. 235, 37 Pac. 911, it was said: "It is now well settled, however, that even though the limit of municipal indebtedness may have been reached, an appropriation of anticipated income does not create an indebtedness, and that a contract which provides that the cost of any improvement shall be paid out of a fund expressly created therefore is valid, notwithstanding the provision of the charter as to the limit of the city's indebtedness: *Salem Water Co. v. Salem*, 5 Ore. 29; *Kopikus v. State Capital Com'rs*, 16 Cal. 248; *People v. Pacheco*, 27 Cal. 175; *East St. Louis v. Flannigan*, 26 Ill. App. 449; *State v. McCauley*, 15 Cal. 429; *People v. Brooks*, 16 Cal. 11; *Grant v. Davenport*, 36 Ia. 396; *People v. May*, 9 Colo. 404, 12 Pac. 838; *Springfield v. Edwards*, 84 Ill. 626; *Fuller v. Heath*, 89 Ill. 296. The reason assigned by these decisions for the application of the foregoing rule is that materials furnished to and labor performed for a municipal corporation are exchanged for warrants, to be drawn upon the treasury and made payable out of a specific fund which has been created by an assessment or levy of taxes and appropriated to that purpose, under an agreement that the person furnishing the materials or performing the labor will rely upon the specific fund only for payment, and that the corporation shall incur no liability whatever. The contract in the case at bar contained a stipulation that the contractors should look for payment only to the fund to be raised by an assessment of the property benefited, and that they would not require the city by any legal process or otherwise to pay for the same out of any other fund; and when the improvement under the contract was completed warrants were drawn upon the treasury in favor of the contractors and made payable out of said fund.

As the contract provided that the cost of the improvement should be paid out of the special fund, the city incurred no indebtedness until it failed to collect the fund within a reasonable time, and hence its authority to enter into the contract was not affected by the charter prohibition." And in *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71, the court, in holding that the issuance of notes by a city representing a portion of the balance due by abutting property owners for street improvement was not the creation of a debt within a constitutional limitation, said: "As to the first contention, under the facts as stated above, the giving of the note by the city was not a creation of a debt falling within the constitutional prohibition relied on by the plaintiff. The city, Ann. Cas. 1917B.—13.

at the time of executing contract for the improvements of its streets, designated by ordinances of April 7th and 21st, had in its treasury cash, derived from the sale of bonds legally issued for the improvement of its streets, largely in excess of the amount required for the payment of its proportionate share of the cost of such improvements contracted for. And when the city, after expending the whole amount of such cash on hand for work on the street as it progressed which included the one-third of the cost of paving for which the city was liable and all of the cost of curbing and two-thirds of the cost of paving for which the abutting property owners were liable, gave its note for the balance due for all work done, with the expectation and the right to collect by execution the assessments due by the abutting owners, and with the special fund derived from the proceeds of the collection of such assessments, to pay off such note—the giving of the note in these circumstances, was clearly not the creation of a debt against the city and illegal and unconstitutional because violative of article 7, § 7, par. 1 (Civ. Code 1910, § 6563). . . . The act of 1913 (acts 1913, p. 1082), empowering the city of Moultrie to improve its streets, limits the liability of the city for such improvements to one-third of the cost of paving, and the giving by the city of the note to the construction company, representing a portion of the balance due by the abutting property owners to the construction company did not make the note such an indebtedness of the city as to be violative of the provision of the constitution referred to."

In *Addyston Pipe, etc. Co. v. Corry*, 197 Pa. St. 141, 46 Atl. 1035, 80 Am. St. Rep. 812, it was held that where a municipality entered into a contract for local improvements to be paid out of special assessments on the property benefited, they being made in good faith, the fact that some of the assessments were afterwards held to be invalid did not affect the validity of the contract. And in *Beaumont v. Masterson* (Tex.) 142 S. W. 984, it was held that a contract by a municipality for local improvements part of which was to be paid by special assessments against the persons benefited was not invalid as exceeding the debt limit by reason of the municipality failing to foresee that part of the assessments could not be collected.

In *Kenny v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L.R.A. 281, it was held that park board certificates issued by a city which were payable out of special assessments against the persons benefited were not a debt of the city within the meaning of a constitutional provision limiting its

amount of indebtedness. To the same effect see *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

The rule that contracts for local improvements to be paid for by special assessments against the persons benefited may exceed the debt limit applies to contracts by counties or townships. *Braun v. Benton County*, 70 Fed. 369, 17 C. C. A. 166, 34 U. S. App. 393; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Burton v. State*, 111 Ind. 600, 12 N. E. 486; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Switzerland County v. Reeves*, 148 Ind. 467, 48 N. E. 995; *Smith v. Hamilton County*, 173 Ind. 384, 90 N. E. 881, *reversing* 89 N. E. 867; *Moore v. Bible*, 173 Ind. 413, 90 N. E. 892; *Hutton v. Boze*, 173 Ind. 719, 90 N. E. 893. See also *Johnson v. Norman County*, 93 Minn. 290, 101 N. W. 180. Thus in *Strieb v. Cox*, *supra*, there was involved a statute which authorized the construction of roads and the issuance of bonds by counties to raise the money required and provided for the payment of the bonds by taxing lands adjacent to the roads constructed. The court, in holding that bonds so issued by a county were not indebtedness of the county within a constitutional limitation, said: "We are of opinion that the bonds issued by the board of commissioners of Grant county, under the provisions of the section quoted and pursuant to the authority thereby conferred, did not and do not constitute an indebtedness of such county, and did not and do not evidence an indebtedness incurred by such county, within the inhibition of article 13 of our state constitution. Such bonds are not payable by the county, or out of the general funds of the county treasury. They are payable out of the particular fund to be raised by the collection of the assessments made on the lands adjacent to such free gravel road, 'divided in such manner as to meet the payment of principal and interest of said bonds,' and placed as divided upon the tax duplicates against the lands assessed, 'and collected in the same manner as other taxes,' which fund, when so collected, 'shall be applied to no other purpose than the payment of said bonds and interest.' No other provision is made by law for the payment of either the bonds or the interest thereon; and the bonds and interest are made payable out of the particular fund to be derived from the collection of the assessments made on the lands adjacent to such free gravel road, and from no other source, and such fund is pledged by the statute for the payment of said bonds and interest. It is manifest, we think, from all the provisions of the above entitled Act of March 3d, 1877, and the amendments thereof, that the legislature intended that the entire cost and expense of constructing any free gravel,

macadamized or paved road, and all bonds of the county issued for the purpose of raising the money necessary to meet the expense of such improvement, should be borne and paid out of the particular fund to be raised by and from the collection of the assessments made on the lands adjacent to such road. While it is provided that the preliminary expenses of such an improvement may be paid out of the county treasury, yet it is further provided that the amount so paid must be refunded out of the particular fund to be raised as aforesaid from the assessments on adjacent lands."

Limitation of Rule.

Where the credit of a municipality is pledged to pay for the cost of a local improvement which exceeds the authorized debt limit, the contract is invalid although it also provides for payment out of special assessments on the property benefited. *Burlington Sav. Bank v. Clinton*, 111 Fed. 439; *French v. Burlington*, 42 Ia. 614; *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532; *Covington v. McKenna*, 99 Ky. 508, 36 S. W. 518; *Atkinson v. Great Falls*, 16 Mont. 372, 40 Pac. 877; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557; *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080; *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800. And see the reported case. See also *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569. Thus in *Austin v. Seattle*, *supra*, the court, in denying the right of a city to issue local improvement bonds on the ground that the authorized debt limit of the city was already exceeded, said: "The city of Seattle has already passed the limit of one and one-half per cent of her indebtedness based upon the assessment roll of August 30, 1890, and no vote has been taken authorizing the increase of her indebtedness. The city council, by ordinance No. 1696, has provided for the issuance of Broadway improvement bonds in the sum of \$17,812.50; and the appellants contend that the city has no power, without a vote of authorization, to issue such bonds, for the reason that when issued they will constitute evidences of primary indebtedness of the city. The ordinance (§ 5) provides: 'The principal and interest of such bonds shall be paid by the city from the proceeds of such local assessments, but the city shall be liable for the payment of both principal and interest if it fails or neglects to collect said assessments, or fails or neglects to collect sufficient to pay the principal or interest on said bonds when they fall due.' For the city, it is claimed that the bonds when issued would not constitute primary indebtedness of the corporation, for the reason that they are payable out of the fund to be created under the terms

of the charter, and that the ordinance makes the city liable only in case of its failure or neglect to collect the assessment, or to collect sufficient to pay the principal and interest of the bonds when they fall due. The appellant must succeed in his contention because the ordinance does not comply with the charter. The last clause of § 9 is, 'and the city shall be liable for the payment of both principal and interest;' and the council has no power to issue a bond which does not provide for a liability equal in degree with that provided by the charter." In *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532, it appeared that a city entered into a contract for street improvements obligating itself to pay the contractor a fixed and definite price, it having already exhausted its constitutional power to create indebtedness. Payments were made from time to time as provided for in the contract until the contractor was paid the greater part of the sum due him. The bonds which were issued to raise funds to defray the most of the improvements, were on their face an absolute promise to pay, but they were subject to the condition that they were payable only out of the fund created by the collection of the special tax for the improvements on the abutting property. It was held that the contract was void and that consequently the bonds were also invalid. So in *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800, it appeared that a municipality proposed to issue improvement bonds whereby it acknowledged itself to be indebted to and promised to pay the bearer. The bonds also provided that the "principal sum and interest shall be payable out of the proceeds of the improvement assessments hereinafter mentioned, and this bond and accompanying coupons are issued upon the faith and security of said assessments." The municipality was already indebted to the extent of its authorized limit. It was held that the issuance of the bonds would be enjoined.

Where a municipality contracts for local improvements the cost of which is to be borne partly by it and partly by special assessments against the persons benefited, and the share of the cost of which the municipality is liable exceeds its authorized debt limit, its liability on the contract cannot be enforced. *People v. Chicago*, etc. R. Co. 253 Ill. 191, 97 N. E. 310; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768. See also *Vallelly v. Park Com'rs*, 16 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61. But a contract will not be held to be invalid on the ground that the share of the cost for which the city is liable exceeds its authorized debt limit where it does not appear that the city is unable to pay its share out of its current revenue as well as its ordinary current expenses. *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562,

2 N. E. 478; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L.R.A. 681; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L.R.A. 281; *Addyston Pipe, etc. Co. v. Corry*, 197 Pa. St. 41, 46 Atl. 1035, 80 Am. St. Rep. 812; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557.

HANFORD

v.

CITY OF SEATTLE.

Washington Supreme Court—July 19, 1916

92 Wash. 257; 158 Pac. 987.

Dedication — Park or Square — Sale of Lots with Reference to Plat.

A sale of lots, according to a plat and the execution of deeds therefor by the owner of the plat, constitutes a ratification of such plat as filed.

[See note at end of this case.]

Same.

Where plat and deed of dedication contain no evidence of intent of platlor to donate a block known as "East Park," for public purposes or for any specific use, and where no public use was made of land, and taxes and special assessments were collected, and the land was transferred by deed as private property, it is held, under Code 1881, §§ 2332, 2339, there was nothing more than an ambiguous dedication of such tract which had been revoked, so that city could not claim land as public park (citing Words and Phrases).

[See note at end of this case.]

Revocation of Dedication.

A dedication by plat of lands for public purposes may be revoked before acceptance by conveying the land as private property.

[See Ann. Cas. 1917A 1109.]

Acceptance of Dedication — Levy of Tax as Refusal to Accept.

Where there has been no acceptance, formal or otherwise, by the city or by the public, of land dedicated for public use, the levy and collection of taxes and special assessments shows an intention not to accept the dedication.

Appeal from Superior Court, King county:
RONALD, Judge.

Action by Frank W. R. Hanford, plaintiff, against City of Seattle, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Hugh M. Caldwell, James E. Bradford, Howard A. Hanson and Geo. A. Meagher for appellant.

C. H. Hanford and P. V. Davis for respondent.

[257] HOLCOMB, J.—Respondent brought action and had judgment to quiet title in him to a certain block of land known as "East Park," or block 32, Hanford's addition to South Seattle. The city claims this land as a public park. It is a part of the same plat of land involved in the case of [258] *Meacham v. Seattle*, 45 Wash. 380, 88 Pac. 628, but the status of this particular tract as a public ground was not there involved or considered. The contention of appellant, briefly stated, is that a parcel of ground included within a plat of lots and blocks, streets and alleys, dedicating the streets and alleys and "other public grounds" to the public, which plat designates the tract involved as "East Park," *ex vi termini* dedicates the tract to the public as a park or "public ground."

This plat was acknowledged by Edward Hanford on June 9, 1869, and filed for record in the King county records of deeds on June 18, 1869, and afterwards re-recorded in the plat book of towns, "Per Order of County Comrs.," on March 16, 1875. The patent to the land from the United States was not issued until August 27, 1871. On July 1, 1878, Edward Hanford and his wife executed a "Deed of Dedication" to the platted lands, to particularly identify the land with reference to the legal government description and further describe the plat and dedication. Between the dates of the filing of the original plat and the later deed of dedication, the platters sold lots with reference to the plat and joined in deeds therefor, which acts constituted ratification of the plat as filed. *Meacham v. Seattle*, supra.

In 1881, Edward Hanford and wife conveyed all they then had remaining of the platted land "*excepting the block in the platted land marked East Park, or Block 22,*" which they expressly reserved. In 1882 they conveyed this block 32, or East Park, to Aaron A. Wait. In 1884 Wait conveyed the block to his daughter Anna E. Wait. She intermarried with Frank Hanford in 1886, and died intestate in 1894, leaving as her heir the respondent, who from her inherited the block.

Seattle was incorporated in 1869, and Hanford's addition to South Seattle was then within its corporate limits and so continued until 1875, when the limits of Seattle were reduced to such an extent as to exclude the Hanford addition to [259] South Seattle, and so remained until 1883 when the corporate limits were again extended so as to include

it. It has remained within the limits of Seattle to this time.

No taxes were levied against the platted tract known as East Park prior to 1882. Taxes were levied against it and paid by the original owners, or the Waits, or descendant, to and including 1905. A certificate for 1906 and subsequent taxes to and including taxes for 1913 was sold and issued to another. Appellant in its governmental capacity has twice assessed block 32, or East Park, for local public improvements, as late as 1913.

The town plat law in force at the time of the dedication of the plat of this land is found in the Code of 1881, §§ 2332 and 2329. The first section contains the following:

"All streets, lanes and alleys, laid off and recorded in accordance with the foregoing provisions, shall be considered, to all intents and purposes, public highways, . . ."

The second section is as follows:

"Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid."

By these provisions of the law then in force, it will be noted that the first provision constituted a legislative acceptance of all streets, lanes, and alleys laid off in accordance with the law providing for the platting and subdivision of land. But as to the second section, it will be observed that, if any grounds other than those designated as streets, lanes, or alleys are intended to be donated or granted to the public or to any other person or concern, it was necessary to mark or note on the plat that such grounds were donated or granted and for what use or purposes intended by the donor or [260] grantor. Three things were essential: (1) An affirmative act of donation or grant by the donor or grantor noted as such on the plat or expressed in some other instrument; (2) the donee or grantee must be named or specifically indicated; (3) the specific use to which the donated or granted property is to be devoted according to the intention of the donor or grantor must be expressed or provable in some way. There was not in this plat, or in the subsequent dedication by deed, any affirmative words or expressions indicating an intent on the part of the platters, who were the grantors of the public grounds, streets, or alleys, to donate East Park or block 32 to the public or to any individual or body politic, for public purposes or any

specific use. Authorities are cited by appellant to the effect that dedication is shown by spaces on plats designated by the words "Park," "Public Square," "Public Ground," "Common," "County Block," "College Square," "Plaza," "Place," etc. *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L.R.A. 145; *Steel v. Portland*, 23 Ore. 176, 31 Pac. 479; *Bayonne v. Ford*, 43 N. J. L. 292; *Ehmen v. Gothenburg*, 60 Neb. 715, 70 N. W. 237; *Fereday v. Mankedick*, 172 Pa. St. 535, 34 Atl. 46; *Thaxter v. Turner*, 17 R. I. 799, 24 Atl. 829; 6 Words & Phrases, 5177.

In the text of the authority last cited, it is said:

"The word 'park,' written on a block on a map of city property, indicates a public use, and conveyances made by the owner of the platted land by reference to such map operates conclusively as a dedication of the block."

The situation here, however, is distinguished from that in most of the cases above cited by the positive terms of the statutes which we have quoted. We have here, in addition to that situation, the fact that, prior to any use indicating an acceptance by the public or the city acting for the public, whatever indicia of dedication to the public there had been by the platters and dedicators of this land had been revoked by subsequent reservation of this particular block by their [261] deed more than thirty-seven years ago. After having reserved this particular block by expressions in a deed, they transferred the land and it was again transferred.

If the dedication was ever a donation in intention, it was a revocable donation prior to acceptance or use by the donee. Revocation may be effected in such case by conveying the land as private property. 9 Am. & Eng. Enc. of Law (2d ed.) 78. Since 1882, the county, which has at all times been a taxing power within the state, has levied and collected taxes upon this block. Tax receipts, showing that the city has collected taxes upon this block since its coming into the city limits in 1882, are in evidence. The city has levied two special assessments upon this property within the last three or four years for public improvements and caused it to be placed upon the assessment rolls therefor. It is contended by appellant that the city could do this without being understood as waiving any of its rights, for the reason that it can assess itself upon its parks for local improvements, and that it customarily does so, in order to assist the property owners in paying for public improvements. The answer to that is that the city did not assess itself, but assessed this particular property as if the property of another, and so placed it upon the assessment roll. Where there has been

no acceptance by the city or the public, either formal or otherwise, the levy and collection of taxes and special assessments shows an intention not to accept the dedication. *Spokane v. Security Sav. Soc.* 82 Wash. 91, 143 Pac. 435.

Appellant also relies upon *Thonney v. Rice*, 43 Wash. 708, 86 Pac. 713, which we do not consider an authority, because in that case it was held that there was timely acceptance of the dedication. We consider this case more analogous to that of *Spokane v. Security Sav. Soc.* supra. As was observed by the lower court, "the city has never done a single act to evidence its understanding that the property was a donation to the public."

[262] We conclude that there was in this case at best nothing but an ambiguous grant to the public by deed or other written conveyance. There was never any acquiescence in the use of it by the public. There was no user or improvement or adverse possession of the block by the public. There has never been any expressed acceptance of the supposed dedication of the block for public purposes. The property has not been separated from the mass of other taxable property. The city never, during the forty-five years elapsing after the platting of the land showing "East Park," exercised any proprietorship over it. The doubtful and incomplete dedication has been revoked by subsequent effective action on the part of the dedicators. It was not, prior thereto, confirmed and made certain by acceptance and use by the public or the city. The incomplete dedication, if any, was rejected by the inclusion of the block in the mass of taxable property, and the city is estopped to assert it as a part of the public property of Seattle by its act in assessing the same as private property.

The judgment of the trial court is right and is

Affirmed.

Parker, Bausman, Mount, and Fullerton, JJ., concur.

NOTE.

Dedication of Park or Square by Selling Lots According to Map or Plat.

General Rule, 197.

Reason of Rule, 198.

Illustrations of Rule, 199.

General Rule.

The rule laid down in *Cole v. Minnesota Loan, etc. Co.* 17 Ann. Cas. 304, that where an owner plats his land, and lays off lots according to the plat, and sells one or more of the lots with reference thereto, he thereby irrevocably dedicates to the public for the

public use the land designated in the plat or map as a park, square, common, or other public place, is supported by the recent decisions on that subject. *Davenport v. Buffington*, 97 Fed. 237, 38 C. C. A. 453, 46 L.R.A. 377; *Davidow v. Griswold*, 23 Cal. App. 189, 137 Pac. 619; *McIntyre v. El Paso County*, 15 Colo. App. 78, 61 Pac. 237; *Macon v. Franklin*, 12 Ga. 239; *East Atlanta Land Co. v. Mower*, 138 Ga. 380, 75 S. E. 418; *Campbell County Ct. v. Newport*, 12 B. Mon. (Ky.) 538; *Vinton v. Lyons*, 131 La. 673, 60 So. 54; *Northport Wesleyan Grove Camp-meeting Assoc. v. Andrews*, 104 Me. 342, 71 Atl. 1027, 20 L.R.A. (N.S.) 976; *Conkling v. Mackinaw City*, 120 Mich. 67, 79 N. W. 6; *Shearer v. Reno*, 36 Nev. 443, 136 Pac. 705; *White v. Moore*, 139 App. Div. 269, 123 N. Y. S. 1012; *White v. Moore*, 161 App. Div. 400, 146 N. Y. S. 593, *affirming* 73 Misc. 96, 132 N. Y. S. 441; *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195, L.R.A.1916B 1160; *Steel v. Portland*, 23 Ore. 176, 31 Pac. 479; *Com. v. Rush*, 14 Pa. St. 186; *Tullahoma v. Gill*, 1 Tenn. Cas. 326; *Clement v. Paris (Tex.)* 154 S. W. 624; *Re Lorne Park*, 33 Ont. L. Rep. 51, 7 Ont. W. N. 558, *affirming* 30 Ont. L. Rep. 289, 5 Ont. W. N. 626. See also *Jefferson County v. Oskaloosa*, 80 Kan. 587, 102 Pac. 1095; *New Orleans v. Carrollton Land Co.* 131 La. 1092, 60 So. 695; *Bartlett v. Harmon*, 107 Me. 451, 78 Atl. 842; *Green v. Miller*, 161 N. C. 24, 76 S. E. 505, 44 L.R.A. (N.S.) 231; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344; *Com. v. Alburger*, 1 Whart. (Pa.) 469. And this rule applies where there has been a lease instead of a sale of the lots. *Cushwa v. Williamsport*, 117 Md. 306, 83 Atl. 389. Likewise a nation, state, or municipality which dedicates land which it owns in the site of a town to public use for the purpose of a park, is as conclusively estopped as a private proprietor from revoking the dedication, from selling the park, and from appropriating the land which it occupies to other purposes after lots have been sold. *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453, 46 L.R.A. 377; *Com. v. Beaver*, 171 Pa. St. 542, 33 Atl. 112. So, in *Davenport v. Buffington*, *supra*, the court said: "We are unwilling to concede that a nation or a state which becomes the proprietor of a town site, plats it, and dedicates its streets and parks to public use, has any greater or better right to revoke or avoid its grant or covenant than a private proprietor would have. It may be that either, before any rights have accrued, can revoke the dedication, but, after lots have been sold, after streets have been graded, after parks have been cared for and improved according to the plat—in other words, after rights have vested in reliance upon the dedication—we deny the right of nation or of individual to

revoke it, or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted."

It has been held that where the dedication is made by the statutory method of filing a plat, and the sale of lots by the owner with reference thereto, it can be withdrawn only by a vacation of the plat under the statute. *Ramstad v. Carr*, 31 N. D. 455, 154 N. W. 195, L.R.A.1916B 1160.

In the reported case it is held that while the foregoing general rule might have, under other circumstances, been applicable to the facts therein, it did not apply for the reason that the plat failed to comply with the three essentials of the statute (Code 1881, §§ 2332, 2329) viz.: (1) An affirmative act of donation or grant by the donor or grantor noted as such on the plat or expressed in some other instrument; (2) the donee or grantee must be named or specifically indicated; (3) the specific use to which the donated or granted property is to be devoted according to the intention of the donor or grantor must be expressed or provable in some way; and the further fact that, prior to any use indicating an acceptance by the public or the city acting for the public, whatever indicia of dedication to the public there had been by the platters and dedicators of the land had been revoked by a subsequent reservation of the particular block and by later conveyances of it as private property.

Reason of Rule.

The reason for the rule was aptly stated in *Green v. Miller*, 161 N. C. 24, 76 S. E. 505, 44 L.R.A. (N.S.) 231, and, though there used with respect to the dedication of streets, is equally applicable to the cases of parks, squares, etc. The court said: "The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created." To the same effect, see *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344.

In *Clement v. Paris (Tex.)* 154 S. W. 624, the court said: "In the reported cases, which are numerous, it has been uniformly held that the proprietor who had sold lots with reference to a plat or map of the town with a block marked 'public square' was estopped to deny that such square had been dedicated to the public. These decisions rest

upon the theory that, by marking the word 'public' thereon, there is implied the representation to the purchasers of lots that such square had been dedicated to the public. If the one act of the owner in so marking the block on the map could be looked to as operating and having the effect to conclusively show to purchasers of the abutting lots the intention of the owner to dedicate to the public use, then the entire marking and arrangement of the map could be further looked to as an act of the owner operating and having the effect of fairly and reasonably indicating and representing to such purchasers that the particular square—open, undivided, unnumbered, and situated as it was—was designed for use by the general public purely and exclusively, as in the nature of a highway or plaza. The block appears in the center of the town site, not divided into building lots like all the others, but left open and entirely surrounded by streets. All the other blocks were subdivided into lots, indicating their use as building lots."

In *Shearer v. Reno*, 36 Nev. 443, 136 Pac. 706, it was said: "When by the sale of the property by reference to the map filed or bounded by streets marked upon it, other parties had become interested in the property set apart for public uses, the owner was precluded from asserting his original rights. The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in the deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased."

In *Davidow v. Griswold*, 23 Cal. App. 189, 137 Pac. 619, the court said: "If we may state it more concisely, we have, then, this situation: The owner of a tract of land has it surveyed and platted as a town site. He has a map of it, upon which are delineated streets and parks, filed in the recorder's office. He sells lots all over this town site, described by reference to this map, and, moreover, upon the positive representation that the streets had been laid out and dedicated to public use, and, in reliance upon these representations, the lots are purchased and improved. This may not be dedication in the strict acceptance of that term but the

result is the same. The owner has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the said purchases under the conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. And if they are to be considered as really streets and parks when we regard the rights of the purchasers, it is difficult to understand how their status would be changed when we regard the rights of the public generally."

In *Vinton v. Lyons*, 131 La. 673, 60 So. 54, the court said: "The dedication became binding and irrevocable the moment lots were sold from the plat, and the plat and sales were recorded in the conveyance records. The setting aside of the two parcels of land designated as block 7 of the plat as a public park had the effect of increasing the value and desirability of the other lots, especially those fronting thereon. The law considers, under such circumstances, that the value of the land dedicated goes into the remaining property and is received by the owner in making sales at an increased price. Besides it may be said that the owner, in laying out a town site when he provides reasonably for parks, makes sales of lots more readily, for the more advantages that property has the more readily it sells. . . . It would be contrary to equity and justice to hold that a real estate company could plat a town, make provisions for a park, sell lots from the plat after filing it for recordation, and after the purchasers had built homes on their lots, and after the company no doubt received a better consideration for those lots, or many of them, because of the dedication, to then withdraw the dedication and make a sale of the property to a private individual. To so hold, it seems to me, would be to set a trap for the unwary, and not only this, but it would place owners of real estate at a disadvantage in laying out town sites and subdivisions to towns, for it is to their interest, quite frequently, that they make some provision of this kind, and, in case of laying out a town, they could give no assurance that what they marked on their plat as a park was indeed a park, and the proposed purchaser of the lots is the one in whom the owner has an especial interest at the time."

Illustrations of Rule.

In *Woodcock v. New Orleans*, 222 Fed. 260, 138 C. C. A. 50, wherein it appeared that certain landowners made a plan of their

property on which a vacant space was delineated by the designation of "Samuel Place," it was held that a sale of various lots by an owner in accordance with the plan, operated as a dedication of "Samuel Place" to the public.

In *Northport, Wesleyan Grove Campmeeting Assoc. v. Andrews*, 104 Me. 342, 71 Atl. 1027, 20 L.R.A.(N.S.) 976, it was held that all the essential elements of a complete dedication of the locus by the owner to the public and the adjoining lot owners for a park were established. It appeared therein that there was a division of a tract of land bordering on the seashore into small lots for sale, the setting apart of a portion of the tract for a park, the representation of the platting by a plan showing the lots by numbers and the locus as "Bay View Park," the exhibition of the plan to purchasers, the selling of lots by express reference to the plan, the promise that the park should be graded and kept open as such, and its use by the lot owners and the public generally at their pleasure continuously for a long period of years during which they had improved and beautified it at their own expense.

But in *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382, it was held that several vacant lots marked on the same plan "15 x 60" were not dedicated to the public.

In the case of *Re Lorne Park*, 33 Ont. L. Rep. 51, 7 Ont. W. N. 558, *affirming* 30 Ont. L. Rep. 289, 5 Ont. W. N. 626, it appeared that the deed which, it was admitted, was common to all the purchasers of lots within the park, contained a covenant in favor of the purchaser, that he, "his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and commons of the said park," and free ingress and egress to and from the said park at any wharf or wharves thereof. In construing the covenant the court said: "The learned referee finds that inducements were held out to the purchasers that they would have the benefit of public recreation grounds provided by the company, and facilities would be offered for holding picnics to all who chose to patronize, the park for that purpose, and were willing to pay the charges which the ferry company saw fit to impose. For this branch of their business the company mainly devoted block Y. Here was provided a place for taking meals and refreshments, and hot water and other facilities were furnished picnic parties, for their enjoyment, and a dining-hall and seats and tables; 'the rest of the place being, as I understand it, enclosed.' I agree with the learned referee that blocks X and Z were used as a common playground open to all the cottagers, and were two of the places

intended by the word 'commons,' and that the lot owners have a right to free access thereto, which ought not to be interfered with by the petitioner; but I cannot agree with him that a different consideration should apply to block Y. As he very truly points out, it was equally open and accessible to all as the other two blocks; and while it was not used as frequently as the other two, it was used at the will and pleasure of the cottagers as a common and place of resort, and the evidence shows that the owners of the cottages could and did resort thereto and make use of the seats and tables there provided; and I agree with my brother Middleton that no distinction ought to be made between the three blocks as to the rights of the cottagers in respect of the same. . . . Here, no doubt, the dedication was not to the public, but was of a quasi-public nature, limited to the general use of those who became owners of lots and residents within the park and their friends who might visit them, and others to whom the company gave, for the time being, the privilege of user. . . . I agree with the learned referee and my brother Middleton that the word 'commons,' as used in the deeds to the purchasers of lots, was not intended to have any strict or technical meaning, but to signify certain places in the park which were to be open and free to all for the purposes of general enjoyment and amusement, and I have nothing to add in that respect to the view so clearly expressed in the court below. The covenant being thus in favor of the purchasers, and having relation to a building scheme of lots known as Lorne Park, it thereby became restrictive in its effect as against the vendor of those lots, and those claiming under him. It could not operate in favor of the purchasers giving them the right to use the spaces referred to as commons without impliedly restricting the vendors from doing any act or thing, whether by sale or otherwise, which would preclude the purchasers from the enjoyment of the right which they had purchased and paid for."

However, in *Adoue v. La Porte* (Tex.) 124 S. W. 134, it was held that a mere reference, in deeds by a grantor, to a recorded map which was a map of an addition to a town showing it subdivided into lots, and on which in the center there was a circular plat of ground marked "Park," was not a dedication of that plat of ground to the public as a park in the absence of other evidence on the map that the land had been set aside for a public park or for any public use.

In *Stover v. Steffey*, 115 Md. 524, 81 Atl. 33, 37 L.R.A.(N.S.) 856, the court said: "The appellant's land, consisting of lots Nos. 9 and 10, as well as the designated park lot, is located on the East side of North Potomac

street, but the said land of the appellant is not adjacent or contiguous to the park lot, but is separated therefrom by lots Nos. 11 to 17, both inclusive, and Park avenue or Dewey Street. The lots of the appellant at the nearest point are over four hundred feet from the park lot. If, therefore, the reasoning of the restrictive principle or rule of law, in force in this state, 'That the sale of a lot of land calling to bind on an unopened street works a dedication to public use of the street, if it is of the land of the grantor, only until it reaches the next opened or unopened street,' were applied, as we think it should be, in cases of this sort where the alleged dedication is for park purposes, we do not think from the facts of this case a dedication of this lot to the public for use as a park should be presumed."

MYAKKA COMPANY

v.

EDWARDS.

Florida Supreme Court—November 24, 1914.

68 Fla. 372; 67 So. 217.

Process — Publication — Scope of Statute — Citation to Rule Day.

The publication provisions of chapter 4129, Acts of 1893, authorizing constructive service of initial process in chancery, have reference to the appearance day stated in the act, and not to rule days on which defaults for failure to plead or demur may be entered under the statute and chancery rules.

Sufficiency of Publication — Once Each Week — When Service Complete.

Under chapter 4129, Acts of 1893, authorizing constructive service by publication of initial process to acquire jurisdiction of a nonresident defendant in a chancery case, where the first publication is less than four weeks or twenty-eight days prior to the appearance day fixed in the order of publication, the requirement that such publication shall be "once each week, for four consecutive weeks," is not complied with, and jurisdiction of the person is not acquired.

[See note at end of this case.]

Process — Decree on Insufficient Service.

Where jurisdiction of a defendant has not been acquired, a decree rendered against him in the cause is not binding upon him.

Quieting Title — Jurisdiction — Constructive Service.

A court of equity has power to proceed in rem in a suit to quiet title or remove a

cloud on title to lands in this state, upon the proper publication of an order against a nonresident defendant.

[See Ann. Cas. 1914D 677.]

Judgments — Sufficiency of Record — Affirmative Showing of Jurisdiction.

Jurisdiction must be affirmatively shown by the record, where the parties defendant are shown to be nonresidents and constructive service is depended on for jurisdiction.

Collateral Attack — Judgment on Constructive Service.

The jurisdiction of the court may be attacked collaterally when it is dependent upon constructive service.

Process — Sufficiency of Publication — Once Each Week for Stated Number of Weeks.

The orders for publication required by chapter 4129, Laws of 1893, to be published once a week for four consecutive weeks if the defendant be stated to be a resident of the United States, are required to be published once a week for four weeks of seven days each, or at least twenty-eight days from the date of the first publication to the day fixed in the order for the defendant to appear.

[See note at end of this case.]

Same.

The word "for," in chapter 4129, Laws 1893, requiring that publication of process against nonresidents shall be had "once a week for four consecutive weeks," means "throughout" or "during the continuance of" such period.

[See note at end of this case.]

Appeal from Circuit Court, Manatee county: WHITNEY, Judge.

Action by Robert J. Edwards, plaintiff, against Myakka Company, defendant. From judgment rendered, defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

James F. Glen for appellant.

Arthur F. Odlin for appellee.

[372] WHITFIELD, J.—On December 4, 1913, Robert J. Edwards filed a bill in equity against Myakka Company, a corporation under the laws of South Carolina, and Janius Beebe, in which it is alleged that Edwards is the owner in [373] fee of certain real estate in Manatee County, Florida, and that such real estate is wild, unoccupied and unimproved; that the said defendant Myakka Company, a corporation as aforesaid, claims to have some title to, or interest in, or claim upon said land, the exact nature of which is unknown to your orator, but the same constitutes a cloud upon the title of your orator, deprives him of his right to sell or mortgage his said real estate, depreciates the value thereof, and that as against said Myakka Company your orator is with-

out remedy at law. And your orator further says that the defendant Junius Beebe claims some title to, interest in or lien upon said land of your orator, the exact nature of which claim, title or interest your orator is unable to state, yet the same constitutes a cloud upon the title of your orator, deprives him of his right to sell or mortgage his said real estate, depreciates the value thereof, and that as against said Beebe your orator has no remedy at law.

Therefore your orator prays that by a decree of this Honorable Court, the title of your orator may be quieted as against said defendants, each and both of them, so far as said real estate of your orator may be concerned; that said defendants be declared possessed of no title to, interest in, or claim upon said lands, and that the same may be decreed to belong absolutely to your orator.

And your orator prays for such other and further relief in the premises as equity may require and as to your Honor may seem meet. Also that said defendants may be required to answer this bill and to stand to and abide by all orders and decrees which may be entered herein."

The defendant Myakka Company filed the following plea: "That this defendant heretofore, to wit, on the 4th day of January, A. D. 1906, filed in the Circuit Court of [374] Manatee County, Florida, its bill of complaint against the present complainant (Robert J. Edwards) and the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons whose names were unknown as might be interested in the property described in the present bill of complaint, which was particularly described in the said bill of complaint filed by this defendant, for the purpose of quieting the title of this defendant to the premises described in the present bill of complaint, as against the present complainant as well as against the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons as might be interested in the said premises, whose names were unknown to this defendant, and such proceedings were had in said cause that, to wit, on the said 4th day of January, A. D. 1906, an order of publication was duly made requiring the present complainant to appear to the said bill of complaint on the 5th day of February, A. D. 1906, it being alleged in the affidavit appended to the said bill of complaint that the said Robert J. Edwards was a resident of a State other than the State of Florida, and that the place of residence of the said Robert J. Edwards as particularly as the same was known to affiant was in Boston in the State of Massachusetts, and that in the belief of the affiant the said Robert J. Edwards was over the age

of twenty-one years, and an order of publication was also duly made requiring the unknown defendants to the said bill to appear thereto on the 2nd day of April, A. D. 1906, and the said order of publication requiring the said Robert J. Edwards to appear to the said bill was duly published once each week for four consecutive weeks in a newspaper published in Manatee County, Florida, designated in the said order, to wit, the Bradentown Herald, and appeared in the issues of said paper on January 11th, January 18th, [375] January 25th and February 1st, A. D. 1906, and the order of publication directed to the unknown defendants was duly published once each week for twelve consecutive weeks in a newspaper published in Manatee County, Florida, designated in the said order, to wit, the Bradentown Herald, and appeared in the issues of said paper of January 11th, January 18th, January 25th, February 1st, February 8th, February 15th, February 22nd, March 1st, March 8th, March 15th, March 22nd and March 29th, 1906, and such proceedings were thereafter had in said cause that upon a certificate being duly made and filed by the Clerk of the Circuit Court of Manatee County, Florida, showing the publication of the notices aforesaid in the manner aforesaid and in the issues of the said newspaper aforesaid, and the posting of copies of the said orders in front of the courthouse door of Manatee county and the mailing of a copy of the said order directed to the defendant, Robert J. Edwards, to him at Boston in the State of Massachusetts, upon default of the said Robert J. Edwards and the unknown defendants to the said bill of complaint to appear thereto or to file any plea, answer or demurrer thereto, the Judge of the said Circuit Court, to wit, on the 26th day of June, A. D. 1906, ordered, adjudged and decreed that there had been due and legal service by publication in the said cause in all respects in the manner prescribed by law, and that all and singular the allegations of the said bill of complaint should be taken as confessed by the defendants and entered a decree *pro confesso* against the said defendants to the said bill of complaint, including the said Robert J. Edwards, and thereupon on the said day by the decree of the said court in the said proceeding it was ordered, adjudged and decreed that this defendant be quieted in its title to the premises described in the said bill of complaint, and in the [376] present bill, as against the said Robert J. Edwards, as well as against the unknown defendants thereto, and that any and all claims on the part of the said Robert J. Edwards to the said lands or any part or parcel thereof be removed as a cloud upon the title of this defendant there-

to, and that he the said Robert J. Edwards, be required, within ten days from the date of the said decree, to wit, within ten days from the said 26th day of June, A. D., 1906, to make, execute and deliver to this defendant a proper release of any and all right, title and interest in and to the said lands and each and every part and parcel thereof, all of which more fully appears by the record of the proceedings in the suit aforesaid, a certified transcript of which is hereto annexed as 'Exhibit A' hereto, and hereby made by reference a part of this plea as fully as if the same were herein incorporated in *hæc verba*.

All of which matters and things this defendant doth aver and plead in bar of the entire bill of complaint of the complainant, and prays judgment of this Honorable Court whether it should make any further or other answer to the said bill of complaint."

On this plea the following order was made: "This cause coming on to be heard upon the argument of the plea of the defendant to the bill of complaint filed herein, it being stipulated by counsel for the respective parties that the plea correctly states the facts in reference to the service of process in the former chancery suit, and should be considered with the same force it would have in case a transcript of the record of the former cause were attached thereto, the former record not being found at the present time, upon consideration thereof, the court being of the opinion that the publication of process in the former suit was insufficient, and that no jurisdiction was acquired thereby to render a decree binding Robert J. Edwards, [377] it is therefore ordered, adjudged and decreed that the plea shall be deemed and held insufficient and disallowed and overruled as a plea to the said bill of complaint, and that the defendant, Myakka Company, a corporation, be required to answer the said bill of complaint, and the said defendant having announced its appeal from the decree to the Supreme Court of Florida, it is by consent of the respective parties ordered that no answer shall be required until the determination of said appeal, or the further order of the court."

The defendant Myakka Company appealed and assigns error as follows:

"1. The court erred in and by the decree appealed from in holding and deciding that jurisdiction was not obtained of Robert J. Edwards to render a decree binding on him in the suit mentioned in the plea of this defendant.

"2. The court erred in holding and deciding that the decree in the former suit mentioned in the plea of this defendant could be collaterally attacked in this proceeding on the ground of the alleged insufficiency of service of publication in the said suit."

The statute under which the asserted constructive service was made is as follows:

"CHAPTER 4129—(No. 15).

An Act to Provide for the Service of Non-Resident Defendants and Others in Chancery Causes, being an Act to Amend Section 1413 of the Revised Statutes.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That Section 1413 of the Revised Statutes [378] of the State of Florida be amended so as to read as follows:

1413. Constructive Service.

1. Obtaining order for publication. Whenever the complainant or his agent or attorney shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a State or county other than this State specifying as particularly as may be known to affiant, such residence, or that his residence is unknown, or that, if a resident, he has been absent more than sixty days next preceding the application for the order of publication, and that there is no person in the State the service of a subpoena upon whom would bind such defendant, or that he conceals himself so that the process cannot be served upon him, and further states the belief of the affiant as to the age of the defendant being over, or under, twenty-one years, or that his age is unknown, the judge or clerk of the court in which such bill shall have been filed shall make an order against the defendant requiring him to appear to the bill upon a day to be fixed by the order, not less than thirty nor more than fifty days from the time of the making of the order, if he be stated therein to be a resident of the United States; and not less than fifty nor more than eighty days if he be stated to be a non-resident of the United States, or if his residence be stated as unknown.

2. Publication of order.—The clerk shall have all orders of publication against an absent defendant, whether made by the judge or himself, published with as little delay as may be, in such newspaper as may be designated in the order, once each week, for four consecutive weeks, if the defendant be stated to be a resident of the United States, and once each week for eight consecutive weeks, if [379] he be stated to be a non-resident of the United States, or if his residence be stated to be unknown; he shall also within twenty days of the making of the order post a copy of the said order at the door of the court-house of the county, and send by mail a copy to the defendant, if his residence be shown by the bill or affidavit.

Sec. 2. This Act shall take effect immediately upon its approval by the Governor.
Approved May 31, 1893."

To accomplish the purpose designed by this statute it should be so construed and applied as to afford due process of law and effectually protect individual rights of non-residents who are not only permitted but encouraged to acquire property in this State, as well as to give ample remedy to those having rights in the property of non-residents situated in this State.

The question to be determined is whether the publication of constructive service, as stated in the above plea, gives the court jurisdiction of Edwards, who was a defendant in the former suit involving the property in controversy here. The publication here considered was to make constructive service of initial process to acquire jurisdiction of a non-resident defendant in a suit in equity—not as notice of proceedings in a cause where jurisdiction of the defendant has been duly acquired, or as notice of legislative proceedings as in *Ex p. Lower*, 178 Ala. 87, 59 So. 611.

The above quoted statute contemplates that when the defendant is a resident of the United States, as in this case, the publication shall begin four weeks before the appearance day. The manifest purpose of the provision requiring the appearance day to be fixed by the order, and, in a case like this, that such appearance day be not less than [380] thirty nor more than fifty days from the making of the order of publication, is to give ample opportunity for the required publication to begin not less than four weeks before the appearance day. The publication provisions of the statute have reference to the appearance day stated in the statute, and not to rule days on which defaults for failure to plead or demur may be entered under the statute and chancery rules. This statute is designed to secure a lawful constructive service of initial process to acquire jurisdiction of a defendant who resides beyond the State, for the purposes of an equity suit affecting the rights of such defendant in lands within the jurisdiction of the court; and the provision that the publication shall be "for four consecutive weeks" means a publication once each week during four weeks, the first publication to be four weeks from the appearance day fixed in the publication. See 3 Words & Phrases, p. 2858; 2nd Series, p. 594. The first publication was on January 11th, and the appearance day was February 5th.

The requirement here that the publication shall be "once each week, for four consecutive weeks," is not complied with when the publication is made once in each week, where the beginning of the publication period or the first publication is less than four weeks or

twenty-eight days from the appearance day to which the publication has reference. See *Knowles v. Summey*, 52 Miss. 377; *Morse v. U. S.* 29 App. Cas. (D. C.) 433; *Early v. Doe*, 16 How. 610, 14 U. S. (L. ed.) 1079; *State v. Cherry County*, 58 Neb. 734, 79 N. W. 825.

The statute also provides that the appearance day of the defendant shall be fixed by the order to be "not less than fifty nor more than eighty days if he be stated to be a non-resident of the United States, or if his residence be stated as unknown," and that the publication shall be [381] "once each week for eight successive weeks if he be stated to be a non-resident of the United States, or if his residence be stated to be unknown." These particular provisions of the statute are not involved here, but it is argued that these provisions should be considered in construing the provision in question here since all the quoted provisions are contained in the same section.

Where the publication is required to be "once each week for eight successive weeks," such publication cannot be fully made when the appearance day is less than eight weeks from the date of the order. The statute permits the appearance day to be fixed "not less than fifty nor more than eighty days" from the date of the order. In applying the statute any real or apparent conflict in it when the defendant is a non-resident of the United States or his residence is unknown, may be avoided by making the appearance in such cases not less than eight weeks but not more than eighty days from the date of the order. This practice is doubtless pursued for convenience if not to make the statute serve the purpose for which it was enacted.

The order of the judge in the former case, that due and legal service had been made by publication, is not effectual when contradicted by the facts shown.

If the court does not acquire jurisdiction of the defendant sought to be brought in by constructive service where there is not a substantial compliance with the requirements of the statute, both as to the publication and as to fixing the appearance day; and where jurisdiction of the defendant has not been acquired, a default cannot be lawfully entered against him for failure to respond to the bill of complaint by plea, answer or demurrer, as required by the statute and rules of court. Nor will a decree rendered, where jurisdiction of the defendant has not been acquired by proper actual or constructive service or appearance, be [382] binding upon the defendant. See *Guaranty Trust, etc. Co. v. Green Cove Springs, etc. R. Co.* 139 U. S. 137, 11 S. Ct. 512, 35 U. S. (L. ed.) 116; *Shrader v. Shrader*, 36 Fla. 502, 18 So. 672.

In *Lafin v. Gato*, 52 Fla. 529, 42 So. 387, it was held that where the order for publica-

tion fixes the appearance day more than fifty days from the making of the order, when the defendant is a resident of the United States, the constructive service is ineffectual. For stronger reasons, where the defendant is a resident of the United States a publication for a period beginning less than four weeks from the designated appearance day, is ineffectual to give the court jurisdiction of the defendant for the purpose of adjudicating his rights in property within the jurisdiction of the court.

The order appealed from is affirmed.

Shackleford, C.J., and Taylor, Cockrell and Hocker, JJ., concur.

[383] ON REHEARING.

ELLIS, J.—This cause was considered by this court during the June Term, A. D. 1914, and the decree of the court below was affirmed.

Upon petition filed by appellant a rehearing was ordered.

The bill of complaint, the plea of the defendant Myakka Company and the order of the court from which this appeal was taken are fully set out in the former opinion by this court.

The Act of the Legislature which was under consideration by this court and which was quoted in full in the opinion written by Justice Whitfield, was intended as its title and provisions recite to provide generally for constructive service of original process to acquire jurisdiction of non-resident defendants or defendants whose places of residence are unknown, in chancery causes.

The first section of the act directs the judge or clerk of the court in which a bill shall have been filed, upon [384] proper showing made in a sworn bill or affidavit duly filed, to make an order against the defendant requiring him to appear to the bill upon a day to be fixed by the order not less than thirty nor more than fifty days from the time of the making of the order if the defendant be stated therein to be a resident of the United States, and not less than fifty nor more than eighty days if he be stated to be a non-resident of the United States or if his residence be stated as unknown.

The second paragraph of the section deals with the publication of the orders so made by the judge or the clerk and directs the clerk to have all orders of publication against an absent defendant, whether made by the judge or himself, published with as little delay as may be in such newspaper as may be designated in the order, once a week for four consecutive weeks, if the defendant be stated to be a resident of the United States, and once each week for eight consecutive weeks if he be stated to be a non-resident of the

United States, or if his residence be stated to be unknown. The clerk was also required, within twenty days of the making of the order, to post a copy of the order at the door of the court-house of the county, and send by mail a copy to the defendant if his residence be shown by the bill or affidavit.

The suit in which the decree was adjudged to be void by the court below, was according to the plea in this cause brought by the appellant in January, 1906, in the Circuit Court for Manatee County against Robert J. Edwards, the appellee in this cause, and the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons whose names were unknown as might be interested in the property described in the bill, for the purpose of quieting the title of appellant to the same lands described in the bill of complaint in this cause as [385] against the said Edwards as well as against the unknown heirs of the said Nichols and Lewis and such other persons as might be interested in the premises whose names were unknown to the appellant. An affidavit appended to the bill in that cause contained the statements that the said Robert J. Edwards was a resident of a State other than the State of Florida; that the place of residence of the said Edwards as particularly as the same was known to the affiant was in Boston, Massachusetts, and that in the belief of the affiant the said Edwards was over the age of twenty-one years.

According to the plea on the 4th day of January, 1906, an order was made requiring the said Robert J. Edwards to appear to the bill of complaint on the 5th day of February, 1906, thirty-two days from the time of making the order counting the last day. The order was published in the newspaper in Manatee County designated in the order and appeared in four consecutive weekly issues of that paper, as follows: on January 11th, 18th, 25th and February 1st, 1906. From the date of the first publication of the order to and including the day fixed in the order for the appearance of the defendant Edwards, there were twenty-five days. There was a certificate by the clerk showing the publication of the order in the newspaper designated therein and at the times mentioned, also the posting of copies of the order at the court house door of Manatee County, and the mailing of a copy of the order directed to the said Edwards at Boston, Massachusetts.

Edwards failed to appear to the bill, and on June 28th, 1906, the Judge of the Circuit Court made an order that the bill of complaint be taken as confessed against the said Edwards, and reciting that there had been due and legal service by publication, and on the same day made [386] the final decree

against Edwards, which the court below in this cause held to be void.

We hold that the pro confesso order made by the Judge of the Circuit Court on June 26, 1906, reciting that there had been due and legal service by publication, was equivalent to a finding by the court that the order requiring the defendant to appear to the bill, had been published by the clerk with as little delay as might have been in the newspaper designated in the order.

A Court of Equity has power to proceed in rem in a suit to quiet title or remove a cloud on title to lands in this State, upon the proper publication of an order against a non-resident defendant. Gen. Stats. § 1950; Chap. 4129 Acts of 1893, Gen. Stats. § 1866; 1 Pomeroy Eq. Jur. § 135; *Tennant v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L.R.A. (N.S.) 625; *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 U. S. (L. ed.) 918.

The jurisdiction of the court, therefore, to proceed in rem or quasi in rem to quiet title or remove a cloud on title to land in this State, as against non-resident defendants depends upon the statute providing for constructive service upon such defendants; in this case upon Chapter 4129 Acts of 1893. By such statutes the power is given the court to remove a cloud from the title to lands without having actual jurisdiction over the person of the defendant by means of personal service. It is true that the State can deal with the property within its limits even though owned by non-residents. The limitation upon this power of the State said Judge Shiras, in *Bennett v. Fenton*, 41 Fed. 283, is as to the mode of procedure.

In *Galpin v. Page*, 18 Wall. 350, 21 U. S. (L. ed.) 959, the court announced the principle that when by legislation of a State constructive service of process by publication is substituted [387] in place of personal service the statutory provision must be strictly pursued in order to bind a citizen of another State not personally served. "Every principle of justice exacts a strict and literal compliance with the statutory provisions."

Mr. Justice Brown in *Guaranty Trust, etc. Co. v. Green Cove Springs, etc. R. Co.* 139 U. S. 137, 11 S. Ct. 512, 35 U. S. (L. ed.) 116, said there is scarcely a State in the Union in which the same principle has not been announced and re-affirmed.

Jurisdiction must be affirmatively shown by the record where the parties are shown to be non-residents, and constructive service is depended upon for jurisdiction. This is the rule even where the jurisdiction is attacked collaterally. *Guaranty Trust, etc. Co. v. Buddington*, 27 Fla. 215, 9 So. 246, 12 L.R.A. 770.

In the latter case the court held that the term "months" as used in the Act of Novem-

ber 7, 1828, Sec. 8, page 154 McClellan's Digest, providing for the publication of orders in chancery causes against defendants to appear and plead and for decrees pro confesso in default thereof, means calendar month, and that no jurisdiction was obtained of the absent defendant, as it appeared that there had not been four months "publication prior to appearance day."

The term "week" is as certain, clear and definite a designation of time according to our division of it as it is possible to make.

It was the evident purpose of the Legislature in the enactment of Chapter 4129, Laws of 1893, to require the judge or the clerk in making the order against the absent defendant to regard the facilities for publication which might exist in the county in which the bill was filed and [388] the order made. The judge or clerk in the order designated the newspaper in which it was to be published; but the statute prescribed the duration of such publication. Its language is "once a week for four consecutive weeks" or "once each week for eight consecutive weeks." The language is not that the order shall be published four times or eight times. It specifies the number of weeks, not the number of times. The evident purpose in providing that the publication should be "once a week" or "once each week" was to avoid a construction that a daily publication could have been contemplated. If the Legislature had intended otherwise, it could very easily have used language to so indicate. Therefore it was deemed proper by the Legislature to leave a margin of time between thirty and fifty days in one case, and fifty and eighty in the other, in which the judge or clerk could adjust the time for appearance to the period of publication which the statute requires. It is true that in cases where the residence of defendants is unknown, the statute requires the appearance day to be not less than fifty nor more than eighty days from the time of making the order, and that full eight weeks publication of the order could not be secured in cases where the order required the defendant to appear on the fiftieth day from the time of making the order; but it by no means follows that a period of less than eight weeks publication was thereby required or permitted by the act. At the time the Act was passed it is doubtful if in six counties in the State daily newspapers were published. So that in counties where there were published weekly newspapers an order might have been made, as contended by appellant's counsel, requiring an absent defendant whose residence was unknown to appear on a day fifty days from the time of making the order; yet if the first publication could not [389] be made in the week the order was made, the clerk could not by publishing the order "with as little delay

as may be," secure more than seven publications before the appearance day. It could not be contended that such a publication would be valid under the act. There is no dispute that there must be at least eight publications in cases where the residence of the defendant is stated to be unknown. It would seem to follow, therefore, that it was the purpose of the statute to require the judge or clerk in making the order, to consider the facilities existing in the particular county for the publication of the order, and adjust the time for appearance to the period during which the statute requires the order to be published.

In the former opinion in this case the court held, in effect, that the use of the word "for" in the statute in connection with the word "weeks" prescribing the period of publication of the order, signified duration of time; and that the requirement of the statute that the publication shall be "once a week for four consecutive weeks" is not complied with when the publication is made once in each week when the first publication is less than four weeks or twenty-eight days from the appearance day to which the publication has reference.

Our re-investigation of this case has not led us to a different conclusion. We do not find, as the learned counsel for appellant contends, that the weight of recent authority is against the view of this court, as expressed in the former opinion.

The opinion expressed by the court in *State v. Cherry County*, 58 Neb. 734, 79 N. W. 825, has not been overruled, according to our reading of the decisions of that court. The court construed the word "for" to mean "during" when applied to time. In the case of *State [390] v. Hanson*, 80 Neb. 724, 115 N. W. 294, cited by appellant's counsel to show that the Nebraska Court had receded from the view expressed in *State v. Cherry County*, it was said that where the "time mentioned in the statute expressed the duration of the notice the same must be published *for* and *during* the time mentioned, when, however, the time mentioned indicates the *number* of times the notice is required to be published it is satisfied if the notice is published the number of times mentioned." The court was construing an act providing for the publication of a notice for holding an election to determine whether a drainage district should be established, in our view quite a different matter from the one under consideration in this court where the State is exercising the power through a court to adjudicate on constructive service merely the rights, interest or claims of a non-resident defendant to property in this State.

In the case of *Burr v. Finch*, 91 Neb. 417, 136 N. W. 72, a still later Nebraska

case, the statute construed omitted the word "for." The question being whether publication of a notice on Thursday, September 14th, Thursday, September 21st, Thursday, September 28th and Friday, October 6th, constituted *four* consecutive publications, it being insisted that the last publication was a day late. The court held this publication sufficient, relying on *Davis v. Huston*, 15 Neb. 28, 16 N. W. 820, and *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866. The court in *State v. Cherry County*, *supra*, pointed out that the word "for" was omitted from the statute construed in the *Davis* case, and in the *Medland* case the court defined a "week" as a period of time commencing Sunday morning and ending Saturday night. The effect of the decision in the *Finch* case seems to be that where two certain dates [391] fall upon days of the same week a publication upon either of those days is a publication in that week.

In the case of *McDonald v. Nordyke Marmion Co.* 9 N. D. 290, 83 N. W. 6, the court referred approvingly to its former opinion in the case of *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L.R.A. 532, in which it was held that where a statute requiring a notice to be given "by publishing the same for six successive weeks at least once in each week" meant that such notice must be published weekly "*for*" and "*throughout*" a period of six full and consecutive weeks and embrace an aggregate of 42 days time and nothing short of 42 days time would satisfy the statutory mandate. The court held that the earlier statute has been superseded by Section 5848 of the Revised Code, providing that publication must be made "Six times, once in each week for six successive weeks;" that the period of duration of the publication which was the decisive test under the earlier law had ceased to be controlling under the existing statute, and that the number of publications was one of the controlling factors. In *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723, 88 Am. St. Rep. 684, 54 L.R.A. 610, the court reaffirmed the construction placed upon the later statute in *McDonald v. Nordyke Marmion Co.*

There is a great deal of apparent conflict of opinion between the decisions of the various States on this question of publication of notice, but that contrariety of opinion arises upon the construction of the various statutes of the different States. We have found no case in which the statute construed was couched in precisely the same language as ours. Similar language occurs in many statutes. In some States the statute contains additional provisions that control or influence the construction. Some of the statutes relate to tax sales, sheriff's sale, probate proceedings, attachment, notice in elections, leg-

relative [392] proceedings, etc., but in each case some word or phrase contained in the particular statute, or the character of the proceedings leads the court to its particular conclusion.

In *Banta v. Wood*, 32 Ia. 469, the court considered the notice published in an attachment proceeding. The statute under which the order of publication was made directed that it be published "for such length of time as may be deemed reasonable" "not less than once a week for four weeks" and "that service shall be deemed complete at the expiration of the time prescribed in the order of publication." It also provided that the defendant against whom publication is ordered or his representative on application and sufficient cause shown at any time before judgment must be allowed to defend the action, and except in an action for divorce the defendant or his representative may in like manner, upon good cause shown, be allowed to defend after judgment at any time within one year after notice thereof and within seven years after its rendition on such terms as may be just. The order of publication directed that it be made for four weeks. The court held the service complete at the last publication.

So in *Morrow v. Weed*, 4 Ia. 77, 66 Am. Dec. 122, the question was as to the validity of an administrator's sale of realty upon the order of a Probate Court. The act authorized the court to order notice of sale, in lieu of another notice, to be published "three weeks successively in any newspaper." The court had jurisdiction of the subject-matter by sufficient petition of the administrator to sell the lands to pay debts. The order directed notice to be published "three successive weeks." The court held publication one day in each week sufficient.

The case of *Marling v. Robrecht*, 13 W. Va. 440, was one in which the court ordered an account to be taken. It was a notice of subsequent proceedings in a case in [393] which the party complaining had been served with process and was apprised of the institution of the suit.

In *Savings, etc. Soc. v. Thompson*, 32 Cal. 347, the summons required the defendant to answer within a given number of days after service of the summons. The day for the defendant to act was left open by the summons depending on the time when the service was made complete. The act required the summons to be published "once a week" not less than "three months." The first publication was January 10th, and the last April 9th, 1865, there was publication each week during that period. The court said the month contemplated by the statute meant calendar month, that the time defendant was required to answer did not commence to run until April 10th.

In *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595, the court was considering the validity of a decree of divorce granted in Connecticut. The statute of that State provided that in petitions for divorce, when the adverse party resides out of or is absent from the State, the court or clerk may make such order as he shall deem reasonable, relative to notice. The order required that notice be given to respondent of the pendency of the petition by publishing a copy of the order for "two weeks successively before the term of the court." The order was published once in each of two successive weeks. The Illinois court held the publication sufficient.

In *Tidd v. Grimes*, 66 Kan. 401, 71 Pac. 844, the question was the validity of a deed based on a tax sale. The statute required publication of the notice "once in each week for four consecutive weeks prior to the sale."

In *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065, in the matter of the probate of a will, the statute provided that the court having jurisdiction should appoint [394] a time and place for proving the will when all concerned may appear, it provided for personal service on all persons interested or by publication under an order in a newspaper "three weeks successively." The court held that the words meant three weekly publications.

In *Smith v. Collis*, 42 Mont. 350, Ann. Cas. 1912A 1158, 112 Pac. 1070, the statute required "Summons by publication to be published" "once a week for four successive weeks." The court said the statute furnished the key to its own interpretation. The statute expressly provided that "the service of summons is complete on the day of the fourth publication." The court said that was a legislative declaration that only four publications were required if there was once in each of four successive weeks.

Our conclusion that the word "for" in our statute means "throughout" or "during the continuance of" and that "for four weeks" means twenty-eight days, and "eight weeks" fifty-six days, is supported by the following authority: *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L.R.A. 532; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397; *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227; *Wilson v. Northwestern Mut. L. Ins. Co.* 65 Fed. 38, 27 U. S. App. 526, 12 C. C. A. 505; *Wilson v. Thompson*, 26 Minn. 299, 3 N. W. 699; *State v. Tucker*, 32 Mo. App. 620; *Parsons v. Lanning*, 27 N. J. Eq. 70; *Wade on Notice*, § 1105; *Foster v. Vehmeyer*, 133 Cal. 459, 65 Pac. 974; 32 Cyc. 490; *Guaranty Trust, etc. Co. v. Buddington*, 27 Fla. 215, 9 So. 246, 12 L.R.A. 770.

As to the second proposition of appellant that the jurisdiction cannot be attacked collaterally, we think the law is settled in this

State contrary to that view. Guaranty Trust, etc. Co. Buddington, *supra*.

[395] The former opinion of the court is sustained and the order appealed from is affirmed.

Taylor, C.J., and Shackelford, Cockrell and Whitfield, JJ., concur.

NOTE.

Construction of Requirement of Publication Once Per Week for Certain Number of Weeks.

Duration of Time Required between First and Last Publication, 209.

When Publication Is Complete:

View Requiring Full Number of Days, 210.

View Not Requiring Full Number of Days, 210.

View under New York Statutes, 211.

Day of Publication, 212.

Duration of Time Required between First and Last Publication.

According to the weight of authority, a provision that a publication shall be made once a week for a specified number of weeks requires only the specified number of weekly publications, and does not require that the full number of days in so many weeks shall elapse between the first and last publication. *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043 (publication of summons); *Bentley v. Shingler*, 111 Ga. 780, 36 S. E. 935 (advertisement to taxpayers); *Griffing v. Mills*, 40 Miss. 611 (notice of attachment); *Knowles v. Summey*, 52 Miss. 377 ("citation notice" to nonresident); *Smith v. Collis*, 42 Mont. 350, Ann. Cas. 1912A 1158, 112 Pac. 1070; *State v. Hanson*, 80 Neb. 724, 115 N. W. 294 (notice of election); *State v. Superior Ct.* 6 Wash. 352, 33 Pac. 827 (publication of summons); *Cox v. North Wisconsin Lumber Co.* 82 Wis. 141, 51 N. W. 1130 (publication of summons); *Bouchier v. Hammer*, 140 Wis. 648, 123 N. W. 132 (notice of tax sale). See also *State v. Georgia Co.* 109 N. C. 310, 13 S. E. 861. Thus in *State v. Hanson*, *supra*, the court said: "Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. It is apparent that the phrases, 'shall publish a notice once each week for three weeks,' and 'a notice shall be given for three weeks by publication,' have different meanings." *Ann. Cas.* 1917B.—14.

In the first 'for three weeks' limits the number of publications, and in the other phrase 'for three weeks' fixes the period of time during which the publication must be made." And in *Bouchier v. Hammer*, 140 Wis. 648, 123 N. W. 132, it was said: "Another defect asserted is that the printer's affidavit of publication showed that the notices were published only three weeks instead of four. The sale of 1903 took place on May 19th, that of 1904 on May 17th. The affidavit in each case declared that the notice 'was printed and published in such newspaper once in each week for four successive weeks, commencing on the 15th of April and terminating on the 6th of May.' Of course there is confusion of terms between the affidavit and the statute. The latter requires that the notice shall be published once in each week for four successive weeks prior to the day of the sale. This of course requires a period of twenty-eight days of publication before the sale, but that publication is accomplished by issue of the paper containing the notice on four distinct days, one only in each week; so 'publication of notice' may apply to the term of notice, but it may also apply to the physical fact of printing the notice in a published newspaper, and clearly that is the significance in which it is used in this affidavit, and indeed is the meaning given to the expression by this court in *Chippewa River Land Co. v. J. L. Gates Land Co.* 118 Wis. 345, 357, 94 N. W. 37, 95 N. W. 954. The joining with the word 'published' the word 'printed' in this affidavit emphasizes and renders sure the meaning in the mind of the affiant. So read, it establishes four printings, and the dates are entirely consistent with that assertion; May 6th being the day upon which a weekly paper would be issued which also was issued on the 15th of April. We think there is no ambiguity in this affidavit, but that it declares that on four specific days in separate successive weeks this notice was printed, and that more than one complete week after its last printing elapsed before the day of sale, and that constitutes in law a publication for four weeks, although the printing terminated in twenty-two days."

The *Montana* statute was construed as follows in *Smith v. Collins*, 42 Mont. 350, Ann. Cas. 1912A 1158, 112 Pac. 1070; "Section 6521, Revised Codes, provides that the summons shall be published 'once a week for four successive weeks.' . . . If our code section, above, contained no other provision than the one quoted, we might experience some difficulty in determining its meaning. But to our minds the section itself furnishes the key to its own proper interpretation, in the last sentence which reads: 'The service of summons is complete on the day of the fourth publication.' This is a legis-

lative declaration that only four publications are required, if there is one in each of four successive weeks. 'A week consists of seven consecutive days.' (Revised Codes, sec. 2030.) 'The time in which any act provided by law is to be done is completed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded.' (Sections 6219, 8067.) Every Sunday is a holiday. (Section 8065.) For the purpose of illustrating our view, let us assume that publication is made on the same day in each of four successive weeks, as, for instance, on the 3d, 10th, 17th and 24th. The greatest period of time which can elapse between the first and fourth publications is twenty-one days, under the rule of computation prescribed by the code above. Or assume the most extreme case which we can imagine: that the publication occurred on the 4th (although that day is Sunday), 13th, 22d, and 31st of the present month of December, 1910. The greatest period of time which can elapse between the first and fourth publications is twenty-seven days, according to the same rule. Since section 6521 requires only four publications, and requires that there shall be at least one in each of four successive weeks, it is self-evident that the statute does not contemplate that there shall be a period of four weeks or twenty-eight days elapse between the first and fourth publications, as such a thing is absolutely impossible. Since, then, the statute cannot mean that a full period of four weeks or twenty-eight days must be covered by the publication, there remains but one other interpretation to be given to the language employed, viz., the publication must occur four times, once in each of four successive weeks, using the term 'week' as defined in the code."

On the contrary it has been held that under a statute providing for a publication once a week for three successive weeks, three weekly publications were insufficient, as being only for fifteen days and not for three weeks, or twenty-one days. *Morse v. U. S.* 29 App. Cas. (D. C.) 433 (constructive service of process on nonresident defendant).

When Publication Is Complete.

VIEW REQUIRING FULL NUMBER OF DAYS.

The view in some jurisdictions is that a provision for the publication of a notice once a week for a certain number of weeks requires that the full number of days in the number of weeks designated shall elapse before the publication becomes effectual and before the act to which the publication relates can be validly performed. *Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824 (notice of statutory foreclosure sale); *Davis v. Robinson*,

70 Tex. 394, 7 S. W. 749 (citation of nonresident defendant); *Irion v. Bexar County*, 26 Tex. Civ. App. 527, 63 S. W. 550 (citation of nonresident defendant); *Odorn v. Crews* (Tex.) 163 S. W. 366 (citation of nonresident defendant). See also *Bouchier v. Hammer*, 140 Wis. 648, 123 N. W. 132. And see the reported case.

A statute providing for a publication once in each week for "at least" a certain number of weeks requires that the duration of the time in days in the number of weeks designated shall elapse between the date of the first publication and the date on which the publication becomes effectual. The provision for the publication "once a week" in such a case does not qualify the requirement of notice "for at least" the number of weeks. *Early v. Doe*, 16 How. 610, 14 U. S. (L. ed.) 1079 (notice of sale for taxes); *Wilson v. Northwestern Mut. L. Ins. Co.* 65 Fed. 38, 27 U. S. App. 526, 12 C. C. A. 505 (sale of mortgaged property). "The publication of a notice of sale once a week for only twenty-seven days before the day of sale is not a 'previous publication' of such a notice 'once a week for at least four weeks prior to such sale,' as required." *Wilson v. Northwestern Mut. L. Ins. Co. supra*.

VIEW NOT REQUIRING FULL NUMBER OF DAYS.

Apparently the weight of authority supports the proposition that a provision for the publication of a notice once a week for a certain number of weeks is complied with when the successive weekly publications have been made; and it is not required that the full number of days in the number of weeks designated shall elapse before the publication becomes effectual. *Lower v. State*, 3 Ala. 122, 57 So. 500 (notice of intention to apply to legislature for local law); *Decker v. Myles*, 4 Colo. 558 (notice to lien claimants); *State v. Yellow Jacket Silver Min. Co.* 5 Nev. 415 (notice of tax election); *Dewitz v. Joyce-Pruitt Co.* 20 N. M. 572, 151 Pac. 237 (notice of sale under mortgage foreclosure; statute provided that last publication must be at least three days prior to sale); *Marling v. Robrecht* 13 W. Va. 440 (notice of time and place of taking account). Thus in *State v. Yellow Jacket Silver Min. Co. supra*, the court said: "This second point made by counsel for defendant is, that the notice which the law requires to be published 'once a week for three weeks' was advertised only for seventeen days, which, it is argued, was not in compliance with the requirements of the law. The language of the statute, it is claimed, makes it necessary that the first publication should be twenty-one days prior to the election. But, in my opinion, the statute admits of no such construction. The

purpose of the advertisement is to give notice to the legal voters of the school district. When there have been three insertions of such notice upon three successive weeks the object of the publication, so far as it can be, is accomplished. The statute certainly requires but three publications of the notice; why then is not its full purpose accomplished upon the expiration of the third day of publication. Some statutes require a publication for a definite period of time, or a certain number of days, and in such case of course the advertisement must be for the full period, but where it is required to be published once a week for a certain number of weeks, it is generally held that the number of insertions and not the days comprised in such weeks is to be regarded."

This view also finds support in *Davis v. Huston*, 15 Neb. 28, 16 N. W. 820, wherein the court said: "The statute . . . provides that: 'The publication must be made four consecutive weeks in some newspaper. . . .' While I do not find any case in which this language has been construed by this court, or indeed by a court of last resort in any state, yet it is well known to the profession that it has uniformly been understood in this state, the same as though the language were that the notice should be printed or inserted in a weekly newspaper once in each week for four weeks successively, etc., and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion."

In *Pennsylvania* the statute requiring that notice of a sheriff's sale of realty shall be advertised "once a week during three successive weeks previous to such sale," has been held not to require the first notice to be published twenty-one days before the day of the sale. *Hollister v. Vanderlin*, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657; *McKee v. Kerr*, 192 Pa. St. 164, 43 Atl. 953. But the statute does require that the advertisement shall be made "during three successive weeks previous to" the sale, and therefore it has been held that a sale, which took place on Saturday of the same week in which the last publication of the advertisement was made, was invalid. *Currens v. Blocher*, 21 Pa. Super. Ct. 30, wherein the court said: "While the act does not require that the first advertisement shall be published three full weeks before the sale, it does require that the publication shall be during three successive weeks previous to such sale; the notice of sale in this instance is the fact which must precede the time of sale. The period during which the notice must be given must have expired before the sale can be made. The officer has the whole of the last calendar week previous to the sale in which to publish his

last advertisement, but he cannot cut short the period of notice required by the statute, by publishing that last notice upon the first day of the last week. The last publication is for the whole of the last calendar week, and until that week has expired the demands of the statute have not been met."

VIEW UNDER NEW YORK STATUTES.

In New York a statute relating to the sale of realty under execution and requiring advertisement once a week for six successive weeks has been held not to require the first advertisement to be made six weeks before the sale. *Olcott v. Robinson*, 21 N. Y. 150, 78 Am. Dec. 126; *Wood v. Morehouse*, 45 N. Y. 369.

But under a statute providing for the service of summons by publication "for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks," it has been held that the service is not complete until the expiration of the full six weeks. *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397, 11 Abb. N. Cas. 104; *Waters v. Waters*, 7 Misc. 519, 27 N. Y. S. 1004; *Koch's Estate*, 19 Civ. Pro. 165, 12 N. Y. S. 94. See also *Herbert v. Smith*, 6 Lans. 493. See also *Richardson v. Bates*, 23 How. Pr. 516 (under similar provision in earlier code). In *Market Nat. Bank v. Pacific Nat. Bank*, supra, the court said: "Section 440 provides for publication for a specified time, not less than once a week for six successive weeks. The number of weeks is specified and not the number of times. Section 441 declares that the time shall be complete upon the day of the last publication, and section 787 that the period of publication must be computed so as to include the day which completes the full period of publication. It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks. The publication evidently means rather more than printing the notice. Its object is to give notice by means of the newspapers, and it cannot be claimed that such notice is given for six weeks before that time expires. Looking at the various provisions referred to, it is a reasonable construction that the law intended a full six weeks' publication and not six times in six different weeks. If it were otherwise the time would vary and lead to confusion, and the defendant might not at all times know when it would expire as the summons need not be published on the same day in each week."

Day of Publication.

The general rule is that a requirement that a publication shall be made once a week does not limit the publication to the same day on each week. *Steinle v. Bell*, 12 Abb. Pr. N. S. (N. Y.) 171 (publication of summons); *Raunn v. Leach*, 53 Minn. 84, 54 N. W. 1058 (service of summons on nonresident); *Hollister v. Vanderlin*, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657 (advertisement of sheriff's sale); *McKee v. Kerr*, 192 Pa. St. 164, 43 Atl. 953 (following *Hollister v. Vanderlin*). See also *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Doheny v. Worden*, 75 App. Div. 47, 77 N. Y. S. 959. In *Raunn v. Leach*, supra, the court said: "A week is defined by all lexicographers as a period of time commencing with Sunday and ending with Saturday night, and also as a period of seven days' duration, without reference to the time such period commences. Therefore it need not commence, necessarily, on the morning of the first day of what has been denominated as the biblical week, but on a later day. In the case at bar the summons was published for the first and second times on the third day of the biblical week, and thereafter it appeared upon either the fourth or fifth day of such week, a Sunday intervening between each publication. It was also published once in each of the six consecutive weeks commencing on the day of its first appearance in the paper, Tuesday, February 7th. We are unable to hold that the statute was not complied with. The summons appeared once in each of the six periods of seven days' duration beginning upon and which followed consecutively the date just mentioned. We construe the statute as authorizing just such a publication. The statutory week must commence upon the day of the first publication, and there is nothing in the language used which would justify the conclusion that because the publication must be 'once in each week' the day of the first publication must determine the day on which each subsequent publication is to be made, and that exactly seven days must intervene between each."

This rule is furthermore supported by the decision rendered in *Ronkendorff v. Taylor*, 4 Pet. 340, 7 U. S. (L. ed.) 882, concerning the notice of a sale for taxes which was required to be given once a week for three months. That case is not strictly within the scope of this note, but inasmuch as the decision turned on the construction of the words "once a week" and not on the phrase "for three months," the following excerpt from the opinion is given: "In examining the dates of the publications, it appears that eleven days at one time transpired between them, and at another time ten days, at another

eight. These omissions, it is contended, are fatal: that the publication being once made, it was essential to the validity of the notice that it should be published every seventh day thereafter. The words of the law are, 'once a week.' Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such publication, as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published, Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the sixth. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week, for three months, the law is complied with, and its object effectuated."

On the contrary, in the case of *In re King*, 5 Ben. 453, 7 N. B. R. 279, 14 Fed. Cas. No. 7,779, concerning the notice of dissolution of a limited partnership which was required to be published "once in each week for four weeks," it was said that when any day of the week was taken for the first publication, that same day of the week must be taken for each succeeding publication; and it was held that a publication was insufficient which was published five times in January and February, 1869, namely, on the 11th, 21st, and 27th days of January, and on the 1st and 10th days of February. The court said: "It is contended that the publication in the state paper was a publication once in each week for five successive weeks, in this way: The first week was from January 11th to January 17th, both inclusive, and the publication in that week was on January 11th; the second week was from January 18th to January 24th, both inclusive, and the publication in that week was on January 21st; the third week was from January 25th to January 31st, both inclusive, and the publication in that week was on January 27th; the fourth week was from February 1st to February 7th, both inclusive, and the publication in that week was on February 1st; the fifth week was from February 8th to February 14th, both inclusive, and the publication in that week was on February 10th. . . . There was not one publication in the state paper, in each of three consecutive weeks of seven days each, ensuing the 11th of January. The first of such weeks of seven days each comprised the 12th, 13th, 14th, 15th, 16th, 17th and 18th.

days of January, and there was no publication on any one of those days."

Under a statute providing for a publication "at least" once a week for a certain number of weeks, it has been held that the words "at least" relate as well to the frequency of the publication as to the period during which it is to continue, and that the requirement is not satisfied by a publication during each of the number of weeks if more than seven days elapse between two publications. *Hernandez v. His Creditors*, 57 Cal. 333 (notice to creditors in proceedings in insolvency).

Under a statute providing for service on nonresidents by publication not less than once a week for six successive weeks, it has been held that a publication which is made twice in one week and not at all in another is insufficient. *Doheny v. Worden*, 75 App. Div. 47, 77 N. Y. S. 959, wherein the court said: "There was an order for the publication, made under section 440 of the Code of Civil Procedure, which directed that it be made in two newspapers not less than once a week for six successive weeks. One of the newspapers designated was the *Syracuse Evening Journal*. The publication in this newspaper was made December 12, 19, 24, 1898, and January 2, 9, and 16, 1899, so that it was made twice during the week commencing Monday, December 19th, and was not published at all during the week commencing Monday, December 26th. There was a full week after the publication on December 24th, during which there was no publication at all. The publication was commenced on a Monday, and was continued on each Monday thereafter, except Monday, December 26th. Christmas, December 25th, falling on Sunday, Monday, the 26th, was the legal holiday under Laws 1892, c. 677, sec. 24. The newspaper was not published on that day by reason of its being a holiday. The mistake was made in publishing the summons in that paper on Saturday, the 24th, instead of Tuesday, the 27th. Two publications were thus made in one week, and none at all in the following week. This mistake rendered the service of summons by publication insufficient. There was no legal service of the summons. The provision in the Code is definite, and must be complied with. Very likely it is not necessary that all the publications shall be made on any one day of the week, but there must be one in each seven days. The court therefore was correct in holding that there was no legal service of the summons upon the defendant in the appellant's action."

MATTER OF ESTATE OF MUNGER.

Iowa Supreme Court—January 15, 1916.

168 Iowa 372; 150 N. W. 447.

Executors and Administrators — Contracts — Compensation of Attorney.

The contract of an administratrix employing an attorney to prosecute an action, though approved ex parte by the judge or court, is of no validity as against those entitled to the estate.

[See note at end of this case.]

Implied Powers.

The powers and obligations of an executor or administrator are defined and limited by the will or statute, and he has no implied powers beyond those necessary to effectuate the powers expressly conferred.

Power to Charge Assets.

The rule that an administrator or executor is without power to impose a charge on the assets by any new and independent contract, unless expressly authorized by statute or will, even though for the benefit of the estate, applies to the employment of an attorney.

Allowance for Expenditures — Burden of Proof.

Under Code § 3415, entitling executors and administrators to compensation for all ordinary services and "such further allowances as are just and reasonable . . . for actual, necessary, and extraordinary expenses or services," allowances claimed thereunder must be specifically stated; there being no presumption that they are reasonable and just, but the burden being on the administrator.

Same.

Where a widow was administratrix, her claims for expenses in the employment of an attorney, stated as for "consultation with Mrs. A. on the death of her husband and in relation to estate matters," and another item relating to consultation with her and another person, without stating what it was about, did not on their face appear to involve matters necessarily of concern to the estate, and, the burden being on the administratrix to show that fact, the court did not err in rejecting such items.

Expenditure for Attorney's Fee — Reasonableness.

Where an administratrix, seeking to be compensated for money paid to an attorney, showed a contract employing the attorney to collect a claim for the death of the decedent, and agreeing to pay him one-third of the amount collected without suit, and in the event of suit one-half the amount collected, and that a suit begun was settled by payment of \$199 funeral expenses and \$1,875 as damages, and she claimed to have paid the attorney \$937, but on objections waived offering any evidence, the court erred in allowing her more than one-third of the amount recovered.

[See generally, *Ann. Cas.* 1916B 263.]

Appeal from District Court, Polk county:
DE GRAFF, Judge.

[373] The administratrix of the estate of Travers D. Munger asked to be allowed certain attorney fees she had paid and that she be permitted to pay others and be directed to distribute the remaining funds of the estate. The guardian of deceased's minor children objected. On hearing, she was allowed the fees she had paid, denied permission to pay others, and ordered to distribute as prayed. Both guardian and administratrix appeal. MODIFIED.

H. L. Bump for appellant.
Strock & Wallace for appellee.

LADD, J.—Travers D. Munger, was killed in a collision on the Chicago, Rock Island and Pacific Railroad, September 10, 1912, leaving him surviving a widow, Ada K. Munger, the administratrix, and two minor children, by a former wife, Mary Munger, from whom he was divorced, August 23, 1912, the day of his second marriage, and who is guardian of the children. The administratrix entered into a contract with W. C. Strock "to take charge of the collection of the claim of first party against the Chicago, Rock Island & Pacific Railway Company or others, arising out of the injury and death of the decedent, Travers D. Munger, said second party to have the exclusive charge of the settlement of litigating of said claim.

"In consideration of the services rendered and to be rendered herein, the first party agrees to pay to the second party a sum equal to one-third ($\frac{1}{3}$) of the amount collected, in the event such collection is without suit commenced, and, in the event of suit commenced, a sum equal to one-half ($\frac{1}{2}$) of the amount collected.

"It is agreed by and between the parties hereto that all the necessary costs incident to the preparation and trial shall be first paid from the amount realized on said claim.

[374] "Second party agrees for the above consideration to take charge of said claim and conduct same to determination in the Courts, if necessary."

This was duly signed by the parties and an *ex parte* order entered by the court being signed by a judge, directing the attorney to proceed to collect the damages by suit or otherwise according to the contract and approving the same. Suit was begun December 23, 1912, and on June 7, 1913, was settled by the payment of \$199.65 funeral expenses, including the undertaker's charge, and \$1,875.35 as damages. Of this, the administratrix claims to have paid the attorney \$937.68, and she prayed that such payment be approved and that she be directed to pay \$57.50

for services of such attorney rendered in connection with the administration of the estate. The guardian resisted by asserting that the order of the court approving the contract, being *ex parte*, was not binding on the estate or those entitled thereto, that the amount agreed upon and alleged to have been paid was excessive, unreasonable and unconscionable, and objection was made to payment for services incident to the administration because of no showing of services having been rendered and for that such services were not in behalf of the administratrix as such. A demurrer on the ground that the facts alleged in the resistance were not sufficient to obviate the contract as approved by the court was overruled and, the cause coming on for trial, the administratrix waived offering any evidence in support of her application. The guardian adduced the evidence of three witnesses and the administratrix called three in rebuttal. The decree denied payment of \$57.50 because of the services not being rendered for the administratrix as such and "ordered that as to the Contract of Employment by the Administratrix of W. C. Strock to prosecute the claim of the Estate against the Chicago, Rock Island & Pacific Railway, and the Order authorizing and approving the same, which was entered on the 19th day of October, 1912, remain as it is entered, and not [375] be disturbed or modified. And Administratrix is allowed credits for fee paid to said W. C. Strock paid thereunder to wit: Nine Hundred Thirty-Seven and 50-100 Dollars (\$937.50)."

I. In her resistance, the guardian asked that the order approving the contract "be set aside and cancelled and held for naught." Appellee seems to think this was essential to the consideration of the issue as to the reasonableness of the expenses incurred for services of counsel, and the language of the decree indicates that such may have been the view of the district court. The vice of such an order is that, without being effective other than as advisory to the administratrix individually, it may and often does serve the purpose of deceiving those entitled to an estate into believing that the compensation thereby approved has been adjudicated against them. The administratrix's contract employing Strock as attorney to prosecute the action, even though approved *ex parte* by the judge or court, was of no validity as against those entitled to the estate.

The powers, duties and obligations of the executor or administrator with respect to the estate are defined and limited by the will or statute. He has no implied powers beyond those necessary to effectuate the powers expressly conferred. In the absence of testamentary provisions to the contrary, he is entitled to the possession of all personal prop-

erty of the estate in trust for the purpose of settling all contracts, claims and obligations of decedent. Without interest in the assets, he is without power of imposing a charge on them by any new and independent contract, unless expressly authorized by statute or will, even though it be for the benefit of the estate. *Hayes v. Shirk*, 167 Ind. 569, 78 N. E. 653; *May v. May*, 7 Fla. 207, 68 Am. Dec. 431; *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; *Fletcher v. American Trust, etc. Co.* 111 [376] Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164, 201, and notes in which cases are collected. And such is the rule with respect to the employment of an attorney in this state. *Clark v. Sayre*, 122 Ia. 591, 98 N. W. 484.

Of course, the executor or administrator may at his discretion contract with reference to necessary matters relating to the estate, but he does so on his personal responsibility, even though he may be entitled to be reimbursed out of the funds of the estate. Being without power as administrator to enter into a new or independent contract in behalf of the estate, such a contract, though possibly obligatory on her individually, was a mere nullity as against the estate and the order of court was ineffectual to vitalize it. Such was our conclusion in *Rickel v. Chicago, etc. R. Co.* 112 Ia. 148, 83 N. W. 957. The order should have been disregarded and the contract accorded consideration only as showing the employment of counsel by the administratrix individually, and this on terms that compensation should be contingent on recovery.

II. Section 3415 of the Code specifies precisely the compensation an executor or administrator shall receive "for all the ordinary services" rendered by them. In addition thereto, "such further allowances as are just and reasonable may be made by the court for actual, necessary and extraordinary expenses or services." When allowances of this character are claimed, these should be specifically stated to the end that the court may know the services for which compensation is sought. In *re Carmody*, 163 Ia. 463, 145 N. W. 16. The bare fact that the executor or administrator has expended money for legal services for which he requests reimbursement alone does not entitle him thereto. Nor is it enough that he may have acted in good faith in the employment of counsel. The expense incurred must appear to have been "reasonable and just." There is no presumption that they are such and as the executor or administrator is likely [377] to be more familiar therewith than those taking exception thereto, the burden of proof is upon him, whenever the right

to such allowances is put in issue by objections interposed, to show that the expenses incurred, as in employing counsel, were necessary for the protection of the estate and also were reasonable and just. *St. John v. McKee*, 2 Dem. (N. Y.) 236; *Munden v. Bailey*, 70 Ala. 63, 70. Only reasonable compensation for the services rendered will be allowed in accounting with the administrator or executor, regardless of what he may have paid. *Moore's Estate*, 72 Cal. 335, 13 Pac. 880; *Fairbairn v. Fisher*, 58 N. C. 385; *Porche v. Creditors of Succession of Banks*, 8 La. Ann. 65; *Macarty's Succession*, 3 La. Ann. 517; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Filbeck v. Davies*, 8 Colo. App. 320, 46 Pac. 214.

III. The items making up the claim for \$57.50 were specifically stated, but many of them on their face did not appear to involve matters necessarily of concern to the estate and none were self-explanatory. To illustrate, the first was for "consultation with Mrs. Ada Munger on the death of her husband and in relation to estate matters." She had not been appointed administratrix and for all that appears, the consultation may have pertained to her individual interests only. The next item relates to consultation with her and a Mr. Sinon, but about what? Therein is included the preparation of petition for letters of administration and a talk with counsel for the former administrator.

These and other items may have been sufficiently specific to meet the requirements of good bookkeeping, but did not of themselves indicate either their necessity to the estate or the reasonableness or justness of the charges. The burden was on the administratrix to so prove, and having failed to adduce any evidence thereon, the district court did not err in rejecting these items.

IV. The necessity of employing counsel to prosecute the claim for damages consequent on the wrongful death of decedent [378] was conceded, the only issue being reasonableness of the compensation to be allowed counsel. The record disclosed that an action was begun, issues joined and a settlement effected as previously stated. On hearing, the administratrix "waived offering any evidence in support of the application." The guardian objecting might very well have rested here, but she did not. She introduced the testimony of three attorneys, reciting to each the naked facts mentioned above, together with the terms of settlement, and that compensation was to be contingent on recovery in some amount, and eliciting the estimate of each as to reasonable value of the services rendered. The administratrix objected on the ground that the recital did not include the terms of the contract, the fact of its approval by the court and the latter had not been set aside.

Of course, these matters were immaterial, but the first witness was permitted to take them into consideration. His answer, however, was without reference thereto, as was that of each of the others, and each testified that reasonable compensation would be one-third of the amount recovered. The administratrix then called three witnesses in rebuttal, each of whom testified that the contract entered into was the usual contingent fee contract and two of them that it was fair and reasonable. On cross-examination, one of the witnesses, by including facts not appearing of record, thought one-half of the recovery reasonable. Such is the record, and we are of opinion that it discloses no controversy, but that one-third of the recovery would be reasonable compensation for the services actually rendered in the circumstances disclosed. It may be that such a contract is usual, but the matter for the court to determine was the reasonable value of the services actually rendered in behalf of the estate in view of the circumstance that compensation was contingent on success, regardless of other conditions of the agreement between counsel and client. The administratrix made no showing of what services were rendered save the bare recital [379] above or as to the reasonable value thereof except as stated, and we necessarily must rely on the proof thereon adduced by the objecting guardian. It follows that the court erred in allowing to the administratrix for services of counsel more than one-third of the amount recovered from the railroad company. With this modification, the order of the court will be affirmed.

Modified and affirmed.

All the justices concur.

NOTE.

Power of Executor or Administrator to Employ Attorney under Express Contract as to Amount of Compensation.

General Rule.

An executor or administrator has no power to make a contract with an attorney, binding on the estate, for the transfer or conveyance of a certain interest in any of the assets of the estate, or for the payment of a contingent fee out of the assets of the estate, as compensation for his services in a suit against or on behalf of the estate. *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; *Bryan v. Craig*, 64 Ark. 438, 44 S. W. 348; *Pike v. Thomas*, 65 Ark. 437, 47 S. W. 110; *In re Page*, 57 Cal. 238; *Lester v. Mathews*, 56 Ga. 655; *Richey v. Cleet*, 46 Ind. App. 326, 92 N. E. 175; *Rickel v. Chicago, etc. R. Co.* 112 Ia. 148, 83 N. W. 957; *Macarty's Suc-*

cession, 3 La. Ann. 517; *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22. And see the reported case. See also *Lusk v. Patterson*, 2 Colo. App. 306, 30 Pac. 253.

"An administrator has no power to enlarge, by his contract, the liability of the estate that he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530. See to the same effect *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; 65 Ark. 437, 47 S. W. 110. In *Rickel v. Chicago, etc. R. Co.* 112 Ia. 148, 83 N. W. 957, the court said: "It is the general holding that an estate cannot be bound by the contract of an executor or administrator, and that no action at law can be maintained against him thereon in his representative capacity. . . . While it is entirely proper to employ attorneys to counsel and assist in the settlement of an estate, 'the duty of compensating them rests primarily on the executor or administrator.' . . . Nor does the fact that the services are beneficial to the estate change the rule. . . . The compensation of an attorney cannot, therefore, be fixed as against the estate by an express contract with the administrator. Consequently the contract in this case, which provides for a contingent fee, cannot be enforced against the estate." To the same effect, see the reported case. In *Matter of Meng*, 96 Misc. 126, 159 N. Y. S. 535, it was said: "The executor claims on this accounting an allowance of \$27,345.56—that is, 33½ per cent of the whole recovery—for the fees, disbursements, and expenses of his attorneys, who instituted the action and brought it to a successful issue. While no written contingent retainer agreement for a one-third is asserted to have been made by the executor, it is claimed on his behalf that immediately upon the death of his testator he employed these attorneys upon some such agreement. While contingent fees are not unusual in this jurisdiction yet in view of the position of the decedent and the amount of the recovery, it may be that 33½ per cent of the total amount recovered is more than should be allowed the executor for the reasonable expenses of the action—that is, for the services and time of the attorneys—unless the proof of the nature and amount of the services shows that this is a reasonable and proper amount to be allowed by the surrogate. In view of the amendment of 1911, providing that the surrogate has power to fix the reasonable

amount of the expenses, the agreement of the executor with the attorneys who instituted and prosecuted the action ought not, I think, to control the surrogate, if, in his judgment, such amount is unreasonable. The executor cannot, I think, in law make an agreement for unreasonable compensation payable out of damages so as to bind the fund in court. The fact that the fee is contingent makes no difference." In *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22, the court said: "Before the executors were removed, they brought an action against George W. Platt, a brother of the testator, in the supreme court to set aside certain transfers and conveyances of property made to him by the testator and to recover from him certain claims and demands. While that action was pending the executors entered into a contract with William R. Martin, who was their attorney, by which it was agreed that in consideration of the services to be rendered by him in the action then pending and in such other actions and proceedings as might be brought against George W. Platt, he should have, as compensation for his services and expenditures, in addition to the costs and disbursements he should recover, an equal one-half of the whole recovery against George W. Platt; and to give effect to the agreement they assigned to him all the one equal half of all their claims and demands against Platt, and in any recovery that might be had against him. It is claimed by and on behalf of Martin's assignee that by virtue of that agreement he has a lien upon this fund which should be paid out of the same. His claim has been under adjudication so many times in the courts below, and has been so thoroughly considered by various judges, that a brief examination of it now is all that is needed. The executors under the will of the testator had no power to make the agreement with Martin and they could not create any lien upon the estate, or assign the same to him. They could bind themselves personally but not the estate which they represented."

In *Macarty's Succession*, 3 La. Ann. 517, it appeared that each of two executors selected his own attorney and contracted to pay him \$3,000, it being understood that this fee was to be for the full compensation of the attorneys in conducting and finally winding up the succession, without regard to whether there should be any suits, and that the attorneys were to superintend personally the suits pending for and against the deceased. The court said: "It will be understood that we are not called upon to impugn the reasonableness of such a contract. That rests exclusively with those who made it, and it may be binding between the parties personally, and still not constitute a charge on the

succession. Executors receive commissions, and in this case their compensation amounted to a large sum. If they choose to perform no duties, but to devolve the whole labor and responsibility of the administration upon attorneys, we know of no reasons why they should not pay them. But their neglect or choice creates no charge on the succession. We have to determine the value of the professional services for which the succession is bound on the facts before us. If the gentlemen have been retained in any suits left undetermined by the deceased, we see no reason why the succession should not pay them for their professional services; and it is to be understood that our adjudication relates only to the matters before us, to wit, the services up to the rendition of this judgment. The executors had a right to retain counsel to superintend suits; but we have no means of ascertaining the value of those services, and presume none of any consequence have been rendered up to the present time. As the matter is not fully before us, we will not, however, preclude the executors from hereafter establishing against the succession their claim for any amount lawfully paid for that purpose."

In *Lester v. Mathews*, 56 Ga. 655, it was held that a temporary administrator had no power to make, in connection with a part of the heirs or all of them, a contract with counsel to resist the probate of a will so as to bind the estate and compel the permanent administrator to pay the fee agreed on.

Qualification of Rule.

Since an executor or administrator has the power to employ an attorney and is entitled to be credited with the amount of a just and reasonable fee paid to an attorney employed by him (see 11 R. C. L. tit. *Executors and Administrators*, p. 233) his agreement for attorney's fees if fair and reasonable will ordinarily be taken as fixing the amount to be allowed, though it is not binding on the court and creates no charge against the estate. *Filbeck v. Davies*, 8 Colo. App. 320, 46 Pac. 214; *MacKie v. Howland*, 3 App. Cas. (D. C.) 461; *Stansell v. Lindsay*, 50 Ga. 360; *Pennebaker v. Williams*, 136 Ky. 120, 120 S. W. 321, *opinion modified* 136 Ky. 143, 123 S. W. 672; *Baldwin v. Barber*, 148 Ky. 370, 146 S. W. 1124; *Noel v. Harvey*, 29 Miss. 72; *Rapp v. Elgutter*, 77 Neb. 574, 110 N. W. 661; *In re Ullman*, 31 Ohio Cir. Ct. Rep. 370; *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178. In *Filbeck v. Davies*, supra, it was said: "It may be laid down as a general proposition that administrators are entitled to proper credits in their account for all disbursements made in good

faith on behalf of the estate in the course of the administration, whether they concern its necessary expenses, or what may be laid out in recovering assets. This proposition is accepted by all the authorities. The rule extends so far as to justify the representative in making contracts with counsel for fees contingent on the recovery of assets, and therefore estimated at a larger figure than would be proper where the compensation was certain and dependent on a contract which was enforceable in any event as against the representative. . . . This proposition is conceded by the attorneys for the appellee, with only the limitation that the power does not extend to the making of a special contract, or a contract for a contingent fee. We do not understand the rule to be subject to any such limitation, except as, of course, it must be always subject to the supervision and control of the court charged with the duty of passing on the accounts of personal representatives. As a general proposition, it is doubtless true the administrator is without the right to pay debts or disburse the funds of the estate, except upon allowance by the court, which must determine the manner and the extent of the payments as well as the distribution of the general funds to the heirs of the persons entitled. If the administrator pays out money without the direct authority of the court, the account is subject to examination, and it may be surcharged or falsified as circumstances may require or the court deems proper. We do not undertake to say what the general rule is with respect to accounts of this description, or whether the administratrix had a right to pay and present the account for allowance, or whether the account should have been first presented, and paid after allowance. In reality, it makes very little difference in the present case, for the result would be the same in either. Whichever course was pursued, the ultimate approval of the court must be obtained before the account is passed and allowed, and the administrator relieved from any further responsibility. When the administratrix took the responsibility of paying the bills, she likewise took chances on ultimate disapproval, if the court should disagree with her respecting the justness of the accounts paid. All we are called upon to determine is whether the accounts as presented were reasonable in their sums, calculated on a just basis, and should have been allowed as they were filed. This was the only question litigated. We cannot conclude otherwise. All agree the charges were less than the ordinary fees charged in such cases, and to this the trial court assented." In *Noel v. Harvey*, supra, the court said: "It is in the first place insisted that the executors improperly credited themselves with the sum of five thousand dollars paid to

William R. Miles for professional services rendered in a suit commenced in the superior court of chancery by Dulany in his lifetime, against John S. Gooch and others. It appears from the testimony that Prior Lea was originally retained as Dulany's counsel in the cause; that he removed from the state before the cause was prepared for trial: that it was pending in court at Dulany's death; that the executors, being wholly unacquainted with the facts of the case, and not knowing where the testimony could be obtained to sustain the bill, employed Mr. Miles at a contingent fee of five thousand dollars, he undertaking to take the testimony, to incur all the expenses necessary to take the same, and his fee to depend upon the result of the suit. It further appears that the amount in controversy was about \$48,000; that the services were performed by Mr. Miles, and the case gained. It further appears that the contract was made in good faith. Under this state of facts, we are of opinion that the court below committed no error in allowing the credit. The only question in such case to be considered is, whether the services were necessary for the protection and interest of the estate, and whether the contract, under all the circumstances, was such as a prudent and cautious man would have entered into for himself. The proof brings the case within this rule." In *Rapp v. Elgutter*, supra, the court said: "And, while it is true that he was not authorized in his trust relations to bind the estate by an unreasonable contract for legal services, it is equally true that, in any one of them, he was entitled to a just and reasonable compensation for legal services procured for the benefit of the estate. So that the question of the legality or illegality of the contract at issue depended upon its being reasonable and beneficial to the estate. *McCoy v. Lane*, 66 Neb. 847, 92 N. W. 1010. The fact that an executor or administrator cannot bind the assets of his estate for the payment of an exorbitant or unreasonable fee for legal services does not prevent an attorney at law from binding himself in a reasonable and beneficial contract for services to be rendered in behalf of such executor or administrator. And we think that, in sound reasoning and good morals, an attorney, who has induced an administrator, executor, or guardian to employ him to represent the interests of an estate by the use of language that would reasonably lead such executor, administrator, or guardian to believe that such services would not exceed a sum named, is, and should be, estopped from demanding of the estate a greater sum than that suggested as an inducement to his employment."

In several instances the courts have allowed executors and administrators credit for the payment of an attorney's fee of a

percentage ranging from one-half to one-third of the recovery in the event of his conducting suits for the estate successfully, without passing on the power of the executor or administrator to employ him under such a contract. In *re McFarland*, 4 Pa. St. 149; In *re Shoenberger*, 211 Pa. St. 99, 60 Atl. 502; *Baker v. Baker*, 87 Va. 180, 12 S. E. 346. See also *Leahart v. Deedmeyer*, 158 Ala. 295, 48 So. 371.

In *James v. Turner*, 78 Tex. 241, 14 S. W. 574, it was held that a surviving wife who qualified to administer the community estate of her deceased husband and herself, had the power to employ an attorney to collect a claim due the estate on a contingent fee of one-half the sum which might be collected. The court said: "The court below held that as qualified survivor Mrs. Boone had authority to make the contract with appellant and that he would not review her action. We are of opinion that after having qualified as survivor to administer the community estate of her deceased husband and herself that she had the power to make the contract sued upon and thereby to bind the estate, and that the limitation as to the reasonableness of the compensation agreed to be paid which would apply in case of a contract made by an ordinary administrator does not apply. There is no pretense that the contract was brought about by fraud nor that the survivor was not acting in the utmost good faith in making it. The court found that the claim to which the contract related was one doubtful when the contract was made, and there was much evidence tending to show that the compensation agreed to be paid to appellee, contingent on recovery as it was, was not unreasonable. That a suit on the claim was proper and necessary is shown by the fact that the only responsible defendant refused to pay without suit, and resisted payment until the affirmance of the judgment against him by this court, and by the further fact that the final judgment evidences that the claim was one which it was the duty of Mrs. Boone as the representative of the community estate to enforce. The power possessed by a surviving husband or wife who qualifies to administer a community estate is much broader than that possessed by an ordinary administrator, and what such a survivor may legally do in the exercise of that power will bind the estate. If such a survivor should fraudulently or in bad faith make contracts binding on the estate, some question might arise as to the liability of such a survivor to account to others interested in the estate for money diverted by such a contract, but other parties to such contracts not affected by such fraud or bad faith would be entitled to protection. The estate represented by appellant received

the services rendered by appellee in pursuance of a contract made with Mrs. Boone which she had lawful power to make, and we see no good reason why it should not be held bound to comply with that contract."

SCHEUERMAN

v.

SCHEUERMAN.

Canada Supreme Court—February 1, 1916.

52 Can. Sup. Ct. 625.

Trusts — Resulting Trust — Purchase by Husband in Name of Wife — Intent to Defraud Creditors.

Equity will not decree a resulting trust in favor of a husband with respect to property purchased by him in the name of his wife when his purpose in thus taking the title was to hinder and delay his creditors.

[See note at end of this case.]

Appeal from Appellate Division of Supreme Court of Alberta.

Action by John Scheuerman, plaintiff, against Anna Scheuerman, defendant. Judgment for plaintiff in trial court: SCOTT, Judge. Judgment affirmed by Appellate Division of Supreme Court on equal division of opinion among judges. Defendant appeals. The facts are stated in the opinions. REVERSED.

F. Ford, K. C., for appellant.

O. M. Biggar, K. C., for respondent.

Emery, Newell, Ford, Botton & Mount, solicitors for appellant.

Short, Cross, Biggar, Sherry & Field, solicitors for respondent.

[626] THE CHIEF JUSTICE.—I think the appeal should be allowed.

The trial judge has found that the evidence does not establish a valid agreement between the parties for the reconveyance of the property to the respondent. The respondent in such a case as this can, of course, ask nothing from the court but his strict rights. There seems to me nothing necessarily inconsistent between the idea of his making an absolute gift to his wife and the fact of his having given her the property to keep it from his creditors. The appellant says that the reason for the gift was "because he lose it anyhow." I think that, as between themselves, the presumption of law

that the gift to the wife was an absolute one is not rebutted.

But if it were necessary to hold that there was a resulting trust, in favour of the respondent, I do not think he is in a position to ask the court to enforce it. He can only make out his case by alleging his own unlawful intentions in making the conveyance to his wife.

[627] In the case of *Muckleston v. Brown*, 6 Ves. Jr. (Eng.) 52, at page 68, the Lord Chancellor said:—

"*Cottingham v. Fletcher*, 2 Atk. (Eng.) 155, does not affect this case. That case was upon the grant of an advowson contrary to the policy of the law, by a Roman catholic in trust for himself. Afterwards he turns protestant; and desires a discovery as to his own act. The defendant put in a plea of the Statute of Frauds; but by answer admitted the trust. Lord Hardwicke is made to say, that upon the admission he would act. I do not know whether he did act upon it; but it is questionable whether he should; for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor, in fraud of the law, and of a man coming upon his own act under such circumstances.

"It is there said it might be different if it had come on upon demurrer. The reason given is that, as this assignment was done in fraud of the law, and merely in order to evade the statutes, it was doubtful whether at the hearing the plaintiff could be relieved. Lord Hardwicke means to say that, if the defendant admits the trust, though against the policy of the law, he would relieve, but if he does not admit the trust, but demurs, he would do what does not apply in the least to this case. The plaintiff stating he had been guilty of a fraud upon the law to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, 'Let the estate lie, where it falls.' That is not this case."

It will be observed that the Lord Chancellor considered it questionable whether the plaintiff ought to have relief even in a case where the defendant admits the trust. In the present case the appellant has denied the trust.

I am prepared to hold that a plaintiff is not entitled to come into court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose.

I think the maxim quoted by Lord Eldon applies [628] in this case and that the court should say "Let the estate lie, where it falls."

IDDINGTON, J.—The respondent, as plaintiff, alleges in his statement of claim that the defendant, now appellant, who is his wife, was the registered owner of lands described therein but held the same as trustee for him, the plaintiff.

He proceeds in said statement of claim to allege that she, in breach of her said trust, sold the lands and he seeks a declaration of the trust and judgment for the part of the purchase-money she got and other relief.

The lands I will assume, as the learned trial judge has found as a fact, were bought with respondent's money, but the conveyance taken to the appellant when his wife.

Under such a naked state of facts the presumption of law would be that she received same by way of advancement. In short she, in law, thereby became the owner unless proven by other facts she was a trustee.

There was no writing or other evidence of a legal trust upon which he could rely. Therefore, he was of necessity, in order to establish his claim that she was his trustee, driven to prove that he had procured the conveyance to be made to his wife lest a creditor or creditors should reach the land if in his name and that the like reason had obtained for the vesting in her of other property out of the proceeds of the sale of which the land in question was paid for or improved.

Many authorities have been cited which I have, in deference to the argument and divided opinions below, [629] fully considered. But from none of them can I extract authority for the proposition of law that when a man has, out of the sheer necessity to prove anything upon which he can hope to rest the alleged claim of trust, to tell of an illegal purpose as the very basis of his claim, that he may yet be entitled to succeed. I find cases where the man has, accidentally as it were, or incidentally, to the relation of his story told that which he might if skillfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established, by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.

This is not respondent's case, but the other kind of case I have just referred to is.

Out of the many cases on the subject *Taylor v. Chester*, L. R. 4 Q. B. (Eng.) 309, furnishes the law applicable to this case, and the case of *Taylor v. Bowers*, 1 Q. B. D. (Eng.) 291, furnishes an apt illustration of the other kind of case.

In this latter all Taylor need have done was to prove that the goods in question were

his and they were found in the possession of the defendant who had never bought them or acquired any honest title thereto.

The plaintiff there had never executed the intended assignment in fraud of creditors or any other and if the defendant had set up the facts he relied upon his defence would have been held illegal. That [630] much is got from an examination of the facts noted and judgments in the case and especially from those in appeal.

The more recent case of *Kearley v. Thomson*, 24 Q. B. D. (Eng.) 742, shews some things said by even eminent authority in the case I have just referred to may not be law.

Had the conveyance been made to a stranger, under such facts and circumstances as might have enabled the respondent to present and rely upon the naked fact of his purchase and payment of the price as producing a resulting trust which the law would imply, the respondent might thereby have escaped telling of his own illegal purpose and succeeded. Here he has to tell the facts disclosing the illegal purpose as his chief, and indeed only, motive for constituting the trust he claims to have existed, and rely thereon, and cannot, as I view the law, successfully do so.

The cases of *Sims v. Thomas*, 12 Ad. & El. 536, 40 E. C. L. 117, and *Symes v. Hughes* L. R. 9 Eq. (Eng.) 475, certainly fall far short of covering this. The real question of law involved and decided in the former was the non-exigibility of the asset in question and the right to sue in such case upon the bond in question despite the provision of an insolvency Act not framed to reach it.

The latter case certainly is not to be extended and it needs extension to cover this case even if binding us, as it does not.

All that was argued and well presented as to the operation of the "Exemptions Ordinance" seems, from my view of the law, as applicable to the facts herein [631] irrelevant. On the law and facts the property was hers and the exemption relative thereto hers also.

The appeal should be allowed with costs throughout, and the action dismissed with costs.

DUFF, J.—In 1908, the respondent, who was the husband of the appellant, purchased land in Edmonton for which he agreed to pay \$700. Shortly afterwards he built a house at a cost of \$600 and, from that time until 1912, the appellant and the respondent occupied the property as their home with their children. On the completion of the purchase, in 1907, the transfer was taken in the name of the appellant and, in 1912, during the respondent's absence in the United States the appellant sold the property at the

price of \$3,500; \$2,000 having been paid in cash and the respondent, on discovering the sale, brought the action out of which this appeal arises claiming the property was his and consequently the residue of the purchase price, \$1,500 still in the vendee's hands.

The respondent puts his case in this way. He says that the purchase money was paid by him under the agreement of 1907; that the house was built partly by his own labour and partly by labour and materials provided by him; that the transfer was taken to his wife by arrangement between them, the effect of which was that she should hold the property as trustee for him.

On behalf of the appellant it is not disputed that she was to hold the property as trustee for the respondent; but it is said that the explicit arrangement was that the property was to be held by her until a certain debt for the payment of which the respondent was then being pressed had been discharged [632] and that the intention of both parties in making the transfer to the wife instead of to the husband was to conceal the fact that the husband was the owner and in that way to protect the property from proceedings by a creditor who, at the time the transfer was taken, had recovered judgment.

The appellant denies that the property was paid for with the respondent's money, but on that point the finding is against the appellant and this appeal must, I think, be decided on the footing that the finding is right.

It is not, I think, seriously open to question that the respondent could only succeed by producing evidence shewing that in directing the transfer to be made to his wife an advancement to her was not intended and the evidence which establishes this is precisely the evidence which shews that the title vested in the wife was intended as a cloak to protect the property from the creditor mentioned. The respondent's case, therefore, rests upon a transaction which if it had in fact the effect contemplated, namely, of delaying or hindering the creditor, would undoubtedly be a transfer void under the Statute of Elizabeth at the instance of the creditor; and in that case the respondent must obviously fail on the principle that a plaintiff cannot recover who is obliged to make out his case through the medium and by the aid of an illegal transaction to which he was himself a party. *Taylor v. Chester*, L. R. 4 Q. B. (Eng.) 309, at p. 314.

The respondent, however, has succeeded, the Appellate Division of Alberta being equally divided on the ground that the rule has no application where [633] nothing has been done in execution of the unlawful purpose beyond payment or delivery of the property itself and that in point of fact the creditor

whose debt has since been paid was not defeated, hindered or delayed. By the law of Alberta a house and building occupied by an execution debtor and the lot or lots on which they are situate are exempt from execution to the extent of \$1,500. The view which has prevailed is that the evidence appearing to shew the property to have been of no greater value than \$1,500, at the time the transfer was taken, the transaction could not be a fraudulent one and impeachable as such under the Statute of Elizabeth because of the well settled rule that the statute only applies to dealings with property which creditors are entitled by law to have applied in the payment of their claims.

The judgment of Lord Justice Mellish concurred in by Lord Justice Baggallay in *Taylor v. Bowers*, 1 Q. B. D. (Eng.) 291, is relied upon as establishing the proposition that the general principle gives to persons making a payment or delivering goods for an illegal purpose a *locus poenitentiae* so long as no part of the illegal purpose has been carried out, and that so long as that has not happened the restitution of the property transferred under such an agreement as that disclosed by the evidence in this case can be enforced. *Taylor v. Bowers*, 1 Q. B. D. (Eng.) 291, was in point of fact not decided upon the principle invoked, Lord Justice James proceeding upon the ground that it was the defendant in that case who was obliged to set up the illegal transaction in order to justify his possession of the goods. Two very eminent judges, however, Lord Justice [634] Mellish and Lord Justice Baggallay do seem to have put their judgment upon the ground that where goods are delivered under a fictitious assignment, the object of which is to defraud creditors, the delivery and assignment of the goods are not to be regarded as execution in part of the illegal purpose so long as no creditor is in fact prejudiced. It has been seriously doubted whether the general principle stated by Lord Justice Mellish in his judgment was correctly applied to the facts of that case; and the subsequent decisions of *Kearley v. Thomson*, 24 Q. B. D. (Eng.) 742, and *Herman v. Jeuchner*, 15 Q. B. D. (Eng.) 561, afford considerable justification for such doubts.

I do not find it necessary for the purpose of deciding this appeal to pass upon the question whether a proper application of the principle stated above to the facts of this case would be to hold that no part of the illegal purpose had been carried out notwithstanding the fact that the conveyance had been taken in the name of the wife. This case must, I think, be approached from a slightly different point of view. The object, as I have said, of taking the transfer in the name of the wife was that her *ex facie* title

should protect the property from pursuit by the husband's creditor, the design being that so long as the debt remained unpaid she should hold the title. Whether or not they had in mind a possible advance in value the scheme necessarily involved the hindering of the creditor in the exercise of his rights in the event of the value of the property reaching a point at which the surplus would become properly exigible. We know that, in 1912, the property had acquired a value of \$3,500. It is conceded apparently that some time [635] before the trial the debt was paid; when, does not appear. If any part of the debt was still unpaid after the value of the property rose beyond \$1,500 the presumption would be that the creditor was prejudiced. In these circumstances it is impossible to say that the creditor was not prejudiced. Indeed, having regard to the fact that the respondent must have known the precise date when the debt was paid and offered no information about it there is some presumption of fact the other way. The conclusion I have come to, however, is this: Accepting the rule in the form in which it is stated in *Symes v. Hughes*, L. R. 9 Eq. (Eng.) 475, and *Taylor v. Bowers*, 1 Q. B. D. (Eng.) 291, I think the onus in the circumstances of this case was on the respondent to shew that the creditor had not been delayed.

It is true that as the respondent in this case does not ask to recover back the property on the ground only that it was property transferred for an illegal purpose which has not been carried out his position is not entirely the same as the position of the plaintiffs referred to in the judgment of Mr. Justice Scott. His case may be put in the alternative. First, the transfer was taken in the name of the appellant, the consideration having been paid, the presumption of advancement is rebutted by the evidence of the agreement between the husband and wife that the property was to be held for the husband for the purpose of protecting him against a creditor. In point of law he rests upon the position that the wife is trustee for him by reason of the fact that the purchase money was paid by him. But while that is his legal position he is obliged, in order to make out that case, to prove [636] an agreement fraudulent in the purpose under which the transfer was taken, which agreement he does not shew that he repudiated before part of its purpose took effect in the delaying of his creditor.

Secondly. He may allege an express trust arising out of the oral agreement that the property was to be held for him with the object stated. The breach of this express trust, the failure on the part of the wife to carry out the agreement under which she

acquired the property being treated in equity as a fraud, constitutes the wife trustee *ex maleficio*, a trustee, that is to say, who is not entitled to invoke the Statute of Frauds as a protection against her own fraud. *Rochefoucauld v. Boustead* [1897] 1 Ch. (Eng.) 196. The respondent does not (be it observed with reference to an argument of Mr. Ford) in this way of putting his case seek to enforce the express oral trust, although the result in this particular case might be the same in the event of success as if he had succeeded in enforcing the express trust. The respondent's right and remedy would have been precisely the same if the arrangement had been that the wife instead of holding the property in trust for him had bound herself to hold it in trust for a third person, orally; to any proceeding by such third person as *cestui que trust* for the enforcement of the express oral trust the 7th section of the Statute of Frauds would have been an effectual answer, but there is no answer to an action on the part of the respondent for *restitutio in integrum* on the ground that the wife's fraudulent refusal to effectuate the express trust under which she acquired the property constitutes her a trustee for the person from whom she [637] received it. Put in this way, nevertheless, the respondent's case still necessarily rests upon an arrangement which when it is fully disclosed appears to be a fraudulent arrangement, and that arrangement the respondent has not shewn to have failed in effectuating its purpose.

In the result the appeal should be allowed and the action dismissed.

ANGLIN, J. (*dissenting*).—The plaintiff sues to recover from his wife the proceeds of property admittedly placed in her name with the intent that it should be held by her in order to defeat the claim of one of his creditors. When placed in the name of the defendant the property was occupied by the husband and family and was not worth more than \$1,500. It was, therefore, exempt from execution under sub-section 10 of section 2 of chapter 27 of the "North-West Territories Consolidated Ordinances, 1898."

In answer to the plaintiff's claim the defendant sets up:—

(a) That the purchase money of the property in question was wholly or in great part hers;

(b) That the property subsequently ceased to be occupied by the plaintiff and became worth more than \$1,500 and the surplus would then have been exigible.

(c) That the plaintiff's admitted fraudulent intent debars his recovery;

(d) That the plaintiff, in order to succeed, is obliged to establish an express trust

which section 7 of the Statute of Frauds renders incapable of proof by parol evidence.

The learned trial judge found explicitly that the [638] purchase money all belonged to the plaintiff. He saw the plaintiff in the witness box and believed his story as against that of the defendant whose evidence was taken on commission. This finding was not disturbed on appeal and we are not in a position to say that it is wrong and that the defendant should have been believed rather than the plaintiff.

It is the value and condition of the property at the date of the transfer which must determine its exigibility. To hold that a subsequent change in occupation or increase in value should be taken into account would introduce an element quite too speculative, would unsettle titles and would defeat the purpose of the statute. *Sims v. Thomas*, 12 Ad. & El. 536, 40 E. C. L. 117; *Willoughby v. Pope*, 101 Miss. 808, 58 So. 705.

The law condemns and penalizes the fraudulent act, not the fraudulent intent. The act must be one which at least may be injurious to persons whom the law protects against it. In *Mundell v. Tinkis*, 6 Ont. 625, the transfer dealt with was of this character. However wrongful the intent with which it is done, an act in *se* lawfully subjects the person who commits it neither to criminal nor to civil responsibility. The transfer by a debtor of property exempt from seizure is lawful and cannot harm his creditor and, therefore, cannot be fraudulent against him. *Mathews v. Feaver*, 1 Cox Ch. (Eng.) 278; *Story's Equity*, sec. 367; *Rider v. Kidder*, 10 Ves. Jr. (Eng.) 360; *Nichols v. Eaton*, 91 U. S. 716, 23 U. S. (L. ed.) 254, at p. 726. However evil the mind and intent of such a debtor may be, he is amenable only *in foro conscientiae*. The plaintiff's intent [639] was fraudulent; his act was not. *Day v. Day*, 17 Ont. App. 157, at pp. 166, 167, 172; *Symes v. Hughes*, L. R. 9 Eq. (Eng.) 475; *Taylor v. Bowers*, 1 Q. B. D. (Eng.) 291; *Cloud v. Meyers*, 136 Ill. App. 45; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849; 20 Cyc. pages 381-4.

Were it not for the presumption of an intention to make a gift by way of an advancement, which ordinarily arises where property belonging to a husband is without consideration transferred to or placed in the name of a wife, proof of the absence of consideration would establish a resulting trust in favour of the plaintiff. The presumption of advancement is, however, readily rebuttable, the sole question being the intent with which the transaction took place (*Marshall v. Crutwell*, L. R. 20 Eq. (Eng.) 328; *In re Young*, 28 Ch. D. (Eng.) 705), and but for the objection to its admissibility, based on section 7 of the Statute of Frauds, the evidence of the

understanding of both husband and wife that the latter should hold as trustee for the former would clearly establish such a trust. That objection cannot prevail, for equity deems it a fraud on the part of a trustee to attempt to withhold trust property from his *cestui que trust* for his own benefit, and will not permit the statute to be made the instrument for committing such a fraud. *McCormick v. Grogan*, L. R. 4 H. L. (Eng.) 82, at p. 97 per Lord Westbury; *Roche-foucauld v. Boustead* [1897] 1 Ch. (Eng.) 196; *In re Marlborough*; *Davis v. Whitehead* [1894] 2 Ch. (Eng.) 133; *Haigh v. Kaye*, 7 Ch. App. (Eng.) 469; *Davies v. Otty*, 35 Beav. (Eng.) 208.

I am for these reasons of the opinion that the appeal fails and should be dismissed with costs.

[640] BRODEUR, J.—The main point to be decided in this case is whether the property in question having been transferred to the appellant for a fraudulent purpose, the respondent could recover that property.

The plaintiff and the defendant are husband and wife.

The husband was very heavily indebted. He owned a homestead for which he had agreed to pay a little over \$1,000, and which according to the laws of Alberta was exempt from seizure to the extent of \$1,500.

In order to prevent his creditors from seizing that homestead and in order to defeat them the husband (the plaintiff respondent) had that property conveyed to his wife, the appellant.

The husband seeks to recover the property and claims that the wife was holding it as trustee for him.

In order to enable him to recover he had to give evidence of the fraudulent scheme: otherwise the wife would have been presumed to have received an advancement. They both admit that the transfer was made for the purpose of defeating creditors. So the presumption of advancement was successfully rebutted provided it involves no other illegality.

But the Statute of Frauds is pleaded by the wife who claims that the husband will have to adduce written evidence of the alleged trust.

The Statute of Frauds was not made to cover fraud; it does not prevent the proof of a fraud.

It is a fraud on the part of a person to whom land is conveyed as trustee to deny the trust and claim the land herself. It is competent to prove by parol evidence that the property was conveyed upon trust for the plaintiff and that the wife is denying the [641] trust and relying upon the form of conveyance in order to keep the land herself. *Roche-foucauld v. Boustead* [1897] 1 Ch. (Eng.) 206.

The question then is whether the plaintiff can invoke his own fraudulent intent to recover the property from his wife.

In general principle fraud vitiates all contracts. The courts never assist a person who has placed his property in the name of another to defraud his creditors, and some decisions go so far as to state that it is of no consequence whether any creditor has been actually defeated or delayed.

Mundell v. Tinkis, 6 Ont. 625; *Rosenburgher v. Thomas*, in 1852, 3 Grant Ch. (U. C.) 635; *Kearley v. Thomson*, in 1890, 24 Q. B. D. (Eng.) 742.

In the case of a trust the same principle applies and the settlor is prevented from recovering the estate if the trust has been created for a fraudulent purpose. *Lewin on Trusts* (12 ed.) p. 120.

But the trial judge relying on the case of *Symes v. Hughes*, L. R. 9 Eq. (Eng.) 475, says that, where the purpose is not carried into execution, the mere intention to effect an illegal object does not deprive the assignor from recovering the property from the assignee and he says also that it was not necessary, in the present case, for the husband to have the property conveyed to his wife at the time in order to protect the lands in question against his creditors because they were exempt from seizure.

By the exemption ordinance, which I have already mentioned, the homestead was exempt from seizure if [642] it did not exceed in value \$1,500. We have no positive evidence as to the value of the property at the time it was conveyed to the wife; but we have the evidence that, a short time after, the property was sold for a much larger price. The intent of the husband, then, was to defeat the creditors when the property would become of a value sufficient to become liable to seizure.

Cases of the same kind with regard to homesteads have been decided in the United States. I find a case of *Kettleschlag v. Ferrick*, 12 S. D. 455, 81 N. W. 889, 76 Am. St. Rep. 623, where it was held that a transfer of the homestead from husband to wife without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims *in case the debtor should remove therefrom is fraudulent as to creditors*.

Similar decisions have been rendered in Texas: *Taylor v. Ferguson*, 26 S. W. 46; *Baines v. Baker*, 60 Tex. 139.

We have also *Barker v. Dayton*, 28 Wis. 367, which was decided in the Wisconsin courts.

The plaintiff in having the homestead conveyed to his wife never ceased to be the real owner of the property. If the property had remained in his hands it could have been seized by his creditors for the payment of

his debts. During all the time his wife was in possession of that property, the creditors, if it was a homestead exceeding in value \$1,500, could claim the payment of their debt upon the property.

The courts should never help any person who has acted with a fraudulent intent, and the same rule should apply whether a transfer is made for the purpose of defeating subsequent creditors or when it is [643] made with the purpose of defeating existing creditors who may exercise their right upon the increased value of the property.

For these reasons I am of opinion that the plaintiff cannot recover the property from his wife and that his action should have been dismissed.

The appeal is allowed with costs.

Appeal allowed with costs.

NOTE.

The reported case holds that where a husband, for the purpose of defrauding his creditors, purchases property in the name of his wife, equity will not aid him by declaring that she holds it subject to a resulting trust in his favor. Whether a resulting trust arises from a purchase by a husband in the name of his wife is discussed, with special reference to the effect of a design to defraud creditors, in the note to *Ferguson v. Booth*, Ann. Cas. 1915C 1079. As to whether equity will aid a grantor to recover property conveyed in fraud of creditors, see the note to *Jayne v. Jayne*, Ann. Cas. 1913E 540.

MARNEY

v.

JOSEPH.

Kansas Supreme Court—January 9, 1915.

94 Kan. 18; 145 Pac. 322.

Pleading — Demurrer — Carrying Back to Earlier Pleading.

A demurrer to an answer may be carried back to a petition and the sufficiency of the petition tested upon that challenge, although a previous demurrer to the petition had been considered and overruled.

Same.

Upon a demurrer to an answer which is carried back to a petition the plaintiff will not be deemed to have admitted allegations in the answer which are inconsistent with and contradictory of those included in his petition.

Ann. Cas. 1917B.—15.

Libel and Slander — Privilege — Statement by Guardian in Interest of Estate.

False statements made by a guardian of an insane ward to relatives of his ward, imputing dishonesty and crime to another who is making a claim against the ward and his estate, are not within the rule of absolute privilege.

[See note at end of this case.]

Same.

Neither will the false statements above referred to be conditionally privileged if they were not written or spoken in good faith in the performance of the guardian's duty and without a malicious purpose, nor if the statements include libelous matter not pertinent to the subject within the privilege of the guardian to write and publish.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Butler county: ATRES, Judge.

Action by Mattie Marney, plaintiff, against J. D. Joseph, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

C. L. Aikman for appellant.

W. H. Von der Heiden, A. E. Morgan, George J. Benson and T. A. Kramer for appellee.

[18] JOHNSTON, C. J.—Mattie Marney brought this action against J. D. Joseph to recover damages resulting from an alleged libel. In her petition she set forth a number of written statements made and published by the defendant imputing misconduct, fraud and crime [19] the defendant then answered, admitting the writing to her. A demurrer to the petition was overruled, and publication of the alleged libels and averring that his statements were true. He also alleged that the statements were written in good faith and were such as are privileged under the law. Plaintiff demurred to the answer, claiming that it failed to state a defense, and upon this demurrer the court determined that it should be carried back to the petition, and upon a reconsideration of the averments of the petition decided that a cause of action against the defendant was not alleged and accordingly gave judgment for defendant.

The fact that the court had previously overruled the demurrer to plaintiff's petition did not preclude a re-examination of its averments upon the demurrer to defendant's answer. It was competent for the court to carry the demurrer back to the petition, thus searching the entire record, and to decide whether or not the averments of the petition, supplemented as they may have been by ad-

missions recited in the answer, stated a cause of action. There is a contention that plaintiff by her demurrer to the answer admitted the averments contained in it to be true, and that these admissions should be held to qualify the averments of the petition, and that so regarded the petition failed to state a cause of action. Ordinarily a demurrer admits the facts stated in the pleading to which it is addressed, and while it is true that the sufficiency of the petition may be tested on a demurrer to an answer and that in testing it any defects in the petition may be regarded as cured by admissions made in the answer (*Sill v. Sill*, 31 Kan. 248, 1 Pac. 556), yet on such consideration the averments of the petition cannot be regarded to be overturned and destroyed by inconsistent and contradictory averments in the answer. The demurrer does not admit allegations of the answer which are contradictory to the averments in the petition. (6 Standard Proc. 952.) In passing upon the sufficiency [20] of the petition the court could not regard the averments in the answer which were wholly antagonistic to those of the petition, to the effect that the charges of misconduct and crime made against plaintiff were true, nor that any other of the averments in the answer which were inconsistent with or contradictory to the allegations of the petition were admitted.

We still have the question whether a cause of action is stated in the petition. The contention of the defendant is that the defamatory communications, about the writing and publication of which there is no dispute, are privileged. As the statements imputed to the plaintiff were those which rendered her liable to punishment and were calculated to make her odious and infamous, they were deemed to be actionable and malicious, unless they come within the exception of privileged communications. This exception includes what are termed absolute and qualified privileges. It is first contended that the defamatory statements in question belong in the class called absolute privilege. This privilege is founded on public policy and provides immunity for those engaged in the public service and in the enactment and administration of law. It is not intended so much for the protection of those engaged in that service as it is for the promotion of the public welfare, the purpose being that members of the legislature, judges of courts, jurors, lawyers and witnesses may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for recovery of damages. The statements in question, as we have seen, were not made in any judicial proceeding nor did the occasion bring them within the rule of absolute privi-

lege. (*Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 40 Am. Rep. 316; *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L.R.A. 236; *Coleman v. MacLennan*, 78 Kan. 711, 130 Am. St. Rep. 390, 98 Pac. 281, 20 L.R.A. (N.S.) 361; Note, 5 L.R.A. (N.S.) 163.) True, the defendant was a guardian of the insane man and his duty required him to protect the [21] estate of his ward, but it did not require him to write and publish charges of misconduct, immorality and crime against those who claimed an interest in the estate of his ward nor those who contemplated the presentation of a claim against it. His statements, as will be observed, were not made to the probate or any other court in any judicial proceeding, but were voluntarily written to relatives of his ward, and some of the statements could not have had any relevancy to any duty owed to the ward. Even if the defamatory statements had been made in a pleading or proceeding in court, they must have been pertinent to the subject of inquiry in order to come within the rule of absolute privilege. (*Townsend on Slander and Libel*, 4th ed. § 222; *Newell, Slander and Libel*, 3d ed. §§ 518, 519.)

It is next contended that the communications come within the class of qualified or conditional privilege. Where a confidential relationship exists between parties so as to put upon one making the communication the duty of protecting the interests of others, and a statement containing no impertinent or unnecessary libelous matter is made in good faith and in the belief that it comes within the discharge of his duty, it may be within the rule of qualified or conditional privilege. In such a case the protection of privilege is not extended to defamatory statements made with bad intent. A confidential relation cannot be used by a party to give expression to his personal spite or ill will, nor can he use the occasion as a cloak to indulge in a malicious publication of an unfounded charge of dishonesty and crime. If he publishes the statement not in the *bona fide* performance of a duty but in furtherance of a malignant design, the conditional privilege is destroyed. (*Kirkpatrick v. Eagle Lodge No. 32*, supra; *Redgate v. Roush*, supra; *Coleman v. MacLennan*, supra; *Richardson v. Gunby*, 88 Kan. 47, 127 Pac. 533, 42 L.R.A. (N.S.) 520; *Newell, Slander and Libel*, 3d ed. § 568 et seq.) In the plaintiff's petition it is expressly [22] alleged that the defamatory statements were not written or published in good faith, but that in writing and publishing them the defendant was actuated by a malicious purpose, and hence it must be held that the petition did state a good cause of action against the defendant. While it will devolve upon the plaintiff to prove the malice alleged in order

to overcome the privilege claimed, still the questions of the good faith of defendant in an effort to perform a duty owed by him to the family of his ward, his belief in the truth of the defamatory statements, and whether they were made with actual malice, are all for the determination of a jury upon the proof that may be produced. (*Richardson v. Gunby*, supra.)

The ruling of the court in sustaining the demurrer to plaintiff's petition cannot be upheld, and hence its judgment will be reversed and the cause remanded for further proceedings.

NOTE.

Statement by Fiduciary with Respect to Subject-matter of Trust as Privileged within Law of Libel and Slander.

In the reported case the court says that while a guardian of an insane person is required to protect the estate of his ward no requirement is placed on him to write and publish charges of misconduct, immorality and crime against anyone who may claim an interest in the estate. False statements of such kind do not come within the rule of absolute privilege and when written and published in bad faith and for a malicious purpose are not conditionally privileged. In *Rielle v. Benning*, 4 Montreal Super. Ct. 219, 11 Montreal L. N. 415, it was held that executors were personally liable for libels published by them in that capacity.

But in *Kemper v. Fort*, 219 Pa. St. 85, 12 Ann. Cas. 1022, 67 Atl. 991, 123 Am. St. Rep. 623, 13 L.R.A. (N.S.) 820, it was held that an action for libel for matter set up in an answer to a petition for a review of their accounts could not be maintained against executors of an estate, the privilege invoked being apparently that which attaches to proceedings in court. In that case it appeared that a guardian filed a petition for a review of the accounts of the executors and to set aside a sale by them. The executors having received information that the ward was illegitimate and hence without interest in the estate so alleged in their answer. Affirming a judgment on a verdict directed for the defendants the court said: "In the present case the averment of illegitimacy was clearly pertinent. The testator, Thomas W. Price, directed that upon the death of his daughter the income for awhile, and ultimately the principal, should go to her 'issue,' to her 'children.' That under the common law these words mean legitimate issue and children cannot be questioned, and the testator is presumed to have so used them: . . . The averments of

illegitimacy would not be pertinent if the question was as to the right of Jesse C. Claggett to take or inherit from his mother, for under the Act of 1855 illegitimates take from their mothers; but appellant's children will take nothing from her under the will of her father. They take under it directly from him and, when he designated the issue or children of his daughter as his legatees, he must be understood as having meant legitimate issue or children. When notified by Thomas Claggett that the right of Jesse C. Claggett to participate in the estate of the father of the appellant was questioned, the appellee properly questioned it in the answers filed. The assignments of error are all overruled and the judgment is affirmed."

STATE

v.

PECK.

IN RE PECK.

Connecticut Supreme Court of Errors—July 13, 1914.

88 Conn. 447; 91 Atl. 274.

Attorneys — Disbarment — Misconduct of Judge.

Misconduct on the part of an attorney, who was judge of the probate court, in the course of the settlement of an estate of a deceased person in such court, justifies his disbarment, since it directly involves a misuse of his professional privilege and is misconduct as a member of the bar, and moreover any misconduct, professional or nonprofessional, disclosing a moral unfitness for the enjoyment of the professional privilege, justifies disbarment.

[See note at end of this case.]

Same.

That an attorney sought to be disbarred is judge of the probate court does not prevent his disbarment, since the judge of the probate court need not be an attorney, and his disbarment can have no effect upon his official status.

[See note at end of this case.]

Disbarment Proceedings — Sufficiency of Complaint.

The sufficiency of the complaint in a proceeding to disbar an attorney must be determined upon an examination of the complaint as a whole.

Nature of Disbarment Proceedings.

A disbarment proceeding is not a criminal prosecution, nor is it a civil action, though

section 11 of the rules regulating the admission, suspension, and displacement of attorneys requires complaints for misconduct to be proceeded with as civil actions, and the complaint need not have the same technical precision of statement or conformity to recognized formalities required in criminal prosecutions or civil actions; it being sufficient if it is sufficiently intelligible and informing to advise the court of the matter complained of in order that it may determine whether it shall institute an inquiry and properly conduct it if instituted, and to advise the attorney of the accusation in order that he may be prepared to meet the charges.

Ground for Disbarment — Misconduct as Judge.

Where an attorney who was judge of the probate court procured the payment of \$750 to him from the assets of an estate as compensation for pretended services as an attorney on behalf of the estate which were never rendered, and exerted his authority as such judge to secure such payment, resorted to deception and concealment in his efforts to secure such payment, and made use in his official position of threats calculated to produce the end desired, for the purpose of coercing payment, he is properly suspended indefinitely from practicing law.

[See note at end of this case.]

Disbarment Proceedings — Right of State's Attorney to Institute.

Acts 1907, c. 120, authorizing the appointment of a grievance committee in each county whose duty it shall be to inquire into and present to the court offenses involving the character, professional standing, etc., of members of the bar, does not provide an exclusive mode of instituting such inquiries, and does not restrict the inherent power of the court to inquire into the conduct of its own officers on its own motion or on the complaint of any party, and hence the state's attorney can present a complaint against an attorney as authorized by section 10 of the rules of court.

[See 2 R. C. L. tit. *Attorneys at Law*, p. 1105.]

Same.

The state's attorney is not disqualified to present a complaint of professional misconduct against an attorney by reason of his bitter enmity to the accused attorney or his prejudice against him, since he does not appear as a prosecuting officer and has no power to control the proceeding, and his only duty is to call the attention of the court to the alleged misconduct; the duty thereafter resting upon the court to see that the interests of justice are preserved and the rights of the accused attorney protected.

Findings in Disbarment Proceeding — Facts Outside of Charges.

It is immaterial in a disbarment proceeding that the court found facts outside of the charges contained in the complaint, where its judgment was not based upon such findings, but upon matters alleged in the com-

plaint and unquestionably sufficient to support the judgment.

Discretion of Court — Determining Fitness of Accused to Practice.

The question for determination in a disbarment proceeding is whether the defendant by reason of his past conduct evidencing his qualities of character and uprightness was a fit person to exercise longer the functions of an attorney, and in determining this question a large measure of judicial discretion was to be exercised reasonably, fairly, and dispassionately.

Rights of Accused.

An attorney accused of professional misconduct is entitled to notice of the charge against him, an opportunity to be heard, a fair and dispassionate investigation, and a reasonable exercise of the judicial discretion.

Appeal from Superior Court, Fairfield county: BENNETT, Judge.

Complaint by State of Connecticut, plaintiff, against Charles H. Peck, defendant, for misconduct as attorney. From judgment rendered, defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Robert E. DeForest for appellant.

J. Moss Ives for appellee.

[449] PRENTICE, C. J.—The acts, which in the complaint are charged as misconduct calling for the respondent's disbarment, and for which, as appears by the judgment-file, he was disbarred, were all done by him in the course of the settlement of an estate of a deceased person in the Court of Probate over which he presided. The misconduct alleged, and made the basis of the judgment, [450] was misconduct connected with the performance of his judicial office. The claim made upon demurrer to the complaint, and renewed at the hearing, that such misconduct was not misconduct as a member of the bar, and, therefore, not of a kind to justify discipline as such member, is, for a double reason, wholly without foundation. In the first place it did directly involve a misuse of the professional privilege. In the second it disclosed a moral unfitness for the enjoyment of that privilege, and it matters not whether the disclosure came through professional channels or not.

An attorney at law admitted to practice, and in the exercise of the right thus conferred to act as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exer-

cise it, so that when he, by misconduct in any capacity, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. As important as it is that an attorney be competent to deal with the oftentimes intricate matters which may be entrusted to him, it is infinitely more so that he be upright and trustworthy. Unfortunately it is not easy to limit membership in the profession to those who satisfy the standard test of fitness. But scant progress in that direction can be hoped for if, in the determination of the qualification of professional fitness, nonprofessional dishonor and dishonesty in whatever path of life is to be ignored. Professional honesty and honor are not to be expected as the accompaniment of dishonesty and dishonor in [451] other relations. So it is that we, in common with other courts, hold, as did Lord Mansfield more than a century ago, that misconduct, indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismissal as well as exclusion from the bar. *In re Durant*, 80 Conn. 140, 147, 87 Atl. 497; *Fairfield County Bar v. Taylor*, 60 Conn. 11, 17, 22 Atl. 441, 13 L.R.A. 767; *Ex p. Brounsall*, 2 Cowp. (Eng.) 829; *Boston Bar Assoc. v. Greenwood*, 168 Mass. 169, 183, 46 N. E. 568; *Sanborn v. Kimball*, 64 Me. 140, 148; *In re Delano*, 58 N. H. 5, 42 Am. Rep. 555; *In re Percy*, 36 N. Y. 651, 654.

The demurrer suggests in this connection that disbarment proceedings so far partake of the character of official impeachment that they are not to be permitted in the case of a judicial officer. This objection is not well taken. Since a judge of probate need not be an attorney, his disbarment can have no effect upon his official status. The courts cannot be held responsible for the character of elective officers, but they can and ought to be for the fitness of those who enjoy the privileges of the legal profession under their authority and sanction.

The demurrer asserts, further, that the complaint addressed to the court fails to set out misconduct, either professional or judicial, on the part of the accused. This general charge is elaborated by reference to specified disassociated allegations, of each of which it is said that it does not charge misconduct. The complaint, however, is to be looked at as a whole, and the question of sufficiency attempted to be presented by the demurrer must be determined upon the result of such an examination. The demurrer, and counsel's argument in support of it, proceed upon the assumption, or rather assertion, that the same tests are to be applied

to a charge of misconduct on the part of an attorney, addressed to a court for investigation and appropriate [452] action, as to a complaint in a civil suit between parties.

This assumption mistakes the true character of a complaint of the former sort. It has been contended in other jurisdictions that disbarment proceedings partake of the nature of criminal prosecutions, and, accordingly, require an observance in the preparation of complaints of the formalities and technicalities prevailing in such procedure. This contention, however, has not met with other than occasional approval by the courts. The most have been made emphatic and sound reply that the proceeding was in no sense criminal, but one undertaken "for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them." *Ex p. Wall*, 107 U. S. 265, 288, 2 Sup. Ct. 569, 27 U. S. (L. ed.) 552; *Sanborn v. Kimball*, 64 Me. 140, 147; *Easton Bar Assoc. v. Greenwood*, 168 Mass. 169, 183, 46 N. E. 568; *In re Bowman*, 7 Mo. App. 569.

Neither are they civil actions. A civil action is one between parties. Here, an attorney is called to answer to the court of his appointment for his conduct as an officer of that court. The inquiry is directed solely to his continued fitness. There is no plaintiff. The State is not a party, as would appear by the title mistakenly given upon the record, to these proceedings. No person is a plaintiff. There may be, indeed, as in this case there is, one who has called the court's attention to alleged misconduct, but he is in no sense a party, and has no interest in the outcome save as all good citizens or worthy members of the bar may have. The complaint made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require. It may even act upon its own motion without complaint, and thus be the initiator of proceedings. "It [the hearing] was an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit." *Fairfield County Bar [453] v. Taylor*, 60 Conn. 11, 15, 22 Atl. 441, 13 L.R.A. 767. "The proceeding to disbar an attorney is neither a civil action nor a criminal proceeding, but is a proceeding *sui generis*, the object of which is not the punishment of the offender, but the protection of the court." *In re Bowman*, 7 Mo. App. 569.

Section 11 of our rules regulating the admission, suspension and displacement of attorneys, indeed provides that complaints for misconduct shall be proceeded with as civil actions, but this does not either make the proceeding a civil action, or necessitate that the complaint be marked by the same pre-

cision of statement, or conformity to the recognized formalities or technicalities of pleading, which are expected in complaints in civil actions. The one supreme requisite is that it be sufficiently intelligible and informing to advise the court of the matter complained of, and the attorney of the accusation or accusations made against him, to the end that the former may determine whether or not it shall institute an inquiry, and, if one is ordered, properly conduct it, and that the latter may prepare to meet the charges against him, if inquiry shall be made. If this condition is satisfied, so that the accused is fully and fairly apprised of the charge or charges made, the complaint is sufficient to give him an opportunity to be fully and fairly heard, and therefore to entitle the court to entertain it, and proceed thereon to an investigation.

In *Randall v. Brigham*, 7 Wall. 523, 530, 19 U. S. (L. ed.) 285, where the foundation of the proceeding was nothing more formal than a letter, the court used this language: "The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transactions to which the letter referred. The informality of the notice, or of the complaint by [454] the letter, did not touch the question of jurisdiction." "No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding." In *re Randall*, 11 Allen (Mass.) 473, 479; In *re Bowman*, 7 Mo. App. 569; *Sanborn v. Kimball*, 64 Me. 140, 147. "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defence." *Ex p. Wall*, 107 U. S. 265, 272, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

Turning now to the complaint, we find that it is confined to a simple narrative of alleged facts and occurrences touching the accused's conduct in the course of the settlement in his court of the estate of a deceased person. There is no such distinct and precise specification and characterization of acts of misconduct as would be incorporated into a criminal indictment, or even a well-drafted civil complaint. But the charges of misconduct are there. They are untakably involved in the narrative, and could scarcely be made more apparent by a more scientific pleading. The accused could not have failed to appreciate the charges involved, and be thereby supplied with all the information requisite for adequate preparation for the court's inquiry. That he was

not misled or inadequately informed is apparent from an examination of the quite voluminous transcript of the evidence presented upon the hearing, which is before us in the record.

The story told in the complaint embodies the charge that the accused was guilty of misconduct, in that he obtained from the assets of the estate the payment to himself of \$750 as compensation for pretended services rendered by him as an attorney on behalf of the estate, but never in fact rendered; that he exerted his influence [455] and authority, as the presiding judge of the court having jurisdiction of the settlement of the estate, to secure such payment; that in his efforts to secure it he resorted to deception, misrepresentation and concealment, and that in those efforts he made use, in his official position, of threats calculated to produce the end desired for the purpose of coercing and compelling the payment and consent thereto on the part of the persons in interest.

These charges certainly are of misconduct unfitting one to continue to exercise the functions of an attorney, and they are all apparent upon the face of the complaint. The court did not err in accepting it as embodying charges deserving of investigation, or in calling upon the accused to answer to them. Inartificial as the complaint may be, it is no pointless story that it tells. The following language, used by the court in *In re Lowenthal*, 78 Cal. 427, 429, 21 Pac. 7, under somewhat similar conditions, is quite appropriate to it, and for the most part might well be borrowed by us in commenting upon it: "We must say that the accusation is not a model pleading in this respect. The facts stated, as we have said, are set out in narrative form, without any allegations connecting them with one or the other of the general charges of misconduct, and are unnecessarily long, but we think they are such as to show misconduct on the part of the respondent, as an attorney of this court, sufficient to put him upon his trial."

Before filing his demurrer to the complaint, counsel for the accused pleaded in abatement for two reasons, to wit: (1) that the proceedings were improperly begun by a presentment by a State's Attorney, and (2) that the State's Attorney, who began them by the presentation of the complaint, acted in the premises without legal right or authority, by reason of his bitter enmity to the accused and his bias and prejudice against him, [456] rendering him incapable of fair and impartial action as an inquiring and complaining officer.

The first of these reasons rests upon the provisions of chapter 120 of the Public Acts of 1907, p. 673, wherein the appointment of

a grievance committee in each county is provided for, their duties defined, and certain powers conferred upon them. Among the duties enumerated in the first section is that of presentment to the court for offenses by attorneys not occurring in its presence. Section 10 of the rules of court (Practice Book, 1908, p. 206), subsequently passed under authority of § 458 of the General Statutes and chapter 256 of the Special Laws of 1907 (15 Special Laws, p. 220), provides that presentment may be made by the grievance committee or the State's Attorney or any member of the bar by direction of the court. The respondent's contention is that the provisions of the public act are controlling and exclusive, so that complaint can now be made by grievance committees only.

The effect of the adoption of the rule after the enactment of the statute aside, it is apparent that the statute did not intend to provide an exclusive mode of instituting inquiries into the conduct of attorneys. The manifest purpose of the statute was to equip grievance committees with powers adequate for the effective performance of their duties. These committees, already existing under judicial authority, were given statutory recognition, and powers adequate to the performance of the duties assigned them were conferred upon them. But there the Act stopped. Neither by expression or by implication does it contain a restriction of the right of complaint to these committees, or a prohibition to the courts of the right to entertain complaints not thus presented. Such an apparent invasion of the power inherent in courts to supervise the conduct of [457] their own officers is not to be presumed, and the provisions of the statute give no countenance to the existence of a legislative intention to that end. See *Grievance v. Ennis*, 84 Conn. 594, 603, 80 Atl. 767.

But that particular consideration aside, it is quite apparent that neither the statute nor the rule, save as the latter comprehends most, if not all, practicable methods of procedure, undertakes to frame exclusive provisions. Each provides methods of procedure, but neither exclusive methods. The courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice. They may of their own initiative, and without complaint, set on foot inquiries as to professional conduct and fitness, or they may, in their discretion, entertain a complaint received from any source within or without the profession. Statute and rule provide orderly methods of procedure possessing the advantage of uniformity, thoroughness, and the promise of efficiency. But the power of the courts is left unfettered to act as situations, as they

may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership. Such statutes as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct. *Boston Bar Assoc. v. Greenhood*, 168 Mass. 169, 183, 46 N. E. 568.

The second ground of abatement finds its justification in the qualification of impartiality required of grand jurors in the performance of their duties in presenting for criminal prosecution. The argument is that the same qualification is, under our system, required of a State's Attorney in the filing of informations by him, and further, by assumption rather than assertion, that it attaches to a State's Attorney's action when [458] he undertakes to act under the provision in our rules which names him as one who may present to the court complaint of misconduct on the part of the attorney.

It is unnecessary to follow the course of this argument, or to examine its premises. It is enough for present purposes to observe that proceedings looking to inquiry into the conduct of an attorney are in no sense, as we have already had occasion to notice, criminal prosecutions; that the State's Attorney, if he acts, does not appear as a prosecuting officer, and that his only duty in such case is to do what others might in calling the attention of the court to alleged misconduct on the part of one of its officers, and thereafter to conform to the behests of the court, in whose hands the proceeding rests. The duty which he performs, from first to last, is one which he owes as a member of the bar and an officer of the court, to whose orders in the premises he is subject, and not as a criminal prosecutor. He has no power to direct or control the proceeding. The complaint being made, the duty rests upon the court to see that the interests of justice are preserved and the rights of an accused attorney protected, and when that duty is performed, as it was in this case by the transfer of the management of the proceeding and the conduct of the hearing to confessedly impartial hands, the accused can have no just cause for complaint.

Beyond question the facts found, as a result of the court's inquiry, furnish ample justification for the order of disbarment. It is, however, asserted on behalf of the respondent, that some of these facts lie outside of the charges contained in the complaint. It is true that two features of the finding, involving serious matters of misconduct and possibly others of less importance, are not touched upon in the complaint. One of these, the most serious of all, could not be, since it related to the presentation

upon the hearing of written testimony [459] falsified by the accused. But no one of these matters is made the basis of the judgment. Whether the one referred to as the most serious might not have been made a cause of disbarment, as having occurred in the presence of the court, we need not inquire. It is enough that it was not. The matters which in a sense lay outside of the field of the charges of the complaint, are related in the finding as incidental to its story and as having a bearing upon the charges made and the conclusions reached with respect to them; but the misconduct, for which judgment of disbarment was entered, as appears by the memorandum of decision, the judgment-file, and the finding, is limited to matters clearly within the complaint. The judgment-file, following the memorandum of decision, beyond finding the allegations of the complaint true, confines its finding of misconduct to three particulars: (1) that the respondent, "as an attorney, deliberately planned to obtain possession of, from an estate before him as judge of probate, a fee for services as attorney which he had not rendered, and to which he was in no manner entitled;" (2) that "he did collect and receive from said estate such fee as attorney, knowing that he was obtaining and receiving it without right and with intent to deprive the owners of the sum so received;" and (3) that he, "in order to retain to himself as attorney the sum so obtained, did, by threats to make use of his power as judge of probate to deprive the heirs of the testatrix of the immediate possession of the estate, extort from them, against their will, a waiver of objection to the allowance by him as judge of the fee received by him as attorney."

These matters were all within the complaint, and it cannot reasonably be contended that they do not amount to misconduct justifying the judgment. An examination of this statement of misconduct, furnishing the basis for the judgment, clearly shows that the court [460] understood its duty, and was careful to recognize the limitations which the complaint imposed upon it. This is further shown by its distinct ruling in favor of the respondent's claim of law, that it "could not legally find, consider or regard as a basis of judgment against the defendant in this case any operative fact not directly and positively alleged in the information." The story told in the finding furnishes more incidental details than does that in the complaint, and it is more precise in its statement of ultimate conclusions, and more direct in its characterization of wrongdoing; but it is, after all, the same story in essence, and leads to the establishment of the same operative facts in so far as they influenced the judgment.

It is further contended that the finding of the court, in its significant details and ultimate conclusions of misconduct, is not supported by the evidence, and should be corrected; and the evidence is before us to secure such correction. If it be assumed that our jurisdiction in proceedings of this character extends to the point of reviewing the conclusions of the investigating court upon matters of fact, as in civil actions, it nevertheless appears to us, upon an examination of the transcript of testimony, that the evidence is such that the court could not well have arrived at other conclusions than those upon which its judgment was based. See *In re Durant*, 80 Conn. 140, 149, 10 Ann. Cas. 539, 67 Atl. 497.

The question for the court's determination was whether the respondent, by reason of his past conduct evidencing his qualities of character and uprightness, was a fit person to be longer allowed to exercise the functions of an attorney and to act as an officer of the court in the administration of justice. *Fairfield County Bar v. Taylor*, 60 Conn. 11, 16, 22 Atl. 441, 13 L.R.A. 767. Into the determination of this question there entered a large measure of judicial discretion, to be exercised not arbitrarily, [461] impulsively, or under the influence of hatred or prejudice, but reasonably, fairly and dispassionately. The accused attorney was entitled to notice of the charge against him and opportunity to be heard, to a fair and dispassionate investigation, and to a reasonable exercise of the judicial discretion. In *re Durant*, 80 Conn. 140, 148, 150, 10 Ann. Cas. 539, 67 Atl. 497. We fail to discover wherein he has not been accorded all these rights.

There is no error.

In this opinion the other judges concurred.

NOTE.

Misconduct in Official or Fiduciary Capacity Other than That of Attorney as Ground for Suspension or Disbarment.

Misconduct as Judicial Officer, 232.

Misconduct as State or Prosecuting Attorney, 234.

Misconduct as Ministerial Officer, 236.

Misconduct in Fiduciary Capacity, 236.

Misconduct as Judicial Officer.

The rule that seems to obtain in the greater number of jurisdictions is that an attorney holding a judicial office may be disbarred for misconduct in his judicial capacity. In *re Breen*, 30 Nev. 164, 93 Pac.

997, 17 L.R.A.(N.S.) 572; In re Hobb, 75 N. H. 285, 73 Atl. 303. See also *Matter of Davis*, 15 Hawaii 377. And see the reported case. *Compare State v. Martin*, 45 Wash. 76, 87 Pac. 1054. Thus an attorney has been suspended for observations and intimations reflecting on the honor, integrity and dignity of the supreme court made while acting as a district judge. *Re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572. And in the case of *In re Hobb*, 75 N. H. 285, 73 Atl. 303, wherein it appeared that an attorney acting in his capacity as a justice of the peace conducted the judicial duties of his office in such a manner as to indicate a wilful disregard of the ordinary mode of procedure in criminal cases and grossly neglected to account for fines imposed by him on offenders, it was held that he should be suspended. In the *Matter of Davis*, 15 Hawaii 377, it was held that the fact that an attorney was a district magistrate at the time an order of disbarment was made, did not constitute a defense to any of the charges made against him or limit the authority or duty of the court in passing on his conduct as an attorney. In *State v. Martin*, 45 Wash. 76, 87 Pac. 1054, it seems to have been conceded by the parties that the act of a person as judge could not be examined in a proceeding for his disbarment, but it was held that where the misconduct charged not only involved his conduct as a judge but also involved him as a man, it was sufficient to sustain a judgment of suspension. The court said: "Such a conception of the moral responsibilities and proprieties, and such a manifestation attending the conduct of a lawyer when acting as judge cannot well be divorced from the man himself, when his character and acts as a lawyer are under investigation."

In the case of *In re Condon*, 166 Ia. 265, 147 N. W. 769, it was held that irregularity in omitting to itemize the costs in a justice's entry did not justify the institution of proceedings against him for his disbarment as an attorney.

In *People v. Phipps*, 261 Ill. 576, 104 N. E. 144, it appeared that an attorney had about ten years before converted to his personal use money in his hands as a master in chancery. It was held that this was not sufficient to justify his disbarment, but that it would be considered in connection with other and later professional misconduct. The court also said that if the matter had been brought to its attention at the time, a disbarment would have been inevitable.

It has been held that a judge who is guilty of misconduct or malfeasance in office cannot on that account be proceeded against by disbarment proceedings, the proper remedy being impeachment. *People v. Goddard*,

11 Colo. 259, 18 Pac. 338. See also *Baird v. Justices' Ct.* 11 Cal. App. 439, 105 Pac. 259; *Matter of Silkman*, 88 App. Div. 102, 84 N. Y. S. 1025. *Compare Matter of Dellenbaugh*, 9 Ohio Cir. Dec. 325, 380, 17 Ohio Cir. Ct. 106, 302. Thus in *People v. Goddard*, supra, it appeared that an attorney while a candidate for judge made a written promise to appoint another as clerk of court in the event of his election. The agreement was deposited with a third person, who was, however, instructed to receive no money from the promisee. Subsequently the attorney on the advice of friends accepted a sum of money from the promisee but after the election the money was returned. The promisee was not appointed as clerk, but the agreement between him and the attorney was compromised. It was held that the conduct of the attorney did not warrant his disbarment, the appropriate remedy for his misconduct being impeachment. In the *Matter of Dellenbaugh*, 9 Ohio Cir. Dec. 380, 17 Ohio Cir. Ct. 302, the rule that an attorney cannot be disbarred for offenses committed in his character and capacity as a judge was recognized. But in that case it appeared that while on the bench a judge had corruptly heard a case and after leaving the bench falsely represented that he had granted a decree in order to have it entered of record and it was held that he should be disbarred as an attorney.

It has been held that where one occupying a judicial position engages in the practice of law in violation of a statute he cannot be disbarred or suspended on that account. *Baird v. Justice's Ct.* 11 Cal. App. 439, 105 Pac. 259; *Matter of Silkman*, 88 App. Div. 102, 84 N. Y. S. 1025. In the case first cited, the court said: "Section 287, Code of Civil Procedure, designates the courts having power to remove or suspend attorneys, and the causes for which such removal or suspension may be made. A justice of the peace is not a court which, under that section, has power to remove or suspend an attorney, and the practicing of law by one occupying a judicial position is not one of the causes for removal or suspension. If, as a matter of fact, French violated the law by thus engaging in the practice of his profession before a justice of the peace, when at the same time he was occupying a judicial position, his offense is that of a judicial officer and not that of an attorney (In re *Silkman*, 88 App. Div. 102, 84 N. Y. S. 1027); and if he subjected himself to any penalty by reason of misconduct, the punishment therefor is provided by section 758, Penal Code. As said in the case last cited: Courts which have inherent power to discipline lawyers are confined in its exercise to such acts exhibiting turpitude, or loss of that good character which was es-

sential to admission in the first instance, and when misconduct is made by statute ground for removal from office for transgression as a judicial officer, the same, in the absence of expressions to the contrary, must be deemed exclusive."

Misconduct as State or Prosecuting Attorney.

It is the prevailing rule that an attorney may be disbarred for misconduct in his capacity as a prosecuting or state's attorney. In re Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; People v. Anglim, 33 Colo. 40, 78 Pac. 687; In re Lyons, 162 Mo. App. 688, 145 S. W. 844; In re Simpson, 9 N. D. 379, 83 N. W. 541; In re Voss, 11 N. D. 540, 90 N. W. 15; In re Johnson, 27 S. D. 386, 131 N. W. 453; In re Norris, 60 Kan. 649, 57 Pac. 528; In re Jones, 70 Vt. 71, 39 Atl. 1087. Thus in the case of In re Norris, supra, it was held that the fact that some of the acts charged against an attorney in a proceeding for his disbarment were acts of official malfeasance committed in his capacity as county attorney was no defense. The court said: "He performed them as an attorney at law—as an official of the court as well as an officer of the county. While we have previously held that a county attorney need not be a duly admitted and licensed member of the bar (State v. Swan, 60 Kan. 461, 56 Pac. 750), yet, if he be such, he must, in representing the interests of his quasi-corporate client, be governed by those rules of professional conduct under which justice must needs be administered to public as well as to private litigants." And in the case of In re Voss, 11 N. D. 540, 90 N. W. 15, it was said: "It cannot be successfully maintained that criminal conduct on his part as state's attorney cannot be used as evidence to take from him the authority under which he practices law, and under which he exercises the functions of state's attorney, whereas a person may commit some offenses not connected with his duties as an attorney at law, when such offenses do not unfit him for the practice of his profession, and render him unworthy of the confidence of clients, and no ground exists for disbarment. In such cases the man and the attorney at law are deemed separate, and an act that may reflect seriously upon the character of the man will not be grounds for disbarment or suspension. But it is not true that corrupt conduct on the part of a state's attorney in his professional capacity will not constitute cause for disbarment or suspension as an attorney and counselor at law. Our conclusion is that the misconduct shown would justify disbarment."

The act of a prosecuting attorney in refusing improperly to prosecute offenders con-

stitutes a ground for his disbarment as an attorney. People v. Anglim, 33 Colo. 40, 78 Pac. 687; In re Simpson, 9 N. D. 379, 83 N. W. 541; In re Voss, 11 N. D. 540, 90 N. W. 15; State v. Hays, 64 W. Va. 45, 61 S. E. 355. In the case last cited, it was said: "The mere fact that he is liable to indictment for malfeasance in office, and to removal therefrom, does in no way affect the power and duty of the court to strike his name from the roll of attorneys for the same misconduct for which he could be, also, both indicted and removed. It is all the more reason why his name should be stricken from the roll that the misconduct which unfits him is a breach of fidelity to the public, whose welfare he is sworn to maintain. Is not such infidelity even worse than breach of trust to a single client? No one will deny the power and duty of a court to strike from the roll the name of one who fails to maintain fidelity to the personal trust of a single client's interest. How much more important is the duty to exercise this power when the infidelity or misconduct relates to an attorney charged, not only by the honor and oath of an attorney at the bar, but also by the dignity and oath of a public official, in an office calling for the exercise of highest qualities as an attorney! . . . Yet we are, by reason, compelled to say that defendant's duties as such public official in the main, and particularly in the instance for which he is accused, related to professional conduct as an attorney. It is impossible to say that what one does as prosecuting attorney is not done as an attorney. It is done in his professional relation to the people, as well as in his official relation. The office of prosecuting attorney is one of the exercise of the same professional attainments and fitness as pertain to a lawyer of private clientage only. As prosecuting attorney, he was acting in his character of an attorney nevertheless." In People v. Anglim, 33 Colo. 40, 78 Pac. 687, it appeared that certain gamblers and keepers of saloons had paid to a prosecuting attorney large sums of money to prevent prosecutions against them for violations of the law, and that he refused to prosecute a larceny case, unless the prosecuting witness would advance a large sum of money. It was held that his conduct was such as to require his name to be stricken from the roll of attorneys.

In the case of In re Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545, it appeared that an attorney while occupying the office of city and county attorney took appeals in several cases in which judgments had been rendered against the city and county. At the expiration of his term of office the appeals were still pending and several months later he accepted a sum of money from the attorney of the parties in favor

of whom the judgments had been rendered on the agreement that he would not accept any further employment from the city and county in relation to the cases. It was held that he should be suspended from acting as an attorney for a period of six months. But in the case of *In re Johnson*, 27 S. D. 386, 131 N. W. 453, it appeared that an action was brought to disbar an attorney who was also attorney general, for acting as an attorney in an action connected with a prosecution started by him. The court in holding that the facts of the case did not justify a disbarment said: "It will be observed that the accused admits the criminal proceedings in the circuit court resulting in the conviction of Frank Brandell and Fred Cline of the offense of grand larceny, with the commission of which they were charged, and also the commencement of the civil actions during the pendency of such criminal proceeding to recover the damages resulting in the alleged conversion of the property so alleged to have been stolen, instituted by James Buchan and W. L. Thompson against Charles Bowman, Fred Cline, Frank Brandell, and George McCarthy, resulting in judgments in favor of the plaintiffs, that they remained such attorneys of record until on or about April 23, 1910, when they filed notice of withdrawal as attorneys in said action. And it is disclosed by the evidence that the actions were subsequently tried in the circuit court by Mr. Bushfield of Miller, and that neither O'Brien nor the accused took any part in said trial, or received any remuneration from the plaintiffs other than \$15 and some cents, fees paid out by them in the actions. . . . Assuming, therefore, that the accused honestly believed that the only question involved in the civil suit was as to the amount of damages sustained by the plaintiffs in the civil actions, and that evidence tending to prove the larceny would not be necessary, it is quite clear that the accused, in his connection with the civil actions, acted in good faith, and had no intention of violating the provisions of the section above quoted. We are inclined to take the view, therefore, that the institution of the civil actions by the accused and his partner was the result of an honest misconception as to the facts that might be necessary to be proven on the trial of the civil actions under the circumstances connected with the case, as then understood by them, and that no intentional wrong or violation of the statute was intended."

In *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844, it was said that if a United States district attorney had a secret partner who was regularly defending persons in the United States court and dividing fees with the district attorney, it would justify his dis-

barment from practice on common principles of honesty and morality regardless of an affirmative statutory condemnation.

In *Underwood v. Com.* 105 S. W. 151, 32 Ky. L. Rep. 32, the disbarment of an attorney who had been convicted several times of the illegal selling of intoxicating liquors while he was the county attorney was affirmed. The court said: "Selling of liquor is not per se immoral. But selling liquor in known violation of law, is wrong. It is not good demeanor. One so engaged would not be admitted to the bar, no matter how learned in the law. On the same ground, he ought not to be allowed to remain on the court's roll. Furthermore, appellant, as an officer of the law, was required by the statute and the duties of his office to prosecute offenses against the liquor laws of his county. The duty devolved upon him officially as the county's official attorney. Himself habitually violating the liquor laws was his assuming an attitude contrary to his professional and official duty to the county and was incompatible with his official and professional duties as the county's legal representative and prosecutor. Manifestly appellant could not and would not prosecute himself for violating the liquor laws. It was in a sense the equivalent to becoming interested in a controversy adversely to his professional duty to his client. It was a gross breach of professional duty and merited the punishment received."

In the case of *In re Jones*, 70 Vt. 71, 39 Atl. 1087, it appeared that a state's attorney intentionally withheld material facts when applying to a judge for a certificate required by statute to entitle him to draw his salary and it was held that he should be disbarred. The court said: "The respondent and his counsel claimed before the commissioners, and now contend, that because the misconduct found relates to the respondent's duties as state's attorney for the county of Rutland, for which he is answerable to the voters of the county and to the state, and for which he might be impeached, this court has no jurisdiction over him in regard to the same. While acting in the county court in the prosecution of cases in which the state was a party, and in all his relations to parties, counsel and court, in such prosecutions, he was also acting in his official capacity as an attorney of this court, and under the obligations assumed by him when he became such attorney. Notwithstanding he might be liable to impeachment or might be rejected by the voters, if a candidate for reelection, his conduct when acting in his office of attorney, and sometimes when acting in a private or other capacity, was open to investigation by this court, and if found to be such that the court, to protect itself and

the public, and to keep the administration of justice pure, ought to withdraw the protection and credit under the law which it accorded him by admitting him to the office of an attorney at law and solicitor in chancery, it is, beyond question, the right and duty of this court to deal with him as justice demands. It may suspend or disbar him."

In *Matter of Cooper*, 12 Hawaii 124, 128, it was held that acts of an attorney general in his official capacity which were not of such a nature as to show moral turpitude or unfitness, could not be passed on by the court in a proceeding on a complaint charging him with unprofessional conduct.

Misconduct as Ministerial Officer.

The act of an attorney in executing false jurats and certificates to affidavits and acknowledgments purporting to be taken before him as a notary public justifies his disbarment. *People v. Hahn*, 197 Ill. 137, 64 N. E. 342; *In re Arcander*, 26 Minn. 25, 1 N. W. 43; *Ex p. Finn*, 32 Ore. 519, 52 Pac. 756, 67 Am. St. Rep. 550; *In re Hopkins*, 54 Wash. 569, 103 Pac. 805. See also *Matter of Barnard*, 151 App. Div. 580, 136 N. Y. S. 185. Thus in the case of *In re Arcander*, supra, it appeared that an attorney in administering as a notary public the oath of office to a justice of the peace and taking the acknowledgments on his official bond antedated both the jurat and the acknowledgment. It was held that he should be suspended. The court said: "The false appearance in this case was produced by what was, in its essential nature, a falsification of a record. No argument can be required to show that the act done was wrong, and that it was done for a wrong purpose. It is of no avail to say that the respondent did it, not in his professional capacity, but as notary public. His admission to practice was an admission to practice in all the courts of this state. This includes justice's courts, our statutes repeatedly recognizing attorney-at-law in courts of that grade. See Gen. St. c. 65, sections 3, 18, 104, and c. 88, sections 1, 4, 30. What the respondent did as notary public, he, as an attorney at law conducting the prosecution in which he was engaged, procured himself to do. As respects the point that this procurement was in his professional capacity, the case in principle is in no respect different from what it would have been if he had procured some other notary public to do what he procured himself to do." *In People v. Hahn*, 197 Ill. 137, 64 N. E. 342, it appeared that an attorney was admitted to practice on a certified copy of a license granted to him in another state, the application being accompanied by an affidavit sworn to before himself under another name as notary

public. He had been disbarred from practicing as an attorney in the other state, but did not reveal that fact in his application. In his practice in the courts after his admission he signed affidavits made on behalf of his clients in his proper name and swore to them before himself as a notary under another name. It was held that these facts together with others were sufficient to justify an order striking his name from the roll of attorneys. In *Matter of Barnard*, 151 App. Div. 580, 136 N. Y. S. 185, it appeared that an attorney as a notary public certified to acknowledgments which were not made before him, but no person in interest was harmed by his acts and no advantage accrued to the attorney by reason of his acts. The court severely censured the attorney but in view of the circumstances of the case took no further action.

In *Matter of Gotthein*, 153 App. Div. 779, 138 N. Y. S. 636, the court in disbarring an attorney for falsely certifying acknowledgments as a commissioner of deeds said: "Upon the faith of these acknowledgments rests the title of real property, and the only security of such titles is in the fidelity with which notaries and commissioners of deeds perform their duty in requiring the appearance of parties to such instruments before them and always refusing to execute a certificate unless the parties are actually known to them or the identity of the parties executing the instruments is satisfactorily proved. We cannot overlook this offense and cannot allow a person guilty of it to remain a member of the profession. The respondent is, therefore, disbarred."

In the case of *In re Delano*, 58 N. H. 5, 42 Am. Rep. 555, it appeared that an attorney used in a business venture money received by him as a collector of taxes and he was disbarred although he had made a partial restitution of the loss. The court said: "The temptation to which Delano yielded is one to which he would be constantly exposed in the practice of his profession. The money he misapplied was not the money of a client: but his situation as collector of taxes was, in substance, the situation of an attorney receiving money for a client. And when it appears that he could not be safely trusted in the former case, it thereby appears that he cannot be safely trusted in the latter. If his defalcation had occurred before he was admitted to the office of attorney, that fault should have prevented his admission; and, being enough to prevent his admission, it is enough to require his removal."

Misconduct in Fiduciary Capacity.

It is generally held that an attorney will be disbarred for misconduct in a fiduciary capacity. *Thorndike v. Hunt*, 5 Jur. (N. S.)

(Eng.) 879; *Matter of Chandler*, 22 Beav. (Eng.) 253, 25 L. J. Ch. 396, 2 Jur. N. S. 366; *Matter of Hoffecker* (Del.) 60 Atl. 981; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868; *Matter of Lichtenberg*, 169 App. Div. 505, 155 N. Y. S. 482. See also *In re Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 21 L.R.A. (N.S.) 517. *In re O—*, 73 Wis. 602, 42 N. W. 221. Thus in the *Matter of Hoffecker*, *supra*, the court in holding that an attorney should be disbarred for his maladministration of a trust said: "A father desires by his will to protect his daughters, ignorant of business and unversed in the practical management of affairs, from the dangers that attend improvidence and rashness or credulity and inaptitude in the control and investment of the estate he leaves behind him. His estate is perhaps the accumulation of a lifetime of industry and self-denial, and the principal reward of his life's labors consists in the confidence he feels that, by putting his accumulations in the custody of a trustee to act as their financial safeguard and protector, he will be able to insure his daughters against want while they live, and provide for their children after them. The responsibilities of such a trust are among the most sacred that a man can assume, and upon this court, upon the chancellor, is imposed the duty, the heavy responsibility, of bringing to severe account any solicitor of the court who is clearly shown to have fallen below the standard required of him by the obligations of such a position. It is his duty to see to it that any solicitor who has shown his unfitness for the office of solicitor which he holds, by such maladministration of a trust as is disclosed by the testimony in this case, shall not remain in a situation to do injury to others who might be induced to trust him. It may be proper for me also to say that, by permitting the respondent to remain a solicitor of this court under such circumstances, I would be wronging his fellow solicitors, and would bring upon them the evil consequences that must certainly ensue from a decision that would amount to nothing less than a judicial determination that such administration of a trust as has been disclosed in this case is not inconsistent with the duties and obligations of a solicitor—is not misconduct that should deprive a solicitor of his office and its attendant privileges. A new standard would thus be established for the officers of this court. Painful as the duty is, I am constrained to make the rule absolute, and order that the name of James H. Hoffecker, Jr., be struck from the rolls of

the court of chancery." And in *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868, the court in disbarring an attorney under the facts stated in the opinion said: "The respondent was an attorney at law and notary public, and had taken the acknowledgment of these women to a deed. He received from them checks, which they indorsed and delivered to him; he giving a receipt upon his office paper, which stated that he was an attorney and counselor at law and that he received this check for collection, the proceeds, when collected, to be turned over to the owners of the checks. He received the proceeds, appropriated it to his own use, and has never accounted for or paid it over. His own testimony shows that there never was an agreement that he could use this money until the 1st of October, but that there was a constant demand for the payment of the money. The mere statement of facts is sufficient to show that this respondent has been guilty of such an offense that he should no longer remain a member of the profession." So in the *Matter of Lichtenberg*, 169 App. Div. 505, 155 N. Y. S. 482, an attorney was disbarred for converting to his own use funds of a bankrupt estate of which he was receiver, and making a false affidavit as to the amount of the funds remaining in his hands. Similarly, in the *Matter of Chandler*, 22 Beav. (Eng.) 253, 25 L. J. Ch. 396, 2 Jur. N. S. 366, wherein it appeared that a solicitor who was also a trustee falsely represented to a person interested in the trust fund that he had invested the fund, his name was stricken from the roll of solicitors. Likewise in *Thorndike v. Hunt*, 3 De G & J. (Eng.) 563, 5 Jur. N. S. 879, 28 L. J. Ch. 417, 7 W. R. 246, it appeared that a suit was instituted against a trustee to enforce his liability. The trustee admitted his liability and to meet it turned over another fund in his hands as trustee. The trustee being a solicitor his name was stricken from the rolls.

But in *People v. Appleton*, 105 Ill. 474, 44 Am. Rep. 812, the court in refusing to disbar an attorney for misconduct relating to his duties as a trustee said: "From an examination of all the testimony, we can come to no other conclusion than that respondent accepted this trust, not as an attorney at law, but simply as an individual, and that whatever of wrongful conduct there may have been, it was but that of any ordinary trustee, and not professional misconduct in the office of an attorney at law."

BELCHER ET AL.

v.

COMMONWEALTH.

Kentucky Court of Appeals—June 18, 1915.

165 Ky. 649; 177 S. W. 455.

Homicide — Evidence Sufficient.

Evidence considered and held to be sufficient to sustain a conviction for murder.

Witnesses — Examination — Leading Questions — Prejudice.

Where in some instances the prosecuting attorney led the witnesses, but in only one such instance was the evidence material, and in that instance there was no objection, the judgment will not be reversed.

Trial — Continuance for Absent Witness — Facts Otherwise Proved.

Where the affidavit on application for continuance was read as the depositions of the absent witnesses, and other witnesses testified to the same facts which it was claimed the absent witnesses would have testified to, there is no error in refusing the continuance.

Homicide — Instructions — Mental Capacity as Affecting Degree.

Where the jury were instructed that defendant, a deaf mute, could not be convicted unless he was of sound mind and had sufficient reason to know what he was doing, thus authorizing acquittal for mental incapacity, it is not error prejudicial to defendant that the court did not instruct on voluntary manslaughter in relation to mental incapacity.

Criminal Law — Capacity to Commit Crime — Deaf Mute.

It is not error for the court to refuse to hold that a deaf mute was incapable of committing a murder.

[See note at end of this case.]

Same.

Whether a deaf mute was mentally incapable of committing a murder is, on conflicting evidence, a question peculiarly for the jury.

[See note at end of this case.]

Appeal from Circuit Court, Pike county.

Criminal action. George Belcher et al., convicted of murder and appeal. The facts are stated in the opinion. **AFFIRMED.**

Staton & Pinson, J. M. Bowling and Childers & Childers for appellants.

James Garnett and Charles H. Morris for appellee.

[649] CLAY, C.—The defendants, George Belcher, Harrison Belcher and Bart Belcher were convicted of the murder of John Belcher, and each given a life sentence in the penitentiary. They appeal.

[650] The facts are these: The defendants are brothers. At the time of the alleged homicide Bart Belcher was 19 years of age, George, 22 years of age and Harrison, 24 years of age. When George was four years of age he had fever. From that time on he was deaf and dumb. John Belcher, the man who was killed, was about 20 years of age and was the first cousin of the three defendants. On the day before the homicide George, the deaf mute, and John, the deceased, had a difficulty. Some of the witnesses say that George struck John without provocation, whereupon John knocked him down. Other witnesses say that John, without provocation, cut George with a knife. According to the evidence for the Commonwealth, John Belcher, the deceased, was employed by a man by the name of Keaton, a railroad section foreman. On the day of the homicide, he, Keaton and others were on a hand car and were engaged in "lining up" the track. As they approached the end of a cut, Keaton, looked up and saw George and Bart Belcher coming down the railroad. Keaton had heard of the difficulty between John and George. Realizing that John was in danger, Keaton shoved him off the car, gave him a water bucket and told him to go to Riley Mullin's house and remain until called for. When John left the car and started towards Mullin's house, George Belcher, the deaf mute, threw up his pistol and shot at him. John was not struck and immediately began to run. George fired again, and Bart, the other brother, stepped across the track, so as to get sight of John, and also fired. At this point Harrison Belcher appeared on the scene. He was coming down the county road on a mule. He jumped off the mule and came to the car. Keaton told him not to go down there and kill John, whereupon Harrison threw up his pistol and threatened to kill the whole party. There is testimony to the effect that Harrison fired one shot towards John. Some witnesses say that while they were standing near the car and after John had fled, Harrison said: "God damn him, he cut my brother and we are going to kill him." Bart also said: "God damn him, he stuck a knife in my brother and we are going to kill him." Harrison and George then started after John and Bart went through the cut. John went on to Riley Mullin's house. After getting in the house John went to the door and looked towards George and Harrison, who were together. [651] George fired his pistol and the shot took effect in John's abdomen. John died about a half hour later from the effects of the wound.

Harrison Belcher testified that he spent part of the night before with Morg Killen. On the morning of the homicide he started to the Potter Fork of Boone, where he had

been "logging." On the way he stopped at John Adams' place, where he found his father very drunk. He stayed around a while looking after his father and finally started home with him. He could not get his father to go home, so he started back the other way to John Davis Bentley's. When he got there he found George. He sent George for a mule to help carry his father home. George brought the mule and they started down the creek. As they proceeded down the creek they heard some shots on the railroad. Harrison then ran over to the railroad and found George and Bart there. He saw John Belcher, the deceased, run towards Riley Mullin's house, but didn't see George follow John. He and Bart started through the cut and someone told them to go and get George to come back. Harrison insisted on Bart's going and Bart insisted on Harrison's going. Harrison claims that he went and on catching up with George tried to get him to come back. He says that when they got near Mullin's house, John was standing in the doorway with a pistol pointed in George's direction, and that before he could stop George, George fired. Bart explains his presence at the homicide in the following way: He had been working for Shack Steele. On the day of the killing, he had broken a skein on his wagon and he and Steele agreed to go to Mr. Adams' and get a skein. In going back from Adams' place he came across the party who had charge of his father, who was drunk. He assisted in getting the old man on the mule and then he and George and two smaller brothers started down the railroad. Pretty soon they saw the section crew approaching. When they pulled to the upper end of the cut the hand car stopped. John Belcher got off, put the water bucket over his left arm, got out his pistol and started towards Riley Mullin's house. As he stepped over the knoll, George shot two shots. Then John Belcher threw his pistol towards George and witness. George then shot again. After proceeding a little further down, John put his elbows on his knees and fired one or two shots. One of these shots grazed witness' hair. As soon as this happened he shot [652] four shots at John. Thereupon John dropped his pistol and again started for Mullin's. He claims that he didn't go with Harrison and George, but admits that he joined Harrison on the railroad a very short time after the killing. After the homicide George fled, but Harrison and Bart were arrested together. There is some evidence to the effect that Bart showed signs of glee on learning that John had been shot and killed. It also appears that Harrison and Bart knew of the assault made upon their brother by the deceased.

Defendants insist that the evidence is not sufficient to sustain the verdict. Each of the

defendants was indicted as principal and as aider and abettor. While the defendants account for their presence at the place of the homicide in a very plausible way, the facts to which they testify are not very convincing. George had been injured by the deceased. Bart and Harrison knew of this fact. Each of the defendants was armed. That they accidentally happened to meet in the cut where deceased was employed does not appear at all reasonable. Considering the fact that they all appeared about the same time; that Bart and Harrison announced their purpose to kill the deceased; that Bart did fire four shots at him and Harrison probably one shot; that George pursued the deceased to the home of Riley Mullins; that Harrison accompanied George, though claiming that he tried to stop him, it was clearly within the province of the jury to conclude that the homicide was not one committed in sudden affray or in sudden heat and passion, but was the result of premeditated design on the part of all three of the defendants.

Our attention is called to two or three instances where it is claimed that the Commonwealth's Attorney led the witnesses for the Commonwealth. In the only instance where the evidence elicited by that method of examination was material, there was no objection on the part of defendants. In the other instances, the evidence was not only not material but the Commonwealth's Attorney was merely recapitulating what the witness had already testified to. We see no reason, therefore, for reversing the judgment on the ground that the Commonwealth's Attorney led the witnesses for the Commonwealth.

Another reason urged for reversal is the refusal of the trial court to grant a continuance, on the ground of absent witnesses. The trial did not take place at the [653] indictment term but at a subsequent term. The affidavit was read as the depositions of the absent witnesses. Not only so, but other witnesses testified to the same facts which it is claimed the absent witnesses would have testified to. Under these circumstances, there was no error in refusing the continuance. *Williams v. Com.* 13 Ky. L. Rep. 753, 18 S. W. 364; *Simmons v. Com.* 13 Ky. L. Rep. 839, 18 S. W. 534; *Trabune v. Com.* 13 Ky. L. Rep. 343, 17 S. W. 186; *Roberts v. Com.* 94 Ky. 499, 15 Ky. L. Rep. 341, 22 S. W. 845.

We deem it unnecessary to set out at length the instructions. It is sufficient to say that, in our opinion, they accurately and clearly present the law of the case. Under this heading it is claimed that the jury should have been told that if they believed that defendant, George Belcher, was guilty under either the first or second instruction, but further believed he was of a feeble mind,

they should find him guilty of the lesser offense of voluntary manslaughter. It is true that in the case of *Mangrum v. Com.* 39 S. W. 703, 19 Ky. L. Rep. 94, this court held that an instruction which gave the jury the right to consider the defendant's mental condition in fixing the degree of his guilt was as favorable as the accused was entitled to, yet the instruction given in this case was more favorable to the accused than the one approved of in the case cited. In the present case the court told the jury that the defendant, George Belcher, being a deaf mute, he could not be convicted unless the jury believed from all the evidence, beyond a reasonable doubt, that at the time mentioned in the evidence the defendant was of sound mind, had sufficient reason to know what he was doing, and to know right from wrong, and had sufficient will power to govern his action. In other words, the instruction authorized an acquittal for mental incapacity, instead of a conviction of manslaughter. Under these circumstances, the refusal to give the suggested instruction was not prejudicial error.

It is further insisted that the trial court should have held that defendant, George Belcher, being a deaf mute, was incapable of committing the crime in question. We are not aware that such a doctrine has ever been announced by the courts. The fact that the defendant is a deaf mute is simply a circumstance to be considered in connection with the other evidence in determining whether or not he was mentally capable of committing [654] the crime. On this phase of the case the evidence was conflicting and the question was one peculiarly for the jury.

A careful reading of the record convinces us that no error prejudicial to the substantial rights of the defendants was committed on the trial.

Judgment affirmed.

NOTE.

Responsibility of Deaf and Dumb Persons for Crime.

The reported case which appears to be the only case passing on the question since the decision in *Rex v. Stafford* [1909] 2 K. B. 81, 16 Ann. Cas. 442, holds that the fact that a person charged with the commission of a crime is deaf and dumb is merely a circumstance to be considered in connection with other evidence in determining whether he was mentally competent at the time of the alleged offense.

STATE EX REL. LANNG

v.

LONG.

IN RE LANNG.

Louisiana Supreme Court—November 4, 1914.

136 La. 1; 66 So. 377.

Courts-martial — Legislative Power to Create.

The provisions of the state constitution, establishing the judiciary department of the state government and vesting the judicial power of the state in certain named and designated courts, do not preclude the exercise, by the general assembly, of the power granted by other provisions of the constitution to establish, as an instrumentality of the executive department, a "well-regulated militia," declared by the constitution to be necessary "to the security of a free state," to provide by law how such militia shall be organized and trained, and incidentally to authorize the creation of courts-martial as one of the ancient and recognized methods by which such instrumentality may be regulated and disciplined.

Militia — Enlistment as Contract — Imposing Additional Duties.

Enlistment in the active militia of the state, save in times of war or public danger or disturbance, is voluntary, and is a "contract," and the state has no power, by the repeal of the law under which it was entered into (and which is the measure of the rights and obligations of the parties thereto) and the substitution of another law in its stead, to impose upon the other contracting party more onerous conditions and obligations to which he has not given his assent.

[See note at end of this case.]

What Constitutes Enlistment — Oath — Evidence of Taking Oath.

Considering together the several provisions of Act 191 of 1912, upon the subject of enlistment, the conclusion is well-nigh irresistible that, in the contemplation of that statute, the taking of the prescribed oath is the determinative act. But, without saying that no one can be held to have enlisted without having taken such oath, the court finds that the evidence here adduced, of acts and omissions by relator, is insufficient to establish such intention or consent on his part.

Courts-martial — Review by Courts.

The question of the jurisdiction of a court-martial is open to inquiry on habeas corpus issued from a court having authority to issue that writ; and the action of such court in the premises may be reviewed by this court in the exercise of the jurisdiction conferred by article 94 of the constitution.

[See 17 Ann. Cas. 445.]

Status of Courts-martial.

While "courts-martial" discharge judicial functions, and are in a sense courts, they are

not within the meaning of article 84 of the constitution, declaring that the judicial power of the state shall be vested in certain named courts.

Certiorari to Criminal District Court.

Habeas corpus proceeding. Francis O. Lanng, relator, and M. J. Long, defendant. Judgment for defendant. Relator applies for writs of certiorari and prohibition. The facts are stated in the opinion. RELATOR DISCHARGED.

A. Miles Coe and H. M. Wilkinson for applicant.

R. G. Pleasant and Jos. E. Generelly for respondent.

Frank D. Chretien, in pro per.

[3] MONROE, C. J.—Relator was prosecuted before a court-martial of the First Separate Troop of Cavalry, Louisiana National Guard, upon a charge of being absent from ordered drill, inspection, and instruction, in violation of article 15, § 98, of Act 191 of 1912, was convicted, and sentenced to pay a fine of \$10, or suffer imprisonment for ten days, and was imprisoned in conformity to the sentence, whereupon he obtained from the judge of division "B" of the criminal district court, a writ of habeas corpus, directing the sheriff, to whose custody he had been committed, to [4] produce him, and to show cause, etc.; but, after hearing, the writ was discharged. Relator then applied to this court for writs of certiorari and prohibition, upon which application an order nisi was issued, the effect of which has been to bring the ruling so made by the judge a quo before us for review. The points mainly relied on are: (1) That there exists no authority, under the Constitution of this state, for the creation of courts-martial; (2) that even though such court were authorized, relator would not have been subject to its jurisdiction, for the reason that he had ceased to be a member of the state militia.

1. The distinction between courts-martial and the courts which pertain to the judicial branches of the state and the federal governments has long been recognized. In *Dynes v. Hoover*, 20 How. 65, 15 U. S. (L. ed.) 338, plaintiff, having been convicted by a naval court-martial of attempting to desert from the navy, and sentenced to imprisonment, and the Secretary of the Navy having approved the sentence, the President issued an order to the marshal to receive the convict and commit him to the penitentiary, whereupon the convict brought an action of trespass and false imprisonment against the marshal in the Circuit Court of the United States for the District of Columbia, and by

Ann. Cas. 1917B.—16.

way of demurrer set up want of jurisdiction in the court-martial and in the President. Considering the question so presented, the Supreme Court said:

"Among the powers conferred upon Congress by the eighth section of the first article of the Constitution, are the following: 'To provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the eighth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the second section of the second article of the Constitution it is declared that, 'The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United [5] States.' These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power so to do is given without any connection between it and the third article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

What has thus been said of the power of Congress to make rules for the government of the land and naval forces of the United States may also be said of the power of the General Assembly of Louisiana to make rules for the government of the land and naval forces of the state. Article 8 of the state Constitution declares that a "well-regulated militia" is "necessary to the security of a free state." Article 298 declares that:

"The General Assembly shall have authority to provide by law how the militia . . . shall be organized, officered, trained, armed and equipped, and of whom it shall consist."

And article 9 declares that:

"Prosecutions shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for a capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the militia when in actual service in time of war or public danger."

The recognition of the necessity for a "well-regulated militia," the grant of authority to provide by law how the militia shall be organized, trained, etc., and the exception with respect to capital cases arising in the militia when in actual service in time of war or public danger, concern the militia as an instrumentality of the executive department of the government, and concern the methods, other than through appeals to the judiciary,

by which that instrumentality may be made effective. And, though courts-martial, created or authorized in the exercise of the power thus impliedly, if not expressly granted, may and do discharge judicial functions, and are therefore in some sense courts, they are not the courts to which article 84 [6] of the Constitution refers, in declaring that the judicial power of the state shall be vested in certain named courts and in others thereafter provided in the Constitution, and which are instrumentalities of the judiciary department. And, to that effect is the jurisprudence of the Supreme Court of the United States, and of perhaps the greater number of the courts of last resort of the states. 27 Cyc. 496, 497, note.

There is some contrariety of opinion among the state courts as to the manner and extent in, and to, which the rulings of courts-martial, in matters affecting the militia of the different states, may be reviewed and controlled. *State v. Nuchols*, 18 N. D. 233, 119 N. W. 632, 20 L.R.A.(N.S.) 413, "case note." But, no one denies that the question of jurisdiction is always open to inquiry upon a writ of habeas corpus (*Ex p. Carll*, 106 U. S. 521, 1 S. Ct. 535, 27 U. S. (L. ed.) 288, note); and, as no appeal lies in this case, there can be no question of the authority of this court to review, in the manner here proposed, the action of the district court, in discharging that writ. Const. art. 94; *Garland's Code of Practice* (Roehl), art. 855, p. 629, and authorities there cited.

2. Acts 181 of 1904 and 191 of 1912 alike divide the militia into "active and reserve" and confer upon the "Governor the power, under certain conditions, to order" that there be drafted, from the reserve into the active militia, as many persons, subject to militia duty, as may be needed. But those conditions did not arise, and that power was not exercised under the act of 1904, and have not arisen and has not been exercised under the act of 1912. Enlistment in the active militia was and is purely voluntary, therefore, under both statutes. The act of 1912 imposes many conditions and obligations that were not contained in the act of 1904, and is apparently intended to operate as a piece of legislation complete in itself [7] and covering the entire subject with which it deals. The title reads:

"An act to define and provide for the organizing and disciplining of the militia, to provide penalties for the violation of the same, to prescribe the duties of the Governor, the Adjutant General, and all officers and enlisted men thereof, to define military offenses, to provide penalties therefor and the method of enforcing the same, to provide for the pay, transporta-

tion and subsistence of the militia when called into actual service, and to repeal all laws in conflict therewith, especially act 181, approved July 6th, 1904."

The last section reads:

"That all laws and parts of laws in conflict with the provisions of this act, especially act No. 181 of the General Assembly of Louisiana, approved July 6th, 1904, and all acts amendatory thereof, be and the same are hereby repealed."

It is quite true that it contains also the sections 2 and 15 which the learned judge, made respondent, has quoted in his opinion, and which declare, in effect (section 2) that "the Active Militia" and the National Guard "of the state shall consist of the regularly enlisted, organized, and uniformed military forces, who have heretofore participated or shall hereafter participate in apportionment of the annual appropriation provided by section 1061 of the Revised Statutes of the United States, as amended" (U. S. Comp. St. 1913, § 3054), and (section 15) "shall consist of the necessary staff department, the commissioned officers heretofore or hereinafter retired, the organization forming the National Guard at this date, and such other . . . as . . . may be enlisted as (or) commissioned therein." But relator had become a member of the "regularly . . . enlisted . . . force" by virtue of his acceptance of an offer which, reduced to definite terms as Act No. 181 of 1904, the state had made, to grant him certain privileges, and, under certain conditions, to feed, clothe, pay and pension him, in consideration of his assuming certain specified obligations and consenting to subject himself, for a specified [8] term, to certain rules and regulations. In other words, he was a member of the force, referred to in the act of 1912, by virtue of a contract, which, by the act of 1912, the state assumed to "repeal," and for which it assumed to substitute that act.

In *U. S. v. Grimley*, 137 U. S. 147, 11 S. Ct. 54, 34 U. S. (L. ed.) 636, it appeared that the defendant (in error) was 40 years old at the time of his alleged enlistment, whereas the law required that recruits should be effective, able-bodied men, between the ages of 16 and 35, and the question was, whether he could be punished, by court-martial, for desertion. The Supreme Court said:

"The government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The government makes no objection because of the untruth.

The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts."

The case of the relator now before us is quite different. He made no untrue statement, and is not now trying to gain advantage by reason of any wrong committed by him. The state has undertaken to repeal the law which contained the offer that he accepted, and which was the sole measure of his rights and obligations under the contract so made, and to substitute in its place another law, purporting to impose upon him conditions and obligations which differ from, and are harsher and more onerous, in material respects, than those to which he had agreed, and his answer to the attempt to enforce those conditions and obligations is "I have not consented to them," which we think is sufficient.

It is said that, after the passage of the act of 1912, relator attended some of the musters or drills of his company, and that, when he [9] failed so to do, he was prosecuted before courts-martial and fined, and that, on two occasions he paid the fines, from which, it is deduced that he accepted the new contract thus tendered, or sought to be imposed on, him, and became an enlisted man according to its terms. The evidence, however, fails to convince us that the acts attributed to him amounted to an enlistment; for at that time the act of 1912 had never been authoritatively interpreted or construed with the act of 1904, nor has it ever since then, been so interpreted or construed. The contention in this case has been that it operated, at once, upon all persons who were then members of the active militia, and, whether with or without their knowledge or consent, imposed its conditions and obligations upon them; and we assume that such was the view taken by the captain of relator's troop, by whom he is prosecuted, and that, taking that view, he felt it to be his duty to enforce the act to the extent of his ability. Relator and other members of the "troop" were therefore in the position of being required to comply with the provisions of the new law or else to submit to the consequences; and it is not surprising that, for a time at least, they should have chosen the alternative first mentioned. But the new law did not have the effect thus attributed to it, and acts that may have been performed by relator, as an enlisted man, under what he erroneously believed to be the compulsion of a highly penal statute, as construed and administered by his superior officers, contained none of the elements of a voluntary enlistment and contract. The fact that, when apparently he

began to realize the true situation that had been brought about, he refused to be bound by the act of 1912, because he was unwilling to accept it as his contract of employment, and that he was court-martialed on account of such refusal, and on two occasions paid the fines imposed on him as the alternative [10] of imprisonment, can hardly be regarded as evidence of a voluntary re-enlistment, the more especially when we consider that the act of 1912 contains the following provisions and requirements upon the subject of enlistment, which were entirely ignored, to wit:

"Sec. 40. . . . That every person who enlists or re-enlists in the active militia of this state shall sign and make oath to an enlistment paper, which shall be filed in the office of the Adjutant General. . . . A person making a false oath to any statement contained in such enlistment paper shall, upon conviction, be deemed guilty of false swearing and punished accordingly. . . .

"Section 98. . . . That the military forces of this state shall be governed by the following rules and articles. . . .

"Art. 1. Enlistment in the active militia of this state shall be voluntary, and every person who enlists therein shall take and subscribe an oath (or affirmation) in the following words:

"I, . . . do solemnly swear (or affirm) that I will support the Constitution and laws of the United States and the Constitution and laws of the state of Louisiana; that I will obey the orders of the Governor, as commander in chief of the military forces of the state, and of all other officers appointed over me, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a citizen soldier in the service of the state of Louisiana, according to the best of my ability and understanding. So help me God. . . .

"Art. 2. No enlisted man, *duly sworn*, shall be discharged . . . without a discharge in writing, approved by his commanding officer. . . ."

The oath referred to in section 40 evidently relates to the qualifications required of persons who enter the service by means of enlistment papers, as contradistinguished from those who receive commissions, whilst that prescribed by section 98, being an oath of allegiance, obedience, etc., is required, as we imagine, of *all* persons who enter the service, though the language of the statute is, "every person who *enlists*." However that may be, it is certainly required, as is the oath referred to in section 40, of the man who *enlists*. Whether the two oaths are, as a matter of custom combined into one or taken separately does not appear, and is a matter of no present concern. What

does [11] concern this case, however, is that, taking the several provisions that have been quoted together, the conclusion is well-nigh irresistible that, in the contemplation of the law, the taking of the oath is determinative of the enlistment; and, though we will not say that no man can be held to have enlisted without having taken the oath, we are of opinion that, to so hold, the evidence of the intention to enlist should be very much stronger than that which has been here presented.

In the case of *United States v. Grimley*, supra, the question was presented whether the defendant (in error) had in fact enlisted, and the court quoted the oath which he had taken, and which read, in part, as follows:

"I, John Grimley, born in Armagh, in the state of Ireland, aged twenty eight years and — months, and by occupation a groom, do hereby acknowledge to have voluntarily enlisted, this eighteenth day of February, 1888, as a soldier in the army of the United States of America. . . ."

After which the opinion proceeds:

"The question presented is whether the petitioner had in fact enlisted and become a soldier. It will be noticed that, in this oath of allegiance is an acknowledgment that he had enlisted, and that it was not an agreement to enlist. . . . Section 1342 of the Revised Statutes provides that the army of the United States shall be governed by certain rules and articles thereafter stated. Article 2 provides:

"These rules and articles shall be read to every enlisted man, at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation. . . . Obviously the oath is the final act in the matter of enlistment. . . . We conclude . . . that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."

It is true that the court also recognizes that the receipt of pay may operate as, or be, the equivalent of, an enlistment; but it does not appear that any oath whatever was taken by the relator now before the court, or that he received any pay, and the evidence fails, in our opinion, to show any enlistment [12] or intention to enlist, as resulting from any other acts or omissions on his part, after the passage of the act of 1912. He is not insisting upon the maintenance of his contract as represented by the act of 1904, but is merely resisting the attempt to force upon him, as a contract of enlistment, the act of 1912, and in so doing we are of opinion that he is sustained by the facts and the law.

It is therefore ordered that the judgment of the district court, here made the subject of review, be set aside, that the writ of

habeas corpus, issued by that court at the instance of relator, be now reinstated and sustained, and that relator be discharged.

NOTE.

Enlistment in Militia as Contract.

The holding of the reported case that an enlistment in the militia constitutes a contract which precludes the state from imposing by statute on an enlisted man duties or obligations which do not result from his enlistment has been followed pro forma in three decisions in the same jurisdiction. *State v. Long*, 136 La. 12, 66 So. 380; *State v. Long*, 136 La. 13, 66 So. 380; *State v. Long*, 136 La. 133, 66 So. 381. No other decision seems to have passed on the question. As to the power of the executive to impose additional duties it was said in *Betty v. State*, 188 Ala. 211, 66 So. 457: "The general scope and the particular occasions of military service by the militia are fixed by law; and, although in the achievement of these authorized objects the governor exercises the plenary powers of a commander in chief, we think it must be readily apparent that he cannot, by the mere device of a military order, create new forms and enter new fields of military activity. Such a power, capable of almost infinite abuse, would be incompatible with the spirit of our institutions. Not being expressly conferred by law, the power must be held as denied by necessary implication."

The contractual nature of an enlistment is involved in the discussion of the validity of the enlistment of a minor in the state military service without the consent of his parents, as to which see the note to *Acker v. Bell*, Ann. Cas. 1913C 1269. See also, as to the right of an infant unlawfully enlisted to release from detention by the military or naval authorities, the note to *Dillingham v. Booker*, 16 Ann. Cas. 127.

SWEETSER

v.

EMERSON.

United States Circuit Court of Appeals,
First Circuit—October 18, 1916.

236 Fed. 161.

Statutes — Liberal Construction — In Aid of Military Power.

A public statute relating to the military power of the government should be liberally construed so as to make such power effective.

Construction to Avoid Absurdity.

Rules of strict and literal construction may be departed from, in order that absurd results may be avoided, and to insure that the statute shall be effective for the purposes intended.

Opinion of Legislator in Aid of Construction.

While debates in the legislature may be considered in determining the legislative intent, individual expression of members of the legislature will not establish such intent, in enacting a statute.

[See 19 Ann. Cas. 1031.]

Militia — Calling into Service of United States — Failure to Take Federal Oath.

Const. art. 1, § 8 (8 Fed. St. Ann. 652, 654), declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion, and to make provision for organizing and disciplining the militia and for governing such part thereof as may be employed in the service of the United States. Dick Law Jan. 21, 1903, c. 196, 32 Stat. 775, as amended by Act May 27, 1908, c. 204, 35 Stat. 399 (Fed. St. Ann. 1909 Supp. 346), authorized the President to call into service the state militia. Act June 3, 1916 (Fed. St. Ann. Pamph. Supp. No. 7, 40), for the national defense, establishing the National Guard, and intending to increase the efficiency of the militia, provides in section 58 that the National Guard shall consist of the regular enlisted militia armed and equipped as provided by the act. Section 70 provides that enlisted men in the National Guard of the several states and territories serving under enlistment contracts containing an obligation to defend the Constitution of the United States and to obey the orders of the President, shall be recognized as members of the National Guard under the provisions of the act for the unexpired portion of their enlistment contracts, and that, when any such enlistment does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed a new enlistment contract, etc. Members of the Massachusetts militia, who had taken an oath to faithfully observe and obey the laws for the regulation of the government of the volunteer militia of the commonwealth, and to support the Constitution of the United States, were called into active service by the President to repel invasion by a foreign foe. It is held that, as the latter statute should receive a liberal construction, members of the Massachusetts militia who did not elect to sign a new enlistment contract are nevertheless, until the expiration of their terms, subject to being called into active service to repel invasion or put down insurrection, etc.

[See note at end of this case.]

Appeal from United States District Court for District of Massachusetts: DODGE, Judge.

Habeas corpus proceeding. Alexander M. Emerson, petitioner, and Warren E. Sweet-

ser, respondent. From judgment rendered, respondent appeals. The facts are stated in the opinion. REVERSED.

George W. Anderson, Major S. T. Ansell and Lewis Goldberg for appellant.

Henry Wheeler and Harry Le Baron Sampson for appellee.

Sitting: PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

[162] ALDRICH, J.—The rights involved in this case have reference to the question how far the statute of 1903, known as the Dick Law, which was designed to promote the efficiency of the militia, and was amended in 1908 (Fed. St. Ann. 1909 Supp. p. 346), was affected by the subsequent act of Congress of June 3, 1916, known as the National Defense Act, and entitled "An act for making further and more effectual provision for the national defense, and for other purposes." (Fed. St. Ann. Pamph. Supp. No. 7, p. 40.)

The general question is whether the act of June 3, 1916, supersedes such prior laws and regulations, and repeals such provisions of the Dick Law, as amended, as authorized the President, in cases of invasion or emergency, to call out and use the organized state militia as a military force to help repel invasion and suppress insurrection, and whether in consequence thereof, under operative provisions of the act of 1916, it is left altogether at the option or election of members of the organized militia of the several states to sign a new enlistment contract or not, and to take an oath of allegiance to the United States of America or not, and to obey the orders of the President of the United States and of the Governor or not, and in the event of an election not to sign a new enlistment contract and take the oath, whether it results from such election that the militiaman, in respect to the unexpired term of his original enlistment, is mustered out and relieved altogether from obligation to respond to the federal emergency call of the President for military aid.

While certain conditions justify rules of technical and strict construction, the particular situation here makes the question more one of interpretation, to be influenced and controlled by the broad and important inquiry whether, under the National Defense Act of June 3, 1916, the purpose of Congress was to weaken or strengthen the federal military arm; and an ascertainment of that character necessarily involves grave consideration of questions of public and private rights and of public policy as well.

It is quite likely, if the questions as to these statutes were to be determined under rules of strict and literal construction, that the conclusion reached by the learned judge

of the District Court upon careful reasoning, would be quite justifiable; but we are not concerned with that view, because we think that a public statute of this character, which relates to the vital question whether the military power of the government shall be potential and effective in the hands [163] of the constitutional authorities, or is to be contingent upon the option of constituent members of the lawful military organizations, is one to be determined under broad rules of liberal construction.

In the situation presented, and under rules of liberal construction, the purpose of Congress would be quite controlling, and in ascertaining the purpose of Congress in its efforts under the Dick Law to promote the efficiency of the militia, and under the National Defense Act to make further and more effectual provision for the national defense, it must be assumed that Congress was actuated by the fundamental idea that governments are created for the protection of the rights and liberties of peoples and properties within their domain—that the use of military force may sometimes become necessary, and that to effect the object of governments they should be so maintained as to make the military force effective in the face of imminent exigencies of government emergencies and peril.

An interpretation of the National Defense Act of June 3, 1916, which would strike down all pre-existing laws as to military obligations under pre-existing contracts for national defense through militia service, would be contrary to the usual course of legislation designed to strengthen the Army, and would be so plainly contrary to the necessary idea of government defense and protection, that it would not be adopted unless it was so plainly expressed as to make it manifestly appear that Congress intended weakness rather than strength. Nothing short of clear and apt words would justify such an interpretation of a statute, intended to operate for greater efficiency and greater effectiveness, as would make it operate, through an overthrow of government rights, for less efficiency and less effectiveness.

While there was doubtless no thought in Congress that the voluntary militia plan contemplated by the National Defense Act of 1916 should be used to coerce enlistment into broader fields, it is quite as obviously clear that there was no congressional thought that a failure to do so would operate to set the organized militia of the several states at large from the limited service upon which its members had already entered. So, as we view it, we have no question at all relating to the duty of members of the organized militia to engage in the broader service, but have the single question whether, under rea-

sonable construction, the voluntary election not to do so operates to discharge its members altogether from federal obligations of military service.

It is a familiar principle that rules of strict and literal construction may be departed from in order that absurd results may be avoided, and to the end that a statute shall be effective for the purposes intended.

In order to construe a statute of this character, therefore, there must be an ascertainment of what Congress intended; and such ascertainment is to be made under recognition of the fundamental and essential idea that chief among government purposes is that of so organizing and reorganizing its military force as to adequately safeguard itself and its people against domestic and foreign dangers.

It would seem quite consistent with the contemplated scheme for military strength and defense to hold that the National Defense Act of 1916 was intended to leave it at the election of the members of [164] the organized state militia, and of the National Guard of the several states, to remain in the service for the full terms of their enlistment for purposes of repelling invasion and suppressing insurrection, or to enter upon the broader field for a longer term. And it seems to us that it would be obviously inconsistent with the scheme for national defense and efficiency to hold that the exercise of the right of election by the militiaman, against the broader field and longer term, should operate to absolve him altogether from prior obligations entered into according to then existing laws.

If the exercise of such a supposed right by a single militiaman operates that way, as a consequence it would of course operate that way in respect to the contracts of the militiamen of the organized militia and the National Guard of the several states, throughout the nation, who should elect not to enter upon the broader service; and thus it would result that it would be at the option of the organized militiamen, and the National Guard of the several states, in respect to their prior engagements, to respond to the President's call or not.

If the exercise of the right of option not to enter upon the broader service is attended with the dire consequence that the militiaman is discharged from the obligations of his prior federal engagement, it, in effect, rests entirely with the constituent members of the organized militia, and the National Guard of the several states, themselves to disorganize and disband the organized militia force, with the result that the central government must in the end rely for its military power upon the Regular and Volunteer Army and what is distinctively

designated as the National Guard. Under such a view, a very substantial and essential part of the federal government's military power would be bound only by a rope of sand.

To get at the meaning of the National Defense Act of 1916, it becomes necessary to consider somewhat the relative rights of the federal and state governments under the Dick Law, and under prior laws in respect to the federal military arm. This is so, because, if the relations are not altogether revolutionized or stricken down by the National Defense Act of 1916, they define the obligation which the militiaman and the state National Guard man assumed when he became a member of the organized militia or the National Guard of his state, and took the oath then prescribed by law.

There is no occasion to go much into the history of the earlier discussions as to what constitutes the primary militia, as distinct from the organized militia, or much into the earlier controversies as to the power of the President to use the organized state militia as a federal military force, because, as stated by the learned judge of the District Court, and indeed as conceded, unless existing obligations were dissolved by the act of Congress of 1916, the petitioner was bound under his engagement of service to respond to the call of the President and render service when needed to suppress insurrections within the national domain, or to repel invasions.

Article 1, section 8, of the Constitution of the United States (8 Fed. St. Ann. 652, 654) declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and it also empowers Congress to make provision [165] for organizing and disciplining the militia, and for governing such part thereof as may be employed in the service of the United States.

While the Massachusetts volunteer militia oath contains no express obligation to obey the orders of the President, those who become members of the militia expressly swear that they will faithfully observe and obey the laws and regulations for the government of the volunteer militia of the commonwealth and the orders of all officers elected or appointed over them, and that they will support the Constitution of the United States.

No question being made here against the idea that the organized militia and the National Guard of the states, under laws and obligations existing prior to June 3, 1916, might be invoked by the President as a military force for certain federal purposes within the national domain, we have no occasion to refer to that aspect of government military strength further than to refer to the power as something which had existence as a gov-

ernment force, to be called out by the President through the Governors of states, and used under military orders in such fields as the prior laws and the nature of the engagement for service contemplated.

We now come to a consideration of the provisions of the act of June 3, 1916, which the petitioner particularly urges in support of his contention that the effect of the National Defense Act was to supersede the old and to create a new and widely different military system, and to discharge all federal obligations of such members of the organized militia and of the National Guard of the states as do not enlist for a longer term and broader field of service than that contemplated by the contract of service under prior existing laws and regulations.

The provision upon which the petitioner chiefly relies is that of section 70, and the particular language is that:

"Enlisted men in the National Guard of the several states, territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States, and to obey the orders of the President of the United States, shall be recognized as members of the National Guard under the provisions of this act for the unexpired portion of their present enlistment contracts. When any such enlistment does not contain such obligation, the enlisted men shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment."

And the proposed oath provides for a more extended term of service, for allegiance to the United States of America, and the state, and that such enlisted man shall obey the orders of the President of the United States and of the Governor.

It is quite true that section 70 declares, as to members of the National Guard of the several states, whose enlistment and oath do not contain the broader obligation, that they shall not be recognized as members of the National Guard until they have assumed the broader obligation by signing the enlistment contract and taking the oath prescribed; but we look upon this as merely declaratory of the fact that they shall not be recognized and classed in the National Guard, distinctively designated as such, and we do not view such declaration as at all inconsistent with the idea that they shall remain in the class of service [166] into which they had in fact previously entered. In short, upon mobilization and under election, not being recognized as members of that body of men known as the National Guard, the militiamen, by operation of law, are relegated to that branch of the service to which they be-

long, and in which they are bound to perform certain federal military duty.

Viewed in the light of the manifest purpose on the whole scheme of Congress for greater federal military efficiency, saying, if members of the National Guard of the several states shall elect otherwise, that they shall not be recognized as members of a distinct branch of the United States Army, falls far short of saying, or meaning, that a militia organization of a state, so far as federal rights are concerned, may be disbanded under the option of its members, and that federal obligations for service may be altogether rescinded at their free will.

Organized militia existed in Massachusetts, and, being under obligations to respond to an emergency call of the President, when mobilized, was subject to regulations established by Congress under the express provisions of the federal Constitution in respect to organization and discipline, and, of course, reorganization.

Under the theory of ample federal constitutional power, through Congress, to organize, reorganize, and discipline the organized militia of the states, and upon the theory of adequate means of segregation under the provisions of the National Defense Act of June 3, 1916, through military orders, there are no obvious reasons for not merging those who voluntarily elect to enter upon the broader and longer service into units of the National Guard for service both within and beyond the national boundaries; and under the same theory we see no reason why those who elect not to enter upon the broader and longer service, but must serve the term for which they enlisted, may not be lawfully merged into designated military units for service in the narrower field contemplated by the original enlistment within the boundaries, and for the purpose of protecting the national borders from invasion and of suppressing insurrection.

Great stress is laid upon section 58 of the act of June 3, 1916, which apparently limits the constituency of the National Guard. It is true that section 58 does declare that the National Guard shall consist of the regularly enlisted militia, armed and equipped as provided by the act of June 3, 1916.

But, we look upon this, however, as intended to establish a particular standard in that branch of the service known as the National Guard, and we think the reasonable theory is that this provision has reference to an intended distinctively classified and standardized branch of the federal service, and that the broader provision of section 1 of the same act creates a larger scope, and has reference to an organization of a wider constituency—that of the Army of the United States, which may consist of other land

forces, such as are now or may be hereafter authorized by law, aside from and in addition to the Regular Army, the Volunteer Army, the officers of the Reserve Corps, the enlisted Reserve Corps, and the National Guard.

Thus, under such broad provision, it is obvious that there may well be units of military land forces other than those particularly enumerated, [167] and these land forces may well be the organized militia land forces under federal engagement to help put down insurrections and repel invasions.

Obviously, the National Guard, as distinctively classified and standardized, is intended to be a constituent part of the broader organization known as the Army of the United States; but that being so by no means necessarily carries with it the idea that the organized militia and National Guard of the several states may not be distinctively recognized as military forces to be mobilized under constitutional military orders, regulations, and designations, and, being organized into military units for the unexpired term, may not be utilized for defending the national bounds and for suppressing insurrection within.

The enacting section of the National Defense Act of June 3, 1916, unquestionably contemplates a broader scope for the exercise of power in respect to military organizations and compositions under constitutional limitations. Indeed, it is expressly and clearly declared that the Army of the United States shall consist of certain enumerated branches and such other land forces as are now or may hereafter be authorized by law. Thus, under this section, the United States Army, under its broad creation as a generic organization, may well be composed, as it would seem, not only of the Regular Army, the Volunteer Army, the National Guard, and the other enumerated branches, but such other, and any number, of constituent military suborganizations of land forces not enumerated, as may now or hereafter be authorized by laws not offending the Constitution of the United States or the Constitutions of the states.

We look upon sections 58 and 70 as intended to classify and standardize a particular branch of the national military force, and not as provisions intended to supersede the older system in its entirety, and to relinquish altogether the rights of the federal government in respect to the obligations of members of the organized military forces of the states which may be constitutionally used for certain kinds of national defense.

While the general and expressed object of the statute of 1916 was a more formidable national defense, through greater efficiency and effectiveness of military force, among

the unquestionable purposes of classification and standardization of that particular branch of the United States Army distinctively known as the National Guard, was that of creating a status which should become the basis for providing for, and for regulating emoluments, disbursements, and pensions in that branch of the military service, and for caring for widows and orphans.

The act of 1916, being one for national defense, and one for more effectual provisions to that end, and Congress, upon its passage, being under the weight of well-known existing conditions of foreign menace, and in the presence of a recent invasion by an organized military body of armed men from a foreign country, the view is an impossible one that Congress intended to make it optional with the whole, or any substantial part, of the organized military force of the states, under obligation to aid the federal government in repelling invasion and suppressing insurrection, to march or not, at will, in furtherance of the duty [168] which they had previously assumed, and for which they had been maintained in part by the government making the emergency call for help.

The President's communication of June 18, 1916, to Governor McCall, invoking military aid, was based upon the possibility of further aggression upon the territory of the United States, and it is quite apparent that both the President and the Secretary of War had in mind conditions which might necessitate reorganizations and subdivisions of the militia force, because, in the call upon the Massachusetts executive for military aid, it was expressly set forth, among other things, that, if "tactical divisions are later organized," requisite and additional staff officers, with rank as prescribed, will be called into service.

While debates upon a pending legislative bill have considerable potency upon questions of legislative intent, individual expression does not necessarily mean an expression of the intent and understanding of the legislative body. It is true that some of the expressions in the colloquial debate, upon the bill in question, between Mr. Hill and Mr. Hay, have a tendency to sustain the view urged by the petitioner in respect to the intention of Congress; but the colloquy ends with a deliberate expression by Mr. Hay that section 22 applies to unorganized militia which in the future may undertake to become organized militia under the provisions of the act.

Such is the view, in substance, which we take of the statute in question, that it keeps out of the National Guard, as distinctively standardized, such members of the militia as do not voluntarily engage for the higher obligations, and that it refers to future organ-

izations and to greater efficiency and effectiveness, rather than to the idea of breaking down existing obligations for service; and it is in this sense that we cannot accept section 61 in respect to the right of states to maintain troops in time of peace as a mandate imposing itself upon organizations, obligations, and rights existing at the time of the passage of the act in question. It is only in the aspect that it has some bearing upon the question of construction that we refer to that section at all.

The argument on the one side that it has reference to existing state organizations, and therefore relieves from obligation, and puts out of service, all members of the militia and of the National Guard of the states not enlisting for the longer term and taking the oath to obey the orders of the President, prescribed by section 70 of the National Defense Act, and the argument of the other side, upon constitutional ground, that, if it means that, its operation would be destructive of the right of the states to maintain troops, raises a question not necessarily pertinent to this case, and one which we need not consider, because, whatever it means, its only weight here is in aid of the interpretation of the scope and meaning of the statute in respect to obligations of service under prior enlistments, and we give it consideration in that respect.

It is our conclusion that the so-called National Defense Act of 1916 was intended to give greater efficiency and effectiveness to the federal military force, through classification and standardization under military regulations and orders based upon existing rights and obligations, rather than one intended to operate to the end that members [169] of the organized militia, and of the National Guard of the states, who do not see fit to voluntarily enlist for a longer term and assume the broader obligations which might require them to go beyond the national bounds, should be absolved from the duty of responding to the emergency call of the President and the mobilization orders of the Governor in discharge of the obligations into which they had entered, and from the narrower service which they had already assumed under existing laws—that of serving a specified term within the national domain under the lawful orders of the President.

It results, therefore, that when the petitioner had elected not to enlist for the longer term and for the broader service, though not recognized as distinctively a member of the National Guard, that he was still in the service for the federal purposes contemplated at the time he enlisted in the Massachusetts militia and took the oath to obey all laws and regulations for the government of the volunteer militia of the commonwealth, to

obey the orders of all officers, and support the Constitution of the United States.

The petitioner being in service for such federal purposes, he was not entitled to be discharged upon habeas corpus.

The order of the District Court is vacated, with directions that the petitioner be returned to the military custody from which he was taken.

PUTNAM, J. (*dissenting*).—It seems to me that the act of June 3, 1916, is too positive and precise to be modified by construction in the manner attempted by the opinion of the court, and I therefore conclude that the decrees and orders of the District Court should be affirmed, and dissent to that extent from the opinion of the court in this case.

NOTE.

Power of Federal Government with Respect to State Militia.

The power of the federal government over the state militia is derived primarily from the Constitution of the United States which includes the following provisions: "Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; . . . to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Art. I, § 8; 8 Fed. St. Ann. 652, 654. "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." Art. II, § 2; 9 Fed. St. Ann. 7.

The Congressional power under the foregoing grant has been exercised from an early date, the regulations now in force being principally embodied in the so-called "Dick Act" (Act of Jan. 21, 1903, as amended by the Act of May 27, 1908, Fed. St. Ann. 1909 Supp. 346) and the National Defense Act of 1916 (Fed. St. Ann. Pamph. Supp. No. 7, 40).

The Congressional power conferred by the foregoing provisions is unlimited except as to the reserved power of the states to appoint officers and conduct the actual training of the militia. *Houston v. Moore*, 5 Wheat. 16, 5 U. S. (L. ed.) 19; *In re Spangler*, 11 Mich. 305. See also 10 Op. Atty-Gen. 13, 279; 22 Op. Atty-Gen. 228.

The respective powers of the state and the federal governments were stated generally in

People v. Hill, 59 Hun 624, 13 N. Y. S. 637, *affirmed* 126 N. Y. 497, 27 N. E. 789, wherein it was said: "It will thus be seen that the power conferred upon the United States is to provide for organizing, arming, and disciplining the militia, and governing such part of them as may be employed in the service of the United States. It is apparent that the organization here mentioned refers to the manner of formation of the militia, the weapons with which they shall be armed, and the tactics in which they shall be instructed. 'Disciplining,' as used in this section, refers in no wise to governmental action, as is apparent from the last clause of the section, where it is provided that the authority of training the militia according to the discipline prescribed by Congress is reserved to the states. And the states were so zealous in guarding the right to control the government of the militia, and the material of its organization, that, in order that there should be no mistake, and that no greater powers should be claimed because of the word 'organizing' than were implied in prescribing the method of the formation of the militia, the appointment of officers, and authority to train is expressly reserved; and the only instance where governmental powers may be exercised by the United States is distinctly mentioned, viz., when the militia shall be employed in the service of the United States. At all other times the whole government of the militia is within the province of the state, and therefore any legislation which the state may adopt, relating to the government of the militia, is in no wise in contravention of the powers conferred upon Congress, as long as it does not infringe upon the method of organization. Why was the power granted to the United States to provide for organizing, arming, and disciplining the militia? It was that the militia should be organized after one model, armed in a uniform manner, and disciplined in one system of tactics; the result being that, when the militia of different states come together, called into service by the government of the United States, they come together as a homogeneous body, all organized in one way, armed in one way, and disciplined in one way; and not as a confused mass, having different methods of organization, different arms, and acquainted with different systems of tactics, and hence their usefulness very materially impaired. It was to provide against this contingency that this power was conferred upon the United States by the Constitution, and beyond this the states delegated no authority to the United States to interfere in their internal affairs in respect to the government of the militia." See also *Anslay v. Timmons*, 3 McCord L. (S. C.) 329. In *Opinion of Justices*, 14 Gray

(Mass.) 614, it was said that the sole power to define the composition of the militia is in Congress.

The President has the sole and final power to determine whether an exigency exists which requires the calling of the militia into the service of the United States. *Martin v. Mott*, 12 Wheat. 19, 6 U. S. (L. ed.) 537; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150. Compare Opinion of Justices, 8 Mass. 549. In *Martin v. Mott*, supra, it was said: "Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If 'the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy,' these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all

discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment."

When the militia is called into the service of the United States its members become members of the military forces of the United States, under the exclusive control of the federal military authorities. In *re Wulzen*, 235 Fed. 362, Ann. Cas. 1917A 274; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; *Com. v. Irish*, 3 Serg. & R. (Pa.) 177, note.

But the militia when not called into service by the President has a status distinct from that of the armed forces of the federal government. *West Virginia v. U. S.* 45 Ct. Cl. 576; *Alabama Great Southern R. Co. v. U. S.* 49 Ct. Cl. 522. In *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L.R.A. 749, it was said: "Under our Military Code, the active militia or National Guard is organized and enrolled for discipline, and not for military service, except in times of insurrection, invasion and riot. The men comprising it come from the body of the militia of the state, and, when not engaged at stated periods in drilling or training for military duty, they return to their usual vocations, subject to call when public exigencies require it, but may not be kept in service, like standing armies, in times of peace. While enrolled as soldiers of the state for the purposes aforesaid, they are neither 'troops,' within the meaning of section 10 of article 1 of the Federal Constitution, nor a 'standing army,' within the meaning of section 14 of the bill of rights in the state constitution. *Dunne v. People*, 94 Ill. 120." In *Alabama Great Southern R. Co. v. U. S.* supra, it was held that a railroad holding a federal land grant was not bound to carry state militia at a reduced rate to and from an encampment where under order of the secretary of war they were to participate in training jointly with regular army forces. The court said: "The Constitution therefore clearly distinguishes between the army and navy on the one hand and the militia upon the other. The latter may be called forth by the President for specific purposes, he being the judge of the exigencies justifying his call, and when so called forth and assembled in obedience to the call there is no doubt that the militia or the National Guard come under the control of the government and into the service of the United States—the governor of the state ceasing to be commander in chief con-

temporarily with the President becoming their commander-in-chief. And certainly when the President becomes the commander-in-chief the militia are in the service of the United States, while they cannot be 'in the actual service of the United States' if he is not their commander-in-chief. . . . That the National Guard may become 'troops of the United States' within the meaning of said land grant act is not to be questioned, but, as was said at the bar in this case, it is not the potentiality but the actuality of being in the service contemplated by the Constitution which fixes their status as 'troops.' The meaning of the act under which the claimant must transport troops is not to be restricted to the regular army, nor can it be extended to include the National Guard when not in the service of the United States. The President did not call forth the militia of said states nor direct them to assemble at Chickamauga Park, nor was he their commander-in-chief while they were there. If it should be conceded that while at the joint camp of instruction the National Guard were under the command of officers of the regular army and because thereof were in the service of the United States—a concession we do not make—it would yet seem that such service commenced with their arrival and ended with their departure, and therefore that during the transportation to and from the camp, for which this action is brought, they were not in the service or troops of the United States."

Members of the state militia when not in the service of the United States under the call of the President are not subject to the articles of war of the United States. *State v. Peake*, 22 N. D. 457, 135 N. W. 197, 40 L.R.A.(N.S.) 354; *Manley v. State*, 62 Tex. Crim. 392, 137 S. W. 1137. And see *Houston v. Moore*, 5 Wheat. 1, 5 U. S. (L. ed.) 19. It is, however, competent for a state to provide by statute that the militia shall be subject to the articles of war and that its members shall be triable by a general court-martial for a violation thereof. *McGorray v. Murphy*, 80 Ohio St. 413, 17 Ann. Cas. 444, 88 N. E. 881. And see *Dowling v. Lee*, 68 Fla. 23, 66 So. 142.

The reported case holds that the provision of the National Defense Act of 1916 (Fed. St. Ann. Pamph. Supp. No. 7, 40) for the administration of a federal oath to members of the militia does not prevent the calling into federal service under an earlier act of a militiaman who has not taken that oath.

OWENS

v.

STATE.

Florida Supreme Court—November 6, 1914.

68 Fla. 154; 67 So. 39.

Jury — Custody and Conduct — Witness for Prosecution as Bailiff.

It is manifestly improper for one who is a material witness for the state in a prosecution for murder, to have charge as bailiff of the jury impaneled to try the case, or to be with or have any communications with such jury. Especially is this true when such party continues to remain with such jury after he has been removed as such bailiff by the court, at the instance of the defendant on trial.

[See note at end of this case.]

Necessity of Excluding Outside Influences.

An impartial jury, selected and kept free from all outside or improper influences, is necessary to a fair and impartial trial.

Same.

In a prosecution for crime which has resulted in a conviction, where it is made to appear that the jury was not kept free from outside or improper influences, and there is a sharp conflict in the evidence upon material points, the judgment may be reversed.

(Syllabus by court.)

Error to Circuit Court, Alachua county: WILLS, Judge.

Criminal action. H. M. Owens convicted of manslaughter and brings error. The facts are stated in the opinion. REVERSED.

T. W. Fielding and *Evans Haile* for plaintiff in error.

T. F. West and *C. O. Andrews* for defendant in error.

[155] SHACKLEFORD, C. J.—H. M. Owens and Alex Powell were indicted and tried for murder in the first degree, which resulted in Alex Powell being acquitted and H. M. Owens convicted of manslaughter. Fifteen errors are assigned, but in view of the conclusion which we have reached it will not be necessary to consider or discuss them all.

We turn to the motion for a new trial, which was overruled and which ruling is assigned as error, and copy the following grounds thereof, which we shall consider together:

"4th. Because one W. F. Beach, a material witness in behalf of the State of Florida, slept in and occupied the same room with the jury that had this defendant in charge.

5th. Because one W. F. Beach, a material witness for the State of Florida, was left in sole charge of the said jury, and escorted said jury to and from supper in a restaurant some distance from the court house, and ate supper with said jury, and had escorted said jury to and from their breakfast and dinner in said restaurant; and at the time of eating supper with said jury, said Beach was at the table with four of said jury, and talked with said four jurors during the time they were eating supper, and for the space of about thirty minutes.

6th. Because W. F. Beach, who was a material witness for the State of Florida, was appointed and designated by P. G. Ramsey, Sheriff of Alachua County, Florida, without the knowledge or consent of defendants, or any of his attorneys, to stay and sleep with the jury that tried this [156] defendant, and the said Beach did stay and sleep with said jury during defendant's trial.

7th. Because one W. F. Beach, a material witness for the State of Florida, during the night of the 29th day of January, A. D. 1914, stayed with and slept in the same room with the said jury, and on that same night one F. M. Cellon was the bailiff over said jury.

8th. Because one F. M. Cellon, being the same F. M. Cellon whom the Judge trying the case, removed on the second day of the trial, after he had slept with the jury trying this defendant, the night before, assisted the prosecuting attorneys in selecting the jury that tried this defendant, and during the trial of this defendant, and while said Cellon was acting as bailiff to said jury, he assisted the attorneys prosecuting this defendant in the prosecution of this defendant, by suggesting questions to said attorneys to ask the witnesses who were testifying, and also assisted said attorneys in prosecuting this defendant by furnishing them with evidence by which they attempted to impeach a witness for this defendant.

9th. Because the said F. M. Cellon stayed with and slept with the jury in the same room, and escorted the jury to and from their meals, before he was removed as bailiff of said jury by the judge.

10th. The said F. M. Cellon was removed by the Judge as bailiff over said jury because of his intense interest exhibited by him during the trial of the case against this defendant, but the said removal was not made until the said F. M. Cellon had already spent one night with said jury in the same room with them, and had escorted said jury to and from several meals, and had eaten with them.

11th. Because said F. M. Cellon, while Aleck Powell was in jail, charged with this defendant for the killing of [157] Splain,

tried to extort a confession from said Aleck Powell, a mere lad under 21 years of age, and tried to force said Aleck Powell to make statements charging this defendant with the murder of Splain.

21st. That because P. G. Ramsey, then the Sheriff of said county, volunteered information to the State's Attorney concerning one of the talesmen who was selected as one of the jurors and tendered the defendant by the State, in the presence of all the jurors, clearly showing to the jury his interest in the case against the defendant.

22nd. Because P. G. Ramsey, Sheriff, took an active part in the prosecution of this defendant, H. M. Owens, and so prejudiced this defendant by the appointment of his Deputy, F. M. Cellon, as bailiff, and Permitting W. F. Beach, a personal friend of W. E. Bells, and from Bell's home, to sleep and eat with the jury trying the cause, as to prevent this defendant from having a fair trial.

23rd. Because the Sheriff and his Deputies prevented this defendant from having a fair and impartial trial."

We shall not discuss these grounds in detail.

The transcript of the record shows that the trial of this case was begun on Thursday, the 29th day of January, 1914, and concluded on Saturday, the 31st day of January, when the verdict was rendered. The bill of exceptions discloses that the following proceedings took place:

"Mr. Williams, of counsel for defendants, here stated to the Court that Mr. Cellon, who is the bailiff in charge of this jury, comes forward and whispers to Mr. Broome, who is assisting State's Attorney, in the prosecution, during the trial of this case, and asked for an order of the court that he be removed, and another bailiff be appointed who is not taking an interest in this case. And thereupon [158] State's Attorney stated that Mr. Cellon had not spoken to him during the trial of the case; that if he had spoken to Mr. Broome, it had not been communicated to him. Whereupon Mr. Broome stated that Mr. Cellon had spoken to him with reference to the case. Motion granted, and the Court ordered Mr. Bruton to take charge of the jury."

It would seem that Mr. Cellon was removed as such bailiff on the second day of the trial, though the record is not entirely clear upon that point. We also find the following proceedings in the bill of exceptions:

"Here, during the second day's trial of the defendants, the attorneys for the defendants, in open court and during the progress of the trial, called the Court's attention to the fact that one W. F. Beach was the bailiff to the petit jury that had these defendants

in charge, and that was trying these defendants; that said W. F. Beach was acting in a manner extremely hostile towards the defendants, and then and there the attorneys for said defendants moved the court to remove the said W. F. Beach as bailiff to said petit jury, and to place some impartial bailiff in charge of said jury; and thereupon the court granted the motion of the attorneys for the defendants, and removed the said W. F. Beach as bailiff to said petit jury."

Just how Mr. Beach came to act as bailiff we are not advised, but presumably by order of the Sheriff, since the sheriff alone had authority to so order. See *Nicholson v. State*, 38 Fla. 99, 20 So. 818. It is further disclosed that W. F. Beach, who was a deputy sheriff, was called as a witness by the State in rebuttal and gave material testimony against the two defendants. It further appears, not only from the affidavits filed by the defendant, H. M. Owens, on behalf of his motion for a new trial, but from the examination of Mr. Frank E. Cellon, Mr. W. [159] F. Beach, and Mr. W. T. Bruton, all of whom were deputies of the sheriff, that both Beach and Cellon were in charge of the jury on the night of the 29th of January and that both Beach and Bruton had charge of the jury on the following night, being the only two nights the jury was out during the trial. It also appears that Beach went with the jury to supper on each night, the first night with Cellon and the second night with Bruton, and ate with them, the second night, when he had been removed as bailiff, still being at supper and eating with them. Still other facts and circumstances are made to appear, which we do not deem it necessary to set forth. It is sufficient to say that, while it is not affirmatively made to appear that either Beach or Cellon did actually attempt to influence the jury in any way, and, as a matter of fact each one positively denies having done so, yet it plainly appears that each one had the opportunity of so doing. It was manifestly improper for Beach, who was a material witness for the prosecution, to have charge of or to be with the jury. See *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, and appended note. We would also refer to *Madden v. State*, 1 Kan. 340; *State v. Snyder*, 20 Kan. 306; *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109; *Rickard v. State*, 74 Ind. 275. We shall not undertake to express any opinion concerning the evidence. Suffice it to say that there is a conflict therein upon material points. This being true, and it plainly appearing that some of the deputies of the sheriff had acted in an irregular and improper manner while in charge of the jury, and it would seem, were over-zealous for the prosecution, we think that the ends of justice would be best

subservied by another trial. As was said in *Buxton v. State*, 89 Tenn. 216, text 217, 14 S. W. 480, "An impartial jury, selected and kept free from all outside or improper influences, has always [160] been regarded by our courts as necessary to a fair and impartial trial."

The other errors complained of need not arise upon another trial, therefore we shall not discuss them.

Judgment reversed.

Taylor, Cockrell, Hocker and Whitfield, JJ., concur.

NOTE.

Prejudice of Officer as Disqualifying Him from Acting as Custodian of Jury.

The majority of the cases decided subsequent to those collated in the note to *State v. Oteri*, Ann. Cas. 1912C 878, hold that the fact that an officer is a witness for the prosecution in a criminal case does not ipso facto disqualify him from acting as a custodian of the jury. *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631; *Galan v. State*, 68 Tex. Crim. 200, 150 S. W. 1171; *Holmes v. State*, 70 Tex. Crim. 214, 156 S. W. 1172. Compare the reported case.

In *Galan v. State*, *supra*, the custodian was a material witness for the prosecution. It was held that it was not error to allow him to act as bailiff unless there was something done by him which influenced or tended to influence the jury in their verdict, the court saying: "If he did wrong in the matter some fact ought to be stated showing or tending to show such action." In *Holmes v. State*, *supra*, the custodian was a witness for the prosecution in a trial for burglary. In declaring him to be eligible, the court said: "If every officer who should be summoned as a witness in a case should thereby be disqualified from performing his official duty, it might occur that there would be no officer to wait on the court. In this case it is not attempted to show any improper conduct on the part of the officer. The court in approving the bill shows that no other deputy was in attendance on court, and the bill presents no error."

The reported case holds that where it appears that the prejudiced custodian had an opportunity to influence the jury, it is ground for a new trial whether the jury were actually influenced or not.

It has been held that the distant relationship of the custodian to the person for whose death the accused was on trial did not serve to disqualify the custodian. *Combs v. Com.* 160 Ky. 386, 169 S. W. 879. In that case the relationship was very distant, or possibly

merely a reputed one. There was no evidence of any misconduct or any prejudice on the part of the custodian, and the accused had assented to the appointment.

MATTER OF ESTATE OF LESTER.

Iowa Supreme Court—February 12, 1915.

169 Iowa 15; 150 N. W. 1033.

Executors and Administrators — Priority of Claim — Funeral Expenses — Cost of Monument.

An expenditure for a monument is not strictly a funeral expense within Code, § 3347, providing that, as soon as the executor or administrator has sufficient means, he shall pay charges of deceased's last sickness and funeral, but even though the estate is insolvent the court may in its sound discretion class such an expenditure as a funeral expense, but postponing it to the payment of such part of a claim for nursing during the last sickness of deceased as is preferred by statute.

[See note at end of this case.]

Appeal from District Court, Wapello county: HUNTER, Judge.

[15] Proceeding in probate for an order authorizing the administrator to expend \$125.00 for a monument for deceased. The court granted the order for a monument in the sum of not to exceed \$100.00, but provided that before expending said amount for that purpose the administrator should first pay all funeral expenses and the expenses of the last sickness of the deceased, which should include the sum of \$156.00 of the \$363.00 claim allowed by the court in favor of Rachel Mead, so far as the administrator has assets in his hands. The administrator, E. M. Lester, appeals. **AFFIRMED.**

Tisdale & Heindel for appellant.

Steck & Steck for Rachel Mead, appellee.

PRESTON, J.—Appellant is the son and only heir at law and the sole beneficiary under the will of deceased. The showing [16] is that the assets consist of \$280.00 in money and a small amount of household goods; that the indebtedness against the estate and admitted claims amount to about \$140.00; but that in addition to such claims is the claim of Rachel Mead, which was allowed in the sum of \$363.00; \$156.00 of the Rachel Mead claim was for nursing the deceased, as we understand the record, and we

do not understand appellant to dispute that fact. The objector, Rachel Mead, filed written objections to the granting of the order because the administrator is the son of decedent and had received from his mother, the deceased, all the real estate she owned of the value of from \$1,000.00 to \$1,200.00, as she says, and for the further reason that the application is not made in good faith, but made for the purpose of preventing Mrs. Mead from making any part of her claim.

The testimony of the administrator shows that the house and two lots deeded to him about 1910 were estimated to be worth from \$600.00 to \$700.00. The administrator has paid out about \$8.00 or \$9.00 for witness fees and \$5.30 for the funeral dress. The funeral expenses were \$90.00. There was also a claim filed for digging a grave; and a livery bill. The total claims filed amount to about \$685.00, including the allowance of objector's claim. The funeral expenses have not been paid, nor has anything been paid on Mrs. Mead's claim. The estate is insolvent. The administrator, as a witness admits that there is feeling between himself and his aunt, Mrs. Mead, because of her coming to nurse his mother.

The contention of the appellant is, that the cost of a monument is a part of the funeral expenses under the statute, and that the court should not have preferred Mrs. Mead's claim, or a part of it, as ahead of the expense for monument; that if there is not money enough to pay all the funeral expenses they should be prorated. We have no argument for appellee. Appellant cites a number of cases from this and other states in support of his claim, among them: *Hapgood* [17] v. *Houghton*, 10 Pick. (Mass.) 154; *Ferrin v. Myrick*, 41 N. Y. 315; *Fairman's Appeal*, 30 Conn. 205. In the *Hapgood* case the question determined was one of pleading, and the *Ferrin* case arose on the question of a contract for funeral expenses. In the Connecticut case it was held that tombstones are properly a part of the funeral expenses, but it was said by the court in that case: "We do not intend to hold that an administrator or executor may procure them (tombstones) in all cases at the expense of the estate. If the estate is solvent, we think he should consult the heirs, and have the advice and approbation of the court of probate. If it is insolvent, they certainly should not be obtained without that advice and approbation. In the absence of specific legislation the propriety of obtaining them, and at what expense, may properly be left to the court." *Webb's Estate*, 165 Pa. St. 330, 30 Atl. 827, 44 Am. St. Rep. 666; *Barclay's Estate*, 11 Phila. 123, 33 Leg. Int. 108; *In re Porter*, 77 Pa. St. 43, are cited on the proposition that an

allowance for the expenses of a suitable tombstone over the grave of decedent is a legitimate item of credit in the account of an executor. *Laird v. Arnold*, 42 Hun 136, 3 N. Y. St. Rep. 376; *Matter of Shipman*, 82 Hun 108, 31 N. Y. S. 571, are cited to sustain the proposition that the cost of a suitable monument is properly allowed the administrator as a part of the funeral expenses.

In Kentucky, such is made a part of the funeral expenses by statute. *Hespen v. Hespen*, 31 Ky. L. Rep. 1328, 105 S. W. 99.

In *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469, it is held that the cost of a tombstone, if not prejudicial to creditors, or disproportioned to the estate, is properly allowed as a part of the funeral expenses.

But it was held in *Hisem v. Lemel*, 19 La. 425, that the cost of erecting a tomb was no part of the funeral expenses. See also: *Note*, 33 L.R.A. 666, 28 L.R.A. (N.S.) 572, and *note*; 18 Cyc. 439.

Our statute provides that as soon as the executor or administrator is possessed of sufficient means over and above [18] the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and next, any allowance made by the court for the maintenance for the widow and minor children. Code Sec. 3347. Under this statute, it has been held by this court, in *Crapo v. Armstrong*, 61 Ia. 697, 17 N. W. 41: "That a tombstone is a proper expenditure to be made by an executor as pertaining to the funeral expenses, and that such expenditure may be made without any direction by will, and notwithstanding the estate may be insolvent. . . . We think that in the absence of any statutory provision upon the subject, the propriety of obtaining tombstones or monuments, and the amount to be expended therefor, may very properly be left to the circuit court having the supervision of the settlement of the estate." And in *Lutz v. Gates*, 62 Ia. 513, 514, 17 N. W. 747, it is held that a suitable monument may properly be erected to the memory of a deceased person and the cost thereof paid by the administrator out of the funds of the estate. In *Mullinnix v. Brown*, 151 Ia. 468, at 475, 131 N. W. 671, it is held that the cost of a suitable monument for one deceased is as properly chargeable against his estate as are the funeral expenses; and that lands may be sold in the absence of a personal estate to meet such claims. Appellant also cites *Foley v. Brocksmit*, 119 Ia. 457, 93 N. W. 344, 97 Am. St. Rep. 324, 60 L.R.A. 571, where the court said, referring to funeral expenses: "The law with reference to such matters is well settled and generally understood. Such charges are not, strictly speaking, debts due from the deceased, but charges

which the law out of decency imposes upon his estate. And so far as these are reasonable in amount they take legal priority of all such debts; as likewise do the administration charges."

But there was no question in regard to a monument in that case. There can be no question as to the propriety of the allowance of such a claim. Some of the cases outside of Iowa, while holding that the cost of a monument is proper funeral expense, do not decide the point that they are such so as to be a preferred claim ahead of other creditors, and [19] none of the Iowa cases so hold. The *Crapo* case, *supra*, seems to hold, inferentially, at least, that such a claim would not come under the statute quoted.

We are of opinion that, while such an expenditure pertains to the funeral expenses, it is not such strictly and so as to come within the provisions of the statute referred to, but we think it may be made so by the court within its sound discretion. One hundred fifty-six dollars of Mrs. Mead's claim, being for nursing, would be a preferred claim as expense of the last sickness, under the statute. The court did not err in requiring the administrator to pay that much of her claim before using any of the funds in his hands to erect a monument. It follows, then, that the order of the district court was right, and it is

Affirmed.

Deemer, C. J., and Evans and Weaver, JJ., concur.

NOTE.

Liability of Decedent's Estate for Cost of Monument or Tombstone.

In General:

As Part of Funeral Expenses, 256.

Allowance to Personal Representative, 258.

Reimbursement of Member of Family, 260.

Propriety or Reasonableness of Expenditure:

In Absence of Testamentary Direction:

In General, 262.

Illustrations, 262.

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Estate of Deceased Married Woman, 267.

In General.

AS PART OF FUNERAL EXPENSES.

The cost of a suitable monument or stone, consonant with the value of the decedent's estate, is properly classed under the head of funeral expenses for which the estate is liable. *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Van Emon v. Superior Ct.* 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep.

258; Fairman's Appeal, 30 Conn. 205; Pease v. Christman, 158 Ind. 642, 64 N. E. 90; Donald v. McWhorter, 44 Miss. 124; Griggs v. Veghte, 47 N. J. Eq. 179, 19 Atl. 867; Emans v. Hickman, 12 Hun (N. Y.) 425; Owens v. Bloomer, 14 Hun (N. Y.) 296; Laird v. Arnold, 42 Hun 136, 3 N. Y. St. Rep. 376; Matter of Shipman, 82 Hun 108, 31 N. Y. S. 571; Allen v. Allen, 3 Dem. (N. Y.) 524; Wood v. Vandenburg, 6 Paige (N. Y.) 277; Matter of Beach, 1 Misc. 27, 22 N. Y. S. 1079; Matter of Howard, 3 Misc. 170, 23 N. Y. S. 836; Matter of Maverick, 135 App. Div. 44, 119 N. Y. S. 914; Ferrin v. Myrick, 41 N. Y. 315; Moulton v. Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. See also Jaqua v. Gray, 46 Ind. App. 24, 91 N. E. 745; Dudley v. Sanborn, 159 Mass. 185, 34 N. E. 181; Bell v. Briggs, 63 N. H. 592, 4 Atl. 702. Compare *In re Ferguson*, 81 Ohio St. 58, 89 N. E. 1070; Meyer's Estate, 18 Phila. (Pa.) 42, 43 Leg. Int. 108; Barclay's Estate, 11 Phila. (Pa.) 123, 33 Leg. Int. 108, 2 W. N. C. 447. In *Wood v. Vandenburg*, 6 Paige (N. Y.) 277, the qualification was made that the cost of a suitable headstone is a part of the funeral expenses in a case where the rights of creditors cannot be defeated thereby. And in *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728, it was said that a simple and inexpensive headstone is demanded by the decencies of Christian burial and may be regarded as a part of the funeral expenses.

But it has been held that the cost of a monument or tombstone is not strictly a funeral expense within the meaning of statutes limiting the amount of, or giving priority to, funeral expenses. *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, reversed on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 U. S. (L. ed.) 339. And see the reported case. Compare *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147. In *Sinnott v. Kenaday*, supra, it was held that the expense of erecting a monument was not strictly a part of the funeral expenses, and hence was not within a statute limiting funeral expenses to \$300. But in *Nelson v. Schoonover*, supra, it was held, contrary to the holding in the reported case, that the expense of erecting a suitable monument was to be classed among funeral expenses, within the meaning of a statute giving priority to such expenses.

The cost of a monument is, however, a part of the funeral expenses within the exemption of such expenses from a transfer tax. *Matter of Edgerton*, 35 App. Div. 125, 54 N. Y. S. 700. See also *Matter of Maverick*, 135 App. Div. 44, 119 N. Y. S. 914.

It has been held that the cost of a tombstone is not a part of the funeral expenses as defined in the Louisiana statute (Code, Ann. Cas. 1917B.—17.

art. 3159) which provides that "funeral charges are those which are incurred for the interment of a person deceased," but that the curator of an estate will nevertheless be allowed the amount expended by him in erecting a tombstone pursuant to the request of the deceased and with the consent of the heirs. *Hisem v. Lemel*, 19 La. 425. And it has been held in the same jurisdiction that the expense of the erection of a tomb to a deceased husband is not chargeable to the community property but is to be borne by the estate of the deceased. *Smith's Succession*, 9 La. Ann. 107.

Although the expense of a monument is a part of the funeral expenses, proper to be made by an executor, it does not follow that the estate may be sued directly on a contract made by the executor for a monument. The executor should be sued personally on his contract, leaving him to recover his allowance out of the estate. *Ferrin v. Myrick*, 41 N. Y. 315; *Hocor v. Lavery*, 51 App. Div. 74, 64 N. Y. S. 518. Compare *Laird v. Arnold*, 42 Hun 136, 3 N. Y. St. Rep. 376. In *Ferrin v. Myrick*, the court said: "The contract for the gravestones was proved to have been made. They were of a character suitable to the rank and station in life of the deceased, and to the circumstances of his estate. The defendant, as administrator, had assets in his hands applicable to their payment. Can the action in such cases be maintained against the estate, as a matter of course, or is the remedy against the administrator personally? The administrator contracted for the purchase and delivery of the monument. He had a right to contract for stones suitable to the rank in life of the deceased, and to the estate left by him. He had no right to contract for stones of an unsuitable character. Thus, for the grave of a man leaving an estate of \$10,000, or \$20,000, monuments of which the expense should be \$100 or \$200, would very likely be deemed suitable and reasonable. If the same individual should leave an estate of but \$500, and a family of small children, an expenditure of several hundred dollars for that purpose, probably would not be deemed suitable or reasonable. . . . Whether the particular article is suitable and reasonable, or otherwise, is a question which the seller is not called upon to decide. That question is not left to his decision. It belongs to the administrator. He decides it at his peril, to be allowed or disallowed, in the final settlement of his accounts with the surrogate. The seller accepts the judgment and decision of the administrator, acts upon his direction, and makes and delivers the stones or the monument upon his direction and upon his agreement. It is, therefore, most reasonable and proper, that the

administrator should be liable himself to the seller, although the estate may not ultimately be liable to him, or to anyone else, for the article furnished. Again, it is to be considered that the administrator is not the agent of the testator, or of the estate, and therefore allowed to contract in its behalf." But in *Laird v. Arnold*, 42 Hun 136, 3 N. Y. St. Rep. 376, creditors sued by petition to make real estate assets for the payment of the debt contracted by the administrator for a monument, and the prayer of the petition was allowed.

ALLOWANCE TO PERSONAL REPRESENTATIVE.

It is quite generally held that the cost of a tombstone or monument, not disproportionate to the value of the estate, is a valid charge against the estate of a decedent and that the personal representative is entitled to use funds of the estate for that purpose and is properly granted an allowance for such a use of the assets.

Alabama.—*Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Hatchett v. Curbow*, 59 Ala. 516; *Pierce v. Fulmer*, 165 Ala. 344, 51 So. 728.

District of Columbia.—*Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, reversed on other grounds 179 U. S. 606, 21 S. Ct. 233, 45 U. S. (L. ed.) 339.

Illinois.—*Spire v. Lovell*, 17 Ill. App. 559; *Phillips v. Duckett*, 112 Ill. App. 587.

Iowa.—See *Crapo v. Armstrong*, 61 Ia. 697, 17 N. W. 41.

Maryland.—See *Crothers v. Crothers*, 123 Md. 603, 91 Atl. 691.

Michigan.—*Pistorius's Appeal*, 53 Mich. 250, 19 N. W. 31; *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 846.

Mississippi.—*Donald v. McWhorter*, 44 Miss. 124.

New Jersey.—*Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867.

New York.—*Laird v. Arnold*, 42 Hun 136, 3 N. Y. St. Rep. 376; *Matter of Beach*, 1 Misc. 27, 22 N. Y. S. 1079; *In re Howard*, 3 Misc. 170, 23 N. Y. S. 836; *Matter of Meuschke*, 61 Misc. 9, 114 N. Y. S. 722; *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. S. 530. See also *Matter of Woodbury*, 40 Misc. 143, 81 N. Y. S. 503; *Matter of Young*, 92 Misc. 637, 157 N. Y. S. 494; *Ferrin v. Myrick*, 41 N. Y. 315.

Pennsylvania.—*Duffy's Estate*, 9 Kulp 409; *Appeal of McGlinsey*, 14 Serg. & R. 64; *Connelly's Estate*, 28 Pittsb. Leg. J. N. S. 355; *Hirst's Estate* 12 W. N. C. 323; *Conway's Estate*, 10 Pa. Dist. 509; *Lutton's Estate*, 17 Pa. Super. Ct. 342; *Webb's Estate*, 165 Pa. St. 330, 30 Atl. 827, 44 Am. St. Rep. 666. See also *Meyer's Estate*, 18 Phila. (Pa.) 42, 43 Leg. Int. 108; *Geiger's Estate*,

12 W. N. C. 439; *Miles' Estate*, 13 Pa. Dist. 264, 30 Pa. Co. Ct. 80. See also *In re Porter*, 77 Pa. St. 43.

South Carolina.—*Patterson v. Jones*, 99 S. C. 128, 82 S. E. 1008.

Such an expenditure may be made by the personal representative, it has been said, without any direction by will. *Crapo v. Armstrong*, 61 Ia. 697, 17 N. W. 41; *In re Porter*, 77 Pa. St. 43. And it may be made although the estate is insolvent. *Cornwell v. Deck*, 2 Redf. (N. Y.) 87. See also *Crapo v. Armstrong*, 61 Ia. 697, 17 N. W. 41.

However it has been said that an administrator will not be allowed to procure a monument at the expense of the estate in all cases and as a matter of course, but that he should consult the heirs and have the advice and approval of the court of probate, even if the estate is solvent, and that if it is insolvent the monument certainly should not be procured without that advice and approbation. *Fairman's Appeal*, 30 Conn. 209. And see *Lund v. Lund*, 41 N. H. 355. But an allowance of a reasonable expenditure for a tombstone will not be refused simply because the executrix failed to consult all the persons interested in the estate. *Titlow's Estate*, 5 Pa. Dist. 40.

It has been held that, although an executor may bind the estate of the deceased on an implied contract for the cost of a monument, he cannot bind it by express contract, and that if he makes an express contract for the purchase of a monument he will be personally bound, and recovery cannot be had against the estate on the contract. *Durkin v. Langley*, 167 Mass. 577, 46 N. E. 119.

Real estate of the deceased may be sold by the personal representative under order of court, in the absence of personalty sufficient for the purpose, to defray the expense of the erection of a suitable monument to the deceased. *Mullinnix v. Brown*, 151 Ia. 468, 131 N. W. 671. See also *Nelson v. Schoonover*, 89 Kan. 388, 13 Pac. 147. In *Mullinnix v. Brown*, supra, the court said: "Again, it is said that no order to sell should have been made because of lack of proof of the allowance of any claims save that for the monument, which was secured upon order of court, and that there exists no authority in law for ordering a sale of real estate for the purpose of paying such claims. In this contention counsel are in error. The record does show the allowance of claims against the estate of the deceased for more than the amount of money and personal property in the hands of the administrator. Moreover, we think that real estate left by one deceased may be sold upon proper application for the payment of such debts as well as for the funeral expenses of one deceased. Whilst counsel cite several cases which they claim

support their contention, we find none which do so. The cost of a suitable monument for one deceased is as properly chargeable against his estate as are the funeral expenses; and that lands may be sold in the absence of a personal estate to meet such claims is entirely clear."

The construction of a vault for the repose of the dead is as proper as the erection of a monument, and the personal representative of a decedent will be allowed a reasonable allowance therefor. *Knapp v. Jessup*, 146 Mich. 348, 109 N. W. 666, 117 Am. St. Rep. 646, 7 L.R.A. (N.S.) 617.

If an executor resists in good faith an action against him personally on a contract for a tombstone, and a recovery is had against him, he may be allowed costs, witness fees, and attorney's fees out of the estate. *Matter of Grout*, 15 Hun 361.

It has been held that a claimant was entitled to recover against the estate of a decedent the value of a monument made by him under an agreement with the administratrix, and that he might so recover although the monument remained on his own premises and had not yet been erected, the agreement with the administratrix providing that he was not to put the work up until he was paid or his claim was allowed by the orphan's court. *Crosson's Appeal*, 125 Pa. St. 380, 17 Atl. 423.

It has been held that the court will not affirmatively allow an expenditure to be subsequently made for a monument, but will only pass on the item as a claim after the expenditure has been made. *Benner's Estate*, 3 Brews. (Pa.) 398.

Injunction will not lie at the suit of the widow, the sole devisee of the deceased, to restrain the executor from erecting a monument to the deceased at a cost of \$500. The executor has a lawful right to do so and no irreparable injury is threatened the widow to call forth the interposition of equity. *Duffy's Estate*, 9 Kulp (Pa.) 409.

By a Kentucky statute (Stats. § 3885) the personal representative or heirs at law may cause to be erected over the grave of the deceased an appropriate memorial tablet, the cost of which shall be allowed as funeral expenses on the settlement of the estate. *Hespen v. Hespen*, 105 S. W. 99, 31 Ky. L. Rep. 1328.

It has been held that the Massachusetts statute authorizing an allowance for a monument was not confined to the case of a monument on a lot bought with the intestate's money, but that it applied equally to a case in which an administratrix bought a lot with her own money and had the intestate's body removed there, after having obtained leave of court to erect the monument on the cemetery lot from which the intestate's body was

moved. *Dudley v. Sanborn*, 159 Mass. 185, 34 N. E. 181. It has been held, however, that the statute applied only to the purchase of a monument by the personal representative and that it did not authorize another person, without the authority of the personal representative, to erect a monument to the deceased and recover the amount of the cost thereof against the estate. *Sweeney v. Muldoon*, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708, wherein it was said: "The purchase of a tombstone cannot be considered as a part of the charges or necessary expenses of the funeral, within the meaning of these provisions of the statutes. It was not intended that any person might erect a tombstone to the deceased, and charge the administrator with the cost of it, as a debt or a preferred debt against the estate. The necessity for a decent burial arises immediately upon the decease, and the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose; but there is no similar necessity for the erection of a tombstone, and, if a tombstone is erected without the authority of the administrator, the statutes have not made the cost of erecting it a debt of the estate. We think it was not the intention of the St. of 1878, c. 228 [P. S. c. 144, § 6; R. L. c. 150, § 12] to authorize another person, without authority from the administrator or executor, to erect a monument to the deceased, and sue the administrator or executor therefor, in an action at law, but merely to authorize an administrator or executor to expend a reasonable sum for that purpose if it becomes necessary, and there are sufficient assets."

By a statute of New Hampshire (G. L. c. 196, § 17) it is provided that "administrators of estates actually solvent may erect monuments at the graves of the testators or intestates, and the reasonable expense thereof shall be allowed them on settlement of their accounts." This statute has been held to include the power to do at the expense of the estate whatever is reasonably necessary to keep a monument in proper condition during the time of administration and to make it as durably suitable and sufficient as its purpose requires. *Bell v. Briggs*, 63 N. H. 592, 4 Atl. 702. It has been held that although it is proper under the New Hampshire statute for an administrator to erect a plain and simple tombstone, and although with the consent and advice of the heirs he may erect a costly one, yet it is unreasonable and an improper expenditure for the administrator to erect a costly monument, without the consent of the heirs. *Lund v. Lund*, 41 N. H. 355, wherein the court said: "The charge for a monument is also, we think, too high. If all the heirs had consented, there

could have been no impropriety; but, on the other hand, there might have been a marked propriety in thus adorning the final resting place, not only of the intestate, but of his parents and sister; and it would seem that this expense was incurred, probably as much on account of the father and sister, as the son and brother. But administrators are to act in good faith to the heirs, for whom they hold the property of the intestate in trust, and should administer estates economically; and should only furnish such plain and substantial monuments as shall be proper for them to erect with the property of others, without their consent. However proper and commendable it might be for the remaining children to erect beautiful and costly monuments to the memory of their departed parents and friends, yet the offering should be voluntary on the part of all concerned. We think that courts of probate should require that administrators, when they are acting on their own responsibility in furnishing monuments with the money of others, without their consent, should practice strict economy in their expenditures; that they should conform to the provisions of the statute in that particular. The statute provides that administrators of estates actually solvent may erect suitable monuments at the graves of the testators or intestates, and the reasonable expense thereof shall be allowed them on the settlement of their accounts." In *Tuttle v. Robinson*, 33 N. H. 104, it was held that the statute was not an authorization for expenditures for the fencing of the burial place of the deceased. In *Brackett v. Tillotson*, 4 N. H. 208, it was held that under the statute an administrator of an insolvent estate would be allowed nothing for the erection of a monument to the deceased. The court said: "The statute of 1826, chap. 43, empowers the judges of probate, in the settlement of the accounts of executors and administrators of estates, actually solvent, to allow such reasonable sums as they may think proper, for the erection of suitable monuments or gravestones at the graves of their testators or intestates. This statute makes a distinction between the case of a solvent, and of an insolvent estate, and in our opinion with good reason. For whatever is allowed to executors and administrators for this purpose, is in fact allowed at the expense of heirs and legatees, or of creditors. And however fit and proper it may be that monuments should be erected at the expense of heirs and legatees, we are not aware of any principle of equity or justice which can require a creditor to contribute anything for the erection of a monument at the grave of his insolvent debtor. This claim of the administrator cannot be allowed."

A statute of Ohio (R. S. § 6185) providing that "the court may also, in settlement,

allow, as a credit to the executor or administrator, any just and reasonable amount expended by him for a tombstone or monument for the deceased," has been held not to confer on the probate court jurisdiction to entertain an application to have the court fix a maximum amount to be expended for a monument and to order him to secure such a monument at the expense of the estate in case one is not provided by the widow or next of kin. In *re Ferguson*, 81 Ohio St. 58, 9 N. E. 1070.

REIMBURSEMENT OF MEMBER OF FAMILY.

By the weight of authority it has been held that where a member of the family of a deceased orders a monument and procures it to be erected over the grave of the deceased, the personal representative having no agency in the matter, the person so procuring the monument is personally liable and the estate of the deceased cannot be held liable for the cost thereof. *Foley v. Bushway*, 71 Ill. 386 [by the widow of the deceased]; *Lerch v. Emmett*, 44 Ind. 331 [by the mother of the deceased]; *Argo v. Donover*, 80 Ia. 214, 45 N. W. 744 [by the brother of the deceased]; *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803 [by the widow of the deceased]; *Samuel v. Thomas*, 51 Wis. 549, 8 N. W. 361 [by the sister of the deceased]. And see *Sweeney v. Muldoon*, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708. Compare *Pease v. Christman*, 158 Ind. 643, 64 N. E. 90; *Lutz v. Gates*, 62 Ia. 513, 17 N. W. 747.

In *Argo v. Donover*, *supra*, it appeared that the deceased, shortly before his death, told his brother that he wished a monument erected to him and that the brother, pursuant to that expression of desire, had a monument erected. It was held that the brother could not recover of the estate the amount so expended. The court said: "It is not clear from plaintiff's petition whether he asks to have the claim allowed as for money expended in erecting the monument at the instance and request of deceased, or for the value of the mares, upon the theory that they became his in consideration of his erecting the monument. There is entire lack of evidence to support the claim upon either theory. It does not appear that deceased desired or requested the plaintiff to procure the monument. He simply expressed the desire that a granite monument from seven to nine feet high should be placed over his grave. The inference would be that this desire should be carried out by his administrator. There was certainly no direction or request that the plaintiff should do so." In *Samuel v. Thomas*, 51 Wis. 549, 8 N. W. 361, it appeared that no administrator had been appointed for five or six months after the death of the intestate and that his sister

expended \$500 for a tombstone and other expenses connected with interment, that the administrator refused to pay this amount out of the estate without an order of court, and that the court refused to give such order. It was held that the order was properly refused. The appellate court said: "What expenses incurred intermediate the death of an intestate and the granting of letters of administration are legally chargeable to the estate? The answer is, we think, that only such necessary expenditures as from the nature of the circumstances cannot properly be postponed until an administrator shall be appointed, are so chargeable. This rule will, of course, entitle an heir, a legatee, widow or guardian, or even a stranger, who has paid reasonable burial expenses, necessarily incurred before administration could be granted, to be reimbursed from the estate. But, as we understand the law, the rule goes no further. Every expenditure which can decently and reasonably be postponed until an administrator is appointed should be so postponed, and one who, before such appointment, voluntarily incurs an expense for which there is no immediate necessity, does so in his own wrong, and cannot compel the administrator, when appointed, to reimburse him. The common law imposed severe liabilities upon one who, without authority, assumed to act as an executor. It always has been the policy of the law to prevent any unauthorized and unnecessary interference with the estates of deceased persons, and to confide the settlement of such estates to the legally appointed and qualified executors or administrators, acting under the scrutiny and control of the proper courts. Certainly, there was no necessity for Mrs. Samuel to expend \$500 upon her brother's grave before letters of administration issued to Mr. Howell. A delay of a few months would have been no disrespect to the memory of the dead, and could furnish no just ground of complaint to his dearest friend. Besides, had the court allowed the administrator to erect so expensive a memorial, it would have seen to it that the brother and the other sister of the deceased should be consulted, and their wishes in regard thereto considered." In *Lutz v. Gates*, 62 Ia. 517, 17 N. W. 747, it appeared that the administrator did not object to the claim of the widow for an allowance of the cost of a monument which she had ordered, but merely resisted the claim *pro forma* because of the objections of some of the heirs, other heirs not objecting. The court said: "The widow consulted some of the heirs—those that were convenient—and they consented it should be paid for out of the estate. But, as we understand, there were heirs that were not consulted. There are other facts which, it is

claimed, tend to show that the monument is suitable and proper, and that it should be paid for out of the estate. These are not set out, for the reason that we think the facts above stated control the question before us. Since this case was determined in the circuit court, the case of *Crapo v. Armstrong*, 61 Ia. 697, has been determined by this court, and, following that case, we think the circuit court erred in sustaining the objection to the claim which was, as above stated, that it is not a proper or legal claim against the estate. The estate is solvent, and, if the charge is not a proper one against the estate, it would follow that in no case could a monument be procured at the expense of the estate."

In *Pease v. Christman*, 158 Ind. 642, 64 N. E. 90, it was held, however, that, inasmuch as the erection of a suitable monument is a part of the funeral expenses of the deceased, a widow who contracts for a monument for her deceased husband should be allowed the amount as a claim against the estate. The court in that case distinguished the case of *Lerch v. Emmett*, 44 Ind. 331.

Where a sister of a testator bought a marble slab for his grave, and the widow and executrix of the testator, thinking the estate should bear the expense, bought the slab from the sister giving her a note for it, it was held that the claim of the widow to be allowed the amount thereof as executrix out of the estate was properly granted. *Menzies v. Ridley*, 2 Grant Ch. (U. C.) 544, wherein it was said: "Another item is 24*l.* 13*s.* 6*d.* for a marble slab to the memory of the testator, and which the master has disallowed. The master finds that the late Margaret Campbell, testator's sister, had paid 24*l.* 13*s.* 6*d.* for a marble slab to be erected to the memory of the said testator, and that his widow, subsequently considering that the expense of the said slab should be borne by the estate, gave her promissory note to the said Margaret Campbell for the said sum, which is not yet paid. It does not appear upon what ground the master disallowed this item: whether because the slab had been prepared at the expense of the testator's sister, and so that it might have been erected without expense to the estate, or because Mrs. Menzies has not yet paid the note which she gave to the testator's sister for the amount, or generally, on the ground that an executor cannot claim against an estate the cost of a gravestone or slab. It is not pretended that the slab in question was unsuitable to the degree and station in life of the deceased, or that the cost was unreasonable, considering the estate left behind him. The claim is not contested by creditors, but by the testamentary guardians of the deceased. The circumstance of the slab

having been prepared at the expense of testator's sister, is not, I think, a good ground for resisting this claim. The testator's widow was the sole acting executrix of her husband's will; Ridley and McAnnany, though appointed executors, never (as they say in their answers) acted as executors or intermeddled with the estate. She, considering that the expense of the slab ought to be borne by the estate, purchased it of testator's sister. I think she was right in considering that the estate, which was bequeathed to herself and her children, should bear the expense of a slab to the memory of her husband and their father. I think she would have been justified in refusing to allow it to be erected except at their expense; to have procured a slab elsewhere if the one prepared for the sister was unsuitable, or if she had refused to part with it; and consequently that she was justifiable in taking it off the hands of the sister at the expense of the estate."

The estate of a decedent is not liable for the cost of a family monument, contracted for and paid for by two sons of the decedent, and bearing the names of the children and grandchildren of the decedent. *Morgan v. Morgan*, 83 Ill. 196. And an executor, son of the testatrix, can have no claim upon the estate of the testatrix for the expense incurred by him in the renovation of the tombstones of the grand parents of himself and of the petitioners who oppose the allowance. *Bantz v. Bantz*, 52 Md. 686.

But where the monument is ordered by members of the family at the express request of the decedent, before his death, the decedent before his death approving the contract and agreeing to pay it, the cost of the monument is a proper claim against the estate of the decedent. *Cate v. Cate* (Tenn.) 43 S. W. 365.

Propriety or Reasonableness of Expenditure.

IN ABSENCE OF TESTAMENTARY DIRECTION.

In General.

To be allowable as a charge against the estate, the cost of a tombstone must be reasonable, taking into consideration the value of the estate, the amount of the debts, the habits and wishes of the deceased, and similar considerations. *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Crapo v. Armstrong*, 61 Ia. 697, 7 N. W. 41; *Crothers v. Crothers*, 123 Md. 603, 91 Atl. 601; *Matter of Beach*, 1 Misc. 27, 22 N. Y. S. 1079; *Matter of Howard*, 3 Misc. 170, 23 N. Y. S. 836; *Matter of Meuschke*, 61 Misc. 9, 114 N. Y. S. 722; *Duffy's Estate*, 9 Kulp (Pa.) 409; *Connelly's Estate*, 28 Pittsb. Leg. J. N. S.

(Pa.) 352; *Taylor's Estate*, 3 Pa. Dist. 691; *Conway's Estate*, 10 Pa. Dist. 509, 18 Lanc. L. Rev. 129; *Barclay's Estate*, 2 W. N. C. 447, 11 Phila. (Pa.) 123, 33 Leg. Int. 108. In *Bendall v. Bendall*, *supra*, the court said: "The principal inquiry should be, is the expenditure for this purpose disproportioned to the means of the estate, or injurious to the interests of the creditors and family of the deceased? Whenever it is ascertained that the estate could well afford the expense, without materially affecting its funds, or injuriously affecting the interests of creditors, or of those who are to take and enjoy it after the death of the testator or intestate, there is no impropriety in allowing the administrator a credit for such expenditure. In this case it is shown that the estate in the hands of the administrator amounted to nearly eight thousand dollars; that there were but few, and these very inconsiderable, debts existing against the deceased, and neither widow or children to be provided for. The estate is bequeathed to collateral relations; and the deceased expressed a desire that his remains should be deposited in a marble vault. Under these circumstances, the administrator might well esteem it his duty to make the expenditure which he has made, and there was no error in allowing him a credit for the sum so expended."

The expenditure by an executor or administrator of an amount for a monument is at his own risk, and the burden is on him to prove that the expenditure was reasonable. *Barclay's Estate*, 2 W. N. C. 447, 11 Phila. (Pa.) 123, 33 Leg. Int. 108.

The court having jurisdiction over the settlement of decedents' estates has a discretion as to whether an expenditure should be allowed for a monument, and an exercise of this discretion is not reviewable and binds all parties unless it is unreasonable or amounts to an abuse of discretion. *Jaqua v. Gray*, 46 Ind. App. 24, 91 N. E. 745; *Crapo v. Armstrong*, 61 Ia. 697, 17 N. W. 41.

The statute of Rhode Island (Pub. Stat. c. 189, § 4) which allows the erection of a suitable monument with the permission of the court of probate, has been held to contemplate something more pretentious than a mere tablet or headstone. *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

Illustrations.

It has been held that it is unreasonable to erect to the deceased a monument of such a character as to provoke comment on the contrast between the lavishness of the monument and the simplicity of the habits and antecedents of the deceased. *Taylor's Estate*,

3 Pa. Dist. 691, wherein the court cut down from \$1,000 to \$100 the credit for the cost of a monument to the deceased, a Quaker, and a man of severely simple habits.

Where the testator has already erected a monument to himself, his executor is not justified in erecting another monument on a different lot merely because the widow of the deceased wishes him to be buried in the other lot. There can be no reasonable expenditure for a monument where the deceased has already provided a monument. *In re Woodbury*, 40 Misc. 143, 81 N. Y. S. 503.

If the estate is insolvent, the personal representative should not be allowed to expend \$42.35 for a tombstone for the deceased. *Little v. Williams*, 7 Ill. App. 67, wherein the court said: "When an estate is in such insolvent condition that it can pay nothing to general creditors, nothing for physician's bill or other expenses of the last illness of the deceased, and only in part pay that which the law regards a still more equitable and deserving claim, we are of opinion the administrator should not be allowed to expend \$42.35 for a tombstone for the deceased. Regard should be paid to the rights of the living."

It has been held that \$375 for a tombstone is an unreasonable expenditure when the estate is insolvent, and that the executor cannot recover on so large a claim against the insolvent estate. *Burbridge v. Rogers*, 7 Ky. L. Rep. (Abstract) 42.

Where an estate amounted to £11,500, and £100 had already been allowed out of it for funeral expenses, an additional allowance of £20 for a tombstone was properly refused by the master. *Bridge v. Brown*, 2 Y. & C. Ch. (Eng.) 181.

An expenditure of between fifteen and twenty per cent of the gross amount of the estate for curbing the cemetery lot and erecting a monument is grossly disproportionate and an allowance for such an expenditure will not be made. *Crothers v. Crothers*, 123 Md. 603, 91 Atl. 691.

Where an estate amounted to a total of only \$17,000, the allowance of \$2,000 for a vault and tomb was held to be unreasonable, and the allowance reduced to \$1,000. *Matter of Shipman*, 82 Hun 108, 31 N. Y. S. 571, wherein it was said: "The surrogate allowed as part of the funeral expenses the sum of \$2,000 for the construction of a 'vault and tomb,' and the sum of \$580 for a cemetery lot. A reasonable charge for a suitable headstone is proper to be allowed as part of the funeral expenses. (Code Civ. Proc. sec. 2749; *Owens v. Bloomer*, 14 Hun 296.) The monument, if it be called that, which is allowed for here, was not of the ordinary character. The amount of the real and personal estate altogether was about

\$17,000. We find no sufficient reason in the facts or in law for the allowance of so large a sum for the purposes stated without express authority in the will. The item of \$2,000 should be reduced to the sum of \$1,000."

The expenditure of \$443 for a tombstone by the administrator of an estate of from \$10,000 to \$15,000 is reasonable. *Laird v. Arnold*, 42 Hun 136, 3 N. Y. St. Rep. 376.

It is extravagant to erect a \$500 monument at the expense of an estate which does not amount to over \$8,000, and real estate will not be decreed to be sold to defray such an expense. *Owens v. Bloomer*, 14 Hun (N. Y.) 296.

Where the assets of the estate do not exceed \$3,540, it is unreasonable to expend \$1,400 for a monument. *Miller v. Morton*, 89 Hun 574, wherein the court held that in such a case the total funeral expenses, including the monument, should not reasonably exceed \$1,000.

The expenditure of \$50 for a headstone is allowable, although the testator had never earned large wages, his estate amounting to between seven and eight thousand dollars. *Matter v. Meuschke*, 61 Misc. 9, 114 N. Y. S. 722.

Where an estate amounts to over \$6,000, it is not unreasonable for the executor to spend \$300 for a second tombstone, after having bought a simple inexpensive stone for the first grave of the deceased, from which grave the remains have been removed. *Matter of Howard*, 3 Misc. 170.

While an expenditure of \$400 for a monument, the estate amounting to \$8,000, reaches the limit of reasonableness, the executor will be granted an allowance therefor where the rights of creditors have not been impaired and where none of the legatees except the widow makes any objection. *Matter of Beach*, 1 Misc. 27, 22 N. Y. S. 1079.

It is not unreasonable to spend \$200 for a tombstone where the estate amounts to \$26,000. *Campbell v. Purdy*, 5 Redf. (N. Y.) 434.

In a case wherein it appeared that an administrator paid \$78 for a gravestone, out of an estate of only \$983.30, it was held that the amount was excessive and the allowance therefor was reduced to \$50. *Matter of Mount*, 3 Redf. (N. Y.) 9, note.

Where an estate amounted to \$2,625.78, it was held to be unreasonable to expend \$670 for a monument and only \$250 was allowed therefor. *Matter of Erlacher*, 3 Redf. (N. Y.) 8.

Where an estate was not sufficient to pay all the legacies in full, it was held that \$500 was all that was suitable to expend on a headstone to mark the resting place of the

deceased. *Tickel v. Quinn*, 1 Dem. (N. Y.) 425.

Where an unmarried man leaves an estate of \$25,000, all of which goes to collateral heirs, an expenditure of \$700 for a tombstone for him is not unreasonable or extravagant and will be approved. *Conway's Estate*, 10 Pa. Dist. 509.

An allowance of \$125 for a monument has been held not to be unreasonably small, although the estate amounted to \$24,000, considering the fact that because most of the legacies were specific the whole of the payment of the cost of the monument would fall on one beneficiary, the testator's son. *O'Brien's Estate*, 3 Pa. Dist. 198.

Where an estate consisted of two houses and \$273.75 in personal property, an allowance of \$1,100 for a tombstone was held not to be unreasonable, there being no creditors, and the widow, the recipient of one-half the estate, asking for the monument. *Geiger's Estate*, 12 W. N. C. (Pa.) 439. But in *Hirst's Estate*, 12 W. N. C. (Pa.) 323, the court refused to grant a petition for the setting aside out of the assets of the estate of \$1,100 for a monument, the application being *ex parte*, and without citation of interested parties.

UNDER TESTAMENTARY DIRECTION.

Where a testator, in his will, directs his executor to erect a monument, and gives the executor a discretion as to the amount to be expended, that discretion cannot be exercised arbitrarily or in disregard of the rights of heirs and legatees but must be exercised within lawful limits. *Matter of Luckey*, 4 Redf. (N. Y.) 95; *Burnett v. Noble*, 5 Redf. (N. Y.) 69. In the case first cited objection was made to the final accounting of the executor because he had contracted for a monument to cost \$1,475 when the personal estate of the decedent was \$11,096. The court held that the expenditure of such an amount was an abuse of the discretion given the executor in the will and cut down the allowance to \$700. The court said: "The rights of creditors are not affected by the determination of the question submitted, and it only concerns the residuary legatee, who is a niece of the decedent. And yet, if it shall be held that the executor was authorized, under the terms of the will, to expend the sum named for a monument, he might have expended the whole of the residuary estate. I am not willing to approve the doctrine that a discretion conferred upon an executor by a will is to be exercised without regard to the rights of other legatees, or that it is an uncontrollable discretion. I am of the opinion that when a discretion is conferred upon an executor or trustee, it should be held a dis-

cretion to be exercised according to law, and the principles of justice. . . . It seems to me, therefore, that in this case the discretion to be exercised by the executor should be limited to the amount adjudged proper by the well-adjudicated cases in this state, and that the terms of the will do not enlarge the power of the executor beyond that limit, otherwise very great injustice would be done to the parties interested, and a precedent established which would be a fruitful source of fraud. I am of the opinion that considering the estate in question, and the circumstances of the case, that \$700 is an exceedingly liberal allowance for the purposes named, . . . and that no greater amount than that should be allowed in this case." In *Burnett v. Noble*, 5 Redf. (N. Y.) 69, it appeared that the testator in his will had directed his executor as follows: "To finish and have made and placed over the graves of myself and husband, in the Evergreens Cemetery, a suitable monument, of a pattern and kind which he may approve of. And I trust to his discretion in the matter, as he understands my wishes." It further appeared that the estate left was not over \$2,000. The executor wished to spend \$700 on a monument, but the court directed that not more than \$250 should be so spent.

But it has been held that under a simple direction in a will that the executor shall erect a suitable monument to the memory of the testator, the discretion of the executor in the matter of the cost of the monument will not be interfered with merely at the objection of the residuary legatee under a charitable bequest, in the absence of gross abuse of such discretion; and it is not such gross abuse as requires intervention of the court for the executor to spend \$6,000 for the monument, the estate amounting to over \$300,000. *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

The word monument means a shaft or stone and not a building, so that where a testator sets aside a fund for the erection of a monument his executor is not justified in using the fund for the erection of a memorial building or other form of memorial. *Faucher v. Faucher*, 156 Cal. 13, 19 Ann. Cas. 1157, 103 Pac. 206, 23 L.R.A. (N.S.) 944; *Ogden's Petition*, 25 R. I. 373, 55 Atl. 933. In *Faucher v. Faucher*, *supra*, the court said, adopting the remarks of the judge of the department court: "He left the fund of \$25,000 to be used by his executors for funeral expenses for the proper interment of his remains and for a suitable monument to his memory. There is nothing in this language to indicate that the testator used the word 'monument' in any other than its natural and specific meaning, which is that of 'a pillar, statue, shaft or any structure

placed over a tomb or at a grave.' (Standard Dictionary.) In its applied sense, a monument being a 'reminder' may take any form. Napoleon's battles are a monument to his memory. Horace by his poetry 'built himself a monument more enduring than brass,' and Sir Christopher Wren in his oft-quoted epitaph, 'Si monumentum requiris, circumspice,' declares St. Paul's cathedral to be his monument. Yet, as suggested by the supreme court of Rhode Island in Ogden, Petition [25 R. I. 373] 55 Atl. 933, if one were to say that he had seen Napoleon's or Horace's or Wren's monument, the mind would call up some memorial shaft or column, and not the victories of one, the poetry of another, or the cathedral of which the third was the architect. So it is said in Cincinnati Soc. Appeal, 154 Pa. St. 621, a monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed to be its meaning." In the case of In re Ogden, 25 R. I. 373, 55 Atl. 933, it appeared that the testator had set aside a fund for the erection of a memorial monument to soldiers. The court held that the amount thus set aside could not be used in the erection of a memorial building.

Where the testator directs in his will that a monument shall be erected, authorizing his executors to spend \$5,000, and no more, it is not necessary that the whole of the \$5,000 shall be spent for the purpose. *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471, wherein the court said: "I think it was not the intention of the testator to require the expenditure for this one object of the full sum of \$5,000. He intended that the monument, lot, fence and inscriptions should not together exceed \$5,000. He says this in so many words, but he does not say that this sum must be spent if neither lot, fence nor inscription were necessary. He had no definite sum in mind for the cost of the monument alone. This might have been greater or less, as the cost of the other things was more or less. Again, he 'reserves' the sum of \$5,000, to be expended in building the monument 'as hereinafter directed.' There is no explicit direction to dispose of all the money in that way only. The final direction is that they 'are authorized and empowered' to expend that sum and no more. On the whole, I do not think that, taking this obscurely worded codicil as a whole, it requires such a construction as to compel the expenditure of more money than is reasonably sufficient to effect the object which testator had in view, viz., the erection of a suitable granite monument, laid upon a foundation six feet in depth, properly inscribed and protected. This object, it is conceded, has been attained, and the work has been done under

the direction of the widow to whom he gave, with a trifling exception, the enjoyment of all his property for her life, and in whom he had, presumably, the fullest confidence."

Where a will directs the executors to expend not over \$2,000 in the repair of the cemetery lot, it is not an act in excess of this authority for the executors, after having erected a sarcophagus at the cost of \$500, to exchange the monument for a better one at a cost of \$935.05. *In re Frazer*, 92 N. Y. 230, wherein it was said: "The will directed the executors to expend a sum not exceeding \$2,000 in the repair of the cemetery lot of W. H. Smith, who was testator's father-in-law, and that his body should be kept in a receiving vault in LeRoy until such repairs be made. After his death a sarcophagus was erected upon the lot at a cost of \$500 and his remains placed therein. After this, the monument on the lot was exchanged for a better one, headstones to graves erected, and coping replaced at a further cost of \$935.05. This last expenditure is objected to on the ground that a new monument was not 'in repair' of the lot, and there being a sarcophagus there was no need of a monument. It can scarcely be necessary to review a discretion exercised by the executors and kept within the limit fixed by the testator himself. What was done was plainly within the authority of the will and was reasonably and fairly executed."

It is unreasonable to spend \$1,050 for a monument to a deceased who has left an estate of only \$2,410, where the will authorizes the executor to erect a monument of New England granite of sufficient size to cut a dozen names thereon, with dates; and since the language of the will is unambiguous, declarations of the deceased cannot be introduced to justify an extravagant outlay for the monument. *Matter of Smith*, 75 App. Div. 339, 78 N. Y. S. 130, 11 N. Y. Ann. Cas. 427, wherein it was said: "The entire estate of the deceased amounted to only \$2,410, and the executor has expended the sum of \$1,050 for a monument and the expenses incidental to lettering, setting and fencing it. The excuse presented for this extravagant outlay is that the wishes of the testator, as expressed in the will and during his lifetime, could not be carried out for less money. In determining the testator's wishes we are limited to the language of the will. The will being entirely clear and unambiguous in its terms, there was neither necessity nor justification for resorting to extrinsic evidence. But, on the hearing, the executor was not only permitted to produce witnesses to testify that the deceased had said in his lifetime that he was going to put the whole of his property in a monument, but the executor himself was permitted to tes-

tify in his own behalf to conversations with him in which he said that he didn't care if his monument took the whole of his property; that he wished to astonish the people. The evidence of the executor was properly subject to the additional objection taken by the contestant that it was incompetent under section 829 of the Code of Civil Procedure, and its admission constituted reversible error. The language of the will was explicit. The executor is merely authorized and empowered to purchase and erect in the testator's burial plot a monument of New England granite of sufficient size to cut thereon a dozen names mentioned in the will, with dates of birth and death, and also to erect a suitable and proper fence around the plot with granite posts. There was evidence that this could have been done at a very considerable less expenditure than that which has been actually incurred, and it was the duty of the executor to see that the work was performed within the limits for such a purpose which the law imposes in the case of a small estate. The use by the testator of the words 'suitable and proper' indicates a comprehension of the propriety of limiting the expenditure to an amount proportionate to his means and station. It is conceded that the charge made is reasonable for the material furnished and the work done, but the objection is, and it appears on the record to be a valid one, that the expenditure has been incurred without regard to the meagre nature of the estate, and the rights and interests of the residuary legatee."

In *Matter of Young*, 92 Misc. 633, 157 N. Y. S. 494, there was involved the following testamentary direction: "I direct my executor after paying the above bequests, out of the balance of my money on deposit in the Bowery Savings Bank and Seamans Savings Bank, that said balance shall be used to defray funeral expenses and the erection of a monument over my grave." It was held that it was not required that the whole of the bank balance should be expended for funeral expenses and the erection of a monument. The court said: "The provision now under consideration does not, in my opinion, in terms require that all of the balance shall be expended for funeral expenses and the erection of a monument, and I believe that the intent of the testatrix was that so much of the balance as would be reasonable, having in mind her station in life and the amount of her estate, should be used to defray the funeral expenses and to pay for a monument. The executor states that he knew the decedent for a number of years before her death, being related to her husband; that she lived with one of her daughters in a very frugal way and that her habits of life were modest and simple. These are facts which he should

take into consideration in deciding how much to spend for a monument. As a guide to him I will say that a monument such as she purchased for her deceased husband would not be unreasonable in my opinion. I do not think that it is necessary for me to fix the cost of such monument arbitrarily, particularly when the executor himself has an intimate knowledge of the circumstances of the decedent. I therefore find that the intent of the testatrix was as above stated and that as to any balance remaining in the hands of the executor after the payment of debts, legacies, expenses of administration and funeral expenses and after paying for a monument, the decedent died intestate, and such balance is distributable in accordance with the statute governing distribution of personal property."

But where a testator, after giving several legacies, provided that "all the rest, residue, and remainder of my estate, after the decease of my said mother, and the payment of said bequests, I direct my said executor to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant," it was held that the last clause did not impose any qualification of reasonableness on the general direction to use all the residue and that there was, therefore, no just ground of complaint at the use by the executor of practically all the residue for the purchase of the monument. *Bainbridge's Appeal*, 97 Pa. St. 482, wherein the court said: "In the exercise of this power, the executor selected a monument which cost seven hundred and fifteen dollars, being about ninety dollars less than the residuary estate. The court sustained him in so doing. This presents the ground of complaint. It is contended the language of the will does not justify the expenditure of so large a sum. It is claimed to be more than 'the amount of funds in his hands will warrant.' This is an attempt to give undue weight to that clause and make it paramount to the previous clause appropriating the whole fund. It should be construed in connection with, and subordinate to, the former clause. He had therein directed his executor to appropriate and use 'all the rest, residue and remainder' of his estate for the purpose named. The whole fund was 'in his hands' for that purpose. The last clause was not intended to take from him the right to so use the whole fund. The word 'suitable' manifestly related to the form and style of the monument, which was left to the discretion of the executor, with the cautionary direction to have due regard to the amount of the funds. There is absolutely nothing indicating he may not use the whole fund. There is no devise over of any

part thereof. The reason therefor evidently is that he expected all of it would be expended for the specific purpose named. Why then shall not due effect be given to an intention so clearly expressed? May not the testator have said to the appellant as the good man of the house said to the laborer, 'is it not lawful for me to do what I will with mine own?' We will not consider the wisdom or the folly of this disposition. He had a right to make it. He did make it, according to the forms of law. He gave the fund and clearly expressed his intention as to its use. We see no cause to set at naught his will or to impair its force. The executor made his election under it. The court confirmed his action. The appellant has no just ground of complaint."

In the case of *In re Porter*, 77 Pa. St. 43, it appeared that the testator left a large estate, leaving \$50,000 to found a college, \$6,000 for the purchase of useful books, and \$5,000 for the improvement of his cemetery lot, the purchase of a monument and the building of a cut-stone wall, and the \$5,000 had been practically used up in the construction of the cut-stone wall. It was held that the executors should be allowed to retain an additional \$5,000 for the purchase of a monument consonant with the wall, especially in view of the fact that the intention to found the college had been defeated and that the heirs and next of kin who had become entitled were not special objects of the testator's bounty.

Where a testator provided in his will for the erection of a suitable tablet to his memory, not to exceed \$1,500, and also for the erection of a monumental tablet to his three deceased wives, it was held to be proper for the executors to expend \$3,000 for a single monument to the testator and to his wives, the estate amounting to \$200,000. *Archer v. Severn*, 13 Ont. 316.

Where a testator left an estate of \$1,200, and in his will left to his executor all his property of every kind and description for the payment of his funeral expenses and the erection of a monument to his memory, it was held that the testator did not intend that all his estate should be expended for the purpose, and the court fixed \$150 as a reasonable amount, directing that the rest should go in distribution. *Emans v. Hickman*, 12 Hun (N. Y.) 425.

Estate of Deceased Married Woman.

It is the duty of a husband to pay the expenses of the burial of his deceased wife, and the erection of a suitable stone or mark of identification is included within this duty. Therefore, as a general rule, her estate is not liable for the cost of a tombstone or monu-

ment and her personal representative will not be granted an allowance for the cost thereof. In *re Weringer*, 100 Cal. 345, 34 Pac. 825; *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139. And even if the erection of a tombstone is not deemed a part of the suitable burial of the wife, the husband, of course, cannot recover against her estate for expenditures therefor, for it is then only to be required as a tribute, or gift, by him to her memory. *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139.

This rule is, however, not absolute but is to be governed by the circumstances, and if the husband is a poor man, and the deceased wife leaves a considerable estate, a reasonable amount should be allowed her personal representative for the erection of a tombstone, taking into consideration the rank and condition of the deceased in society. In *re Weringer*, 100 Cal. 345, 34 Pac. 825.

Where a feme covert, in her will, sets apart a fund for the erection of a monument over her grave, a reasonable amount for such an expense is properly allowed out of her estate. In *re Koppikus*, 1 Cal. App. 84, 81 Pac. 732.

GRIFFIN

v.

UNION SAVINGS AND TRUST COMPANY.

Washington Supreme Court—August 11, 1915.

86 Wash. 605; 150 Pac. 1128.

Evidence — Ambiguity in Writing — Effect of Use of Printed Letterhead.

Where a contract of guaranty was written on a letterhead of a bank, which showed the names and official capacities of the various officers, and was signed by one who appended the word "manager" after his signature, but there was nothing to show that the manager intended the bank to be bound, the word "manager" must *prima facie* be taken as mere *descriptio personae*, though it creates sufficient ambiguity to admit parol evidence as to the intention of the signer.

[See note at end of this case.]

Corporations — Liability on Contract by Agent — Manner of Signing.

Where a contract was signed by one who described himself as manager of defendant bank, plaintiff has the burden of proving, there being nothing else to show that defendant was bound, that it was the intention of the signer to bind the bank.

Same.

Where a manager had no authority to execute a contract of guaranty for his bank, that fact is evidence that a contract signed by him as manager was intended only as his personal obligation.

Same.

A bank is held not to be bound by a contract signed by its manager as such.

Appeal from Superior Court, King county:
ALBERTSON, Judge.

Action by E. W. Griffin, plaintiff, against Union Savings and Trust Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

McClure & McClure and Domcorth & Todd
for appellant.

Wm. Parmerlee for respondent.

[606] ELLIS, J.—This is an action to recover the sum of \$2,605.75, the amount of two drafts drawn by the plaintiff, Griffin, on the Chena River Mining Company, payment of which it is alleged was guaranteed by the defendant by a letter of guaranty given to the plaintiff by one O. B. Woolley, who was at that time the manager of the defendant's branch bank at Renton, Washington. The guaranty was written on a letter-head of the branch bank, at the top of which was printed the name of the trust company, the names and the official capacities of its various officers, and Woolley's name, as manager of the Renton branch. The letter was dated at Renton, Washington, June 20, 1912, and, omitting the printed heading, reads as follows:

"E. W. Griffin, Esq.,

"Fairbanks, Alaska.

"Dear Sir: This is to guarantee payment to you for any and all drafts drawn by the Chena River Mining Co. upon themselves for an amount not exceeding five thousand—\$5,000.00—dollars. Said drafts are for work to be done on their property between the dates of September 1st, 1912, and June 1st, 1913.

Yours truly,

"O. B. Woolley, Manager."

None of the officers of the defendant had any knowledge of the giving of this guaranty, nor any knowledge of Woolley's relations to the mining company.

The circumstances leading up to the giving of the guaranty are briefly these: Griffin, Struthers, Hightower and Woolley, owned the majority of the capital stock of the Chena River Mining Company and were desirous of developing the claims held by that company in Alaska. Woolley was secretary and treas-

urer of the company with a prospective salary of \$6,000 a year. Griffin was a merchant operating a store in the vicinity of the claims, and while in Seattle on his way to Alaska from a trip to the east, he was approached by Struthers and requested to act as Alaska agent for the mining company and to advance funds to [607] finance the development of the claims. Griffin refused to do this unless indemnified. While Griffin, prior to this time, had no acquaintance with Woolley and claims that he did not know Woolley had any interest in the mining corporation, it seems that he did know that Struthers and Hightower were doing their banking business with the Renton branch of the defendant. Upon being asked by Struthers if the bank's guaranty would be satisfactory to him, he replied in the affirmative. Griffin testified that, on the day he left for Alaska, he telephoned to Woolley at Renton that he wanted the guaranty before leaving. He did not testify that he told Woolley that he required the bank's guaranty or that a personal guaranty would not suffice. Later in the day, Woolley brought to Griffin in Seattle the guaranty above set out, saying as he handed it to him: "Here is this guaranty." Touching what occurred at this time, Griffin testified:

"I don't recall the exact words; I could not say; I don't think we had any talk about it; he simply handed it to me; he probably said, 'Here is this guaranty what I was to give you;' I know I telephoned him that day that I was going away and wanted that guaranty before I left and he promised that he would come right down with it that afternoon, so when he came down he simply handed it to me and said, 'Here is this guaranty;' now, that is my recollection of the circumstances in connection with it."

Griffin left the guaranty with one Shallenberger, his agent in Seattle, and returned to Alaska. Thereafter, from time to time, he honored orders drawn on him by the men in charge of the work on the claims, in the aggregate amount of the two drafts in question, and, to reimburse himself, drew the drafts and sent them to Shallenberger for collection. Shallenberger presented them to Woolley for payment, but Woolley withheld payment at that time in order to secure the approval of Struthers, for the reason that the drafts were drawn on the bank instead of the mining company as agreed. Shallenberger finally procured drafts properly [608] drawn and presented them to the bank for payment. In the meantime, Woolley had been deposed from his position as manager and the bank refused payment. The plaintiff then brought this action to recover the amount of the drafts from the bank. It was tried by the court without a jury. The court

found in favor of the plaintiff and entered judgment accordingly. The defendant appeals.

The appellant contends that the contract of guaranty, if intended to bind the bank, was *ultra vires* and void; that Woolley had neither actual nor apparent authority to bind the bank by this guaranty, and that it was respondent's duty to inquire as to Woolley's authority; and finally, that the contract of guaranty was not executed by or on behalf of the bank, but was on its face the personal contract of Woolley alone, which fact could not be disputed by parol testimony. It is obvious that if this last claim be found correct, it will be unnecessary to consider the others.

It is but fair to the trial court to say that this last point was not very distinctly raised in the court below. It was, however, presented by the pleadings, and there was an objection to the admission of the guaranty in evidence on the ground of incompetency. The question is presented and argued in the briefs on both sides, and the respondent has raised no objection to its consideration here on the ground that it was not sufficiently presented in the court below. We must, therefore, consider it.

It will be noted that the writing itself presents nothing whatever to indicate any connection of the bank therewith, except the fact that it is written upon its letter-head and that the word "manager" is appended to Woolley's signature. The respondent contends, and the trial court seems to have entertained the view, that these two circumstances establish as a fact that Woolley was acting in his capacity as manager and intended to bind the appellant by this guaranty.

[609] The only decision cited as supporting this theory is *People's Bank v. National Bank*, 101 U. S. 181, 25 U. S. (L. ed.) 907. In that case the guaranty was written below one of the defendant's letter-heads and was signed "M. D. Buchanan, Vice-President." In the guaranty, occurred the following language:

"In accordance with your telegram I herewith hand you ten notes of \$5,000 each, etc. . . . We debit your account \$50,000. . . . This bank hereby guarantees the payment of the principal sum and interest of said notes."

The notes were also indorsed:

"Pay to the order of the People's Bank of Belleville. Henry E. Picket. This bank hereby guarantees the payment of this note, principal and interest, at maturity. M. D. Buchanan, Vice-President Manufacturers' National Bank of Chicago."

The words, "This bank hereby guarantees," found in both the separate guaranty and in the indorsement, show beyond question that

the signer, however defectively the form of his signature expressed that purpose, intended to bind the bank and not himself personally. This alone is sufficient to distinguish the case from that before us. But in addition to this, it also appears that the guaranty was given with the knowledge and consent of the president and cashier of the bank, both of whom were directors, as was also the vice-president who signed it. Moreover, the plaintiff's account with the defendant was debited with the full amount of the face of the notes, the defendant thus receiving and retaining the full benefit of the transaction. The court, of course, held that the defendant was estopped to deny that the guaranty was its own. The distinction from the case here is too plain to require further comment.

There are many decisions which hold that the words agent, manager, trustee, treasurer and the like, affixed to the signature of the person who executes a simple contract, when the instrument itself does not clearly indicate that it was [610] made on behalf of some one other than the signer, are at least *prima facie*, mere *descriptio personarum*. *Pershing v. Swenson*, 58 Minn. 310, 59 N. W. 1084; *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; *Barker v. Mechanic F. Ins. Co.* 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Gavazza v. Plummer*, 53 Wash. 14, 101 Pac. 370, 42 L.R.A.(N.S.) 1. It is now, however, quite generally held, especially as to unsealed instruments, or where, as here, the use of seals has been abolished by statute, that the question is one of intention, and that the word agent, or any other word indicating a representative capacity, affixed to the name of the signer, when the intent cannot be clearly gathered from the recitals of the instrument itself, imports into the instrument such an ambiguity as to permit a resort to extrinsic evidence to determine the true intention of the parties. *Southern Pac. Co. v. Von Schmidt Dredge Co.* 118 Cal. 368, 50 Pac. 650; *Smith v. Alexander*, 31 Mo. 193; *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432; *Metcalf v. Williams*, 104 U. S. 93, 26 U. S. (L. ed.) 665. See also note to *Gavazza v. Plummer*, 53 Wash. 14, 101 Pac. 370, 42 L.R.A.(N.S.) 16. The statement which more nearly harmonizes with the different shades of meaning conveyed in the various decisions than any other which we have been able to find, and which we conceive to be in consonance with the better reasons, is that found in *Pratt v. Beaupre*, 13 Minn. 187, 190, as follows:

"The rule is, that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie*, they are descriptive

of the person only; but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract."

The following decisions voice the same rule: *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899; *Lewis v. Mutual L. Ins.* [611] Co. 8 Colo. App. 368, 46 Pac. 621; *Keeley Brewing Co. v. Neubauer Decorating Co.* 194 Ill. 580, 62 N. E. 923.

The last case cited is also further instructive as showing that the mere use of the letter-head of the supposed principal is wholly insufficient to show an intention to charge the principal, or to dispense with the necessity to resort to evidence *aliunde* to establish the real intention. In that case a proposal was written below the letter-head of the decorating company which read, "We propose, etc.," and was signed by the alleged agent in his own name followed by the words "Mfg. Agt. & Supt. of Contracts." The other party, having accepted the proposal, sought, as here, to hold the decorating company on the contract so created. The court said:

"The words 'Mfg. Agt. & Supt. of Contracts,' following the signature of D. E. Livermore, are mere *descriptio personae*. (*Braun v. Hess*, 187 Ill. 283.) There is, however, enough uncertainty upon the face of the agreement to admit parol proof of who was intended to be bound as principal (*Vail v. Northwestern L. Ins. Co.* 192 Ill. 567), and the burden of proof was upon the appellant to show that the Neubauer Decorating Company, and not Livermore, was the principal in the contract. The appellant failed to sustain such burden of proof."

We hold that the guaranty here in question was *prima facie* the personal undertaking of Woolley alone, that the fact that it was written under the letter-head of the appellant and Woolley's official title "manager" was appended to his signature created sufficient ambiguity as to his intention to admit of parol evidence, and that the burden of proof was upon the respondent to overcome by competent evidence the *prima facie* import of the instrument.

A careful consideration of the entire record convinces us that the respondent has not sustained this burden. There is not a word of testimony that Woolley himself intended to bind the appellant by this guaranty or that he was ever asked to give a bank guaranty. Griffin did not testify that [612] he himself ever at any time told Woolley that he wanted a bank guaranty. Though he testified that he did tell Struthers and Hightower that he would accept a bank guaranty,

there is no evidence that either Struthers or Hightower ever requested a bank guaranty from Woolley or told him that Griffin had demanded or expected to receive a bank guaranty. There is nothing in evidence raising an implication that Griffin had any reason, because of any antecedent custom or course of dealing with Woolley or with the bank, to rely upon this instrument as binding the bank. He had never had any dealings with Woolley or with the bank, and there is no evidence that Woolley ever gave to any one on behalf of the bank any guaranty of any kind. There is not a single circumstance in evidence having any reasonable tendency to estop the appellant from disputing liability upon this guaranty. It received no benefit from it, and there is no competent evidence that it was intended, either by Woolley or by any one else, that it ever would receive any such benefit. The evidence is clear that Woolley, as manager of the branch bank, had no actual authority to execute this, or any guaranty on its behalf. While this fact would not be important as binding upon Griffin had the guaranty been so drawn as to be clearly intended to bind the appellant, since Griffin would then have had the right to rely upon the fact that the giving of such a guaranty was within the apparent scope of Woolley's authority as manager, the lack of actual authority is nevertheless important as bearing upon the question of Woolley's intention in giving the guaranty. The very fact that he had no such authority is some evidence that he never intended to bind the appellant by this instrument, *prima facie* his personal undertaking. *Smith v. Alexander*, 31 Mo. 193.

Another circumstance strongly tending to show that the appellant cannot be bound by this guaranty and that there was no intention on Woolley's part that it should be, is found in the fact that it received no consideration whatever for [613] the giving of the guaranty. It does appear that, at the time the guaranty was given, the Orillia Lumber Company, a corporation, doing business in King county, was, and long had been, heavily indebted to the Renton branch of the appellant trust company, and that Woolley, by a system of false bookkeeping, had concealed from the officers and directors of the appellant the existence of a large part of this indebtedness. Struthers and Hightower were the sole stockholders of the Orillia Lumber Company, and Woolley, apparently in the hope of receiving sufficient money from them through a sale of the mining claims to discharge this excess indebtedness, entered into an agreement with them reading as follows:

"This indenture or agreement made and entered into on this 13th day of May, 1912, by

and between W. E. Hightower and Fred J. Struthers, each of whom own a one-half interest in the Orillia Lumber Company and are representing the Orillia Lumber Company, a corporation, and as parties of the first part, and O. B. Woolley, duly authorized agent of the Union Savings and Trust Company, a corporation (Renton branch), party of the second part, Witnesseth:

"That as said party of the first part, the Orillia Lumber Company, a corporation, is indebted to the Union Savings and Trust Company in the sum of \$....., and that as said Hightower and Struthers are interested in selling their interests in the Chena River Mining Company, a corporation, and expect to receive a large sum of money out of the sale of said mining company, it is hereby agreed: That upon the sale of said mining company, and in consideration and upon payment or payments for the sale of said mining property, that all of the first moneys received for the sale of said property shall be turned and paid over to either the Union Savings and Trust Company, or paid to O. B. Woolley, and that money to be paid to said party of the second part by said parties of the first part or their agents until all of said above sums of money due to said party of the second part shall be paid in full. And it is further agreed: That parties of the first part shall not receive any of the moneys paid in said sale until all of the said sums of money, both principal and [614] interest, are paid in full and all notes and debts cancelled.

"Witness our hands and the corporate seal of said corporations the day and year first above written.

"(Signed) Orillia Lbr. Co.

"By W. E. Hightower.

"J. Fred Struthers.

"C. B. Woolley."

It is argued that this agreement was made for the benefit of the appellant and that, therefore, it served as a sufficient consideration proceeding to the appellant to sustain the giving of the guaranty here in question. It must be borne in mind, however, that this agreement was entered into sometime before the giving of the guaranty was thought of, and that its existence, as well as the excessive indebtedness of the Orillia Lumber Company to the branch bank, was concealed from the officers of the appellant. Moreover, this agreement was also signed by Woolley personally, and was so worded as to make it of doubtful value to the appellant, except by the grace of Woolley, even had a sale of the mine been made. The guaranty here in question makes no reference to this agreement, and there is not a word of testimony in the record indicating that the guaranty was given

because of this agreement, or that this agreement was ever intended to operate as a consideration for the guaranty. We are constrained to hold that the respondent has wholly failed to overcome by any competent evidence the *prima facie* import of the guaranty as that of Woolley alone.

The judgment is reversed, and the cause is remanded with directions to dismiss the action.

Morris, C. J., and Main and Crow, JJ., concur.

FULLERTON, J. (*dissenting*).—In my opinion the evidence justifies the conclusion that the guaranty given by Woolley to the respondent was understood to be, and was in fact, the guaranty of the appellant bank, and not the personal guaranty of Woolley. For this reason, I dissent from the conclusion of the majority.

NOTE.

Evidentiary Effect of Use of Printed Letterhead or Billhead.

While statements embodied in a printed letterhead or billhead fall within the rule that written matter in a contract controls that which is printed (see the note to *Atlantic Terra Cotta Co. v. Goetzler*, Ann. Cas. 1913E 958), the heading is not wholly without importance. The reported case holds that the fact that a writing, signed by an individual with the addition of words *descriptio personae*, bears the printed letterhead of a corporation creates such an ambiguity as to admit parol evidence of an intention to bind the corporation. That holding finds support in *Keeley Brewing Co. v. Neubauer Decorating Co.* 194 Ill. 580, 62 N. E. 923, stated at length in the reported case. See also *Reif v. Commercial Cabinet Co.* 185 Ill. App. 577. The same rule was applied to an individual signature without suffix in *Towers v. Stevens Cattle Co.* 83 Minn. 243, 86 N. W. 88, the court saying: "It is earnestly contended for defendant that inasmuch as this, as well as letters to plaintiff, was signed by George H. Stevens individually, the contract was necessarily made with him, and not with the cattle company. It does not follow, as an absolute matter of law, that, because such letters were signed in Stevens' individual name, he did not use his signature for or in behalf of the corporation, if such an understanding and intent can be gathered from the acts of the parties and the entire correspondence, taken together in connection with the subject-matter of the deal. The important fact appears that all letters signed in this case by Stevens in his

individual name were written upon defendant's letterheads, whereon he was designated as the president and manager of the corporation, and relate to property he did not then own, but the corporation did, while no claim or attempt was made to show that Stevens owned any cattle to which an individual transaction between himself and plaintiff would apply. The plaintiff wrote some letters to Stevens, as well as to the company, all about the same subject-matter (commissions for securing purchasers); and while Stevens answered all letters in his own name, which well might have been a custom adopted and pursued by him in the business of the corporation, yet it does not appear that any distinction with reference to a different ownership of the property to which commissions were to apply was ever suggested in the correspondence, and it is apparent that plaintiff supposed he was to act for the defendant in procuring purchasers of the corporate property. The court below had the whole correspondence before it, and, upon the entire record, we think there was evidence to support its view that such letters showed 'corporate earmarks,' in the deal between the cattle company and the plaintiff; hence the finding of the trial court should be sustained, unless it can be held, as a matter of law, that the plaintiff, in attempting to deal with the corporation, through its manager in charge of its business, with reference to the corporate property, is concluded absolutely by the individual signature of the manager in the letters referred to. We do not think that such a rule finds support in the decisions of this or other courts. In such a case the whole transaction evidenced by the acts of the parties in connection with the whole correspondence should be taken together, and the sense in which the signature was used is a matter of proof." In *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316, there was involved an assignment written on the letterhead of a railroad company and signed by two persons designating themselves as "Prest." and "Sec'y." The court said: "When the instrument bears no marks of an official character upon its face, there is great difficulty in applying the rule; but where marks of an official character not only exist, but actually predominate, the case is shorn of all perplexity. The assignment in this case is headed and dated at the company's official place of transacting business; and although the officers use the plural 'we,' instead of naming the company, as the contracting party, it sufficiently appears that they were acting officially for the company, and intended to bind it."

On the same principle, the fact that a bill or note signed by an individual is written below a printed heading which includes a corporate

or firm name is sufficient to take the instrument out of the rule relating to the liability of an agent failing to disclose his principal. *Hitchcock v. Buchanan*, 105 U. S. 416, 26 U. S. (L. ed.) 1078; *Continental Nat. Bank v. Heilman*, 81 Fed. 36, *affirmed* 86 Fed. 514. 30 C. C. A. 232; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Waugh v. Suter*, 3 Ill. App. 271; *Akron Second Nat. Bank v. Midland Steel Co.* 155 Ind. 581, 58 N. E. 833, 52 L.R.A. 307; *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750; *Fuller v. Hooper*, 3 Gray (Mass.) 334; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Chipman v. Foster*, 119 Mass. 189; *Gillig v. Lake Bigler Road Co.* 2 Nev. 214. *Compare Brooklyn First Nat. Bank v. Stuetzer*, 80 Hun 435, 30 N. Y. S. 83; *Brooklyn First Nat. Bank v. Wallis*, 84 Hun 376, 32 N. Y. S. 382; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710.

As against the persons by whom it was put out, a printed letterhead is admissible to show the fact of incorporation or partnership. *Farmers' Bank v. Saling*, 33 Ore. 394, 54 Pac. 190; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677. *Compare Ludowieg v. Talcott*, 47 Misc. 77, 93 N. Y. S. 621. In *Gordon v. Funkhouser*, *supra*, it was said: "In the course of the examination of Dr. Gordon, as a witness in his own behalf, he was asked: 'Is that the letterhead of the old firm of Sites & Gordon?' (handing witness the letterhead), and the witness answered, 'Yes, sir.' To which question the plaintiff objected because the paper itself did not indicate the time the paper was used, and also on the ground that the answer to the question was a declaration of the witness, himself the interested party, which objections were sustained, and this is assigned as error. There was evidence tending to show that there was a partnership conducted under the style and firm name of Sites & Gordon, composed of W. K. Sites and A. Hays Gordon, at the time the bond sued on was executed by W. K. Sites, and that the firm of which Dr. Gordon is alleged to have been a member was not formed until three years thereafter. The letterhead in question is in the form of letterheads generally used in the mercantile business, stating the names of the individual members of the partnership, the place at which the business of the firm is conducted, and leaving the date at which the letterhead is used blank. Upon this letterhead appeared the names of W. K. Sites and A. Hays Gordon as the members of the firm, and it was clearly the right of the witness to state in answer to the question that it was the letterhead used by that firm." But in *Ricker Nat. Bank v. Brown*

(Tex.) 43 S. W. 909, it was said that a letterhead was not evidence of the facts thereby disclosed as against third persons. The court said: "The letterhead showed that George E. Ricker, who was cashier of plaintiff bank, was also secretary and treasurer of the Hynes Buggy Company. This was admitted, over objection, to show that said Ricker was an officer of both concerns, upon which appellee based the theory that Ricker, being an officer of the buggy company, was bound to take cognizance of any transaction with said buggy company, and that the bank was charged with the knowledge possessed by him. The letterhead of the buggy company would be evidence against said company, if a party to the suit, but could not be used against the appellant. The letterhead stands upon the same footing as the letters themselves."

KLEIN

v.

MARAVELAS.

New York Court of Appeals—December 15, 1916.

219 N. Y. 383.

Fraudulent Conveyances — Bulk Sales Law — Validity.

The New York Bulk Sales Law (Personal Property Law, § 44) invalidating as to creditors a sale in bulk of a stock of merchandise is constitutional.

[See note at end of this case.]

Klein v. Maravelas, 173 N. Y. App. Div. 953, reversed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action by David Klein, doing business as Samuel Klein & Son, plaintiff, against Peter Maravelas, defendant. Judgment for defendant at Special Term of Supreme Court. Judgment affirmed by Appellate Division of Supreme Court. Plaintiff appeals by permission. **REVERSED.**

[383] The complaint was based upon section 44 of the Personal Property Law (L. 1914, ch. 507) and alleged the defendant's non-compliance with the said statute as a purchaser of a stock of merchandise and fixtures in bulk and demanded plaintiff's appointment as a receiver, for the benefit of the plaintiff and all the other creditors similarly situated, of the defendant's vendor.

Ann. Cas. 1917B.—18.

The following questions were certified: 1. "Does the complaint state facts sufficient to constitute a cause of action?" 2. "Is section 44 of the Personal Property Law (as amended by chapter 507 of the Laws of 1914) constitutional?"

Max Arens and *Elie Klein* for appellant.

Ira Wollison for respondent.

Julian A. Gregory and *Allen S. Wrenn* for New York Credit Men's Association et al., intervening.

[384] CARDOZO, J.—This case makes it necessary for us to say whether the so-called sales in bulk law is a constitutional enactment (Personal Prop. Law, § 44, L. 1914, ch. 507; Cons. Laws, ch. 41). A very similar law was enacted in 1904 (L. 1904, ch. 569). In *Wright v. Hart* ([1905] 182 N. Y. 330, 75 N. E. 404, 3 Ann. Cas. 263, 2 L.R.A. (N.S.) 338), we held it to be unconstitutional. We said that it violated the federal constitution in denying to merchants the equal protection of the laws. We said that it violated both the federal and the state constitution in imposing arbitrary restrictions upon liberty of contract. That decision was reached by a closely divided court. Three judges dissented. There were strong dissenting opinions by Judge Vann and Chief Judge Cullen.

Since *Wright v. Hart* was decided, the validity of like [385] statutes has been upheld in two cases by the United States Supreme Court (*Lemieux v. Young*, 211 U. S. 489, 29 S. Ct. 174, 53 U. S. (L. ed.) 295; *Kidd, etc. Co. v. Musselman Grocery Co.* 217 U. S. 461, 30 S. Ct. 606, 54 U. S. (L. ed.) 839). Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our state constitution; and that requires us to say whether we shall adhere to our decision in *Wright v. Hart*.

We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright v. Hart* [1905] 182 N. Y. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state. The United States Supreme Court has sustained them (*Lemieux v. Young*, supra; *Kidd, etc. Co. v. Musselman Grocery Co.* supra). The courts of Washington (*McDaniels v. J. J. Connelly Shoe Co.* [1902] 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L.R.A. 947); Tennes-

see (*Neas v. Borches* [1902] 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851); *Connecticut* (*Walp v. Mooar* [1904] 76 Conn. 515, 57 Atl. 277; *Young v. Lemieux* [1907] 79 Conn. 434, 8 Ann. Cas. 452, 65 Atl. 436, 600, 129 Am. St. Rep. 193, 20 L.R.A.(N.S.) 160); *Massachusetts* (*Squires v. Tellier* [1904] 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322); *Oklahoma* (*Williams v. Wichita Fourth Nat. Bank* [1905] 15 Okla. 477, 6 Ann. Cas. 970, 82 Pac. 496, 2 L.R.A.(N.S.) 334); *Minnesota* (*Thorpe v. Pennock Mercantile Co.* [1906] 99 Minn. 22, 9 Ann. Cas. 229, 108 N. W. 940); *Michigan* (*Spurr v. Travis* [1906] 145 Mich. 721, 9 Ann. Cas. 250, 108 N. W. 1090, 116 Am. St. Rep. 330; *Musselman Grocery Co. v. Kidd, etc. Co.* [1908] 151 Mich. 478, 115 N. W. 409); *Pennsylvania* (*Wilson v. Edwards* [1907] 32 Pa. Super. Ct. 295; *Feingold v. Steinberg* [1907] 33 Pa. Super. Ct. 39); *Georgia* (*Jacques, etc. Co. v. Carstarphen Warehouse Co.* [1908] 131 Ga. 1, 62 S. E. 82); *Mississippi* (*Moore Dry Goods Co. v. Rowe* [1910] 97 Miss. 775, 53 So. 626; [1910] 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C 1213; *Maine* (*McGray v. Woodbury* [386] [1912] 110 Me. 163, 85 Atl. 491); *Texas* (*Nash Hardware Co. v. Morris* [1912] 105 Tex. 217, 146 S. W. 874); *Nebraska* (*Appel Merchante Co. v. Barker* [1912] 92 Neb. 609, 138 N. W. 1133); *New Jersey* (*Kett v. Masker* [1914] 86 N. J. L. 97, 90 Atl. 243); *Idaho* (*Boise Assoc. v. Ellis* [1914] 26 Idaho 438, 144 Pac. 6, L.R.A.1915E, 917); *Montana* (*Wheeler, etc. Mercantile Co. v. Moon* [1914] 49 Mont. 307, 141 Pac. 665), and *Oregon* (*Coach v. Gage* [1914] 70 Ore. 182, 138 Pac. 847), have sustained them. *Indiana*, *Ohio* and *Illinois*, which once held such laws bad (*McKinster v. Sager* [1904] 163 Ind. 671, 72 N. E. 854, 106 Am. St. Rep. 268, 68 L.R.A. 273; *Miller v. Crawford* [1904] 70 Ohio St. 207, 1 Ann. Cas. 558, 71 N. E. 631; *Williams, etc. Co. v. Preslo* [1911] 84 Ohio St. 328, Ann. Cas. 1912C 704, 95 N. E. 900; *Off v. Morehead* [1908] 235 Ill. 40, 14 Ann. Cas. 434, 126 Am. St. Rep. 184, 20 L.R.A.(N.S.) 167), have sustained their present laws, which do not differ substantially from our own (*Hirth-Krause Co. v. Cohen* [1911] 177 Ind. 1, Ann. Cas. 1914C 708, 97 N. E. 1; *Johnson Co. v. Belosky* [1914] 263 Ill. 363, 105 N. E. 287; *Steele, etc. Co. v. Miller* [1915] 92 Ohio St. 115, 110 N. E. 648). The one jurisdiction in which such statutes remain invalid is *Utah* (*Block v. Schwartz* [1904] 27 Utah 387, 1 Ann. Cas. 550, 76 Pac. 22, 101 Am. St. Rep. 971, 65 L.R.A. 308), and there the adverse judgment was rendered many years ago.

In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of

contract (*Rast v. Van Deman, etc. Co.* 240 U. S. 342, 366, 36 S. Ct. 370, 60 U. S. (L. ed.) 679; *Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 31 S. Ct. 186, 55 U. S. (L. ed.) 112, 32 L.R.A.(N.S.) 1062; *Otis v. Parker*, 187 U. S. 606, 23 S. Ct. 168, 47 U. S. (L. ed.) 323). The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past (*People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639). Back of this legislation, which to a majority of the judges who decided *Wright v. Hart*, seemed arbitrary and purposeless, there must have been a real need. We can see this now, even though it may have been obscure before. Our past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land. Least of all should it stand when rendered by a closely divided court against the earnest protest of distinguished judges. Indeed, in a later case (*People v. Luhrs*, 195 [387] N. Y. 377, 89 N. E. 171, 25 L.R.A.(N.S.) 473), we stated with the concurrence of all the members of the court, that the authority of *Wright v. Hart*, had been shaken, though the case did not call upon us to determine whether it was still the law. We cannot say to-day in the face of such overwhelming authority, that the presumption of validity which attaches to every act of legislation has been overcome. The present statute is similar in essentials to the one condemned in 1905. In details it may be distinguished from the earlier one, but the details are in reality trifling. We cannot without a sacrifice of candor rest our judgment upon them. We think we ought not to do so. We should adopt the argument and the conclusion of the dissenting judges in *Wright v. Hart*, and affirm the validity of the statute on which the plaintiff builds his rights.

The order should be reversed, without costs, and the questions certified answered in the affirmative.

Willard Bartlett, Ch. J., Chase, Collin, Cuddeback, Hogan and Pound, JJ., concur.

Order reversed, etc.

NOTE.

In the reported case the court sustains the constitutionality of a statute making the transfer of goods in bulk void as against creditors unless five days before the transfer an inventory is taken and notice to creditors is given. The question of the constitutionality of sales in bulk statutes is fully discussed in the notes to *G. S. Johnson Co. v. Belosky*, Ann. Cas. 1915C 411; *Williams v. Preslo*, Ann. Cas. 1912C 704; *Off v. Morehead*, 14 Ann. Cas. 434, and *Block v. Schwartz*, as re-

ported in 1 Ann. Cas. 550, and 101 Am. St. Rep. 971.

Whether the sale of a part interest in a business to a partner or for the creation of a partnership comes within a bulk sales law is considered in the note to *Daly v. Sumpter Drug Co.* Ann. Cas. 1914B 1101; and whether a conveyance to a creditor in payment of a debt is a sale under such a law is treated in the note to *Sampson v. Brandon Grocery Co.* 9 Ann. Cas. 331. The execution of a chattel mortgage as a violation of a sales in bulk statute is dealt with in the note to *Hannah v. Richter Brewing Co.* 12 Ann. Cas. 344.

For cases construing the statutory provision that a sale of goods in bulk shall be presumed to be fraudulent and void, see the note to *Wm. R. Moore Dry Goods Co. v. Rowe*, Ann. Cas. 1913C 1213. And cases concerning the meaning of "goods, wares and merchandise" within statutes regulating sales thereof in bulk are collated in the note to *Everett Produce Co. v. Smith*, 5 Ann. Cas. 798.

The remedies of a creditor for a violation of a bulk sales law are set forth and discussed in the note to *Coffey v. McGahey*, Ann. Cas. 1916C 923.

CITY OF DAYTON

v.

TRUSTEES OF SPEERS HOSPITAL.

Kentucky Court of Appeals—May 26, 1915.

165 Ky. 56; 176 S. W. 361.

Taxation — Exemptions — Hospital as Charity.

A testatrix gave property to three persons in trust for the establishment of a hospital; the trustees to report annually to the chancery court in the county, and such court to fill all vacancies in the office of trustee. The hospital received private pay patients; public patients going there of their own accord, or sent there by the county and certain nearby cities, including the city in which the hospital was located, and which was seeking to subject the hospital to taxation. No patients were kept without charge, but some of those who came of their own accord failed to pay, and no one had ever been turned away for inability to pay. The county and such cities compensated the hospital as to patients sent by them, but in a sum less than the actual cost. The operation of the hospital resulted in different years, either in a deficit or in a very small gain. There was no provision for reversion in the will, the trustees served

without pay, and it did not appear that it was ever intended that any private gain should result. The profit from private patients who paid for their care and treatment went into the general fund of the hospital, and was used for maintaining it. It is held that the hospital property was exempt from taxation as a "public charity;" since whatever is done or given gratuitously in relief of the public burdens, or for the advancement of public good, is a public charity, and an institution founded and endowed as a purely public charity does not lose its character as such under the tax laws if it receives a revenue from the recipients of its bounty sufficient to keep it in operation, or, applying another test, if the object for which an institution is founded is the general public good, and not private gain, and it is so conducted that the public receives all the benefits of it, it is a purely public charity.

[See note at end of this case.]

Appeal from Circuit Court, Campbell county.

Action by City of Dayton, plaintiff, against Trustees of Speers Hospital, defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Hubbard Schwartz for appellant.
Kelly & Regenstein for appellees.

[56] HURT, J.—This is an appeal of the city of Dayton, Kentucky, from a judgment rendered by the Campbell Circuit Court, in an action by the city against J. O. Jenkins, John L. Phythian, and W. E. Senour, trustees of the Speers Hospital, in which the city sought to procure a [57] decree of sale of the hospital, in satisfaction of taxes assessed against it by the officials of the city, for the years 1910 and 1911. The defense offered by the appellees was that the hospital was an institution of purely public charity, and the case resulted in a judgment dismissing the petition of appellant. The case was tried upon an agreed statement of facts, which are, in substance, that the taxes for the benefit of the city were regularly levied upon the hospital for the years mentioned, in the first of which years the taxable value, at which it was assessed, was \$28,000.00, and the second year \$38,000.00, and the whole amount sought to be recovered was \$1,100.50, as taxes due from it to the city for the years mentioned. The hospital was founded by funds set apart for that purpose by the will of Elizabeth L. Speers, who died in 1894, and whose will was duly probated October 20th, 1894. The item of the will which set apart the funds for the erection and maintenance of the hospital, after providing that the various specific leg-

acies devised in the will to various persons, should be paid, and all costs and expenses incident to the settlement of her estate, "conveyed and transferred the entire balance of her estate, real, personal, and mixed of every kind, wherever situated, to Dr. B. K. Rachford, Dr. C. B. Schoolfield, and William C. Pickering, as trustees, in trust, for the establishment and maintenance of a hospital in the city of Dayton, Campbell County, Kentucky. Said hospital to be erected and maintained, and conducted in such a manner, and upon such plan, as, in their judgment, would do the greatest good. Said trustees shall annually report all of their acts and doings to the highest court in said county, having original equitable jurisdiction, and all vacancies in said trustees shall be filled by said court. Said court shall require from said trustees proper bonds, for the performance of their duties, and it may allow them annually, out of the trust funds, a just and fair compensation for their labor, etc." In pursuance to the trust thus created, the trustees and their successors erected the hospital at a cost of about \$72,000.00, which left real estate of the value of \$14,200.00 situated in Ohio, which also passed into the hands of the trustees. The receipts of the hospital, with the rents of the property, in Cincinnati, were not sufficient to pay its operating expenses, and its doors were closed, but in 1901 the present trustees were appointed, [58] and they applied to the Campbell Circuit Court for permission to borrow \$6,000.00 to pay its debts, and \$2,000.00 additional with which to make needed repairs. The trustees borrowed the \$8,000.00 from J. J. Ellerhorst, and thereafter they borrowed from Ellerhorst \$2,250.00 additional, making \$10,250.00, to secure which they gave a mortgage for that sum upon the real estate situated in Cincinnati, Ohio, and while the income from that property did not quite pay the interest on the Ellerhorst mortgage, he accepted same in full satisfaction of it. In 1909 it became necessary to provide a more commodious and convenient building for the nurses at the hospital, and the trustees again applied to the Campbell Circuit Court and received permission to borrow \$20,000.00 for that purpose, and to secure it by a mortgage upon the hospital itself. \$16,453.36 of this fund was expended in erecting necessary additional building, and the remaining \$3,546.64 was put in the treasury of the hospital, and used to pay accumulated debts and the operating expenses of the institution. There was another debt of \$1,000.00 due one Langendorfer, incurred in building the nurses' addition to the hospital, and Langendorfer had secured his claim by filing a mechanics' lien upon the hospital property, and to satisfy this claim the circuit court authorized the trustees to

place another mortgage upon the property for that sum, which was done in 1912. The average number of patients cared for in the hospital each day in 1910 was thirty-three, of which number nineteen were private patients and fourteen public patients, and the average number of patients cared for in 1911, each day, was twenty-seven, of which number fourteen were private patients and thirteen were public patients. In the year 1910 the city of Dayton sent to the hospital and paid for twenty-one patients, who remained there an aggregate of three hundred and fifty-eight days, and in 1911 it sent twenty-one patients to the hospital, who remained an aggregate of four hundred and thirty-two days. Private patients are those who enter the hospital and pay from their own resources for their room, board, and nursing, and pay the physician, for professional services rendered them, directly. The profit, if any, derived from the care of these private patients, for their rooms, board, and nursing, goes into the general fund of the hospital, and is used for maintaining the hospital. Public patients [59] are described as those who come of their own accord, or are sent by the authorities of the city of Dayton, Bellevue, Newport, and Campbell County. All public patients are received and treated in the public wards. No patients are kept in the hospital without charge, but some patients, who come of their own accord, fail to pay their bills. All public patients receive medical attention at the hands of the members of the hospital staff, free of charge to them, and one interne is on duty at all times, and his services are, also, given to the patients. The hospital trustees serve and have always served without compensation. When the hospital first began operation a number of rooms were furnished by charitably inclined persons and organizations, and since that time other rooms have been furnished in a similar manner. The hospital each year receives from various sources charitable contributions in the way of beds, towels furniture, food supplies, and various necessities, which have been used for the benefit of all the patients in the operation of the hospital. The hospital is located in the central part of Dayton, and has the benefit of the sewerage system of the city of Dayton, and such police and fire protection as is furnished any other building in the city. The hospital pays the same for water, gas, and electric light and power service as is paid by other consumers. Each year, during its operation, the hospital has received contributions of money, which are used in the operation of the hospital.

The agreed statement of facts further shows that for several years, before the year 1910, the cities of Dayton and Bellevue con-

tributed annually to the hospital the sum of \$1,000.00 per year, and the city of Newport contributed annually to the support of the hospital \$3,000.00, and the county of Campbell contributed annually the sum of \$1,000.00. These contributions were made to the hospital upon condition that the indigent sick of three cities named and of the county were to be received at the hospital and treated there without charge to them. This plan continued for several years, when it was changed, so that the cities of Dayton, Bellevue, and Newport paid \$1.05 per day for each indigent person sent to the institution by them, but in the year 1913 the city of Newport paid \$3,500.00 for that year, while the county of Campbell continued to donate \$1,000.00 per year, as theretofore. The hospital trustees [60] have given to the cities of Dayton and Bellevue notice that after March 1st, 1914, the rate to be paid for each patient per day was to be \$1.20. The actual cost per day for caring for each patient has been \$1.28 per day. During the year 1910, in addition to the public patients received from the three cities named and Campbell County, three persons came of their own accord, who remained an aggregate of twenty days, and in 1911 three such patients were treated for an aggregate of thirty-three days.

It was, also, agreed that the earnings of the hospital for the year ending August 31st, 1909, for board, operating, nursing, rents, donations, miscellaneous receipts of all kinds, and discounts earned, amounting to \$18,720.69, while its expenses for the same time for wages, provisions, fuel, water, and light, surgical supplies, drugs, house supplies, repairs, interest, insurance, and general expenses amounting to \$17,032.89, which, after deducting \$861.45 for persons treated free of charge, left a balance in favor of the institution of \$826.35; for the year ending August 31st, 1910, the receipts of the hospital amounted to \$18,067.43, and deducting the expenses for the same period from it, left a net deficit for the same year of \$147.87; deducting the expenses from the earnings for the year ending August 31st, 1911, showed a net gain for the year of \$184.14. A statement of the earnings and expenses for the year ending August 31st, 1912, showed a net balance in favor of the institution of \$126.43.

This court, in *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470, 36 S. W. 921, 40 L.R.A. 119, and in *Widows' etc. Home, etc. v. Com.* 126 Ky. 386, 103 S. W. 354, 16 L.R.A.(N.S.) 829, quoted with approval from the case of *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 25 Atl. 55, wherein it laid down, among others, the two following rules by which to determine whether an institution was one of purely public charity:

"First: Whatever is done or given gratuitously in relief of the public burdens or for the advancement of public good, is a public charity. Where the public is the beneficiary, the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefits resulting from the gift or act go to the public, is a purely public charity, the word 'purely' being equivalent to 'wholly.'

[61] "Third: An institution founded and endowed as a purely public charity does not lose its character as such, under the tax laws, if it receives a revenue from the recipients of its bounty sufficient to keep it in operation."

In the case of *Gerke v. Purcell*, 25 Ohio St. 229, the Ohio supreme court said:

"When the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely,' as applied to public charity in the constitution."

Another test of purely public charity is the object for which it was founded. If it was for the general public good, and not for private gain, and was so conducted that the public received all the benefits of it, it is a purely public charity. *Donohugh v. Library Co.* 86 Pa. St. 306.

By the will of Elizabeth Speer, the funds for the establishment and maintenance of this hospital in the city of Dayton were set apart by her, and the hospital to be erected and maintained, and was to be conducted in such a manner and upon such a plan, as, in the judgment of the trustees, would do the greatest good. No provision is in the will providing that the funds so set apart should ever revert to any private person, or should in any event, ever, be used for any purpose, except the one designated in the will. The title to the property is vested in trustees, who have no personal interest in the property, whatever, and in the case of vacancies in the office of trustees, the vacancies must be filled by the circuit court of the county. The purpose of the donor was to create a pure charity, and the fund was placed in the service of the public without any view to provide gain for any one. The nursing and medical treatment of the indigent sick, and of those whose pecuniary circumstances are such, as will not justify an expenditure of more than a small sum for medical and surgical treatment, and nursing and caring while sick, is, without question, a public charity, if the doors of the institution are open to all persons, alike. It is always the duty of the State to provide for its indigent sick.

It does not appear that it was ever intended, that any private gain should result to any person in the operation of the trust created by the donor, in setting apart the fund for the erection and maintenance of the

[62] hospital. The supervision of its operation was given to the court of the highest equitable jurisdiction in the county, and the power to name the trustees was vested in the same tribunal—thus stamping it with evidences of its public character. In its operation no one has been excluded from its benefits. The county in which it is situated and the nearby cities have used it as an instrumentality to care for their indigent sick, and to procure surgical and medical treatment for them. It is true, the county and cities have compensated the institution for the care and treatment of their poor and friendless sick, but in a sum less than the actual cost to the institution for caring for them. One-half of the inmates have received the services of the physicians, as well as the nursing and their board, free of any charge to them. While a charge is made against every patient, other than the ones who are consigned there by the county or cities, it does not appear that anyone has ever been turned away, or excluded from its benefits, because of poverty, or inability to pay for the benefits. Private patients are received, who pay the institution for their rooms, boarding, and nursing, and pay their physicians for their treatment, but the funds received from this source are all devoted to the general expenses of the hospital. A building and grounds and furniture are not adequate to maintain a hospital. The nurses must be paid, fuel and lights, water and food provided, and some one to superintend and direct the operations of the hospital.

The fact that the institution receives a revenue from the recipients of its bounty, sufficient to keep it in operation, does not take from it its character as a purely public charity, where it was founded and endowed as such, and when all of the receipts go to providing for the purposes for which it was erected and maintained. The municipalities and the county itself in which the institution is located, and whose duty it is to care for the indigent sick of each of them, respectively, have, by its use, been saved the burden of erecting an institution of the kind of their own, or otherwise caring for such sick.

In 6 Cyc. 900, a public charity is defined "to be a gift, to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, [63] suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The Speers Hospital has been so conducted and was so endowed and maintained, that no

private gain has come to any one, and all of its benefits go to the public.

The cases of *Walthen v. Louisville*, 85 S. W. 1195, 27 Ky. L. Rep. 635, and *Gray St. Infirmary v. Louisville* 65 S. W. 11, 23 Ky. L. Rep. 1274, relied upon to show that Speers Hospital is not a purely public charity, are not in point, since each of those institutions was founded and conducted with a view to private gain and resulted in private gain to the managers.

It is, therefore, adjudged that the judgment appealed from be affirmed.

NOTE.

Hospital as Charity Exempt from Taxation.

Introductory, 278.

What Constitutes Charitable Hospital:

Hospital Not Operated for Profit, 278.

Hospital Operated for Profit, 281.

Property Included in Exemption:

Land Adjoining Hospital, 281.

Land Detached from Hospital, 282.

Introductory.

The present discussion is confined to the question whether a hospital is such a charity as to be exempt from property taxation. It excludes the charitable nature of a hospital when considered for other purposes than that of exemption from taxation, and also excludes exemption from inheritance, succession or transfer taxes.

Whether a gift for the establishment of a hospital is a charitable gift is discussed in the note to *Buchanan v. Kennard*, Ann. Cas. 1912D 50. The cases dealing with the charitable nature of a private hospital as exempting it from liability for the negligence of employees are reviewed in the notes to *Parks v. Northwestern University*, 4 Ann. Cas. 103; *Bruce v. Central M. E. Church*, 11 Ann. Cas. 150; *Duncan v. Nebraska Sanitarium*, etc. Assoc. Ann. Cas. 1913E 1127; and *Schloendorff v. Society of New York Hospital*, Ann. Cas. 1915C 581. The liability to an inheritance tax of a bequest to a foreign charitable corporation is considered in the notes to *Humphreys v. State*, 1 Ann. Cas. 233; and *Matter of Crawford*, Ann. Cas. 1912B 992.

What Constitutes Charitable Hospital.

HOSPITAL NOT OPERATED FOR PROFIT.

A hospital wherein no charge is made to patients received therein constitutes a charity exempt from taxation. *Western Dispensary v. New York*, 56 Super. Ct. 361, 4 N. Y. S. 547. See also *Frederick County Com'rs v.*

165 Ky. 56.

Sisters of Charity, 48 Md. 34; Cooper Hospital v. Camden, 68 N. J. L. 691, 54 Atl. 419, reversing 68 N. J. L. 208, 52 Atl. 210; Cooper Hospital v. Camden, 70 N. J. L. 478, 57 Atl. 260; Humphreys v. Little Sisters of the Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286.

In Massachusetts Soc. etc. v. Boston, 142 Mass. 24, 6 N. E. 840, it was held that a free hospital for the care of homeless, neglected, diseased or abused animals was exempt from taxation.

A hospital caring for poor patients free but charging those able to pay for its privileges is exempt from taxation as a charity provided such revenue is devoted solely to the purposes of the institution so that the hospital is operated without profit.

England.—Cawse v. Nottingham Lunatic Asylum [1891] 1 Q. B. 585, 60 L. J. Q. B. 485, 65 L. T. N. S. 155, 39 W. R. 461, 55 J. P. 582.

Arkansas.—Hot Springs School Dist. v. Sisters of Mercy, etc. 84 Ark. 497, 106 S. W. 954.

Colorado.—St. Johns Cathedral v. Denver, 37 Colo. 378, 86 Pac. 1021.

Illinois.—Sisters of St. Francis v. Board of Review, 231 Ill. 317, 83 N. E. 272; Board of Review v. Provident Hospital, etc. School Assoc. 233 Ill. 242, 84 N. E. 216; German Hospital v. Board of Review, 233 Ill. 246, 84 N. E. 215; Board of Review v. Chicago Polyclinic, 233 Ill. 268, 84 N. E. 220; Proctor Hospital v. Board of Review, 233 Ill. 583, 84 N. E. 618.

Kentucky.—Mason County v. Haywood Hospital, 167 Ky. 17, 179 S. W. 1050. And see the reported case.

Louisiana.—State v. Board of Assessors, etc. 52 La. Ann. 223, 26 So. 872.

Massachusetts.—New England Sanitarium v. Stoneham, 205 Mass. 335, 91 N. E. 385.

Michigan.—Michigan Sanitarium, etc. Assoc. v. Battle Creek, 138 Mich. 676, 101 N. W. 855, 11 Detroit Leg. N. 719.

Minnesota.—Hennepin County v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298.

Missouri.—State v. Powers, 10 Mo. App. 263, affirmed 74 Mo. 476.

New Jersey.—Denville Tp. v. St. Francis Sanitarium, 98 Atl. 254. See also Sisters of Charity v. Cory, 73 N. J. L. 699, 65 Atl. 500.

New York.—People v. Purdy, 58 Hun 386, 12 N. Y. S. 307, affirmed 126 N. Y. 679, 28 N. E. 249. See also People v. Nowles, 34 Misc. 501, 70 N. Y. S. 277.

Pennsylvania.—Philadelphia v. Pennsylvania Hospital, 154 Pa. St. 9, 25 Atl. 1076; Philadelphia v. Pennsylvania Hospital, 8 Pa. Co. Ct. 72.

West Virginia.—Reynolds Memorial Hospital v. Marshall County Ct. 90 S. E. 238.

Wisconsin.—St. Joseph's Hospital Assoc. v. Ashland County, 96 Wis. 636, 72 N. W. 43.

Thus in State v. Powers, 10 Mo. App. 263, affirmed 74 Mo. 476, it was held that a hospital building was not excluded from the benefits of the constitutional exemption from taxation for the reason that the institution derived some part of its revenue from paying patients. The court said: "Suppose that the community in charge of the hospital devoted themselves partly to some kind of manual labor, shoemaking for instance, in order to raise money for the purpose of furnishing medicine and necessities and comforts to their patients, would not this be a charitable act? If they devote themselves partly to the care of paying patients, to defray the expenses of attendance upon the poorer patients who cannot pay, this is surely an act of charity. Must we hold that if the community raise money by begging, their purposes are purely charitable; but if they work to support themselves whilst ministering to the sick, and to support the sick to whom they minister, the character of the charity is impaired? Or is it to be contended that no charitable institution, not endowed, and independent, is to be exempted from taxation under the law? The fact that paying patients are taken, the profits derived from attendance upon these patients being exclusively devoted to the maintenance of the charity, seems rather to enhance the usefulness of the institution to the poor; for it is a matter of common observation amongst those who have gone about at all amongst the suffering classes, that the deserving poor can with difficulty be persuaded to enter an asylum of any kind confined to the reception of objects of charity; and that their honest pride is much less wounded by being placed in an institution in which paying patients are also received. The fact of receiving money from some of the patients does not, we think, at all impair the character of the charity, so long as the money thus received is devoted altogether to the charitable object which the institution is intended to further." And in State v. Board of Assessors, etc. 52 La. Ann. 223, 26 So. 872, wherein it was contended that certain institutions could not be classed as charitable because they received pay from a class of patients able to pay in the desire to avail themselves of well-equipped institutions where the sick could receive proper attention, the court said: "It strikes us as a narrow construction to hold that these institutions are not to be deemed charitable, because unable to bear the whole expense of taking care of the indigent needing medical attention, and of those whose straightened circumstances render them helpless to obtain the attention and medicines they need,

the institutions make a moderate charge of those able to make return in some small degree for the shelter, medical treatment, medicines and food they receive. Nor can we see our way clear to hold that institutions established for charitable purposes, and serving the purposes to the extent shown by the record, are not to be decreed charitable, because they derive some revenue from the class called 'pay patients.'” Likewise in *St. Joseph's Hospital Assoc. v. Ashland County*, 96 Wis. 636, 72 N. W. 43, the court said: “How it can be doubted that this institution is doing a benevolent work in the truest sense of the word we are unable to see. It is really the work of the good Samaritan. It is true that those who are able to pay do pay a very moderate weekly charge, but those who are unable to pay receive the same care for nothing. This does not render the work done any the less benevolent. Doubtless, if the hospital were absolutely free to all, it could not be operated. It is the very fact that pay is collected from those who can pay which enables the sisters to operate the hospital and care for those who are too poor to pay. If this work be not benevolent work, especially in the great cities and in the newly-settled districts, then there will have to be a new meaning attached to the word 'benevolent.' . . . The fact that there were surplus receipts at times, which were loaned to build other hospitals of the same character, does not show that the property was used for pecuniary profit.” In *Philadelphia v. Pennsylvania Hospital*, 154 Pa. St. 9, 25 Atl. 1076, involving an alleged exemption from a municipal assessment for a water pipe the court said: “While it was conceded that the building and grounds are exempt from taxation for the reason that defendant is a purely public charity, yet it was contended that within the portion of the grounds charged with this claim there is a large building reserved exclusively for the use of patients paying a higher rate than any others; that these payments much exceed the cost of maintenance assignable to themselves, if the original cost of the property and any estimated rental is excluded. It appears to be conceded that the object of the trustees in maintaining this department of the institution is to make a profit, by the use of which to extend the institution's capacity for good among the destitute members of the community. It was not contended, nor is there anything to show, that there was any actual profit realized in this department after taking into consideration the value of the ground and improvements, and the cost of maintenance. The apparent profit is applied to the general objects of charity, and no portion of it inures to the benefit of any person concerned in ad-

ministering the charity.” And in *St. John Cathedral v. Denver*, 37 Colo. 378, 96 Pac. 1021, it was held that the exaction of payment from the inmates of a home for consumptives for the actual necessities furnished according to their circumstances and the accommodations they received, did not constitute a use of the building for other than a strictly charitable purpose. So in *Sisters of St. Francis v. Board of Review*, 231 Ill. 317, 83 N. E. 272, it was held that an institution organized not for profit but for conducting hospitals and training schools for nurses was a charity and exempt from taxation. The court said: “The facts in reference to the training schools conducted in this hospital are not clearly made to appear by the evidence, but as we understood the record, persons not members of the corporation who desire to become trained nurses are permitted to enter the hospital, where they are boarded and taught to perform the duties of their chosen calling in exchange for such assistance as they can give in doing the work of the institution. . . . In this hospital charity is extended to all the members of the community and is not confined to any particular class of individuals. It is an institution of public charity, and where an institution devoted to beneficence of that character is, under the law, exempt from taxation, it does not lose its immunity by reason of the fact that those patients received by it who are able to pay are required to do so, or by reason of the fact that it receives contributions from outside sources, so long as all the money received by it is devoted to the general purposes of the charity, and no portion of the money received by it is permitted to inure to the benefit of any private individual engaged in managing the charity.” Likewise in *Denville Tp. v. St. Francis Sanitarium* (N. J.) 98 Atl. 254, the court said: “That the buildings and land exempted in this case are used for charitable, benevolent, and hospital purposes abundantly appears, and as the act extends the exemption to cases where the charitable and benevolent work carried on is supported partly by fees and charges paid by the beneficiaries where the entire income is used for such purposes, the fact appearing in this case that there is an income from the beneficiaries which is used for charitable and benevolent purposes does not make this institution one conducted for profit, and thus beyond the benefit of the exemption.”

In *Struthers v. Sudbury*, 27 Ont. App. 217, it was held that a hospital owned and carried on by physicians which was subject to governmental control and for the support of which public funds were contributed, was exempt from taxation as a public hospital. But in *Engstad v. Grand Forks Coun-*

ty, 10 N. D. 54, 84 N. W. 577, it was held that the building and land of a private individual, used as a charitable hospital, was not exempt from taxation for the reason that property owned by one individual could not, within the meaning of the statute, be property "belonging to an institution."

HOSPITAL OPERATED FOR PROFIT.

A hospital operated for profit is not exempt from taxation as a charity. *St. Andrew's Hospital v. Shearsmith*, 19 Q. B. D. (Eng.) 624; *Meedham v. Bowers*, 21 Q. B. D. (Eng.) 436, 59 L. T. N. S. 404, 37 W. R. 125; *People v. Ravenswood Hospital*, 238 Ill. 137, 87 N. E. 305; *New Orleans v. Congregation*, etc. 15 La. Ann. 389. Thus in *People v. Ravenswood Hospital*, supra, it was held that a hospital organized for profit was not exempt from taxation, though conducted as a public hospital. The court said: "It would be a contradiction in terms to say that a corporation organized for gain and pecuniary profit is an institution of public charity. It follows, of necessity, that the law requires that the property to be exempt must belong to and stand in the name of an institution organized for public charity as well as that the property shall be used actually and exclusively for such charitable purposes. The right to enjoy exemption from taxation can only be established by strict proof of the existence of all facts necessary to authorize the exemption." And in *Needham v. Bowers*, 21 Q. B. D. (Eng.) 436, the court said: "In this case the question raised is whether the Barnwood House Institution was liable to pay inhabited house duty, or whether it comes within the exemption No. 4 of 48 Geo. 3, c. 55, which exempts 'any hospital, charity school, or house provided for the reception or relief of poor persons.' We think that this exemption, which specifies hospitals along with charity schools and poor houses, must be construed in the same manner as we have construed the exemption in s. 61 of 5 & 6 Vict. c. 35, and that it does not include the case of a hospital not maintained by charity, but carried on, and carried on at a profit, by funds derived from patients who pay for their treatment."

In *Wathen v. Louisville*, 85 S. W. 1195, 27 Ky. L. Rep. 635, it appeared that certain persons owned property on which buildings were situated in which a medical school was conducted for profit. One of these buildings was used as a hospital and dispensary in which medicines were dispensed and patients treated free of charge unless able to pay a small sum. If not able to pay they were treated without charge. Holding that as the institution was operated for gain no part of it was exempt from taxation under the consti-

tution the court said: "It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instruction and the operations by the professors in the presence of the students the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows a great deal of charity work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit." See to the same effect *Gray St. Infirmary v. Louisville*, 65 S. W. 11, 23 Ky. L. Rep. 1274. See also *People v. Campbell*, 93 N. Y. 196.

Property Included in Exemption.

LAND ADJOINING HOSPITAL.

As a rule land adjoining a hospital which is exempt from taxation as a charity is included in the exemption. *St. Thomas', etc. Hospitals v. Huddell* [1901] 1 K. B. (Eng.) 364; *Massachusetts Gen. Hospital v. Somerville*, 101 Mass. 319; *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298. *Compare Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252. Thus in *Massachusetts Gen. Hospital v. Somerville*, 101 Mass. 319, it was held that land bought and held by a benevolent institution for the insane to prevent too near proximity of buildings and use which might be deleterious to the hospital was exempt from taxation. The court said: "There is nothing in the case to show that this was not the real intention; nor that the whole of the lands were not in fact held, and proper to be held, for this purpose. The court cannot, from the mere fact of the extent of the lands so held (one hundred and ten acres, including marsh and flats), determine judicially that the trustees of the institution have wrongly exercised their discretion in this respect. The presumption is in favor of their judgment, and it requires something more than mere difference of opinion, upon a matter of opinion especially confided to them, to overcome that presumption." *Compare Denville Tp. v. St. Francis Sanitarium* (N. J.) 98 Atl. 254. But in *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252 it was held that only the building of a charity hospital and not the land used as a necessary part of the institution was exempt from taxation.

In *Denville Tp. v. St. Francis Sanitarium* (N. J.) 98 Atl. 254, it appeared that the sanitarium was the owner of a large tract of land on which were erected several build-

ings especially for sanitarium purposes. The board of equalization exempted from taxation the buildings with five acres of land necessary for the fair enjoyment of the buildings. Affirming that ruling the court said: "That the buildings and land exempted in this case are used for charitable, benevolent, and hospital purposes abundantly appears, and as the act extends the exemption to cases where the charitable and benevolent work carried on is supported partly by fees and charges paid by the beneficiaries where the entire income is used for such purposes, the fact appearing in this case that there is an income from the beneficiaries which is used for charitable and benevolent purposes does not make this institution one conducted for profit, and thus beyond the benefit of the exemption."

In *Jepson v. Gribble*, 1 Ex. D. 151, 45 L. J. Exch. 502, 34 L. T. N. S. 493, 24 W. R. 460, it was held that the medical superintendent's house built on part of the grounds of a hospital was exempt from taxation. See to the same effect *Harrison v. Bulcock*, 1 H. Bl. (Eng.) 68.

LAND DETACHED FROM HOSPITAL.

As a rule land detached from a hospital which is exempt from taxation as a charity is included in the exemption, provided it is used to further the purposes of the institution. *St. Thomas', etc. Hospitals v. Hudgell* [1901] 1 K. B. (Eng.) 364; *Cox v. Rabbits*, 3 App. Cas. (Eng.) 473; *Mason County v. Hayswood Hospital*, 167 Ky. 17, 179 S. W. 1050; *People v. Purdy*, 58 Hun 386, 12 N. Y. S. 307, *affirmed* 126 N. Y. 679, 28 N. E. 249. *Pennsylvania Hospital v. Delaware County*, 169 Pa. St. 305, 32 Atl. 456; 36 W. N. C. 547. *Compare State v. St. Barnabas Hospital*, 95 Minn. 489, 104 N. W. 551; *Cooper Hospital v. Camden*, 68 N. J. L. 691, 54 Atl. 419, *reversing* 68 N. J. L. 208, 52 Atl. 210; *Cooper Hospital v. Camden*, 70 N. J. L. 478, 57 Atl. 260. Thus in *Pennsylvania Hospital v. Delaware County*, *supra*, wherein it appeared that farms were bought and used for hospital purposes as a part of the hospital plant, as an open air sanatorium, and as a roaming ground for convalescent patients, the court said the property which was used directly for that purpose, and in the operation of the charity, was exempt, though it might also be used in a manner to yield some return and thereby reduce the expenses. On the other hand in *State v. St. Barnabas Hospital*, 95 Minn. 489, 104 N. W. 551, it appeared that the defendant conducted a hospital for charitable purposes and with no view to profit. It had acquired by gift certain farming lands, which it rented, and derived an annual income therefrom of about \$600. It was held that the land was not exempt from taxation. The

court said: "It may . . . be stated that the lands and premises for more than four years previous to these proceedings have been a part of the endowment of the hospital, and are and can be used only for the support and care of charity patients, but were composed of farming lands separate from the curtilage of the institution, and not essential or necessary to the use of the same for hospital purposes." And in *Cooper Hospital v. Camden*, 70 N. J. L. 478, 57 Atl. 260, the court, said: "The lot which has been taxed is distant from the lands on which the buildings are erected, and there is nothing in the case to show that it is available for the erection thereon of hospital buildings or that it is contemplated to hold or use it for such a purpose. . . . If the right to exemption is conceded in this case, this corporation and all other benevolent corporations with like exemptions could purchase and hold lands in every municipality in the state free from taxation." See to the same effect *Cooper Hospital v. Camden*, 68 N. J. L. 691, 54 Atl. 419, *reversing* 68 N. J. L. 208, 52 Atl. 210.

In *People v. Raymond*, 194 N. Y. 189, 87 N. E. 90, *reversing* 126 App. Div. 720, 111 N. Y. S. 177, it was held that the Roosevelt Hospital in the city of New York was exempt from taxation on property which was not used exclusively for charitable purposes. The court said that the peculiar features attending its incorporation and characterizing its endowment were controlling. But in *Enaut v. McGuire*, 36 La. Ann. 804, 51 Am. Rep. 14, it was held that vacant property held in anticipation of being used at some time for the erection of a charity hospital, though not specifically dedicated to that purpose, was not exempt from taxation.

In *Philadelphia v. Jewish Hospital Assoc.* 148 Pa. St. 454, 23 Atl. 1135, 30 W. N. C. 25, it was held that a hospital building originally used for that purpose by an association which had moved to another building was no longer exempt from taxation. The court said: "A hospital building is not a hospital in the true sense of the word. No charity is administered by the mere possession of the building. As a building only, and independently of its uses, it is a mere house, and comes strictly within the taxing laws as such. To entitle it to consideration as a hospital it is essential that it be devoted to the purposes for which hospitals are used. Whenever it is restored to such use it may with propriety be claimed that it has been brought within the operation of the exempting laws. Until then the property is nothing but a house and land, and as such it is subject to taxation, as are other houses and land." *Compare Cox v. Rabbits*, 3 App. Cas. (Eng.) 473.

TRUAX ET AL.

v.

RAICH.

United States Supreme Court—November 1, 1915.

239 U. S. 33; 36 S. Ct. 7.

States — Liability to Suit — What Constitutes Suit against State.

A suit by an alien to restrain the attorney general and county attorney from enforcing to his injury the Arizona anti-alien labor law of December 14, 1914, which he asserts is repugnant to the Federal Constitution, cannot be regarded as a suit against the state.

[See 14 Ann. Cas. 791.]

Injunctions — Restraining Prosecution under Invalid Statute.

Equity has jurisdiction to restrain the criminal prosecution of an employer under the Arizona anti-alien labor law of December 14, 1914, at the instance of an alien employee who alleges that the act violates the Federal Constitution and that its enforcement will result in his immediate discharge from employment, although such employment may be one at will, rather than for a term.

[See 1 Ann. Cas. 121; 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

Aliens — Statute Restricting Employment — Validity.

The discrimination against aliens lawfully resident in the state, which is produced by the provisions of Arizona Act of December 14, 1914, that every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers shall employ not less than eighty per cent qualified electors or native-born citizens of the United States or some subdivision thereof," renders the statute invalid under U. S. Const. 14th Amend. (9 Fed. St. Ann. 538) as denying the equal protection of the laws, and such statute cannot be justified as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction.

[See note at end of this case.]

Appeal from United States District Court, District of Arizona.

Action by Mike Raich, plaintiff, against William Truax, Sr., et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Wiley E. Jones, Leslie O. Hardy, George W. Harben, J. Addison Hicks and W. B. Cleary for appellants.

Alexander Britton, Evans Browne and Francis W. Clements for appellee.

[35] HUGHES, J.—Under the initiative provision of the constitution of Arizona (Art. IV. § 1), there was adopted the following measure which was proclaimed by the Governor as a law of the State on December 14, 1914:

"An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof,

"Be it enacted by the People of the State of Arizona:

"Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some sub-division thereof.

"Sec. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred (100.00) dollars, and imprisoned for not less than thirty (30) days.

"Sec. 3. Any employee who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred (\$100.00) dollars, and imprisoned for not less than thirty (30) days." Laws of Arizona, 1915. Initiative Measure, p. 12.

[36] Mike Raich (the appellee), a native of Austria, and an inhabitant of the State of Arizona but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employees, of whom seven were neither "native-born citizens" of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States for the District of Arizona, asserting among other things that the act denied to him the equal protection of the laws and hence was contrary to the Fourteenth Amendment of the Constitution of the United States (9 Fed. St. Ann. 538). Wiley E. Jones, the attorney general of the State, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer

Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction *pendente lite*. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the County Attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The [37] defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by § 266 of the Judicial Code (Fed. St. Ann. 1912 Supp. p. 242). The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex p. Young*, 209 U. S. 123, 155, 161 [14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A. (N.S.) 932] which has repeatedly been followed; *Ludwig v. West Union Tel. Co.* 216 U. S. 146 [30 S. Ct. 280, 54 U. S. (L. ed.) 423]; *Western Union Tel. Co. v. Andrews*, 216 U. S. 165 [30 S. Ct. 286, 54 U. S. (L. ed.) 430]; *Herndon v. Chicago, etc. R. Co.* 218 U. S. 135, 155 [30 S. Ct. 633, 54 U. S. (L. ed.) 970]; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 643-645 [31 S. Ct. 654,

55 U. S. (L. ed.) 890, 35 L.R.A. (N.S.) 243]; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 607, 620 [32 S. Ct. 340, 56 U. S. (L. ed.) 570]; *Home Telephone, etc. Co. v. Los Angeles*, 227 U. S. 278, 293 [33 S. Ct. 312, 57 U. S. (L. ed.) 510].

It is also settled that while a court of equity, generally speaking, has "no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors" (*In re Sawyer*, 124 U. S. 200, 210 [8 S. Ct. 482, 31 U. S. (L. ed.) 402]) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions [38] under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis, etc. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218 [23 S. Ct. 498, 47 U. S. (L. ed.) 778]; *Dobbin v. Los Angeles*, 195 U. S. 223, 241 [25 S. Ct. 18, 49 U. S. (L. ed.) 169]; *Ex p. Young*, supra; *Philadelphia Co. v. Stimson*, supra, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. *Moran v. Dunphy*, 177 Mass. 485, 487 [59 N. E. 125, 83 Am. St. Rep. 289, 52 L.R.A. 115]; *Berry v. Donovan*, 188 Mass. 353; *Brennan v. United Hatters North America*, 73 N. J. L. 729, 743 [9 Ann. Cas. 698, 65 Atl. 165, 118 Am. St. Rep. 727, 9 L.R.A. (N.S.) 254]; *Perkins v. Pendleton*, 90 Me. 166 [38 Atl. 96, 60 Am. St. Rep. 252]; *Lucke v. Clothing Cutters, etc. Assembly No. 7507*, 77 Md. 396 [26 Atl. 505, 39 Am. St. Rep. 421, 19 L.R.A. 408]; *London Guarantee, etc. Co. v. Horn*, 101 Ill. App. 355, 206 Ill. 493 [69 N. E. 526, 99 Am. St. Rep. 185]; *Chipley v. Atkinson*, 23 Fla. 206 [1 So. 934, 11 Am. St. Rep. 367]; *Blumenthal v. Shaw*, 23 C. C. A. 590, 77 Fed. 954. It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe v. Atchison, etc. Ry.* 235 U. S. 151, 162 [35 S. Ct. 69, 59 U. S. (L. ed.) 169]); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the com-

plainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employees to bring the [39] alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. (See *Gegiow v. Uhl*, Commissioner, decided October 25, 1915 [239 U. S. 3, 36 S. Ct. 239, 60 U. S. (L. ed.) 114]). Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—"any person within its jurisdiction"—as it has frequently been held, includes aliens. "These provisions," said the court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369 [6 S. Ct. 1064, 30 U. S. (L. ed.) 220] (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." See also *Wong Wing v. U. S.* 163 U. S. 228, 242 [16 S. Ct. 977, 41 U. S. (L. ed.) 140]; *U. S. v. Wong Kim Ark*, 169 U. S. 649, 695 [18 S. Ct. 456, 42 U. S. (L. ed.) 890]. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property for resources of the people of the State, the enjoyment of which may be limited to its citizens as against [40] both aliens and the citizens of other States. Thus in *McCready v. Virginia*, 94 U. S. 391, 396 [24 U. S. (L. ed.) 248]; the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Pat- sone v. Pennsylvania*, 232 U. S. 138, 145, 146

[34 S. Ct. 281, 58 U. S. (L. ed.) 539] where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483 [25 U. S. (L. ed.) 628]; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342 [21 S. Ct. 390, 45 U. S. (L. ed.) 557]); and it should be added that the act is not limited to persons who are engaged on public work or received the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time "regardless of kind or class of work, or sex of workers" shall employ "not less than eighty per cent qualified electors or native born citizens of the United States or some subdivision thereof." It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employees. The purpose of an act must be found in its natural operation and effect (*Henderson v. New York*, 92 U. S. 259, 268 [23 U. S. (L. ed.) 543]; *Bailey v. Alabama*, 219 U. S. 219, 244 [31 S. Ct. 145, 55 U. S. (L. ed.) 191]), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "An act to protect the citizens of the United States in their employment against non-citizens [41] of the United States, in Arizona." As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the business described. Literally, its terms might be taken to include with aliens those naturalized citizens who by reason of change of residence might not be at the time qualified electors in any subdivision of the United States, but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the

State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.* 111 U. S. 746, 762 [4 S. Ct. 652, 28 U. S. (L. ed.) 585]; *Barbier v. Connolly*, 113 U. S. 27, 31 [5 S. Ct. 357, 28 U. S. (L. ed.) 923]; *Yick Wo v. Hopkins*, *supra*; *Allegeyer v. Louisiana*, 165 U. S. 578, 589, 590 [17 S. Ct. 427, 41 U. S. (L. ed.) 832]; *Coppage v. Kansas*, 236 U. S. 1, 14 [35 S. Ct. 240, 59 U. S. (L. ed.) 441]. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that "the employment of aliens unless restrained was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere [42] fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. U. S.* 149 U. S. 698, 713 [13 S. Ct. 1016, 37 U. S. (L. ed.) 905.] The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor;" that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ

aliens to the extent of twenty per cent of his employees. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind of work, it cannot be denied that the authority exists to make its measures to that end effective. *Otis v. Parker*, 187 U. S. 606 [23 S. Ct. 168, 47 U. S. (L. ed.) 323]; *New York v. Hesterberg*, 211 U. S. 31 [29 S. Ct. 10, 53 U. S. (L. ed.) 75]; *Purity Extract, etc. Co. v. Lynch*, 226 U. S. 192 [33 S. Ct. 44, 57 U. S. (L. ed.) 184]. If the restriction to twenty per cent now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage [43] less. We have nothing before us to justify the limitation to twenty per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent of the employees to be aliens or even a less percentage, or were it made applicable to all business in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 207 [22 S. Ct. 616, 46 U. S. (L. ed.) 872]; *McLean v. Arkansas*, 211 U. S. 539, 551 [29 S. Ct. 206, 53 U. S. (L. ed.) 315]; *Miller v. Wilson*, 236 U. S. 373, 384 [35 S. Ct. 342, 59 U. S. (L. ed.) 628, L.R.A. 1915F 820]); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law. The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention in view of the invalidity of the act under the Fourteenth Amendment.

Order affirmed.

MCREYNOLDS, J. (*dissenting*).—I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against [44] a state to which the Eleventh Amendment declares "the judicial

power of the United States shall not be construed to extend." *Fitts v. McGhee*, 172 U. S. 516, 10 S. Ct. 269, 43 U. S. (L. ed.) 535. If *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A. (N.S.) 932, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away. That the challenged act is invalid I think admits of no serious doubt.

NOTE.

Validity of Statute Discriminating against Aliens in Employment of Laborers.

In the reported case it is held (*affirming* 219 Fed. 273) that an Arizona statute prohibiting any employer of five or more laborers from having in his employ more than twenty per cent of aliens is void as a denial of the equal protection of the law. In accord with the rule laid down in the reported case are several cases holding to be invalid a Pennsylvania statute (Act of June 15, 1897) which imposed on every employer of an unnaturalized alien a tax of three cents for each day that the alien should be employed. See *Fraser v. McConway, etc. Co.* 82 Fed. 257, 6 Pa. Dist. 555; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 40 Atl. 977, 67 Am. St. Rep. 579, 42 L.R.A. 442, *affirming* 7 Pa. Dist. 201; *Ade v. County Comrs.* 7 Pa. Dist. 199. In the case first cited it was said: "Can the tax laid by the Pennsylvania Act of June 15, 1897, be sustained consistently with the principles enunciated by the Supreme Court of the United States in the cases which have arisen under the Fourteenth Amendment? I think not. This tax, as we have seen, is imposed 'at the rate of three cents per day for each day each of such foreign-born unnaturalized male persons may be employed.' The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign-born unnaturalized male persons over twenty-one years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others, under like circumstances, are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of

persons. Now, the equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. The *Railroad Tax Cases*, 13 Fed. 722, 733. The court there, in discussing the prohibitions of the amendment, said: 'Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid.' It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here."

As to the validity of a statute prohibiting the employment of alien labor on public works see the note to *People v. Crane*, Ann. Cas. 1915B 1254, 1271, and see *Heim v. McCall*, the case immediately following.

HEIM ET AL.

v.

McCALL ET AL.

United States Supreme Court—November 29, 1915.

239 U. S. 175; 36 S. Ct. 78.

Courts — Federal Courts Following State Decision — Scope of State Statute.

The application of the provisions of N. Y. Consol. Laws, chap. 31, § 14, against the employment of aliens on public works to contracts for the construction of subways in New York city, and the extent to which they affect the corporate rights of the city or of the subway contractors, are local questions not open for review in the Federal Supreme Court on writ of error to a state court.

Municipal Corporations — Power of State to Regulate — Labor on Municipal Improvements.

The general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works by or for such municipalities.

Aliens — Statute Prohibiting Employment on Public Works — Validity.

Privileges and immunities of the citizens of the several states are not abridged, contrary to U. S. Const. art. 4, § 2 (9 Fed. St. Ann. 158), by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the

construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[See note at end of this case.]

Same.

The freedom to contract secured by U. S. Const. 14th Amend. (9 Fed. St. Ann. 428) is not infringed by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[See note at end of this case.]

Same.

Property is not taken without due process of law, nor is the equal protection of the laws denied, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 416, 538) by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[See note at end of this case.]

Same.

The equality of rights and privileges with citizens of the United States with respect to security for persons and property which citizens of Italy are assured by the Italian treaty of February 26, 1871 (17 Stat. at L. 845; 7 Fed. St. Ann. 656), is not infringed by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[See note at end of this case.]

Error to New York Court of Appeals.

Action by William E. Heim, et al., plaintiffs, against Edward E. McCall, et al., defendants. Judgment for defendants in trial court reversed by Appellate Division of Supreme Court, First Judicial Department. Judgment of Appellate Division reversed by Court of Appeals. Plaintiffs bring error. **AFFIRMED.**

[176] BILL in equity to restrain the Public Service Commission for the first district of the State of New York from declaring certain contracts for the construction of portions of the rapid subway system of the City of New York void and forfeited for violation of certain provisions inserted in the contracts in

pursuance of § 14 of the Labor Law (so-called) of the State. Laws 1909, ch. 36, Consol. Laws, ch. 31 (Book 30, McKinney's Consol. Laws). It reads as follows:

"Section 14. Preference in employment of persons upon public works.—In the construction of public works by the State or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference [177] shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. . . . "1

It is provided that a list of contracts theretofore made, with the names and addresses of the contractors, shall be filed in the office of the Commissioner of Labor, and when new contracts are allowed the names and addresses of such new contractors shall likewise be filed and, upon demand, each contractor shall furnish a list of subcontractors in his employ. Each contractor is required to keep a list of his employees which shall set forth whether they are naturalized or native born citizens of the United States. A violation of the section is made a misdemeanor.

The case went off on demurrer and it is therefore necessary to give a summary of the bill, which we do in narrative form, as follows:

Heim is a property owner and taxpayer of the State of New York. The defendants are the acting Public Service Commissioners for the First District of the State of New York and have been constituted and are the Public Service Commission of that district.

The Board of Rapid Transit Railroad Commissioners for the City of New York under the laws of the State (referred to as the Rapid Transit Act) in 1896 laid out and established a route for said railroad in the city, which was subsequently constructed, equipped and operated. [178] Afterwards other routes were established, constructed, equipped and operated.

These routes were located in the boroughs of Manhattan and the Bronx and Brooklyn, and since 1912 and prior thereto have been leased and operated by the Interborough Rapid Transit Company, referred to as the Interborough Company. There has been a like lease of roads in Brooklyn by the Con-

¹Section 14 of the Labor Law was amended by act of March 11, 1915, ch. 51, Laws of New York, 1915, as follows:

"SECTION 14. Preference in employment of persons upon public works.—In the construction of public works by the State or a

municipality, or by persons contracting with the State or such municipality, preference shall be given to citizens over aliens. Aliens may be employed when citizens are not available. . . . "

solidated Railroad Company, called the Brooklyn Company.

The Board of Rapid Transit Commissioners, acting under the laws of the State, decided that other rapid transit railroads were necessary, and determined and established routes and the general plans for the construction thereof.

The lines are described and respectively called Interborough lines and Brooklyn lines.

The Board and the Public Service Commission contemplated that such extension and additions would form, with the existing Interborough and Brooklyn lines, a complete and comprehensive rapid transit system for the accommodation of the entire city. And the construction of such roads was deemed and was and has been an imperative necessity for the comfort and conveyance of the residents and taxpayers of the city.

The cost of construction of such new roads was upwards of \$235,000,000 and their equipment \$44,000,000. The city had no available money and could not borrow the necessary moneys for a large part of such construction or equipment without exceeding its legal and constitutional debt limit by many million dollars.

To utilize the old with the new systems upon a 5-cent fare basis and to overcome the difficulties and delays for lack of funds and accomplish the early construction and operation of the system on the best possible terms for the city, negotiations were entered into between the Public Service Commission and the city authorities on the one [179] part and the Interborough Company and the Brooklyn Company on the other part with a view of formulating and entering into contracts with the companies for the provision of funds for the construction and operation of roads.

A form of contract was finally agreed upon and a contract was duly signed, executed and delivered by the Interborough Company on the one part and the Public Service Commission in behalf of the city on the other part, on or about March 19, 1913.

As a result of the negotiations another contract was entered into with the New York Municipal Railway Company, which had been formed in the interest of the Brooklyn Company, whereby the latter company agreed to contribute toward the cost of construction and equipment and to lease and operate a portion of the roads in conjunction with the then existing system. There is an enumeration of the provisions of the contracts and the amounts to be contributed by the companies and for the lease of the routes.

The contracts were made a part of the public records and approved by the Board of Estimates and Apportionment and other proper authorities before execution.

Ann. Cas. 1917B.—19.

The Public Service Commission has let and awarded each of the contracts for construction of the new routes and the Interborough Company became a party to many of them for the purpose stated in the contracts, that is, "solely for the purpose of paying out a part of its contribution towards the cost of construction of the said respective routes."

The new routes were duly approved by the proper authorities and the Public Service Commission in accordance with the general plan of the routes, either obtaining the consent of the property owners along the routes or, failing to obtain such consent, having commissioners appointed by the Appellate Division of the Supreme Court to determine [180] and report whether the routes were to be constructed and operated according to the plans adopted. The commissioners reported favorably and their report was confirmed by the court, and the general plans "thereafter constituted and now are the routes and general plans of the so-called Dual System of Rapid Transit Railroads herein referred to."

In pursuance of the Rapid Transit Act the Public Service Commission prepared plans and specifications for the construction of the major portion of said routes in accordance with the general plans, and thereafter, before awarding any contract, advertised for proposals in the form of an invitation to contractors and in compliance with the Rapid Transit Act and the acts amending and supplementing it.

Bids were duly made and contracts duly awarded and approved by the proper authorities.

Each of the contracts contained the following provisions: "In obedience to the requirements of section 14 of the Labor Law, it is further provided that if the provisions of said section 14 are not complied with, this contract shall be void." A provision in identical language was contained in the invitation to bidders.

The requirement (it is alleged) both in the proposals and contracts is unconstitutional, void and of no effect, in that it is in conflict with § 2 of Article IV of the Constitution of the United States (9 Fed. St. Ann. 158) (that is, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States") and with § 1 of Article XIV of the amendments to the Constitution (9 Fed. St. Ann. 416 et seq.) and with other sections and provisions; also in violation of the constitution of the State and in conflict with the treaty between the United States and Italy and various other treaties which contain "the Most Favored Nation Clause"—in other words, providing that the citizens of such countries shall enjoy all the privileges, rights and [181] immunities

which the citizens of countries most favored in any existing treaty with the United States enjoy.

All of the contractors promptly made the necessary preparations for the execution of their contracts and all are in the process of performance at different stages, some of them having been performed to the extent of 75% and all performed to a very large extent. In no instance are any of the contractors in default.

In the course of construction each of the contractors has constantly employed and now employs a large number of laborers and mechanics who are residents of the city of New York but who were born in Italy and are subjects of its King, and also employed laborers who, though citizens of the United States, were not citizens of New York, and did not give preference to citizens of the State of New York over such laborers so employed who were not citizens of the State but citizens of the United States.

At the time of the proposals it was known to be and is necessary to employ a large number of such subjects of the King of Italy and citizens of other States and of other countries to perform said contracts within the time and at the prices stated in order to keep the construction and equipment of the Dual System within the total amount provided and specified in the contracts and plans.

The treaty between the United States and Italy of 1871 provides that the subjects of the King of Italy residing in the United States shall have and enjoy the same rights and privileges with respect to persons and property as are secured to the citizens of the United States residing in the United States.

At no time since the letting of such contracts has there been available a sufficient force or number of laborers, citizens of the United States or of the State of New York, to perform the work in accordance with such contracts; and no question was raised until a few days since of the right of the contractors to employ alien laborers, which [182] the contractors believed that they had a right to do, and they regarded the provision of the law and of the contract prohibiting the same as in effect null and void.

Within the past ten days complaint has been made to the Public Service Commission of the violation of the law and the alien labor provision in the contracts, and the Commission has threatened to refuse to approve further monthly estimates of amounts payable to contractors, thus depriving them of the means of prosecuting the work and the right to perform the same; indeed, have refused to approve certain monthly estimates, and, unless enjoined, will declare such contracts void and terminate the same.

The termination of the contracts will result in irreparable loss and damage and waste of money to the city, the work will be delayed or not done or the cost will be enormously increased because the supply of labor will be diminished, resulting necessarily in the diminution of labor available for the work which will greatly protract the same; and litigation with the contractors will be caused. Also damage will result because of the fact that a large percentage of capital and money necessary for the work is supplied by third parties under contract with the city to supply the same, which contracts were based upon estimates made in advance, and said contracts may be invalidated and the purpose for which they were made defeated.

The total capital to be supplied was \$250,000,000, of which the said third parties agreed to supply \$115,000,000 and the city the balance. If the contracts be declared void the capital so to be supplied will be inadequate for the work and the money already supplied by the city and the said third parties will have been wasted.

Injunction is prayed against declaring the contracts void and forfeited and refusing to prepare and certify vouchers of the amount of monthly estimates for work done.

[183] There was a demurrer to the bill, which was sustained by the Supreme Court, and injunction denied. The judgment was reversed by the Appellate Division and an injunction ordered, which action was reversed by the Court of Appeals and the bill ordered dismissed. 214 N. Y. 620.

Thomas F. Conroy and Thomas E. O'Brien for plaintiff in error Heim.

James F. McKinney for plaintiffs in error Cranford Company and Flinn-O'Rourke Company.

George S. Coleman for defendants in error.

[186] *McKENNA, J. (after stating the facts).*—There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The Appellate Division felt that there might be objection to the right, under the holding of a [187] cited case. The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit; and, so assuming, we pass to the merits.

The Supreme Court put its decision upon the power of the State "to provide what laborers shall be employed upon public works" and that "the State has the same right in conducting its business that an individual has" and had, therefore, "a perfect right to enact § 14 of the Labor Law, and it does not violate any rights of an alien under existing treaties"

The Appellate Division of the court, however, was of opinion that the law could not be sustained upon such consideration and saw in it such flagrant discrimination as to be offensive to the Fourteenth Amendment to the Constitution of the United States; and so concluding, the court considered it unnecessary to discuss the effect of treaties.

The court also passed, without absolute decision, the question whether the Labor Law applies to the work of building subways for the Rapid Transit in the City of New York. It was, however, stated in the opinion of the court that in view of the language in a cited case, there was "much ground for saying that even if the State could lawfully impose the test of citizenship upon employees of its own contractors, and the contractors with the city engaged in what is properly state work, it has no more power to impose such test upon the persons employed in building a subway for the city than it would have if the subway were being constructed by a private corporation or individual." Two members of the court were clear that the State had no such power and concurred besides with the majority in holding that the Labor Law was "a violation of both the Federal and state constitutions."

The Court of Appeals reversed the action of the Appellate Division.

[188] The basic principle of the decision of the Court of Appeals was that the State is a recognized unit and those who are not citizens of it are not members of it. Thus recognized it is a body corporate and, "like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the State, or expending the State's moneys, are trustees for the people of the State (Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.) 1018). It is the people, i. e., the members of the State, who are contracting or expending their own moneys through agencies of their own creation." And it was hence decided that in the control of such agencies and the expenditure of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the National or the state constitution. "The statute is nothing more," said Chief Judge Bartlett, concurring in the judgment of the court "in effect than a resolve by an employer as to the character of its employees."

Notwithstanding the simplicity of the determining principle pronounced by the Court of Appeals, its decision is attacked in many and voluminous briefs.

The fundamental proposition of plaintiff in error Heim is that, assuming that § 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United

States (a) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (b) the rights of the various subway contractors with the city, (c) the rights of aliens and citizens of other States resident in New York, and (d) it is in violation of treaty rights.

Plaintiffs in error Cranford Company and Flinn-O'Rourke Company were made defendants upon their motion at the argument for injunction. In the Appellate Division they, their counsel say, "neither assenting to nor denying the special allegations, doubtless urged by complainant's [189] counsel, . . . urged the single ground of the unconstitutionality of the law and its violation of treaties." And these grounds are again urged.

To sustain the charge of unconstitutionality the Fourteenth Amendment is adduced, and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employees in depriving them of their right of contracting for labor, and that the State of New York, by enacting and enforcing the law, deprives employers and employees of liberty and property without due process of law and denies to both the equal protection of the law.

The treaty that it is urged to be violated is that with Italy, which, it is contended, "put aliens within the State of New York upon an equality with citizens of the State with respect to the right to labor upon public works;" and that Congress has fortified the treaty by § 1977 of the Revised Statutes [2 Fed. St. Ann. (2d ed.) 126]—(a part of the Civil Rights legislation.)

The application of the law to the subway contracts, and whatever its effect and to what extent it affects the corporate rights of the city or of the subway contractors are local questions (Stewart v. Kansas City, 239 U. S. 14, 36 S. Ct. 15, 60 U. S. (L. ed.) 120), and have in effect been decided adversely to plaintiffs in error by the Court of Appeals. The principle of its decision was, as we have seen, that the law expressed a condition to be observed in the construction of public works; and this necessarily involved the application of § 14 to subway construction and the subordinate relation in which the city stood to the State. Therefore, the contention of plaintiffs in error that the rapid transit lines have given the city rights superior to the control of the State, so far as the law in question is concerned, has met with adverse decision. Whatever of local law or considerations are involved in the decision we are bound by; whatever of dependence the decision has in the general power of a [190] State over its municipalities has support in many cases. We have recently decided the power exists, and we may be excused from further discussion of it. *Stewart v. Kansas City*, *supra*.

With the rejection of the asserted rights of the city must go the asserted rights of residents and taxpayers therein and the rights of subway contractors, so far as they depend upon the asserted freedom of the city from the control of the State.

The claim of a right in the city of such freedom is peculiar. The State created a scheme of rapid transit, constituted officers and invested them with powers to execute the scheme, yet, the contention is, that scheme, officers and powers have become in some way in their exercise and effect superior to the state law, or, according to the explicit contention (we say explicit contention, but it is rather a conclusion from an elaborate argument and much citation of cases) that the city's action in regard to the subway is proprietary in character, and, being such, the city can assert rights against the State, and that individual rights have accrued to residents of the city of which the city is the trustee and which "are so interwoven and bound up with the rapid transit system as to be 'beyond the control of the State.'" Counsel have not given us a sure test of when action by a city is governmental and when proprietary. We need not attempt a characterization. If it be granted that the city acted in the present case in a proprietary character and has secured proprietary rights, to what confusion are we brought! A taxpayer of the city, invoking the rights of the city, asserts against the control by the State of the proprietary action of the city the protection of the Fourteenth Amendment, and then against the proprietary action of the city that Amendment is urged in favor of the contractors with the city, and their exemption from the performance of their contracts declared. There seems to be a jumble of rights. [191] If the city is not an agent of the State (it is contended the city is not) but a private proprietor (it is contended the city is) it would seem as if it has the rights and powers of such a proprietor, and, as such, may make what contracts please it, including or excluding alien laborers.

But upon these suppositions we need not dwell. It is clear it is with the state law and the city's execution of it as agent of the State that we must deal and only on the assumption that the state law has been held to apply to the Court of Appeals, and, by a consideration of the power to enact it, determine the contentions of all of the plaintiffs in error.

The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in *Atkin v. Kansas*, 191 U. S. 207, 222, 223, 24 S. Ct. 124, 48 U. S. (L. ed.) 148. It was there declared, and it

was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the condition, upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." And it was said, "No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

This was the principle declared and applied by the Court of Appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In *Atkin v. Kansas* the law attacked and sustained prescribed the hours (8) which should constitute a day's work for those employed by or on behalf of the State, or by or on behalf of any of its subdivisions. The Fourteenth Amendment was asserted against the law: indeed, there is not a contention made in this case that was not made in that. Immunity of municipal corporations from legislative [192] interference in their property and private contracts was contended for there (as here); also that employees of contractors were not employees of cities. It was contended there (as here) that the capacity in which the city acted, whether public or private, was a question of general law not dependent upon local considerations or statutes, and that this court was not bound by the decision of the state court. And there (as here) was asserted a right to contest the law, though the contracts were made subsequent to and apparently subject to it, upon the ground that they were entered into under the belief that the law was void. Finally the ultimate contention there was (as it is here) that the liberty of contract assured by the Fourteenth Amendment was infringed by the law. In all particulars except one the case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employee to contract as they shall see fit, the relation of the State to the matter regulated, that is, the public character of the work.

The power of regulation was decided to exist whether a State undertook a public work itself or whether it "invested one of its governmental agencies with power to care" for the work, which, it was said, "whether done by the State directly or by one of its instrumentalities," was "of a public, not private, character." And, being of public character, it (the law—the Kansas statute) did not "infringe the liberty of any one." The declaration was emphasized. "It cannot be deemed," it was said, "a part of the liberty of any con-

tractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." And obversely it was said (as we have already quoted): "On the contrary, it belongs to the State, as the guardian of its people, and [193] having control of its affairs, to prescribe the conditions [italics ours] upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." See also *Ellis v. U. S.* 206 U. S. 246, 11 Ann. Cas. 589, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047. The contentions of plaintiffs in error, therefore, which are based on the Fourteenth Amendment cannot be sustained.

Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that Treaty (1871) it is provided, Articles II and III, 17 Stat. 845, 846:

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established."

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." (7 Fed. St. Ann. 650.)

There were slight modifications of these provisions in the treaty of 1913, as follows:

"That the citizens of each of the high contracting parties shall receive in the States and Territories of the other, the most constant security and protection for their persons and property and for their rights. . . ."

Construing the provision of 1871 the Court of Appeals decided that it "does not limit the power of the States, as a proprietor, to control the construction of its own works and the distribution of its moneys." The conclusion [194] is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in *Patstone v. Pennsylvania*, 232 U. S. 138, 145, 34 S. Ct. 281, 58 U. S. (L. ed.) 539, and a convention with Switzerland (as in the present case) which was

supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property." And the ruling was given point by a citation of the power of the State over its wild game which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the State over the subject-matter, a power which exists in the case at bar, as we have seen.

From these premises we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error thereunder nor under the provisions of the treaty with Italy.

Judgment affirmed.

NOTE.

The reported case sustains the validity of a New York statute forbidding the employment of aliens on public works. The decision proceeds on the ground that a state has a plenary power to prescribe the conditions on which it will permit public work to be done on its behalf or on behalf of one of its municipalities. The cases discussing the validity of a regulation prohibiting the employment of alien labor on public work are reviewed in the note to *People v. Crane*, Ann. Cas. 1915B 1254, 1271. As to statutes discriminating against aliens in private employment see the note to *Truax v. Raich*, reported ante, this volume, at page 283.

O'NEAL ET AL.

v.

BAINBRIDGE.

Kansas Supreme Court—March 6, 1915.

94 Kan. 518; 146 Pac. 1165.

Landlord and Tenant — Termination of Lease — Destruction of Building.

Whether or not a building has been totally destroyed is ordinarily a question of fact for the jury.

[See Ann. Cas. 1913A 1095.]

Same.

A tenant, occupying a part of a building under a written lease, may continue to hold under the lease, although the part occupied has become uninhabitable by reason of a partial destruction by fire.

Termination by Consent.

The cancellation of a lease, by act of the parties, must have the consent of both lessor and lessee.

[See generally, Ann. Cas. 1916B 306.]

Damages — Refusal to Permit Tenant to Occupy — Loss of Profits.

Loss of profits, when they can be ascertained, is a proper measure of damages for wrongfully refusing to permit a tenant to occupy the premises covered by a lease.

[See Ann. Cas. 1915B 805.]

Instructions Approved.

An examination of the instructions discloses no error.

Words and Phrases — "Damage by the Elements."

Fire is one of the elements included in the expression "damages by the elements excepted," where that phrase is used in a lease of a building.

[See note at end of this case.]

Appeal and Error — Questions Reviewed — Necessity of Motion for New Trial.

Before the supreme court can reverse a judgment on account of the exclusion of evidence, that evidence must be presented to the trial court when the motion for a new trial is heard.

Trial — Taking Case from Jury.

Judgment on the evidence should not be rendered by a trial court when a jury is a matter of right and there is evidence sufficient to submit to the jury.

(Syllabus by court.)

Appeal from District Court, Ford county: FINLEY, Judge.

Action by James F. O'Neal et al., doing business as O'Neal & O'Neal, plaintiffs, against Carrie R. Bainbridge, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Arthur C. Scates, Albert Watkins, Frank L. Martin and Van M. Martin for appellants.
L. A. Madison, Carl Van Riper and F. Dumont Smith for appellees.

[519] MARSHALL, J.—Plaintiffs brought this action and recovered a judgment for \$800 as damages. The defendant appeals.

The action is based upon the alleged breach of the covenants of a lease by which the defendant leased the plaintiffs the first floor and basement of a building in Dodge City, Kan. On the 10th of March, 1912, the building was partially destroyed by fire. The roof was

totally destroyed; a portion of the east wall was burned; the falling of the roof broke through an old skylight, and a portion of the second-story floor was burned through. No damage was done to the foundation; the entire west wall, two stories and basement, being a party wall, was uninjured, and was used in rebuilding. All of the north and south ends, except three or four feet necessary to tie in to the second story of the new east wall, were used. The jury found that [520] the building was not totally destroyed, that the loss was 75 per cent. The fire, unquestionably, left part of the building untenable. The basement continued to be occupied. The plaintiffs allege that the premises occupied by them became uninhabitable, and that they were compelled to remove their fixtures, billiard and pool tables, and stock of goods. After the building was burned, the defendant started to rebuild it, and had some talk with one of the plaintiffs, when she told him she was going to fix the building, and intended for him to go in. Later, she told the plaintiffs that she was going to erect a building for other purposes, and that they could not occupy it. It is alleged that the defendant was bound and obligated to repair the building and place it in a habitable condition, but there is no such covenant in the lease. The building was ready for occupancy about January 1, 1913.

Before the fire the plaintiffs had sublet the basement, and after the fire directed the subtenant to pay the rent directly to the defendant. After the fire the defendant demanded no rent, and the plaintiffs paid none.

At the trial the plaintiffs introduced evidence as to the nature of the business the year before the fire, testified how much business they did, how much money they put in, and how much profit they made.

The court tried the case on the theory that it required a total destruction of the building to terminate and cancel the lease, and submitted the question to the jury as to whether or not the building was totally destroyed. The jury found that there was not a total destruction of the building, that it was 75 per cent destroyed, and found a verdict against the defendant for \$800.

The points relied on by the defendant are:

"1. The destruction of the building by fire to the extent of 75 per cent, which rendered it untenable, and uninhabitable, cancelled and terminated the lease.

[521] "2. After the fire, both parties to the contract recognized and treated the lease as cancelled, and the building as untenable.

"3. The loss of profits, in any event, is not the true measure of damages.

"4. The instructions of the court were erroneous.

"5. The court erred in sustaining objections to competent testimony offered by the defendant.

"6. The court erred in overruling the defendant's motion for judgment on the evidence."

1. Whether or not the building had been totally destroyed was a matter for the jury to determine. Counsel have drawn different conclusions from the evidence on this point. Where different conclusions can be reached, the jury must decide. (*Johnson v. Leggett*, 28 Kan. 590, 607; *Brown v. Atchison*, etc. R. Co. 31 Kan. 1, 16, 1 Pac. 605; *Atchison*, etc. R. Co. v. *Matthews*, 58 Kan. 447, 452, 49 Pac. 602; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 U. S. (L. ed.) 485; 38 Cyc. 1517.)

2. Was the lease canceled and terminated because of the building becoming untenable and uninhabitable by the 75 per cent destruction thereof? The fire rendered the rooms occupied by the plaintiffs untenable and uninhabitable until repairs were made. If the tenants desired to continue the lease, they could do so, by the payment of rent, whether the landlord so desired or not, because the building was not destroyed, although rendered unfit for occupation. (24 Cyc. 1379.)

In *Connecticut Mut. L. Ins. Co. v. U. S. 21 Ct. Cl. 195*, *Davis, J.*, said:

"Covenants terminating a lease should the buildings be destroyed are strictly construed as against the lessee, and are held not to relieve him from liability in case of injury to the building short of destruction; that is, if the injury be of such a nature that the property may be repaired without rebuilding the structure, there is no destruction within the meaning of such a covenant, even if the building be temporarily uninhabitable." (p. 201; *Vanderpool v. Smith*, 2 Daly 135; *Wall v. Hinda*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Izon v. Gorton*, 5 Bing. N. Cas. 501, 35 E. C. L. 198; *Smith v. McLean*, [522] 123 Ill. 210, 14 N. E. 50; *Turner v. Mantonya*, 27 Ill. App. 500; *Monotuck Silk Co. v. Shay*, 37 Ill. App. 542; Note, 22 L.R.A. 613.)

3. Did the parties to this lease treat it as canceled after the fire? This is not alleged in the answer, is not embraced in the instructions requested, nor in those given. Some evidence on this question was introduced, but that evidence does not warrant the conclusion that the plaintiffs considered the lease at an end. They did not consent to its cancellation. Where a lease or other contract is canceled by act of the parties, both parties must consent to such cancellation. The evidence fails to show such consent on the part of the plaintiffs. It rather tends to show that the plaintiffs insisted on the performance of the contract. The defendant refused to let the

plaintiffs occupy the building after it was repaired.

4. Is loss of profits a proper measure of damages?

"Damages for loss of profits may be recovered where the amount of such loss and the fact that it resulted by defendant's refusal to comply with the alternative writ can be determined by the court with reasonable certainty." (*Larabee Flour Mills Co. v. Missouri Pac. R. Co.* 85 Kan. 214, syl. ¶ 7, 116 Pac. 901.)

This principle was followed in *Mensing v. Wright*, 86 Kan. 98, 119 Pac. 374, where this court said:

"Where the business of conducting a skating rink is wrongfully interrupted, damages for loss of profits which are neither speculative nor uncertain but can be determined with reasonable certainty may be recovered." (Syl. ¶ 1.)

Loss of increase in the growth and weight of cattle has been held to be a proper measure of damages in an action to recover for failure to furnish the amount of pasture contracted for. (*Skinner v. Gibson*, 86 Kan. 431, 121 Pac. 513.) The same rule has been applied where cattle have been wrongfully disturbed and frightened. (*Davis v. Kansas Gas, etc. Co.* 85 Kan. 195, 115 Pac. 977.)

[523] Following these decisions, it was proper for the court to instruct the jury that:

"The measure of damages in such case will be the amount of profit that the plaintiffs would have made in their said business for the remainder of the term of the lease, less the rents for the premises from the time of the fire to the date when again ready for occupancy. In arriving at said profit you may take into consideration the gross receipts for the period up to the time of the fire, the total expenses to be deducted from such gross receipts, and arrive as nearly as possible at the average net profits of the plaintiffs.

"You are not bound to take the net profits of the plaintiffs as the absolute measure of their damage, but may take into consideration the probability or improbability of such profit continuing for the remainder of the term."

5. It is next urged that the instructions of the court were erroneous. Complaint is made of the instruction concerning the measure of damages. That is disposed of. The next matter presented is, that the instruction requiring the defendant to prove a total destruction of the building was erroneous. The defendant plead total destruction of the building. That question was specially submitted to the jury. The jury found that the building had not been totally destroyed. Other instructions are complained of. We have examined them and find no error therein.

6. It is contended that the plaintiffs were bound to repair the building, if it could be repaired. The lease, in part, reads:

"And the said parties of the second part [plaintiffs] . . . agrees that they will, at their own expense, during the continuance of this Lease, keep the said premises and every part thereof in good repair . . . reasonable use and wear thereof and damages by the elements excepted."

Is fire one of the elements within the meaning of this stipulation? In 15 Cyc. 482, it is said: "Elements. In common speech, earth, air, fire and water." In Van [524] Wormer v. Crane, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582, it was held that "damages by the elements" excepted from a lessee's covenant to repair, includes destruction by fire without the lessee's fault." (Headnote, 47 Am. Rep. 582.) See Note in 53 L.R.A. 673-678, on "What constitutes damages 'by the elements' within the meaning of contracts with stipulations referring thereto." We are of the opinion that the tenants in this case, the plaintiffs, were not under any obligation to repair the leased premises after the fire.

7. Complaint is made of the exclusion of certain evidence. It does not appear that the evidence excluded was produced in any way at the hearing of the motion for a new trial. (Civ. Code, § 307.) This matter cannot be considered at this time. (Davidson v. Timmons, 88 Kan. 553, 558, 129 Pac. 133; Walter v. Calhoun, 88 Kan. 801, 805, 129 Pac. 1176; Williams v. Withington, 88 Kan. 809, 812, 129 Pac. 1148; Cheek v. Missouri, etc. R. Co. 89 Kan. 247, 257, 131 Pac. 617.)

8. The lost complaint made is that the court erred in denying the defendant's motion for judgment on the evidence. This was properly a jury trial. Evidence sufficient to warrant submitting the case to the jury was introduced. The motion was properly denied.

We have examined all the matters complained of, and do not find anything upon which to base a reversal of the judgment.

The judgment is therefore affirmed.

NOTE.

Construction of Phrase "Damage by Elements" or Similar Phrase as Used in Contract.

Generally, 296.

Damage by Fire, 296.

Damage by Water, 297.

Damage by Decay, 298.

Generally.

Construing the term "damages by the elements," the court in Van Wormer v. Crane, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep.

582, said: "'Damages by the elements' must be conceded to be a somewhat uncertain expression. Strictly speaking, the elements are ultimate, undecomposable parts which unite to form anything; as the gases which form air and water are the elements respectively of those substances. But the term is used in many other senses, and the definitions of lexicographers would be of little service to us in this case. Anciently it was supposed there were four elements of material things—earth, air, fire and water; and when it came to be known that this classification had no scientific basis, the term had found a place in common speech which it still retains. Injuries to buildings by wind, rain, frosts and heat are spoken of as injuries by the elements, and all the ordinary decay from natural causes is classed in the same category. Probably no one would make any question respecting this. . . . If a flood had destroyed this building the defendants would not be held responsible, because it would have been said the damage is of a sort that must be referred to the elements within the understanding of the parties in entering into this covenant. If a tornado had destroyed it, the same would have been said. We cannot suppose the parties intended to except natural and ordinary decay from wind and rain, and not the more sudden and grievous calamities proceeding from the same sources. . . . In the popular acceptance of the phrase, injuries by the elements are such injuries as result from the operation of the most common destructive forces of nature against which buildings need to be protected."

However the expression excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been caused by the elements. Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Pope v. Farmers' Union, etc. Co. 130 Cal. 139, 62 Pac. 384, 80 Am. St. Rep. 87, 53 L.R.A. 673; Harris v. Corlies, 40 Minn. 106, 41 N. W. 940, 2 L.R.A. 349.

The terms "damage by the elements" and "damage by the act of God" have been held to be convertible. Polack v. Pioche, 35 Cal. 416, 423, 95 Am. Dec. 115; Pope v. Farmers' Union, etc. Co. 130 Cal. 139, 62 Pac. 384, 80 Am. St. Rep. 87, 53 L.R.A. 673. In Polack v. Pioche, supra, it was said: "The elements are the means by which God acts, and we are unable to perceive why 'damages by the elements' and 'damages by the acts of God' are not convertible expressions in the law of leases."

Damage by Fire.

Damage by fire is generally held to be included within the term "damages by the elements" provided the fire is unexplainable or

is not caused by human agency. *Pope v. Farmers' Union, etc. Co.* 130 Cal. 139, 62 Pac. 384, 80 Am. St. Rep. 87, 53 L.R.A. 673; *Allen v. Quann*, 80 Ill. App. 547; *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582. And see the reported case. In *Van Wormer v. Crane*, supra, wherein the question at issue was whether the destruction of a house by fire came within the phrase "damages by the elements," it was said: "The injury in this case was caused by fire. No fault in connection with it is charged upon the defendants, and it seems to be taken for granted on both sides that the fire was accidental. We may therefore assume that the fire was one which occurred without traceable fault, and that it is to be classed as a calamity for which no one is responsible except as he may have expressly undertaken to be so. . . . We have no doubt the parties intended by this exception to include all damages resulting from fire, as much as those attributable to air or water, unless traceable to the agency of man. The purpose was to excuse the lessees in cases where the damages from the causes mentioned had happened without their fault, and a popular phrase was made use of to express this intent, instead of specifying the particular injuries which were in mind. In the popular acceptance of the phrase, injuries by the elements are such injuries as result from the operation of the most common destructive forces of nature against which buildings need to be protected; and of these fire is the chief."

So, fire was held to be embraced in the term "elements" in *Allen v. Quann*, 80 Ill. App. 547, involving a contract of sale of certain canned corn wherein it was provided that the seller should not be responsible for nondelivery "in case of destruction of cannery by the elements."

Construing a warehouse contract providing for the return of wheat stored, on surrender of the certificate, "damage by the elements excepted," the court in *Pope v. Farmers' Union, etc. Co.* 130 Cal. 139, 62 Pac. 384, 80 Am. St. Rep. 87, 53 L.R.A. 673, said: "Damage by the elements" is the equivalent of the phrase 'act of God.' . . . As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation, namely, that defendant's liability to return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tend-

ed merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God."

But in *Spalding v. Munford*, 37 Mo. App. 281, wherein it appeared that a lease required the tenant to repair all damage to the property, the usual wear and tear and "providential destruction or destruction by fire," excepted, and by a further stipulation provided that in the event of the destruction of the premises by fire the rent should cease, it was held that the clause in the lease meant a total destruction such as would require a rebuilding as distinguished from a repairing, and did not include damage to the roof by fire with the consequent damage from cutting holes in the leased premises and the use of water in fighting the fire.

Damage by Water.

Damages caused by the sudden and unexpected action of water such as freshets, floods, etc., are generally held to be included within the term "damages by the elements." *Gleason v. U. S.* 33 Ct. Cl. 65; *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582; *Sweezy v. Collins Northern Ice Co.* 171 Mich. 75, 137 N. W. 84.

But damage caused by a flood resulting from the breaking of a reservoir has been held not to be included in the term "damages by the elements" as used in a covenant for repair in a lease where the flood was due to the act of a stranger in interfering with the embankment of the reservoir where the water was stored. *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115. And in *Harris v. Corlies*, 40 Minn. 106, 41 N. W. 940, 2 L.R.A. 349, the construction of a lease providing for the repair by the landlord where the premises were rendered untenable "by fire or the elements" was in issue. In answer to the contention that water percolating and oozing through and under the basement walls whereby the building became so wet and unhealthy as to become untenable, came within the phrase injury by "the elements" it was said: "We think that the language of the lease refers only to some sudden, unusual, or unexpected action of the elements occurring during the term, such as floods, tornadoes, or the like; extraordinary disasters, not anticipated by either party, the efficient cause of which originated after the term began, and which either destroyed the building, or left it in a materially and essentially worse condition than it was in when leased. We think this is substantially the sense in which such expression in leases have always been used, and in which they would now be ordinarily understood by business men in executing such contracts."

Damage by Decay.

The courts are not in accord as to whether damages caused by gradual decay are included in the term "damage by the elements" as used in contracts to fix or relieve from responsibility. Thus in some jurisdictions it is held that the term "damage by the elements" includes only some sudden, unexpected and unavoidable violence of nature and that ordinary decay cannot be considered of such a nature. *Hatch v. Stamper*, 42 Conn. 28, 30; *Kirby v. Wylie*, 108 Md. 501, 70 Atl. 213, 129 Am. St. Rep. 451, 21 L.R.A.(N.S.) 129; *Harris v. Corlies*, 40 Minn. 106, 41 N. W. 940, 2 L.R.A. 349; *Waddell v. De Jet*, 76 Miss. 104, 23 So. 437; *Suydam v. Jackson*, 54 N. Y. 450; *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. S. 425; *Bigelow v. Collamore*, 5 Cush. (Mass.) 226. See also *Myers v. Hussenbuth*, 32 Misc. 717, 65 N. Y. S. 1026. In *Harris v. Corlies*, supra, it was said: "It can hardly be said that the parties intended by these clauses of the lease literally to include every case of untenantableness or partial untenantableness 'by the elements.' Every case of damage to or destruction of human structures, not caused by animal force, may, in one sense, be said to be caused by the elements, as, for example, ordinary gradual decay. But it would hardly be claimed that such a case would be within the meaning of the provisions of the lease." And in *Kirby v. Wylie*, 108 Md. 501, 70 Atl. 213, 215, 21 L.R.A.(N.S.) 129, 129 Am. St. Rep. 451, it was held that the term "elements and act of God" did not include the destruction of a building by order of the authorities who based their action on the unsafe condition of the building caused by gradual decay from natural causes.

But in other jurisdictions it is held that the term "damages by the elements" is sufficiently broad to include all damage caused by the action of nature and that gradual decay must be considered to be within the meaning of the term. *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582; *Sweezy v. Collins Northern Ice Co.* 171 Mich. 75, 137 N. W. 84; *Hanchett v. O'Reilly*, 72 N. J. L. 212, 68 Atl. 1066. In *Sweezy v. Collins Northern Ice Co.* supra, the rule was stated as follows: "Damage by the elements" includes all injury by wind, rain, snow, frost, and heat as well as all ordinary decay from natural causes." In *Hanchett v. O'Reilly*, supra, in answer to the contention that a clause in a lease providing that the landlord should make repairs when the premises become untenable because of damage from the elements did not include ordinary decay, the court said: "The defendant urges that the covenant to repair, when properly construed, means that the injury by the ele-

ments, causing an untenable condition of the premises, must be such as shall be brought about by a sudden, forcible, unusual and unforeseen disturbance, and must exclude such deterioration which is the result of the ordinary action of rain, heat, cold, etc. Such has been the construction of these words in cases arising under the statutes declaring that rent shall cease where premises become untenable by fire or the elements, for the reason that it was not the object of such statutes to alter the relation between landlord and tenant as they exist at common law. . . . But the reasoning does not apply where there is an express covenant by the lessor to repair."

MUTUAL BENEFIT LIFE INSURANCE COMPANY

v.

SWETT ET AL.

United States Circuit Court of Appeals,
Sixth Circuit—April 12, 1915.

222 Fed. 200.

**Life Insurance — Rights of Beneficiary
—Power of Insured to Change Beneficiary.**

Under an ordinary policy of life insurance, in which there is no reservation of the right to cut off or modify the interest of the beneficiary, the policy and the money to become due thereunder belong, from the time it is issued, to the person named in it as the beneficiary, and insured is without power by deed, assignment, will, surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary.

[See 1 Ann. Cas. 684; 11 Ann. Cas. 49; Ann. Cas. 1912B 1144.]

Same.

Under a life insurance policy reserving to insured the right, without the consent of the beneficiary, to change the beneficiary, the beneficiary had no vested right, but only a mere expectancy during the lifetime of insured, and insured's control over the policy was, subject to its terms, as complete as if he himself had been the beneficiary.

Assignment of Policy — Assignment by Wife of Insurance in Her Favor.

As a wife designated as beneficiary in a policy on her husband's life, which reserved to the husband the right to change the beneficiary, had no vested right, but a mere expectancy only, she did not, by joining in her husband's assignment of the policy as security for his indebtedness, become a surety for

him; the absolute right to assign the policy being lodged in him, and it was not necessary that she should receive a consideration for joining in the assignment in order to bind her.

[See note at end of this case.]

Power to Make Second Assignment.

Where, though an assignment of a \$15,000 life insurance policy as security for a debt recited that it was to secure an indebtedness of \$15,000, it was the intention to protect the assignee as to insured's entire liability to it, a letter subsequently written the assignee by him, directing that in case of his death the proceeds, after the satisfaction of a \$10,000 note, should be applied to relieve an accommodation indorser from liability on account of another note for \$6,000, was explanatory and confirmatory of the original intent, and passed by way of assignment whatever value the policy possessed after the delivery of the first assignment, as insured was not restricted to a single assignment of the policy, which by its terms was assignable.

Distinction between Assignment and Change of Beneficiary.

An "assignment" of a life insurance policy and a "change of beneficiary" are different things, as an "assignment" is the transfer by one of his right or interest in property to another, and rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity, while the power to change the beneficiary is the power to appoint, and must be exercised in the manner agreed upon in the contract of insurance.

Right of Assignee to Reassign.

Where insured, who had assigned the policy to secure an indebtedness to the assignee, wrote the assignee, directing it, in case of his death, to apply the proceeds in payment of a \$10,000 note, and the balance to relieve an accommodation indorser from liability on another \$6,000 note, such letter was sufficient authorization to the assignee to assign an interest in the policy to the executors of the accommodation indorser, who had been compelled to pay the note on which they were liable, and they thereby acquired such a title as was necessary to enable them to hold the policy as collateral security for the debt which they had paid, and to sustain an action upon the policy.

Same.

Where a policy was assigned to secure certain notes held by the assignee, an assignment of an interest therein to the executors of an accommodation indorser on one of the notes, who were required to pay the note, was valid and binding on the beneficiary, in the absence of any authorization from insured to make such assignment; the policy having reserved the right to insured to change the beneficiary.

Renewal of Notes Secured by Assignment — Effect.

Where a life insurance policy was assigned to a bank to secure insured's notes held by

it, the renewal of such notes did not destroy the assignment, in the absence of any intention on the part of the insured and the bank that the renewal should have that effect.

Validity of Assignment — Consent of Insurer — Right of Third Person to Urge Nonconsent.

Where, after the assignment of an insurance policy to secure an indebtedness, insured wrote the assignee relative to the disposition of the proceeds of the policy in case of his death, such letter, considered as an additional assignment, was not ineffective as against a beneficiary, though neither it nor a copy of it was filed with or assented to by the company, as required by the policy, as the provision in the policy requiring notice to the company was for its protection, and could not be set up by any one else to defeat an assignment made without compliance therewith.

Bankruptcy — What Property Passes — Life Insurance Policy.

As the holder of a life insurance policy, reserving to him the right to change the beneficiary, and which by its terms was assignable, had a transferable interest in the policy, if, notwithstanding an assignment thereof by him, an interest in the policy still remained in him, such interest passed to his trustee in bankruptcy as of the date of the adjudication, and a purchaser of his right, title, and interest acquired a right superior to that of the beneficiary.

Appeal from United States District Court for Southern Division of Western District of Michigan: *SESSIONS*, Judge.

Action by Mutual Benefit Life Insurance Company, plaintiff, against Myra M. Swett et al., defendants. Judgment for plaintiff. Defendant named appeals. The facts are stated in the opinion. **AFFIRMED.**

Lewis Brucker, and *E. L. Beach* for appellant.

Jacob Kleinhans and *Wallace Foote* for appellees.

Sitting: *WARRINGTON*, Circuit Judge and *SATER* and *HOLLISTER*, District Judges.

[202] *SATER, J.*—The question for decision is: Are the Hackley National Bank of Muskegon, Mich., and the executors of Charles H. Hackley, deceased, entitled to the proceeds of the \$15,000 policy issued by the Mutual Benefit Life Insurance Company of Newark, N. J., to Edward R. Sweet on September 4, 1900, and made payable "to Myra M. Swett, his wife, if living, otherwise to the executors, administrators, or assigns of the said insured;" or do such proceeds belong to Mrs. Swett, who was named as his beneficiary and is now his widow? The case is here on her appeal from a decree against her.

The policy by its terms was assignable, but provided that no assignment of it should be effective until written notice of it was given [203] to the company. One of the special privileges accorded by it was that the insured, at any time while the policy was in force and not assigned, might change the beneficiary by returning the policy to the company with his written request for its appropriate indorsement of such change on the policy. The policy by apt language defines the owner of it to be either the person who is made such by its terms or who becomes such by its assignment. At the time the policy was issued, the bank held Swett's notes for borrowed money to the amount of \$16,305, one of which, for \$10,305, was unsecured. On the \$6,000 note, Hackley was an accommodation indorser. Both were soon to mature. As Swett was not able to pay them, he agreed with the bank to take out a policy to secure them. He also agreed in 1896 to insure his life to protect his wife on her loan to him of some \$14,000 or \$15,000, which he had a few months previous given to her. She claims that the policy, whose proceeds are in question, was, in pursuance of such promise, for her benefit. On September 18, two weeks after the policy issued, Swett and his wife, without protest on her part, executed and delivered to the bank a written assignment of the policy and of "all sum or sums of money, interest, benefit and advantage whatsoever now due or hereafter to arise, or to be had or made by virtue hereof, to have and to hold unto the said Hackley National Bank to secure an indebtedness of \$15,000." On September 28 the company filed a copy of the assignment in its office, and also indorsed on the original assignment the fact that a copy had been so filed, and that, if the assignment should be thereafter canceled, the bank should return the original to the company. The policy was delivered to the bank, and was never in the wife's possession, nor did she ever make any inquiry concerning it or her husband's bank indebtedness. On October 25 Swett by letter directed the cashier of the bank, in case of his death, to apply the proceeds of the policy, first, to the payment of the \$10,000 note and interest; and, second, to the protection of Hackley on his indorsement of Swett's paper as he (Hackley) might direct. A copy of the letter was not transmitted to the company.

When the larger note became due, Swett paid \$305 and renewed the note for the residue, which was the original principal sum. This note, and also that for \$6,000, were periodically renewed, but neither of them was reduced or paid prior to his death, which occurred in October, 1906. Hackley died in February, 1905. The bank presented to his executors the \$6,000 note as a claim; on

June 3 following, it was paid. The bank subsequently executed and delivered an assignment of an undivided one-third interest in the policy to such executors. Shortly prior to his death Swett was adjudged a bankrupt. The trustees in bankruptcy, in consideration of \$500, sold and transferred all of the right, title, and interest of Swett in and to the policy to the executors of Hackley. As the bank and Hackley's executors on the one hand, and the widow on the other, each claimed the entire proceeds of the policy (\$17,448.41), the insurance company by its bill caused the respective claimants of the fund to interplead and deposited the value of the policy in court. Appropriate pleadings were interposed, and on the final hearing the result heretofore mentioned was obtained.

[204] The contentions of the widow, in so far as they need be noticed, are that, upon the issuance of the policy, she became the sole owner, or, at least, acquired a vested interest in it, of which she could not be divested without her consent; that the assignment of the policy to the bank was, as to her, without consideration; that, if the assignment was valid, she occupied merely the position of a surety, in consequence of which the lien on the policy was released and discharged by the subsequent extensions, without her knowledge and consent, of the time of the payment of the notes held by the bank; that no change of beneficiary was possible after the policy had been assigned, and that, therefore, Swett's letter of September 25 to the bank was ineffective for any purpose; that the Hackley executors took nothing by the purchase of her husband's interest, if any, from the trustee in bankruptcy; and that in any event she is entitled to all of the funds in excess of \$10,000, for the reason that the assignment of the policy was to secure only the \$10,000 note due the bank. Her several claims are controverted by the bank and the Hackley executors.

The rule is well settled that, under an ordinary policy of life insurance in which there is no reservation of a right to cut off or modify the interest of the beneficiary, the policy and the money to become due under it belong, from the time it issued, to the person named in it as the beneficiary, and that the insured is without power, whether by deed, assignment or will, or by surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary. In such a policy the beneficiary acquires, the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy, except it be a breach of condition. *Central Nat. Bank v. Hume*, 128 U. S. 195, 206, 9

S. Ct. 41, 32 U. S. (L. ed.) 370, 375; May on Ins., § 399L (4th ed.); Cooley's Briefs on the Law of Insurance, 3755. If, however, by the terms of the policy itself there is reserved to the insured the right, without the consent of the beneficiary, to change the appointee with the assent of the insurer, the beneficiary acquires only an expectancy and not a vested interest during the life of the insured. May on Ins., § 399M; Cooley's Briefs on the Law of Ins. 3755; Elliott on Ins. § 355; Kerr on Ins. § 231; Hopkins v. Northwestern L. Assur. Co. 99 Fed. 199, 40 C. C. A. 1; Hogan v. Fauerbach Brewing Co. 194 Fed. 846, 848, 114 C. C. A. 634; Lamb v. Mutual Reserve Fund L. Ass'n, 106 Fed. 637; Robinson v. U. S. Mut. Acc. Ass'n, 68 Fed. 825; Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012; Golden Star Fraternity v. Martin, 59 N. J. L. 207, 216, 35 Atl. 908.

The right so reserved rests upon the terms of the contract, and is the same as that conferred on the insured by the certificate, charter, or by-laws of a mutual or benefit association, when insurance is effected in such an organization. As the policy to Swett stipulated that he might, on his written request of the company for its appropriate indorsement on the policy, change the beneficiary, his wife did not acquire a permanent or vested interest in it. The existence of such an interest during her husband's lifetime was made impossible by the [205] control over the contract of insurance given to him, independent of her will. Her right was inchoate, a mere expectancy during his lifetime, dependent on the will and pleasure of her husband as holder of the policy, and could not vest until his death happened with the policy unchanged. His control over the policy was, subject to its terms, as complete as if he himself had been the beneficiary. Denver L. Ins. Co. v. Crane, 19 Colo. App. 191, 200, 73 Pac. 875. The wife had no vested interest which she could assign until the death of her husband—no assignable or transferable interest in the policy until some right of action on it accrued in her favor. May on Ins. § 399F; Sabin v. Phinney, 134 N. Y. 423, 428, 31 N. E. 1087, 30 Am. St. Rep. 681. As she had but a mere expectancy at the time of the assignment, she did not become surety for her husband, because the absolute right to assign the policy was lodged in him. Having no property right in the policy (Golden Star Fraternity v. Martin, 59 N. J. L. 207, 216, 35 Atl. 908), she pledged nothing for his debts; nor was it necessary that she should receive a consideration for her joining with him in the assignment in order to bind her, because in so doing she parted with nothing of appreciable value. The bank's rights were as secure without her joinder as with it. The ownership of the policy was not in her, but in

her husband. The policy recognizes that ownership of it may be acquired by assignment. The bank by the assignment became its qualified owner, to the full extent necessary to satisfy the husband's indebtedness from its proceeds.

The claim that the evidence of the cashier shows that the policy was assigned to protect only the \$10,000 note cannot be sustained, whether his evidence, or the agreed statement of facts, or both, be considered. The assignment, it is true, named an indebtedness of but \$15,000; but it is clear from the record that Swett intended to protect the bank as to his entire liability to it. His letter of September 25 to the cashier expressly directing that, after the satisfaction in full of the \$10,000 note, the residue of the proceeds of the policy should be applied to relieve Hackley from liability on account of his indebtedness, was explanatory and confirmatory of his original intent and passed by way of assignment whatever value the policy possessed remaining after the delivery of the instrument jointly executed by himself and wife. He was not restricted to a single assignment of the policy. Manton v. Robinson, 10 R. I. 405, 34 Atl. 148.

Whether, on account of Swett's indebtedness to the bank exceeding the amount of the policy, the assignment was in effect a change of beneficiary, is not in our judgment important to determine. However, the assignment of a policy and a change of beneficiary are not the same, but different, things. An assignment is the transfer by one of his right or interest in property to another. It rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity. The power to change the beneficiary is the power to appoint. The power of appointment must be exercised in the manner agreed upon in the contract of insurance. Niblack, Benefit Societies & Acc. Ins. (2d ed.) § 173. Swett made an assignment of the policy. He did not exercise or attempt to exercise the power to appoint [206] another beneficiary. His wife still remained such. She takes nothing as beneficiary, but that is because the debts, which the policy was assigned to secure, consumed the entire proceeds of the policy.

The bank assigned an undivided one-third interest in the policy to the Hackley executors, for the reason that they had been obliged to pay to it Swett's \$6,000 note which Hackley had indorsed. Swett's letter of September 25 was sufficient authorization for its so doing. The interest thus acquired by the executors vested the title in the executors, so far as that was necessary to enable them to hold the policy as collateral security for the debt which they had paid and to sustain an action upon the policy. In the absence of

such an authorization, the assignment to them was valid and binding on the beneficiary. *Corcoran v. Mutual L. Ins. Co.* 183 Pa. St. 443, 39 Atl. 50.

In the absence of any evidence of an intention on the part of the bank and Swett that the renewals of his notes evidencing his indebtedness to the bank should destroy the assignment of the policy, such renewals did not have that effect. *Corcoran v. Mut. L. Ins. Co. supra.*

The claim that Swett's letter of September 25, considering it as an additional assignment, was ineffective to confer any right on the bank, because neither it nor a copy of it was submitted to, filed with, or assented to by the company, is not meritorious. A provision in a life insurance policy that an assignment of it shall not become effective until written notice of it is given to the company is for its protection, and cannot be set up by any one else to defeat an assignment made without compliance therewith. 19 Am. & Eng. Enc. of Law (2d ed.) 96; May on Ins. § 396; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625.

As Swett had a transferable interest in the policy and the authority to change the beneficiary at will, if, notwithstanding his assignment to the bank, any interest still remained in him, such interest passed to his trustee in bankruptcy as of the date of adjudication. *Loveland, Bank.* (4th ed.) 817, 818. Whether the Hackley executors believed the title which passed to the trustee to possess intrinsic value or merely desired to safeguard the interest in it which they had already acquired is immaterial. For a valuable consideration they purchased whatever the trustee had. His assignment and transfer to them of all of Swett's right, title, and interest in and to the policy gave them a right superior to that of his widow.

Other claims made by the widow have been considered, but need not be noticed. We find no error in the record.

The trial court is affirmed.

NOTE.

Validity and Effect of Assignment by Wife of Insurance in Her Favor on Life of Husband.

General Rule, 302.

As Affected by Interest of Children, 304.

Assignment for Debt of Husband, 304.

Rule in New York, 305.

General Rule.

In many jurisdictions it is held, that in the absence of a specific statutory prohibi-

tion, a wife may, under the statutes giving a married woman the control over and the right to transfer her sole and separate property, assign her interest in an insurance policy on the life of her husband for her benefit.

United States.—*Newcomb v. Mutual L. Ins. Co.* 9 Ins. Law J. 124, 18 Fed. Cas. No. 10,147.

Arkansas.—*Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41.

Colorado.—*Collins v. Dowely*, 4 Colo. 138, 34 Am. Rep. 72.

District of Columbia.—*Ford v. Travellers' Ins. Co.* 6 Mackey 384.

Illinois.—*Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; *Norwood v. Guerdon*, 60 Ill. 253.

Indiana.—*Pence v. Makepeace*, 65 Ind. 345; *Damron v. Penn Mut. L. Co.* 99 Ind. 478.

Maryland.—*Emerick v. Coakley*, 35 Md. 188; *Dungan v. Mutual Ben. L. Ins. Co.* 38 Md. 242; *Whitridge v. Barry*, 42 Md. 140; *Dungan v. Mutual Ben. L. Ins. Co.* 46 Md. 469.

Minnesota.—*Allis v. Ware*, 28 Minn. 166, 9 N. W. 666.

Missouri.—*Connecticut Mut. L. Ins. Co. v. Ryan*, 8 Mo. App. 535.

New Jersey.—*Landrum v. Knowles*, 22 N. J. Eq. 594; *De Ronge v. Elliott*, 23 N. J. Eq. 486.

Pennsylvania.—*Bond v. Insurance Co.* 9 Phila. 149, 30 Leg. Int. 304; *Kulp v. Brant*, 162 Pa. St. 222, 29 Atl. 729; *Dusenberry v. Mutual L. Ins. Co.* 188 Pa. St. 454, 41 Atl. 736; *Herr v. Reinoehl*, 209 Pa. St. 483, 58 Atl. 862.

Tennessee.—*Scobey v. Waters*, 10 Lea 551.

Wisconsin.—*Archibald v. Mutual, L. Ins. Co.* 38 Wis. 542; *Canterberry v. Northwestern Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096, *overruling* *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094. See also *Boehmer v. Kalk*, 155 Wis. 156, 144 N. W. 182, 49 L.R.A. (N.S.) 487.

Canada.—*Graham v. Canada L. Assur. Co.* 24 Ont. 607.

In *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398, the court, after setting out the Illinois married women's act, said: "The application for this policy was in the name of Mrs. Pomeroy, and it was issued to her, and it is not denied that it was her sole and separate property, and if so, under this act it was at her disposal and under her control, and no reason is perceived why her assignment to appellee was not binding in equity, and if so, she cannot repudiate her act. Under the statute she is entitled to the benefits it confers, and must be held liable for her acts performed in pursuance of the authority it confers. If it gives the rights of sole ownership it must impose the lia-

bilities incident to such a right." And in *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41, a similar conclusion was reached, the court saying: "Under these statutes and other laws of this state, which vest her with all the rights of an unmarried woman as to her separate property, and make no exceptions as to policies of insurance upon the life of her husband, we can see no good reason why she cannot assign such policies as a man or single woman can transfer."

And see the reported case, wherein it is held that, where by the terms of the policy the husband is given the right to change the beneficiary, the wife acquires no vested interest in the policy and that it is not necessary that she shall receive a consideration in order to be bound by an assignment of the policy by the husband in which she joins.

Nor does a statute protecting the interest of the wife and children in an insurance policy from the claims of the husband's creditors operate to deprive the wife of the right to assign her interest in the policy as her separate property. *Newcomb v. Mutual L. Ins. Co.* 9 Ins. Law J. 124, 18 Fed. Cas. No. 10,147; *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Emerick v. Coakley*, 35 Md. 188; *De Ronge v. Elliott*, 23 N. J. Eq. 486; *Canterbury v. Northwestern Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096. In *Newcomb v. Mutual L. Ins. Co.* supra, the court, applying the Massachusetts married women's separate property act and construing a statute protecting the interest of the wife and children for whose benefit insurance policies had been issued, said: "Is a policy of life insurance an exception to the general rule—that the owner of property may convey it? Our statute of 1864 (chapter 197) enacts that a policy upon the life of any person, duly assigned, transferable or made payable to a married woman, or to any person in trust for her, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same or his creditors provided that if any premium is paid in fraud of creditors, an equal amount (of the insurance money) shall inure to the benefit of said creditors. . . . Looking at the whole scope of the act, I am much inclined to think that its intent is merely to guard the interests of the wife against the husband and his creditors, and that she is to be the absolute owner during her life, with only a contingent interest in her children. If this be not so, the legislature have undertaken in a most arbitrary fashion to limit the right of a married woman to buy or receive the gift of a policy insurance, an injustice which I should not willingly impute to them. The courts of all the states which have passed upon this question under stat-

utes more or less like ours, excepting the court of appeals of New York, have held that the married woman has the full domain over the policy, and may sell, assign, or pledge it like her other separate property." In *Emerick v. Coakley*, 35 Md. 188, the court, holding that the protective statute did not effect the wife's right to assign a policy on her husband's life, said: "It is urged, however, that the power given to the wife to insure the life of the husband for her sole use, was intended to provide the means of support for the wife and children after the husband's death, and that, therefore, such a policy stands upon a different footing from all other separate property of the wife, and that an assignment of it is against public policy; and the case of *Eadie v. Slimmon*, 26 N. Y. 11, 15, 17, 18, is relied upon as conclusive authority upon this point, especially as the statute of New York, in regard to such life policies, is substantially the same as ours. In view, however, of the 11th section of article 45 of the Code, and the decisions of this court respecting the disposition by married women of their separate property, to which we have before referred, we cannot recognize the decision in *Eadie v. Slimmon* as law in this state."

But in some jurisdictions it has been held that under a statute providing that a policy of insurance on the life of the husband for the benefit of the wife shall be free from the claims of the husband's creditors, the wife has no power to change the beneficiary in the policy by assignment. *Smith v. Head*, 75 Ga. 755.

In *Pratt v. Globe Mut. L. Ins. Co.* (Tenn.) 17 S. W. 352, it was held that as the contract was made under the New York statute of 1840 it must be governed by the New York decisions construing that statute which declared such a policy to be unassignable by the wife. See the decisions under the New York statute of 1840, set out infra, in the subdivision *Rule in New York*.

Where by the terms of a policy the wife's right to assign is specifically provided for, as for instance where the policy is made payable to the wife or her assigns, the courts have uniformly recognized the right and upheld assignments under it. *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; *Damron v. Penn Mut. L. Ins. Co.* 90 Ind. 478; *Emerick v. Coakley*, 35 Md. 188; *Dungan v. Mutual Ben. L. Ins. Co.* 38 Md. 242; *Whitridge v. Barry*, 42 Md. 140.

But as the power of a married woman to transfer her separate property was prior to the separate property acts subject to the common-law rule that a feme covert could not bind herself by an executory contract, where an assignment of a policy was made by a

married woman to secure her own executory contract, the assignment was invalid. *Godfrey v. Wilson*, 70 Ind. 50.

An assignment of an insurance policy made by a wife to secure the payment of a judgment which did not exist has been held to be invalid for want of consideration. *Price v. Atchison First Nat. Bank*, 62 Kan. 743, 64 Pac. 639.

As Affected by Interest of Children.

The wife's right to assign an insurance policy on the life of her husband may be restricted by a provision of the policy or of a statute that the policy shall inure to the benefit of the children as well as the wife. In such a case the wife cannot defeat the interest of the children by an assignment of the policy, and any assignment by her is limited strictly to whatever interest she may have. *Newcomb v. Mutual L. Ins. Co.* 9 Ins. Law J. 124, 18 Fed. Cas. No. 10,147; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157; *Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295; *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919 (*overruling Baker v. Young*, 47 Mo. 453, in so far as it held that the children of the wife for whose benefit the husband's life had been insured had no interest in the policy); *Wanschaff v. Masonic Mut. Ben. Soc.* 41 Mo. App. 206; *Henry v. Thompson*, 78 N. J. Eq. 142, 78 Atl. 14; *Brown's Appeal*, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. Rep. 900; *Entwistle v. Travelers' Ins. Co.* 202 Pa. St. 141, 51 Atl. 759, *reversing* 17 Pa. Super Ct. 180; *Herr v. Reinoehl*, 209 Pa. St. 483, 58 Atl. 862; *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105; *Scobey v. Waters*, 10 Lea (Tenn.) 551. See also *Boyd v. Massachusetts Mut. L. Ins. Co.* 153 Mass. 544, 27 N. E. 669. In *Brown's Appeal*, *supra*, it was said: "The assignment is formal and her husband joined her in its execution. Whatever title she had therefore passed to her assignee. The extent and character of her title appeared plainly on the face of the policy. She was the payee named in the first instance, but the promise to her was not an absolute and unconditional promise to pay to her, or to her administrators, executors or assigns, but a promise to pay to her upon condition that she was living when the policy should fall due. If she survived her husband the insurance money was payable to her, but if she did not it was payable to her children then living. Their right to the money depended upon the terms of the contract, which was payable to them if she was not living at the death of the insured. They were parties to the contract, as truly as she

was, and with as clear a right to sue upon it, upon the happening of the contingency that made them the payees, as she could have had if living. Her assignment put her assignee in no better position than she occupied, and conferred upon him no greater interest in the policy. Her death in the lifetime of her husband extinguished her interest in the policy, and it can no more survive in the hands of her assignee than in her administrator. The condition on which her right to recover was to end, and that of her children was to arise, has happened, and the contract of the insurance company is now with the children, and must be enforced by them for their benefit."

A provision that the policy shall inure to the benefit of the children is of course ineffective to limit the wife's right to assign where there are no children. *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *Henry v. Thompson*, 78 N. J. Eq. 142, 78 Atl. 14.

Assignment for Debt of Husband.

Where the assignment by the wife of an insurance policy on the life of her husband is made to pay or secure the payment of his debts, its validity depends on the construction of the particular statutes relating to the separate property of married women. Thus, under the statutes of some jurisdictions, it is held that a married woman may assign her interest in an insurance policy on the life of her husband for her benefit even though the purpose of the assignment is to secure the payment of his debts. *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Collins v. Dawley*, 4 Colo. 138, 34 Am. Rep. 72; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; *Norwood v. Guerdon*, 60 Ill. 253; *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937; *New York L. Ins. Co. v. Miller*, 22 Ky. L. Rep. 230, 56 S. W. 975; *Emerick v. Coakley*, 35 Md. 188; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666. In *Collins v. Dawley*, *supra*, it was said: "That a policy of insurance upon the life of the husband for the benefit of the wife may be assigned or pledged as collateral security by her for the debt of her husband, unless prohibited by local statute, is, we think, settled by the great weight of authority. The policy was a writing obligatory for the payment of money, and may be assigned at law as well as in equity."

In *Pennsylvania* it has been held that the prohibition in the statute (Act of June, 1893, P. L. 344) against a married woman making a technical contract of indorsement, suretyship or guaranty does not disable her from transferring her property as security for the debt of another, and so assignments by her of policies on her husband's life for her benefit

to secure his debts are held to be valid. *Kulp v. Brant*, 162 Pa. St. 222, 29 Atl. 729; *Dusenberry v. Mutual L. Ins. Co.* 188 Pa. St. 454, 41 Atl. 736; *Herr v. Reinoehl*, 209 Pa. St. 483, 58 Atl. 862.

But in other jurisdictions under statutes forbidding a married woman to make a contract or conveyance as surety or guaranty for her husband, as assignment of a policy on her husband's life for her benefit as security for his debts is held to be invalid. *Smith v. Head*, 75 Ga. 755; *Damron v. Penn Mut. L. Ins. Co.* 99 Ind. 478; *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Putnam v. New York L. Ins. Co.* 42 La. Ann. 739, 7 So. 602; *Stokell v. Kimball*, 59 N. H. 13.

For a general discussion of the right of a married woman to become surety for her husband's debt, see the note to *Montpelier First Nat. Bank v. Bertoli*, reported post, this volume, at page 587.

Rule in New York.

In New York prior to the statutes of 1873 (Laws 1873, ch. 821) and 1879 (Laws 1879, ch. 248) it was uniformly held that insurance policies issued under the Act of 1840 (Laws 1840, ch. 80), providing for the insurance of the husband's life for the benefit of the wife and children, were unassignable by the wife. *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587; *Fowler v. Butterly*, 78 N. Y. 68, 34 Am. Rep. 507; *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503; *Smillie v. Quinn*, 90 N. Y. 492; *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474; *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L.R.A. 259; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L.R.A. 175; *Grems v. Traver*, 87 Misc. 644, 148 N. Y. S. 200; *People v. Globe Mut. L. Ins. Co.* 15 Abb. N. Cas. 75, affirmed 96 N. Y. 675; *Wilson v. Lawrence*, 8 Hun 593; 13 Hun 238. The reason for the rule was stated in *Eadie v. Slimmon*, supra, as follows: "We think the intent of the statute was to make these policies a security to the family of any married man, and a provision for their use and benefit, and that this intent would be defeated if they were held to be assignable by the wife like ordinary choses in action belonging to her in her own right as her separate property. . . . By the common law, a person could insure his own life for any sum for which he might choose to pay the premium, and which the insurers would engage to insure; but if one desired to insure the life of another, he could only insure the interest which he had

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in such other life. If he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual damages sustained, the contract would be void under the statutes against betting and gaming. This principle the legislature, by the Act of 1840 (Laws, p. 59), relaxed in respect to insurance as affected by a married woman, for any sum which she and the insurance company might see fit to contract for. It was provided that, in the case of her surviving her husband, the amount payable by the terms of the policy should be payable to her for her own use, free from all claims of the representatives of her husband or of his creditors. There is another feature in the act which shows that it was an enabling and not a declaratory provision. By the general rules of law a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of *cestui que vie*; or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act the contract may be continued in favor of the children of the insured wife after her death. These features distinguish this case from that of an ordinary chose in action belonging to a married woman as her separate estate. The provision is special and peculiar, and looks to a provision for a state of widowhood, and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property or an ordinary security for money." In *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587, it was held that legislation enlarging the legal status of married women did not operate to empower the wife to assign an insurance policy issued on the life of her husband pursuant to the Act of 1840. In *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807, the fact that the wife paid the premiums on the policy out of her separate estate was held not to affect her want of authority to assign the policy. However it was held in *Robinson v. Mutual Ben. L. Ins. Co.* 16 Blatchf. 194, 9 Ins. Law J. 73, 8 Rep. 613, 20 Fed. Cas. No. 11,961, that the New York statute of 1840 did not apply to an insurance policy containing an express contract between the wife and the company, providing that on the death of the husband the money should be paid to her "or assigns," and that an assignment by the wife and husband of such a policy was valid. In *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503, it was held that to bring a policy on the life of the husband within the operation of the Act of 1840 and render it unassignable by the wife,

it was not necessary that it should appear by the terms of the policy that it was the intention of the parties to avail themselves of the provisions of the act, as this would be presumed. See to the same effect *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807. During the period of its running, it was held that an endowment policy was no exception to the general rule of nonassignability under the statute of 1840. *Brummer v. Cohn*, 86 N. Y. 11, 46 Am. Rep. 503. But after the lapse of the period fixed in an endowment policy within which the obligation of the insurer ran to the wife, children or personal representatives, it was held that the wife had no right to receive payment under it, and an assignment by the husband and wife then became valid. *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. The fact that the insurer was a foreign corporation was held not to affect the nonassignability of a policy issued pursuant to the Act of 1840. *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. And where both husband and wife were nonresidents of the state of New York, it was held that her right to assign a policy issued by a New York insurance company was governed by the statutes of New York. *Bloomington v. Lisberger*, 24 Hun 355; *Milhous v. Johnson*, 51 Hun 639, mem. 4 N. Y. S. 199. The right to avoid an assignment has been held to be confined to the wife, creditors having no right to attack its validity on the ground that the policy was unassignable by the wife under the Act of 1840. *Smillie v. Quinn*, 90 N. Y. 492. And it has been held that her right to avoid an invalid assignment was not lost by the surrender of the policy by the assignee. *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807. Nor was her right to avoid the assignment precluded by the fact that the assignment contained a covenant to the effect that it was valid and sufficient and that she would, whenever, required, do any act necessary to carry out the terms of the assignment. *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L.R.A. 259. It was also held in that case that the wife's right to avoid an invalid assignment of a policy on her husband's life was not barred by delay in seeking to reclaim the policy of a period within that prescribed by the statute of limitations. To the same effect see *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807. However, where the wife elected to avoid an invalid assignment of a policy on her husband's life, it was held that a repayment of the premiums paid by the assignee should be made a condition of granting relief. *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L.R.A. 259.

By the Act of 1873 (Laws 1873, ch. 821) power was conferred on the wife to assign an insurance policy on the life of the husband in her favor, provided she had no children or any issue of children living. *Travelers' Ins. Co. v. Healey*, 86 Hun 524, 33 N. Y. S. 911; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L.R.A. 259.

Under the Act of 1879 (Domestic Relations Law, § 52, Book 14 McKinney's Consol. Laws, p. 107) the wife was given the power to assign an insurance policy on her husband's life in her favor, whether there were children or not, the only limitation on her power being that the assignment must be with the written consent of the husband. *Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495; *Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L.R.A. 175, *affirming* 73 Hun 274, 26 N. Y. S. 371; *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160; *Fuller v. Kent*, 13 App. Div. 529, 43 N. Y. S. 649; *Kimball v. Lester*, 43 App. Div. 27, 59 N. Y. S. 540, *affirmed* in 167 N. Y. 570, 60 N. E. 1113; *Morschauer v. Pierce*, 64 App. Div. 558, 72 N. Y. S. 328; *Rathborne v. Hatch*, 90 App. Div. 161, 85 N. Y. S. 775, *affirmed* in 181 N. Y. 584, 74 N. E. 1125; *Dexter v. Supreme Council*, etc. 97 App. Div. 545, 90 N. Y. S. 292; *Dudley v. Fifth Ave. Trust Co.* 115 App. Div. 396, 100 N. Y. S. 934, *affirmed* in 188 N. Y. 565, 80 N. E. 1109; *Connecticut Mut. L. Ins. Co. v. Van Campen*, 57 Hun 592, mem. 11 N. Y. S. 103; *Travelers' Ins. Co. v. Healey*, 86 Hun 524, 33 N. Y. S. 911. See also *Harvey v. Van Cott*, 71 Hun 394, 25 N. Y. S. 25, *affirmed* in 149 N. Y. 579, 43 N. E. 987. The consent of the husband to an assignment by the wife of a policy in her favor is required by statute to be in writing, and it is generally held that in the absence of that written consent, any attempted assignment by a married woman is void and without effect. *Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495; *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160; *Rathborne v. Hatch*, 90 App. Div. 161, 85 N. Y. S. 775; *Dudley v. Fifth Ave. Trust Co.* 115 App. Div. 396, 100 N. Y. S. 934, *affirmed* 188 N. Y. 565, 80 N. E. 1109; *Milhous v. Johnson*, 51 Hun 639, mem. 4 N. Y. S. 199. And this has been held to be true even though the assignment was made to the husband. *Dudley v. Fifth Ave. Trust Co.* 115 App. Div. 396, 100 N. Y. S. 934, *affirmed* 188 N. Y. 565, 80 N. E. 1109. But where a policy was taken out by the husband, payable to his legal representatives and afterwards assigned by him to his wife it was held that she might assign the policy without his written consent, and that a paid up policy, payable to the wife taken out by her in lieu of the original policy under a clause in the latter conferring that right, was assignable by the wife without the consent of the

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husband. *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160. However, it has been held to be a sufficient compliance with the statute if the husband joins in the written assignment. *Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495. But the joinder of the husband in the note given for the debt was held to be insufficient in *Milhous v. Johnson*, 51 Hun 639 mem. 4 N. Y. S. 199. Under the Act of 1879 the restriction placed on the wife's right to assign by the existence of children was removed and she was empowered to assign, provided only that it was done with the written consent of the husband. *Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495. However, where the policy was payable to the children in case the wife predeceased the husband she could not assign it even with the consent of her husband so as to divest the contingent interest of the children. *Travelers' Ins. Co. v. Healey*, 86 Hun 524, 33 N. Y. S. 911, reversing 28 N. Y. S. 478. The fact that the policy was issued by a foreign insurance company has been held not to render inapplicable the statute allowing the wife to assign the policy with the written consent of the husband. *Fuller v. Kent*, 13 App. Div. 529, 43 N. Y. S. 649. It has been held that, though a mutual benefit certificate is by its terms nonassignable so as to invest the assignee with the benefits accruing to a bona fide holder, the rights acquired by an assignment for value will operate as a valid enforceable agreement when the contingent interest has ripened into an existing vested right. *Kimball v. Lester*, 43 App. Div. 27, 59 N. Y. S. 540, affirmed 167 N. Y. 570, 60 N. E. 1113; *Dexter v. Supreme Council*, etc. 97 App. Div. 545, 90 N. Y. S. 292. Compare *McCord v. McCord*, 40 App. Div. 275, 57 N. Y. S. 1049.

**RELiance AUTO REPAIR
COMPANY.**

v.

NUGENT.

Wisconsin Supreme Court—November 17,
1914.

159 Wis. 488; 149 N. W. 377.

**Jury — Right to Jury Trial — Scope
of Constitutional Guaranty.**

Const. art. § 1, 5, providing that the right of "trial by jury" shall remain inviolate, merely guarantees such right to a jury trial as existed before Wisconsin became a state, which was a trial in a court of competent

jurisdiction by a jury of twelve men impartially selected.

[See 1 Ann. Cas. 703.]

**Denial of Jury Trial — Appeal Not
Triable by Jury.**

Const. art. 1, § 5, providing that the right to jury trial shall remain inviolate, guarantees only one jury trial; hence the Civil Court Act (Laws 1909, c. 549), which provides for jury trial in the civil court of Milwaukee, but authorizes the circuit court on appeal to affirm or modify judgments of that tribunal without jury trial, is valid.

[See Ann. Cas. 1912C 1109.]

Requirement of Jury Fees — Validity.

Civil Court Act (Laws 1909, c. 549) § 19, requiring a party desiring a jury trial in the civil court of Milwaukee to pay a fee of \$12, which is to be taxed as costs if successful in the action, is not in violation of Const. art. 1, § 5, declaring that the right to jury trial shall remain inviolate, particularly as jury fees were required in territorial days.

[See note at end of this case.]

**Statutes — Invalidity of Amendment
— Effect on Original Act.**

The invalidity of an amending statute, which merely added a provision to the original statute, does not avoid the original.

Appeal from Circuit Court, Milwaukee county: **HALSEY**, Judge.

Action by Reliance Auto Repair Company, plaintiff, against Michael Nugent, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[489] Plaintiff sued in the civil court of Milwaukee county to recover \$93.35 for repairs upon and storage of defendant's automobile and recovered judgment therefor after a trial by the court, a jury trial having been waived.

The defendant appealed to the circuit court, where the judgment was affirmed upon the record notwithstanding the defendant's demand for a trial by jury. The defendant appeals from that judgment.

William J. Kershaw and *R. I. Kenney* for appellant.

Micheal Levin, for respondent.

WINSLOW, C. J.—The defendant's chief contention is that under sec. 5 of art. 1 of the state constitution, which provides that "the right of trial by jury shall remain inviolate," he was entitled to a jury trial in the circuit court, and that so much of the Civil Court Act (ch. 549, Laws of 1909) as purports to authorize the circuit court on appeal to affirm or modify judgments of the first named court upon the record without a jury trial is unconstitutional.

The Civil Court Act provides (sec. 19, ch. 549, supra) that either party to a civil action

in that court may demand and have a trial by a jury of twelve men, to be drawn from the jury list of the county, upon paying to the clerk of the court \$12, which sum is to be recovered as costs if he prevails. As appears from the statement of facts, the appellant waived his right to this jury trial.

The following propositions are decided in this case:

1. The jury trial guaranteed by the constitution is the jury trial which existed in the territory at the time of the adoption of the constitution, i. e. a trial in a court of competent jurisdiction before a jury of twelve men impartially selected. *Norval v. Rice*, 2 Wis. 22; *Gaston v. Babcock*, 6 Wis. 503; *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112, 22 L.R.A. 609.

[490] 2. The jury trial provided for in the civil court of Milwaukee county satisfies this guaranty; and, as the guaranty only contemplates one jury trial, the provisions of law authorizing the affirmance of judgments of the civil court without new trial do not transgress the constitution in this regard.

3. The requirement that the party demanding a jury shall pay into the court a jury fee of \$12, to be recovered by him in the cost bill if successful in the action, is not an unreasonable regulation of the right, nor is it an invasion of sec. 9, art. I, of the constitution, which provides that "every person . . . ought to obtain justice freely, and without being obliged to purchase it." *Christianson v. Pioneer Furniture Co.* 101 Wis. 343, 77 N. W. 174, 917; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909 at p. 215; *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785; *Adams v. Corriston*, 7 Minn. 456; *Adae v. Zangs*, 41 Ia. 536; *Venine v. Archibald*, 3 Colo. 163; *State v. Neterer*, 33 Wash. 535, 74 Pac. 668; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169. Furthermore, it appears that under the territorial statutes of Wisconsin any party recovering a verdict was required to pay into court for the benefit of the county \$3 before the declaration of the verdict. *Terr. Stata.* 1839, p. 399, sec. 23. Under the Revised Statutes of 1849 and 1858, every plaintiff was required to pay into the court for the use of the county \$3 immediately after the swearing of the jury. *R. S.* 1849, ch. 131, sec. 28; *R. S.* 1858, ch. 133, sec. 33. Considering the greater purchasing power of money during those earlier years, this sum is not markedly greater than the sum now required to be advanced by the party demanding a jury. It is to be remembered also that under the present law the sum advanced is recovered as costs in case of success in the case.

4. It is unnecessary to pass upon the contention that ch. 261, Laws of 1913, amending the Civil Court Act, denies to defendants re-

siding in Milwaukee county the equal protection [491] of the laws. By this act it is provided that in cases where the defendant resides in another county he may have the place of trial of the appeal changed to the circuit court of his own county and be entitled to a new trial in the same cases as in case of appeal from justice's court. If the objection were sound (a point concerning which we express no opinion), its only effect would be to condemn the amending law,—not the act which it attempts to amend.

BY THE COURT.—Judgment affirmed.

A motion for a rehearing was denied, with \$20 costs, on February 9, 1915.

NOTE.

Constitutionality of Statutes Requiring Prepayment or Taxation as Costs of Jury Fees.

The earlier decisions passing on the constitutionality of a statute requiring the prepayment or taxation as costs of jury fees are collated in the notes to *Humphrey v. Eakeley*, 5 Ann. Cas. 929; *Williams v. Gottschalk*, 12 Ann. Cas. 376, and *Eckrich v. St. Louis Transit Co.* 98 Am. St. Rep. 517. In two recent decisions besides the reported case such statutes have been upheld as not being a denial or abridgment of the constitutional right of trial by jury. *Morrison Hotel, etc. Co. v. Kirsner*, 245 Ill. 431, 92 N. E. 285, 137 Am. St. Rep. 335; *Gottschall v. Campbell*, 234 Pa. St. 347, 83 Atl. 286. Thus, in the case first cited the court reaffirmed the validity of the provisions of the municipal court act (*Hurd's Rev. St.* 1909, c. 37, § 319) requiring a party to a suit in that court, at the time of entering his appearance, to file with the clerk a demand in writing for a trial by jury, and to pay six dollars for jury fees. The court declared that the act was not a denial of or encroachment on the right to a jury trial, on the authority of *Williams v. Gottschalk*, 231 Ill. 175, 12 Ann. Cas. 376, 83 N. E. 141.

The holding in the reported case is to the effect that a statute (Civil Court Act, Laws 1909, c. 549, § 19) providing that either party to a civil action in that court may demand and have a trial by a jury of twelve men, to be drawn from the jury list of the county, on paying to the clerk of the court twelve dollars, which sum is to be recovered as costs if he prevails, is constitutional. The court holds that the jury trial provided for in the statute satisfies the constitutional guaranty that "the right of trial by jury shall remain inviolate" (*Const.* art. 1, § 5), which is merely a guaranty of the jury trial which existed in the territory at the time of the adoption

of the constitution, i. e., a trial in a court of competent jurisdiction before a jury of twelve men impartially selected; and that the requirement that the party demanding a jury trial shall pay into court a fee of twelve dollars, to be recovered by him in his cost bill, if successful in the action, is neither an unreasonable regulation of the right to a trial by a jury, nor an invasion of the constitutional provision that "every person . . . ought to obtain justice freely, and without being obliged to purchase it." (Const. art. 1, § 9.) In *Gottschall v. Campbell*, 234 Pa. St. 347, 83 Atl. 286, in holding to be valid a similar statute [Act of May 5, 1911, § 8 (P. L. 201)] the court said: "In section 8, provision is made for a jury trial on request of either party, and the payment of the jury fee in advance. It is suggested that this provision is an abridgement of the constitutional right of trial by jury. But under the long settled practice in this state, under the Act of March 29, 1805, sec. 13, 4 Sm. L. 237, a jury fee must be paid before judgment can be entered on a verdict. A verdict is of little value unless judgment be entered upon it, and it is but a slight step further to require payment of the jury fee before the trial, instead of before judgment. It might as well be argued that the plaintiff was denied the right to a jury trial because compelled to pay for the issuing and service of a summons, before such trial can be had."

CVITANOVICH

v.

BROMBERG.

Iowa Supreme Court—April 8, 1915.

169 Iowa 736; 151 N. W. 1073.

Evidence — Opinion — Estimate of Quantity.

Where, in an action under Code, § 2423, to recover payments made for liquor illegally sold by defendant to plaintiff, a witness testified that he delivered liquor to plaintiff, but kept no account of the sales or the quantity, and turned over to defendant the amount each night, it is proper to permit the witness to give his opinion as to the amount of liquor delivered to plaintiff.

Witnesses — Cross-examination — Quantity of Liquor Delivered.

Where, in an action under Code, § 2423, to recover payments made for liquor illegally sold by defendant to plaintiff, the testimony of a witness delivering liquor for defendant to plaintiff and collecting the money therefor was indefinite as to the quantity of liquor sold, refusal to permit defendant to show on the cross-examination of the witness that he worked for other liquor houses and delivered their liquor to the plaintiff was error.

Intoxicating Liquors — Keeping for Illegal Sale — Presumption from Payment of Federal Tax.

Code, § 2427, making receipts of payment of United States liquor taxes presumptive evidence that the person owning the receipt is engaged in keeping liquor for sale "contrary to the provisions of this chapter," applies to an action under section 2423 to recover payments made for liquor illegally sold, for the two sections are in the same chapter.

Same.

The presumption created by Code, § 2427, arising from a receipt of payment of United States liquor taxes, may be rebutted.

Argument of Counsel — Reference to Wealth of Party.

Where, in an action under Code, § 2423, to recover money paid for liquor illegally sold by defendant to plaintiff, defendant on cross-examination stated that he had made good money in real estate, and further questions on cross-examination insinuated that he had become wealthy out of illegal sales of liquor, the argument of plaintiff's counsel, that defendant became rich collecting money on liquor which he sold, is prejudicial, and the misconduct is not cured by the court stating that it made no difference whether defendant was rich or not.

[See note at end of this case.]

Witnesses — Cross-examination of Party As to Wealth.

In an action under Code, § 2423, to recover money paid for liquor illegally sold by defendant to plaintiff, questions on the cross-examination of defendant as to his having become rich by taking orders for liquor are improper.

Appeal from District Court, Appanoose county: VERMILLION, Judge.

Action to recover for liquors illegally sold to plaintiff by defendant. Joseph Cvitanovich, plaintiff, and David Bromberg, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Wilson & Smith for appellant.

C. A. Baker for appellee.

[737] PRESTON, J.—1. We have had some difficulty in determining the merits of the

controversy because of the confusion in the record. Twenty-four witnesses were examined, but their names appear sixty-seven times in the abstract and two additional abstracts. Substantially all the witnesses on both sides were recalled on the trial, some of them as many as four or five times. Their evidence is abstracted in the same way and set out in different places in the abstract, and again in the same manner in the additional abstracts. Some of the corrections of the testimony in the additional abstracts do not refer to the page where the testimony is set out in the abstract, or the first additional abstract. It might be well, perhaps, for trial judges, when counsel on both sides get into the habit of only partly examining their witnesses and excusing them, and then recalling all, or substantially all, of them, [738] to suggest to the attorneys that they exhaust the testimony of the witness before excusing him, subject, of course, to the right to recall a witness if something has been really overlooked. We have been compelled to abstract the abstracts and spend some time in straightening out the record that we could have very well used in investigating the points presented.

2. Appellant argues that the plaintiff is a self-confessed bootlegger and that his client, the defendant, claims that this case is a plain and simple holdup; that plaintiff was convicted of selling liquor and went to jail, and, because defendant would not pay his fine of three hundred dollars, this suit was brought; and that there was a conspiracy between plaintiff and one Hershberg, who was angry at defendant, and that the case rests largely upon the testimony of Hershberg, who, as defendant alleges, was discredited and impeached; that but for the prejudice against a person in the liquor business, there would have been no verdict.

Appellee admits in argument that plaintiff was convicted of selling intoxicating liquor, as he says, because defendant had induced him to sell, and promised plaintiff that he would protect him and that plaintiff would not have to go to jail; and that then defendant refused to pay appellee's fine and protect him, as he had promised; but, though witnesses gave impeaching testimony against Hershberg, and we are assured by counsel for appellee that plaintiff is a Croatian, speaking no English, and was induced by the defendant to purchase intoxicating liquors from him (defendant) and sell the same at his residence, where plaintiff's wife kept boarders, all foreign-speaking people, and that thus he became a "self-confessed bootlegger," from the record we are convinced that the transactions are not creditable to either plaintiff or defendant, and that neither is as innocent as he pretends. They were both selling liquor contrary to law.

3. The third assignment of error is that the court erred in permitting the witness Hershberg to express an opinion [739] as to the amount of beer and whisky delivered to plaintiff during the time in controversy, for that his answer was simply a guess or speculation. It must be admitted that the evidence is somewhat indefinite, but it is not altogether the expression of an opinion, as contended by appellant, but the statement of facts. The claim is that this witness, under instructions from defendant, delivered beer and whisky to the plaintiff. Witness testifies that he kept no account of the sales or the quantity of liquor sold, but that he turned in to defendant the amount each night. His estimate is that he delivered about so many cases of each, beer and whisky, to defendant and that plaintiff paid the defendant during the time in question a certain amount on each coal mine pay day. Under the circumstances, it would be difficult to get at it in any other way. But we are of opinion that it was a question for the jury from all the evidence in the case. It was also a question for the jury, under the instructions of the court, of which no complaint is made, as to whether the sales were made in Iowa.

4. Complaint is made because Exhibit "P-3" was admitted in evidence. This purports to be an account between plaintiff and the Rochester Brewery, and the wife of plaintiff testifies that the defendant gave it to her.

5. Hershberg testified that he was working all the time for the Rochester Brewing Company, and defendant assigns as error that the court limited the cross-examination of this witness as to handling of liquors for other concerns during the time it is alleged Hershberg was delivering liquor for defendant. The record is:

Q. "What other breweries were you acting for in 1909 and 1910, if any?"

Objected to as assuming, immaterial, not proper cross-examination. The objection was sustained, but witness seems to have answered. The abstract shows:

[740] A. "I was working all the time for the Rochester Brewing Company."

Q. "Don't you know that you handled Simon Lewis whisky at Rock Island?"

Objected to as incompetent, not proper cross-examination, immaterial. Sustained.

Q. "Don't you know that you delivered the Simon Lewis liquor to Joe Cvitanovich during the time you have said you were working for the Rochester Brewing Company?"

Objected to as not proper cross-examination. Sustained.

We think the court might well have permitted a more liberal cross-examination of the witness, under the circumstances. As before stated, the evidence of the witness was somewhat indefinite as to the amount of

liquor sold, and we think if, during the time witness claims he was working for one concern and delivering liquor to plaintiff for defendant, he was selling liquor to plaintiff from other houses, it would have a bearing on the question of amount of liquor sold by defendant. We would not reverse for this alone, although we think defendant was entitled to a cross-examination of the witness on that subject. But witness Simon Lewis testified as a witness for defendant, without objection, that he was in the liquor business at Rock Island, and that Hershberg was working for him in 1909, and that he was collecting for liquor sold in the territory where plaintiff was selling; this witness also testified that he shipped liquor to a man named Joseph Cvitanovich from June, 1908, to November, 1910. We think defendant was entitled to cross-examine the witness on the subject, notwithstanding the evidence of Lewis.

6. Appellant complains that the court erred in admitting testimony as to possession by defendant of a government stamp. Appellant cites no cases, but contends that the statute does not apply to a civil proceeding for the recovery of the purchase price of liquor, but only to criminal proceedings [741] under the chapter relative to selling or keeping for sale of intoxicating liquors. Sec. 2427 provides, in part:

"In all actions, prosecutions and proceedings under the provisions of this chapter, proof of the actual manufacture, sale or gift in evasion of the statute of intoxicating liquors by a person not authorized to manufacture, sell or give the same shall be presumptive evidence of illegal manufacture or sale, etc. . . . The fact that any person not authorized to keep for sale and to sell intoxicating liquors for lawful purposes, engaged in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of such liquors in this state, shall be presumptive evidence that the person owning or controlling such receipt or stamp, or having paid such special tax, is engaged in keeping for sale or selling intoxicating liquors contrary to the provisions of this chapter."

The trial court instructed in accordance with this provision of the statute. This action, as before stated, was brought under Sec. 2423 of the Code, which is in the same chapter as the section quoted, and we think it applies here.

7. But it is said by appellant that the court erred in refusing to permit defendant's explanation of his possession of a govern-

ment stamp or license. The statute quoted makes the possession of the government stamp, or payment of the tax, presumptive, and not conclusive, evidence. We think a party is entitled to explain in regard to this. In *Jones v. Welch*, 167 Ia. 443, 149 N. W. 515, the holder of the stamp was permitted to give his explanation, but it was not determined that he had a right to do so. Under the record in this case, it is doubtful whether appellant is in a position to complain. Defendant testified that he never sold any liquor at all, and then this question was asked:

[742] Q. "And, by the way, was it your understanding that the Government required that a collection agent have a Government license?"

Plaintiff objects as immaterial. The objection sustained.

This is all the record shows on this subject. There was no offer to prove that such was the understanding of the witness. Possibly we should infer that the witness would have answered "yes," but he could have answered the question by either "yes" or "no." If the answer to the question should be "no," then, of course, it would not be an explanation at all.

8. The next two assignments of error may be considered together. They are: First, that the court erred in overruling defendant's objections to questions as to defendant's becoming rich by the taking of orders for beer and whisky; and second, that counsel for plaintiff was guilty of prejudicial misconduct in argument to the jury in referring to the same matter. The learned trial court seems to have tried the case carefully and, doubtless, in the hurry of the trial, overlooked the record as it is in regard to this matter. We think these two exceptions must be sustained. We had always supposed that litigants were entitled to a trial of their cases on the merits, regardless of the question as to whether they are rich or poor. The record shows that, when defendant was on the stand, counsel for plaintiff, in cross-examination, asked:

Q. "The facts are, Mr. Bromberg, that you have grown rich from taking orders for beer and whisky in this county, haven't you? (Defendant objects as prejudicial, improper and misconduct. Overruled.) A. I make good money in the real estate. Not in the whisky. That comes on the side. Q. Oh, whisky is on the side? A. Yes, sir. Q. How much money did you make in the year 1909 in real estate? (Objected to as immaterial, and sustained.) Q. How much money did you make in 1909 selling beer and whisky? (Objected to as assuming and immaterial. Sustained.)"

[743] In the argument to the jury, counsel for plaintiff said:

"I say that Bromberg got rich collecting money on beer and whisky which he sold to people in Appanoose County, Iowa. (Defendant objects to the statement as improper, prejudicial, etc.) Court: It doesn't make any difference whether Mr. Bromberg is rich or not; it has nothing to do with the case. Counsel for Defendant: We except to the remark of counsel for the reason stated."

It should be said that, before witness had completed his answer, and after he had said, "I make good money in the real estate," counsel for plaintiff moved to strike the answer as not responsive, which was overruled, and the witness continued with the rest of that answer without any further question being asked.

Counsel for appellee state in argument here that the question was asked for the purpose of having witness admit that he had taken orders for beer and whisky and was selling it, and was so considered by the trial judge, and that the statement by the trial court that it doesn't make any difference whether Bromberg is rich or not cures the error, if any there was. But we are of opinion that this is not sufficient. If counsel for plaintiff had only referred in his argument to the financial condition of defendant, and the court had promptly made the statement it did, and this had been all there was to it, it is possible that the error should be considered as cured, although there are cases holding that even then a case should be reversed for such a remark.

In *Westercamp v. Brooks*, 115 Ia. 159, 88 N. W. 372, an objectionable remark was made by one of the attorneys in the opening argument, and, upon objection being made, the court stated that he would instruct the jury not to consider any statements outside the record, and the court did so instruct in one of its written instructions, and co-counsel in the closing argument withdrew the remarks complained of and requested the jury not to consider any matter outside the record. Under such [744] circumstances, it was held that there was no prejudice, and there are other cases to substantially the same effect. But in this case, the evidence was in the record that defendant had made money in real estate, and this was in answer to a question as to whether he had not grown rich from taking orders for beer and whisky. In addition to that, the matter was emphasized by two other questions, objections to which were sustained. We are of opinion that there was reversible error at this point. As bearing upon this question, see: *Sullivan v. Chicago*, etc. R. Co. 119 Ia. 464, 93 N. W. 367; *Wheeler*, etc. Mfg. Co. v. *Sterrett*, 94 Ia. 158, 62 N. W. 675; *Henry v. Sioux City*, etc. R. Co. 70 Ia. 233,

30 N. W. 630; *Almon v. Chicago*, etc. R. Co. 163 Ia. 449, 144 N. W. 997.

In the instant case, as before stated, there was not only the statement of counsel in argument to the jury that defendant was rich, but there was evidence in the record as to his having made money, and insinuations in other questions, some of which were answered and some not answered. We have already indicated that the evidence is somewhat doubtful at some points, and there are other close questions in the case, and, on the whole record, we think it ought not to be said that the record as heretofore set out in regard to the wealth of the defendant was not prejudicial.

It is thought sometimes that in some of the cases a reversal has been had in civil actions for less serious misconduct than misconduct in some of the criminal cases where the conviction was affirmed. It would appear, perhaps, that the rule ought to be the other way, and yet a possible explanation of this is that, as is well known, in criminal cases counsel for defendant go outside the record in order to secure an acquittal, knowing that a new trial may not be granted under such circumstances, and that counsel for the state have a right to reply to such improper statements, and that, as long as the argument for the state is confined to a reply to improper argument by counsel for defendant, a reversal will not be had. If the state has no right to reply to such argument, then an acquittal might be obtained in a great many cases on matters [745] entirely outside the record, if the trial court does not control the trial. In civil cases, however, a new trial may be granted either party for prejudicial misconduct.

Some other matters have been argued, but we do not regard them as of controlling importance. Appellant's motion to strike the additional abstract is overruled.

For the errors pointed out, the judgment is reversed, and the cause remanded for another trial.

Deemer, C.J., and Evans and Ladd, JJ., concur.

NOTE.

Propriety of Argument of Counsel Referring to Poverty or Wealth of Party to Action.

General Rule, 312.

Qualification of Rule, 314.

Prejudicial Error, 315.

General Rule.

For counsel in argument to go outside the record of the case and call to the jury's at-

tention the financial condition of either of the parties to the action or to make reference to or draw a contrast between the relative wealth of the parties is generally deemed to be improper. The impropriety of remarks of that character is said to result from the fact that they hinder the jury in deciding the action on its merits since they incite the jurors' minds and passions and appeal to their emotions and sympathy.

Delaware.—Jones v. Tucker, 3 Boyce 422, 84 Atl. 4, 1012.

Illinois.—Felix v. Scharnweber, 119 Ill. 448, 10 N. E. 16; Monmouth Min. etc. Co. v. Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Taylor v. Harris, 68 Ill. App. 92; Williamson v. Hirsh, 147 Ill. App. 500; Whitehead v. Springfield Light, etc. Co. 161 Ill. App. 564; Hammond v. Bloomington Canning Co. 190 Ill. App. 511.

Indiana.—U. S. Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Southern R. Co. v. Bulleit, 40 Ind. App. 457, 82 N. E. 474.

Iowa.—Sullivan v. Chicago, etc. R. Co. 119 Ia. 464, 93 N. W. 367; White v. Chicago, etc. R. Co. 145 Ia. 408, 124 N. W. 309; Almon v. Chicago, etc. R. Co. 163 Ia. 449, 144 N. W. 997. And see the reported case.

Kentucky.—Louisville, etc. R. Co. v. Morgan, 110 Ky. 740, 62 S. W. 736; Illinois Cent. R. Co. v. Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598; Carter Coal Co. v. Hill, 166 Ky. 213, 179 S. W. 2.

Michigan.—Smith v. Jennings, 121 Mich. 393, 80 N. W. 236; Davis v. Adrian, 147 Mich. 300, 110 N. W. 1084; Holmes v. Loud, 149 Mich. 410, 112 N. W. 1109.

Missouri.—Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037; Norris v. St. Louis, etc. R. Co. 230 Mo. 695, 144 S. W. 783.

New Hampshire.—Caverhill v. Boston, etc. R. Co. 77 N. H. 330, 91 Atl. 917; Lemay v. Demers, 77 N. H. 563, 94 Atl. 262.

New York.—Griffith v. American Bridge Co. 163 App. Div. 597, 148 N. Y. S. 994.

North Carolina.—Jenkins v. North Carolina Ore Dressing Co. 65 N. C. 563.

Oklahoma.—St. Louis, etc. R. Co. v. O'Connor, 43 Okla. 268, 142 Pac. 1111.

Texas.—Willis v. McNeill, 57 Tex. 465; Texas, etc. R. Co. v. Jarrell, 60 Tex. 267; The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Chicago, etc. R. Co. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; Texas Cent. R. Co. v. Pledger, 36 Tex. Civ. App. 248, 81 S. W. 755; Dallas Consol. Electric St. R. Co. v. Black, 40 Tex. Civ. App. 415, 89 S. W. 1087; Duerler Mfg. Co. v. Eichhorn, 44 Tex. Civ. App. 638, 99 S. W. 715; Ft. Worth Belt R. Co. v. Johnson, 59 Tex. Civ. App. 105, 125 S. W. 387; Chicago, etc. R. Co. v. Swann, 60 Tex. Civ. App. 427, 127 S. W. 1164; Gulf, etc. R. Co. v. Fox (Tex.) 6 S. W. 569; Bit-

terman v. Hearn (Tex.) 32 S. W. 341; Southwestern Tel. etc. Co. v. Taylor (Tex.) 118 S. W. 188; Campbell v. Prieto (Tex.) 143 S. W. 668; Gulf, etc. R. Co. v. Culver, 168 S. W. 514.

Vermont.—McKenzie v. Boutwell, 79 Vt. 383, 65 Atl. 99.

Wisconsin.—Neumeister v. Goddard, 133 Wis. 405, 113 N. W. 733.

In the note to Louisville, etc. R. Co. v. Payne, Ann. Cas. 1912A 1291, a review may be found of the cases passing on the propriety and effect of a reference by counsel to the wealth of a corporate party when the evident purpose of the remarks is to draw attention to the fact that the party referred to is a corporation.

In Southern R. Co. v. Bulleit, 40 Ind. App. 457, 82 N. E. 474, the following remark was held to be improper: "Give him [plaintiff] \$2,000. The defendant will make that much money in the time you are signing your verdict."

In Illinois Cent. R. Co. v. Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598, the words complained of and condemned were as follows: "No verdict you can render, gentlemen, will ever sufficiently compensate him for what he has suffered. The wealth the millions upon millions owned by this defendant, if it were given to him, would not make good to him the loss that he has sustained. I had no stenographer to take down your speech. Poor Proctor could afford no such luxury."

In Jenkins v. North Carolina Ore Dressing Co. 65 N. C. 563, it was held to be improper for the plaintiff's counsel to speak of his client as a "poor widow" and of the defendant as "a wealthy corporation, attempting to cheat her out of her rights."

In Caverhill v. Boston, etc. R. Co. 77 N. H. 330, 91 Atl. 917, an argument of the plaintiff's counsel that the verdict asked for was not a very serious matter to the railroad, "taking from them a few coppers," but meaning "a good deal to her," was held to exceed the limits of legitimate argument.

In Miller v. Burgess (Tex.) 136 S. W. 1174, the objectionable words used were as follows: "Why shouldn't this defendant, P. J. Miller, pay to this poor working boy the amount of his note, when he (meaning Miller) lives on his ranch in Jones county and counts his white-faced Hereford cattle by the hundreds, and controls property and people like a feudal lord; when he owes to his plaintiff the amount of his debt, which represents hard, honest toil on his part."

In Chicago, etc. R. Co. v. Swann, 60 Tex. Civ. App. 427, 127 S. W. 1164, it was held to be improper for counsel to say that the amount appellee sought to recover was a "little thing" to the appellant but a "big thing" to the appellee.

In *Norris v. St. Louis, etc. R. Co.* 239 Mo. 695, 144 S. W. 783, the plaintiff's counsel in argument said: "Gentlemen, this young girl comes to you, not of the silk stocking aristocracy. . . . Now, when she was asked about resigning, Judge Robinson says, 'Did you write out your resignation?' And she answered, 'Why, no. Of course not.' She is not like one of those big railroad officials. When a railroad lawyer or a railroad president resigns, they write it out and have a big red seal on it and a pink ribbon and all that." In condemning the use of such words the court said: "The trial court should not permit argument which amounts to an appeal to the jury to give judgment for one party on account of his poverty or the wealth of the opposite party; and trial courts should promptly rebuke counsel who indulge in such arguments."

In *Campbell v. Prieto (Tex.)* 143 S. W. 668, the defendant's counsel called attention to the fact that the plaintiff was a man well to do and financially able to lose the suit and that the defendant was a poor, poverty-stricken Mexican peddler, and was unable to withstand any loss in the suit. The court said: "The relative financial conditions of the parties had not been proved, and could not properly have been proved, and any reference to such matters was not permissible, and it should have been promptly condemned and checked by the court."

In *Neumeister v. Goddard*, 133 Wis. 405, 113 N. W. 733, the plaintiff's counsel used the following language: "Hi Goddard can spend a thousand dollars to their hundred. . . . Half the money spent in this litigation would heal the wound he has made in the financial standing and position of these people in the world. He would not pay them, but rather spend it on lawyers. The time may come when you will come up against the power of money." The court expressed its disapproval as follows: "The use of such language to a jury cannot be too severely censured. It is not argument. It is rather insinuation pregnant with unfair suggestion. The restraints of self-respect and the rules of forensic argument alike forbid it. The field for argument and illustration is broad and inviting. . . . There is no justification or excuse for leaving it and selecting instead improper suggestions."

Qualification of Rule.

Where the poverty or wealth of a party to an action is shown by the evidence and a reference thereto has some legitimate bearing on the case it does not constitute improper argument. Thus in *Norris v. St. Louis, etc. R. Co.* 239 Mo. 695, 144 S. W. 783, the plaintiff's counsel said: "Years ago

the father of this brave little woman died of consumption, and left her to make her own way in the world." The fact that the plaintiff's father had died of consumption leaving the plaintiff an orphan, having been brought out in the evidence by the defendant, as tending to show a probable cause for the decline of the plaintiff's health, was held to leave no ground for objection to the remark. In *Gilman v. Laconia*, 71 N. H. 212, 51 Atl. 631, it was shown by the evidence that the plaintiff was a person who "ran a small baggage express" with one horse, and the defendant was a municipal corporation. The following remark of the plaintiff's counsel in his closing argument was held not to be improper: "I do not ask for a verdict for my client because he is a poor man, nor because the city is rich and powerful; I only ask for a verdict if he is entitled to one under the law and the evidence." In *Hersey v. Hutchins*, 70 N. H. 130, 46 Atl. 33, the plaintiff's counsel in his closing argument, replying to some comment of the defendant's counsel on certain plans of the plaintiff and the defendant, said: "Our client here is a woman of small means; she couldn't be at the expense the defendant has in making surveys." In holding such remarks to be proper the court said: "The argument that the plaintiff, having small means, could not be to so great an expense as the defendant had been to in procuring plans, stated no fact that was not in evidence. It was proper to suggest to the jury that the rudeness of her plans was not due to a purpose of withholding information from them, but to her want of means to procure more elaborate ones. This view was properly urged upon the jury as an answer to the defendant's comments upon the comparison of his plans with hers. . . . The instruction that the case was not to be decided upon the fact as to the comparative wealth or poverty of the parties was correct; but the direction to the jury to entirely disregard the remark of counsel, took from the plaintiff her right to have the circumstance of her limited means considered upon the question of why she did not furnish more or better plans." In *Winston v. Terrace*, 78 Wash. 140, 138 Pac. 673, wherein the respondent's counsel referred to the appellant as a "millionaire" and as being "a rich man," the remarks were held to be within the scope of legitimate argument when consideration was given to the fact that the appellant had pleaded in his answer in the action which was for trespass and assault that he was known in the community where he lived "to be worth a considerable sum of money and to have considerable property," which facts were testified to on his behalf in support of his claim that the action of the respondents was the result of a conspiracy on the part

of the respondents to obtain some part of his property. In *Baker v. Madison*, 62 Wis. 147, 22 N. W. 141, 583, counsel was held to have used with propriety the following words: "I am careful not to get error into the case. If my client was a rich man, I should like to litigate this matter for the next twenty-five years, and I think it would give me a good support; but my client is poor, and we live in Minneapolis, and every time we come down here it costs him a hundred dollars." The court said: "The remark that plaintiff was a poor man, and the allusion to the expense of the litigation in connection with that fact, if unproved, would have been improper, not because such statement was pertinent to the issue—for it was not—but because it might have tended unduly to influence the minds of the jurors in favor of the plaintiff, which, on principle, is as objectionable as prejudice against the defendant. But we think it a fair inference from the testimony that the plaintiff is not rich. He was a farm laborer, working for others for hire in summer, before and after he was injured, and sometimes taught school in the winter. He had no mechanical trade. It is not unreasonable to infer from his condition and employment that he was poor. The rule we are considering does not prohibit a statement by counsel of a fact proved in the case, even though such fact is outside the issue."

Where the wealth of a party is referred to for a purpose which is under the circumstances plausible argument, the remarks are not open to objection. *McKinnie v. Lane*, 133 Ill. App. 438, *affirmed* 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338, wherein reference to the standing and position of the appellant was made for the purpose of showing the confidence of the appellee in the appellant when he signed and delivered a receipt though it was alleged that the bill had not been paid. In *Cook v. Smith-Lowe Co.* 135 Ia. 31, 109 N. W. 798, it was contended that the fact that the plaintiff returned to work too quickly retarded his complete recovery from an injury for which he sought to recover. It was held that the statements of counsel in argument that "miners do not have a very large bank account" and that "he had a wife and family, and he had to get daily bread" were not improper but legitimate argument to show that the plaintiff's return to work before he had completely recovered and at a time when physical exertion would be injurious to him should not be construed against him in determining the amount of his recovery.

In an action for the death of a husband and father by wrongful act, since the jury may consider the financial loss accruing from the deprivation of the society, comfort, care,

and protection of the deceased as well as of his support, it has been held that counsel may properly in his address to the jury "picture to the imagination the probable pecuniary privations and condition of the bereaved widow and child resulting from the absence of the supporting care and protection of the deceased." Under such circumstances the argument is directed to an element of damage allowed by law. *Hale v. San Bernardino Val. Traction Co.* 156 Cal. 713, 106 Pac. 83.

Where the party complaining is the first to offend the court will refuse to entertain any complaint with regard to the alleged objectionable words. *Patton v. Lund*, 114 Ia. 201, 86 N. W. 296, wherein the plaintiff's counsel declared that the defendant was not a poor widow in answer to a statement by her counsel that she was.

Prejudicial Error.

Improper remarks of counsel referring to the wealth or poverty of the parties have generally been held to constitute ground for a reversal of the judgment where the remarks are objected to and there is no instruction by the court that they are to be disregarded by the jury. *Taylor v. Harris*, 68 Ill. App. 92; *U. S. Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69; *Almon v. Chicago, etc. R. Co.* 163 Ia. 449, 144 N. W. 997; *Illinois Cent. R. Co. v. Proctor*, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598; *Carter Coal Co. v. Hill*, 166 Ky. 213, 179 S. W. 2; *Smith v. Jennings*, 121 Mich. 393, 80 N. W. 236; *Holmes v. Loud*, 149 Mich. 410, 112 N. W. 1109; *Willis v. McNeill*, 57 Tex. 465; *Texas, etc. R. Co. v. Jarrell*, 60 Tex. 267; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117; *Chicago, etc. R. Co. v. Langston*, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; *Ft. Worth Belt R. Co. v. Johnson*, 59 Tex. Civ. App. 105, 125 S. W. 387; *Chicago, etc. R. Co. v. Swann*, 60 Tex. Civ. App. 427, 127 S. W. 1164; *Bitterman v. Hearn (Tex.)* 32 S. W. 341; *Southwestern Tel. etc. Co. v. Taylor (Tex.)* 118 S. W. 188; *Miller v. Burgess (Tex.)* 136 S. W. 1174; *Campbell v. Prieto (Tex.)* 143 S. W. 668; *Gulf, etc. R. Co. v. Culver (Tex.)* 168 S. W. 514. *Compare Louisville, etc. R. Co. v. Morgan*, 110 Ky. 740, 62 S. W. 736. Thus in *U. S. Cement Co. v. Cooper*, *supra*, it appeared that counsel said: "The plaintiff is not rich. He was not born with a silver spoon in his mouth. He cannot sit in a richly adorned chair with silver and gold piled about his plate. He cannot ride in fine chariots. He does not have millions, like the defendant, made from the labor of other men." In holding that the impropriety was fatal to the judgment the court said: "The

appellant, in the presence of the jury, objected to the language at the time, and moved that the court withdraw the same from the jury, which motion was overruled. Appellant thereupon moved that the court withdraw the case from the jury and set aside the submission, which motion was also overruled, and an exception properly reserved. The language complained of was not directed to any issue or legitimate evidence in the case, and was of a prejudicial character. There could have been no justification for its use, and it cannot now be said that it did not affect the result."

However, in some cases remarks of that character have been held not to constitute reversible error where it did not clearly appear that they had prejudiced the rights of and worked an injury to the adverse party. *Gulf, etc. R. Co. v. Fox* (Tex.) 6 S. W. 569; *Dugan v. Chicago, etc. R. Co.* 85 Wis. 609, 55 N. W. 894. See also *Texas Cent. R. Co. v. Pledger*, 36 Tex. Civ. App. 248, 81 S. W. 755.

The effect of the impropriety of uttering remarks as to the wealth or poverty of the parties has been held to be cured by an emphatic instruction of the court to the jury that statements of that nature are to be disregarded. *Jones v. Tucker*, 3 Boyce (Del.) 422, 84 Atl. 4, 1012; *Whitehead v. Springfield Light, etc. Co.* 161 Ill. App. 564; *Southern R. Co. v. Bulleit*, 40 Ind. App. 457, 82 N. E. 474; *Hamlin v. Philbrook* (N. H.) 97 Atl. 977; *Duerler Mfg. Co. v. Eichhorn*, 44 Tex. Civ. App. 638, 99 S. W. 715; *McKenzie v. Boutwell*, 79 Vt. 383, 65 Atl. 99; *Neumeister v. Goddard*, 133 Wis. 405, 113 N. W. 733. See also *Felix v. Scharnweber*, 119 Ill. 448, 10 N. E. 16; *Graves v. Bonness*, 97 Minn. 278, 107 N. W. 163; *Bitterman v. Hearn* (Tex.) 32 S. W. 341; *Southwestern Tel. etc. Co. v. Taylor* (Tex.) 118 S. W. 188. And see the reported case. *Compare Griffith v. American Bridge Co.* 163 App. Div. 597, 148 N. Y. S. 994. Thus in *Duerler Mfg. Co. v. Eichhorn*, supra, it was said: "But counsel, in his speech to the jury, spoke of Miss Eichhorn as a 'penniless girl.' He ought not to have done that. A verdict should not be sought upon anything save evidence in the record pertinent to the issues in the case, for it rests upon nothing else. The strongest guard that conscience can muster should be placed over a jury where there is 'a woman in the case,' and her lawyer ought to be satisfied with the fact that his client is a woman, and not 'roll it under his tongue as a sweet morsel' that she 'is penniless' and throw it out for the jury to ruminate upon, lest it excite the sympathy of its members and put conscience to flight and warp their judgment. But as 'a wise man forseeeth danger and shunneth it,' the trial judge in-

structed the jury not to consider the remark of counsel as to her being a 'penniless girl,' saying that plaintiff's condition had nothing to do with her right to recover. . . . It should be presumed, therefore, that the jury regarded the instruction of the court, and its verdict was not influenced by the remark."

Where it appears that an instruction to disregard statements of counsel as to the wealth or poverty of the parties was given by the court it will be presumed to have been obeyed by the jury. *Jones v. Tucker*, 3 Boyce (Del.) 422, 84 Atl. 4, 1012; *Southern R. Co. v. Bulleit*, 40 Ind. App. 457, 82 N. E. 474; *Hamlin v. Philbrook* (N. H.) 97 Atl. 977; *Duerler Mfg. Co. v. Eichhorn*, 44 Tex. Civ. App. 638, 99 S. W. 715. *Compare Griffith v. American Bridge Co.* 163 App. Div. 597, 148 N. Y. S. 944. And see *Sullivan v. Chicago, etc. R. Co.* 119 Ia. 464, 93 N. W. 367, wherein it was held that the effect of words of that nature was not remedied by the trial court merely saying: "It is an improper statement to the jury to even call their attention to a matter of that character." The appellate court said: "Jurors, as a rule, do not come to the trial of causes with minds trained to a proper discrimination between what are and what are not relevant matters; and, by reason of the lack of legal education and experience, they are oftentimes innocently, and even unconsciously, controlled in their view of causes submitted to them by influences that would have no place in the consideration of one familiar with the ethics of the law, and accustomed to the work of legal decision. . . . It does not always follow that a direction by the court to disregard certain improper matters, to which attention has been called during the trial, has the desired effect. The juror may honestly endeavor to keep the improper matter out of sight, and believe that he has done so, and yet unconsciously it may enter as an element into the composition of its verdict. If we expect to retain the benefits of our jury system, great care must be taken not only by the court, but by attorneys as well, to see to it that only matters proper for their consideration are brought to the attention of juries."

It has been held that the error committed by uttering improper remarks as to the wealth or poverty of the parties was remedied where the court told the jury that the parties must be regarded as on an equal footing, and no request for further instructions was made. *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084. And in *White v. Chicago, etc. R. Co.* 145 Ia. 408, 124 N. W. 309, the error was held to be cured by a withdrawal of the remarks by the counsel even in the absence of an instruction from the court. The court said: "Whether by design

or inadvertently in the heat of argument counsel succeeded in getting before the jury (1) the poverty of plaintiff; (2) the wealth of defendant. . . . True there was some evidence that plaintiff was without means, but this did not authorize counsel to make use of the circumstance as a basis of argument contrasting his poverty with defendant's wealth. Neither circumstance was entitled to the slightest weight in determining the amount of damages to be allowed. But counsel withdrew the remark concerning defendant's millions in a way to obviate any prejudice, for what he said plainly indicated that this was not for the jury's consideration." But in *Williamson v. Hirsh*, 147 Ill. App. 500, wherein it appeared that "the court ruled against the remarks" of the plaintiff's counsel to the effect that the defendants were "large manufacturers, a wealthy concern," and stated in addition that there was nothing in the record showing the defendants to be a wealthy concern, it was held that the remarks constituted ground for reversal, it not being safe to say that the words were not prejudicial.

In *Caverhill v. Boston*, etc. R. Co. 77 N. H. 330, 91 Atl. 917, and *Lemay v. Demers*, 77 N. H. 563, 94 Atl. 262, it was held that an improper statement referring to wealth or poverty having been objected to, it was incumbent on the party making the same in order to remedy the error to withdraw it, and to obtain an instruction to the jury not to consider it and a finding of fact from the presiding justice that the trial was not rendered unfair thereby, a failure to comply fully with those details being fatal to the verdict.

In *Jenkins v. North Carolina Ore Dressing Co.* 65 N. C. 563, it was held that except where there is a gross abuse of privilege the trial court need not stop the counsel and reprove him at the time of the utterance on being requested to so do by opposing counsel, but may make the correction along with other matters in his charge. The appellate court said: "Zealous advocates are apt to run into improprieties; and it must generally be left to the discretion of the judge, whether it best comports with 'decency and order,' to correct the error at the time, by stopping or reproving the counsel; or wait until he can set the matter right in his charge. It must often happen that the judge cannot anticipate that the counsel is going to say anything improper; and it may be said before the judge can prevent it, as in this case. The judge could not know that the counsel was going to speak of his client as a 'poor widow.' And then the question was, whether he was obliged to stop the counsel then and there, and reprove him, and tell the jury that they must not consider that, or whether

he would wait and correct that, and all other errors, when he came to charge the jury. Ordinarily this must be left to the discretion of the judge. But still it may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial. In the case before us the impropriety was not gross."

An objection to improper references as to wealth or poverty is held to be essential to a party's right to complaint thereof on appeal. *Norris v. Whyte*, 158 Mo. 20, 57 S. W. 1037; *St. Louis, etc. R. Co. v. O'Connor*, 43 Okla. 268, 142 Pac. 1111. And the objection, it appears, should be made at the time the utterance is made. *Norris v. Whyte*, supra, wherein it was said: "The argument of counsel to the jury is part of the proceedings in the case, an incident of the trial, just as much so as the testimony of the witnesses or any other step that is taken in the trial, and any objection to remarks of counsel must be made at the time the remarks are made and a ruling of the court obtained or asked therein just as is required when a question to a witness is objected to, so that the error may be prevented or its effect corrected by the court, and a failure to do so at the time is fatal to the right to object to it afterwards."

But under the rules governing the Texas district courts it has been held to be discretionary whether objection shall be made at the time of the utterance of the remarks or whether the question shall be raised by the bill of exceptions presented as ground for a new trial. *Willis v. McNeill*, 57 Tex. 465, wherein it was said: "This discretion given to counsel, as to whether he will make the objection at the time, was doubtless based upon the well-known embarrassments and often prejudice which generally attend the interruption of the argument of one counsel by another; and was intended to place that as a duty where it properly belongs—upon the presiding judge."

In *Norris v. St. Louis*, etc. R. Co. 239 Mo. 695, 144 S. W. 783, it was held that a mere objection and exception was not enough on which to base a reversal, but that a request should be made to have the offending counsel disciplined and an exception taken to a refusal of that request. The court said: "Except in extreme cases, it is not sufficient to secure reversal, for an attorney to merely object and except to the remarks of opposing counsel. He should request that the transgressing counsel be rebuked by the court; and where the proper rebuke is not administered, he should except to the court's failure

to rebuke; otherwise, this court will be disinclined to grant a new trial based on improper remarks of counsel."

WALSH

v.

CITY OF BRIDGEPORT.

Connecticut Supreme Court of Errors—
October 8, 1914.

88 Conn. 528; 91 Atl. 969.

Appeal and Error — Assignments of Error — Sufficiency — Erroneous Assumption.

Where the allegations of a complaint and the findings of fact were materially different in several particulars, assignments of error assuming that the record showed that the allegations of the complaint had been found proven are improper.

Fire Department — Pay of Fireman — Absence on Account of Sickness.

Bridgeport City Ordinance March 15, 1909, § 134, provides that the board of fire commissioners may continue, in their discretion, the salary of any officer or member of the fire department who shall have received any injury while in the performance of his duty, incapacitating him from performing his usual duties in the department. It is held that such provision gives rise to a conclusive inference that firemen will not be entitled to salary during absence because of incapacity to perform their duties not received while in the performance of duty.

Same.

Bridgeport City Ordinance March 15, 1909, § 134, provides for the regulation of the fire department of the city by a board of fire commissioners, prescribes the manner of paying their salaries, and declares that the board may continue the salary of a member of the department unable to perform his duties by reason of incapacity received while performing the usual duties of the department. In April, 1910, the city adopted an ordinance by which members of the fire department were divided into three classes, section 2 of which provided the yearly salaries of each grade, but made no reference to the method of compensation, the time when it was to be paid, or the power of the commissioners to continue the salary of a member when incapacitated from service. It is held that such later ordinance did not operate as an implied repeal of the former, so as to warrant payment of salary to a fireman while absent from duty because of illness not contracted in the service of the department.

Ordinances — Implied Repeal.

Where a later ordinance contains no repealing clause, it will not repeal a former

ordinance unless the later one is clearly intended as a substitute for the earlier, or there is an irreconcilable conflict between them, and then only so far as the inconsistency extends.

Words and Phrases — "Wages" and "Salary" Distinguished.

The word "salary," as used in a city ordinance providing for the compensation of firemen, is synonymous with "wages," though the word "salary" is sometimes understood to relate to compensation for official or other services, as distinguished from "wages," which is the compensation for labor.

[See note at end of this case.]

Appeal from City Court of Bridgeport:
COUGHLIN, Judge.

Action by Thomas Walsh, plaintiff, against City of Bridgeport, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Hugh J. Lavery and Laurence S. Finkelstone for appellant.

John S. Pullman for appellee.

[529] RORABACK, J.—This is an action brought by Thomas Walsh, a fireman of the city of Bridgeport. The plaintiff alleges in his complaint that there is a certain sum of money due him as a portion of his salary as a fireman of the defendant city, which it, through its board of fire commissioners, refused to pay.

The record shows that this case was tried in the City Court of Bridgeport at its March term, 1914; that the court, having heard the parties, found the issues for the defendant, and adjudged that the defendant recover of the plaintiff its costs.

The plaintiff appealed, and the parties agreed to a finding of facts in the case, which the trial court adopted.

Upon appeal to this court the only errors assigned are: (1) "That the court erred and mistook the law in ruling that upon the allegations of the complaint alleged and proved, said Thomas Walsh was not a salaried public officer of the City of Bridgeport. (2) That the court erred and mistook the law in ruling that upon the allegations of the complaint alleged and proved, the said Thomas Walsh was not entitled to his salary during the time he was absent from duty by reason of illness. (3) That the court erred and mistook the law in ruling that upon the allegations of the complaint alleged and proved, the ordinance of the City of Bridgeport, which became effective on the first day of April, 1910, said ordinance regulating the pay of firemen [530] of said city, did not repeal such portions of Section 134 of the ordinances of the City of Bridgeport, as amended on March 15th, 1909, as gives the Fire Commis-

sioners the power to deduct pay from the salary of the said Thomas Walsh, while the said Thomas Walsh was absent from duty by reason of illness."

The plaintiff, in his assignment of errors, assumes that the record showed that the allegations of the complaint have been found to be proven. This assumption is not true. The record discloses no foundation for any such claim. The allegations of the complaint and the finding of facts in several particulars are materially different. Assignments of error should be supported by the record. *Palmer v. Hartford Dredging Co.* 73 Conn. 182, 190, 47 Atl. 125.

The third reason of appeal, although improperly framed, we shall treat, as both parties have treated it, as if properly made for the purpose of considering the action of the trial court in holding that the ordinance which took effect in April, 1910, raising the firemen's pay, did not repeal § 134 of the ordinance of 1909, which requires "an accurate semi-monthly pay roll of the officers and members of the fire department, in which shall be designated the date and period of service of each officer and member and the amount due each of them up to the first and 16th days of each month respectively."

The charter of the city of Bridgeport authorizes the common council to make, alter and repeal orders and ordinances regulating the fire department and fixing the salaries of its members. 15 Special Law, p. 513, § 53. Pursuant to this power the common council has from time to time passed ordinances changing the pay of the city firemen and regulating the manner in which the pay rolls of the fire department should be made up.

In May, 1907, the plaintiff was duly appointed a [531] fireman of the city of Bridgeport and is still a member of that department.

On March 15th, 1909, the ordinance upon this subject was amended to read, in part, as follows: "Section 134. The board of fire commissioners shall keep a record of the officers and members of the department and of each separate company thereof. They shall also keep an accurate semi-monthly payroll of the officers and members of the fire department, in which shall be designated the date and period of service of each officer and member and the amount due each of them up to the first and 16th days of each month respectively, and said pay roll shall be delivered to the city auditor on or before the 1st and 16th days of each month to be kept on file. The city clerk is hereby authorized and empowered to draw his order on the city treasurer on the 1st and 16th days of each month respectively, for the amount of such pay rolls in favor of the clerk of the board of fire commissioners or of the president of the

board of commissioners and the amount so received by said clerk of the board of fire commissioners shall be disbursed by him to the officers and members of the fire department in the manner herein provided, but in the absence or disability of said clerk, by the president of the board of fire commissioners or such person as the fire commissioners shall designate. On the 1st and 16th days of each month, respectively, said clerk of the board of fire commissioners shall pay to each officer and member of the fire department that sum of money which is due to each of them on said days, and when payment is so made said clerk shall take a receipt upon said pay roll of each officer and member so paid for the amount paid to him and said pay roll thus receipted shall be lodged with the city auditor and kept on file by him. The board of fire commissioners may continue, in their discretion, the salary of any officer or member of the [532] fire department who shall have received any injury while in the performance of his duty incapacitating him from performing his usual duties in said department."

The last clause, which gives the board of fire commissioners power, in their discretion, to continue the salaries of members during their incapacity resulting from injuries received while in the performance of their duties, makes the inference conclusive that but for this provision they would not be entitled to their salaries during such incapacity, nor during the time they failed to perform their duties because of incapacity not received while in the performance of their duties.

This ordinance took effect April 1st, 1909, and has never been repealed unless by the adoption of a regulation made by the defendant city, which provided: "Section 1. After April 1, 1910, the permanent drivers, hosemen, stokers, linemen, laddermen and tillermen shall be divided in three grades, the highest to be known as Grade A, the next to be known as Grade B, and the lowest to be known as Grade C. All permanent drivers, hosemen, stokers, linemen, laddermen and tillermen appointed after this ordinance takes effect shall serve the first year in Grade C, the next succeeding year in Grade B, and each succeeding year thereafter in Grade A. Each driver, hoseman, stoker, lineman, ladderman and tillerman, who is a member of the regular force on April 1, 1910, shall then be placed in that one of the grades herein provided for, to which his length of service preceding April 1, 1910, entitles him to belong. Drivers, horsemen, stokers, linemen, laddermen and tillermen may be reduced at the discretion of the board of fire commissioners from one grade to another lower grade as a punishment for any offense coming under the jurisdiction of the board of fire commissioners. Section 2. Commencing April 1,

1910, the yearly salaries [533] of the members of the fire department, indicated below, shall be as follows: Captains, \$1,400; engineers, \$1,300; lieutenants, \$1,250. And Grade A, drivers, hoseman, stokers, linemen, ladder men and tillermen, \$1,200. Grade B, drivers, hosemen, stokers, linemen, ladder men and tillermen, \$1,100. Grade C, drivers, hosemen, stokers, linemen, ladder men and tillermen, \$1,000. Section 3. This ordinance shall take effect April 1, 1910, and all ordinances or parts of ordinances heretofore enacted and inconsistent herewith, are hereby repealed, to take effect April 1, 1910."

Under this ordinance the plaintiff became a member of Grade A of the fire department, so-called, and was entitled to a salary at a yearly rate of \$1,200. On April 11th, 1910, the plaintiff became ill from eczema which did not arise out of his employment as fireman, and by reason of such illness was incapacitated from duty and did not report for duty until April 25th, 1910. The bi-monthly payrolls of the fire department for the month of April, 1910 (as called for in §134 of the ordinances), did not call for any payment to the plaintiff for services from April 11th, 1910, to and including April 25th, 1910. The omission of salary due to the plaintiff on the pay rolls from April 11th, 1910, to April 25th, 1910, was due to the fact that the plaintiff did not report for duty. The plaintiff would have received from the city the sum of \$46.66 more than he did actually receive for services in the month of April, 1910, if no deduction had been made in his pay roll for the two weeks he was off duty.

It is conceded that the controlling question in the case is as to the effect of the ordinance of April, 1910, upon the ordinance of 1909 (§ 134). If the provisions of the ordinance of 1909 (§ 134) are repealed by the ordinance of 1910, the plaintiff has the right to recover; if not, this action cannot be maintained.

[534] "All statutes, whether remedial or penal, should be construed according to the apparent intention of the legislature, to be gathered from the entire language used, in connection with the subject and purpose of the law." *Bissell v. Beckwith*, 32 Conn. 509, 516. The ordinance of April, 1910, embraces but one part of the general subject of the compensation of firemen. It deals with the different grades of firemen and the annual rates of compensation or salary. It makes no reference to the method of compensation, the time when it is to be paid, or the power of the commissioners to continue the salary of a member of the fire department when incapacitated from service. When two Acts are not in terms repugnant, yet if the later one covers the whole subject-matter of the former, and embraces new provisions plainly showing that it was intended as a substitute for the

former, the latter will operate as a repeal of the former. *U. S. v. Tynen*, 11 Wall 88, 20 U. S. (L. ed.) 153. No such conditions exist in the present case. There is no inconsistency or repugnancy between any of the provisions of the two ordinances. When the provisions of the ordinance of 1910 are read in connection with the provisions of the ordinance of 1909, it is apparent that there was no intention that the ordinance of 1910 should in any way supersede the provisions of the ordinance of 1909. They can both stand and have concurrent operation. The two ordinances can and must be read together, that the defendant municipality may administer its finances relating to this department in an orderly and intelligent manner.

It is plain that there is no repeal of § 134, as amended in 1909, unless, as the plaintiff claims, by implication. Such repeals are not favored, and will not be extended beyond the reason therefor, nor presumed where the old and new statute may well stand together. *Windham County Sav. Bank v. Hines*, 55 Conn. 433, 12 Atl. [535] 517; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Kallahan v. Osborne*, 37 Conn. 488; *Central Ry. etc. Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32. If both the earlier and the later statute can be reconciled, they must stand and have concurrent operation. *Goodman v. Jewett*, 24 Conn. 588; *Kallahan v. Osborne*, 37 Conn. 488; *Talcott v. Glastonbury*, 64 Conn. 575, 30 Atl. 764. The repugnancy between the two statutes must be clear and manifest, to warrant a court in holding that the later repeals the former. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Middletown v. New York, etc. R. Co.* 62 Conn. 492, 27 Atl. 119. A statute is not repealed by a later affirmative one containing no repealing clause, unless there is irreconcilable conflict, or the later statute is clearly intended as a substitute for the earlier. *Red Rock v. Henry*, 106 U. S. 596, 1 S. Ct. 434, 27 U. S. (L. ed.) 251; *Henderson's Tobacco*, 11 Wall. 652, 20 U. S. (L. ed.) 235. Repeals by implication extend to only so much of the prior statute as is within the reason of repeal. They are never extended further than the inconsistency compels. *New Haven, etc. Counties v. Milford*, 64 Conn. 568, 30 Atl. 768.

It is impossible to read the two ordinances together and come to the conclusion that there was any intention, either express or implied, in the ordinance of 1910, to change the method of regulating the compensation of the members of the fire department, or to deprive the board of fire commissioners of the discretionary power vested in them to disallow a claim for services which have never been rendered. The ordinance of 1910 deals with no such subjects directly or indirectly.

The word "salary" has not that inflexibility which the plaintiff claims for it. According to some lexicographers the words "wages" and "salary" are synonymous. The words seem to be synonymous, convertible [536] terms, though use and acceptance under certain circumstances may have given the word "salary" a significance somewhat different from the word "wages" in this: that the former is understood to relate to compensation given for official or other services as distinguishable from "wages," the compensation for labor. In the present case it makes but little difference whether the distinction here suggested be recognized or not. We are dealing with a case where the board of fire commissioners of Bridgeport, in their discretion, had the right to continue the salary of a member of the fire department when it should appear that he was injured while in the performance of his duty. The finding shows that Walsh became ill from eczema, which did not arise out of his employment, and that by reason of such illness he did not report for duty or render any services during the time for which he now claims to recover for services. The omission of the city of Bridgeport to pay was on this account.

There is no error.

In this opinion the other judges concurred.

NOTE.

Distinction between "Salary" and "Wages."

"Salary" and "Wages" Distinguished.

It has been held that the term "wages," as distinguished from "salary," applies to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month or season, while "salary" denotes a higher degree of employment, or a superior grade of services, and implies a position or office; that, by contrast, the term "wages" indicates inconsiderable pay for a lower and less responsible character of employment, while "salary" is suggestive of a larger and more permanent or fixed compensation for more important services. *Gordon v. Jennings*, 9 Q. B. D. (Eng.) 45, 51 L. J. Q. B. 417, 46 J. P. 519, 46 L. T. N. S. 534, 30 W. R. 704; *Wilkes-Barre First Nat. Bank v. Barnum*, 160 Fed. 245; *Gay v. Hudson River Electric Power Co.* 178 Fed. 499; *South, etc. R. Co. v. Falkner*, 49 Ala. 115; *In re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; *People v. Brookfield*, 13 Misc. 566, 34 N. Y. S. 674; *People v. Remington*, 45 Hun 329, *affirmed* 109 N. Y. 631, 16 N. E. 680; *Meyers v. New York*, 69 Hun 291, 23 N. Y. S. 484. See also *People v. Myers*, 25 Abb. N. Cas. 368, 11 N. Y. S. 217, 42 Alb. Ann. Cas. 1917B.—21.

L. J. 332; *Cochran v. A. S. Baker Co.* 30 Misc. 48, 61 N. Y. S. 724; *Bell v. Indian Live Stock Co. (Tex.)* 11 S. W. 344, 3 L.R.A. 642. And see the reported case. So, it has been said that the word "wages," in its application to laborers and employees, certainly conveys the idea of a subordinate occupation which is not very remunerative—one of not much independent responsibility, but subject rather to immediate supervision. *South, etc. R. Co. v. Falkner*, 49 Ala. 115; *In re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489. And it has also been said that the word "wages" is applied in common parlance specifically to the payment made for mechanical labor, or other labor of a manual kind, as distinguished from "salary," which denotes compensation paid to professional men. *In re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; *Cochran v. A. S. Baker Co.* 30 Misc. 48, 61 N. Y. S. 724.

In *Gordon v. Jennings*, 9 Q. B. D. (Eng.) 45, 51 L. J. Q. B. 417, 46 J. P. 519, 46 L. T. N. S. 534, 30 W. R. 704, it was held that the salary of the secretary of a corporation amounting to £200 a year, payable quarterly, was not "wages" within the meaning of the Wages Attachment Abolition Act of 1870 (33 & 34 Vict. c. 30, s. 1). *Grove, J.* said: "The intention of the act is to abolish the attachment of 'wages.' Now it may be that the term 'wages,' according to the etymological meaning of the word, may be correctly applied to any remuneration for services, but it seems to me that the popular signification must be looked to. The term 'wages' is not applied to the remuneration of a high or important office of the state or a company, for instance, but to that of domestic servants, laborers, and persons of a similar description. Taking the collocation of the word 'servant' with 'workman' and 'laborer,' it is obvious that the reasonable application of the act is to persons of small means—to servants, such as laborers and workmen receiving small wages at short periods. What is the position of the judgment debtor here? He is a secretary paid a salary of £200 a year by quarterly payments. I do not think his position and remuneration can be said to come within the same description as those of menial servants or laborers. His salary is more than sufficient to keep life up; his salary and employment are such as many persons in the position of gentlemen are sometimes glad to get." *Lopes, J.* said: "The question is whether the judgment debtor was a 'servant, laborer, or workman' receiving 'wages' within the meaning of the act. It is important to consider the object of the act in order to determine this question. It seems obvious from the terms used that the object was to except from the liability to attachment of debts the case of persons who would be likely

to be deprived of their daily means of subsistence by having their earnings attached in the hands of their employers. I do not think that a person in the position of the judgment debtor comes within the language or the spirit of the act. To be within the act I think a person must be earning what would be popularly called 'wages.' In the case of *In re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489, the court said, in speaking of a statute giving a preference to claims for wages against an insolvent corporation: "The most important word in the statute is the word 'wages.' It was wages that the legislature intended to prefer in the distribution of the assets of the insolvent corporation, not salaries, nor earnings, nor compensation. It was not intended to prefer the claims of all employees, but it was manifestly intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word wages. This word is applied in common parlance specifically to the payment made for manual labor, or other labor of menial or mechanic kind, as distinguished from salary and from fee, which denotes compensation paid to professional men. (Century Dictionary.) In its application to laborers and employees it conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to immediate supervision. This was the construction which this court placed upon the statute in the case of *People v. Remington*, 45 Hun 338, affirmed here on the opinion below, 109 N. Y. 631. It was said in that case that the statute was designed to secure the prompt payment of the wages of persons who, as a class, are dependent upon their earnings for the support of themselves and their families, and it was not designed to give a preference to the salaries and compensation due to officers and employees of a corporation occupying superior positions of trust or profit. I cannot doubt that this is a correct interpretation of the statute which conforms to the purpose which the legislature evidently had in view in its enactment. In order to give the preference provided by the statute, the claim must be for wages in the ordinary sense of that term. It was not, we think, the purpose of the statute to secure a preference for claims due to the clerical force engaged in transacting the business, nor to the superintendent, foremen or officers of the corporation who are compensated by a fixed yearly salary. Although the word employees is used, yet the purpose of the statute was to protect mechanics, operatives or laborers from loss of their wages in the event of the insolvency of the corporation. It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no

reason for excepting these corporations but for the fact, well known, that they do not employ labor, in the ordinary sense of that word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employees, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employees could protect themselves, whereas the common laborer, operative or mechanic, would be left by the failure of the business in a much more helpless condition. The wages of laborers, mechanics and domestic servants has in modern times become the subject of protective legislation in this and many other countries, and whenever the law has been extended beyond these classes, so as to include the claims of parties performing clerical duties or work of a like character, it was by judicial construction based upon language much broader than is to be found in the enactment in question." But see *Hopkins v. Cromwell*, 89 App. Div. 481, 85 N. Y. S. 839, wherein it was held that the words "wages" and "salary," as used in a statute (Laws 1897, p. 772, c. 624, § 29), providing for the distribution of the assets of an insolvent corporation under an assignment for the benefit of creditors, should be construed as being practically synonymous. The court affirmed the decision in the lower court, wherein it was said: "It is to be noted that the *Stryker* case (like several others somewhat contra) construes an act of more restricted phrase, in that the apt words there are 'wages' and not 'wages or salaries,' while the subjects of the statute are designated as 'operatives and laborers' and not 'employees.' . . . Broadly, the word 'salary' means a recompense or consideration made to a person for his pains or industry in another man's business. Jacob, quoted in *Abbott's Law Dictionary*. Whether it be derived from 'salarium,' or more fancifully from 'sal,' the pay of the Roman soldier, it carries with the fundamental idea of compensation for services rendered. Indeed, there is eminent authority for holding that the words 'wages' and 'salary' are in essence synonymous. . . . I think the legislature employed the words 'wages or salaries' while practically equipollent, for the purpose of fully describing the compensation which is to be paid to employees, inasmuch as that term, while embracing operative or laborer, means something more. The final question in every case is whether the subordinate tested by the character of his services and the nature of his relation, is an employee within the protection of the statutes, whose compensation may be fairly said to be

wages or salary, within the accepted scope of these terms; and the fact that the compensation in this case was practically paid for piece work, that is, for pickles after they were sorted, properly treated and forwarded for the principal as the result of plaintiff's manual labor, should not exclude the plaintiff from the benefits of this statute."

It has been held that the word "wages," in its ordinary acceptation, has a less extensive meaning than the word "salary;" that "wages" is ordinarily restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers, and other employees of like class, as distinguished from the compensation of clerks, officers of public corporations, and public officers. *Speilberger v. Brandes*, 3 Ala. App. 590, 58 So. 75; *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, 130 Am. St. Rep. 234, 28 L.R.A. (N.S.) 1108. See also *People v. Remington*, 45 Hun 329, *affirmed* 109 N. Y. 631, 16 N. E. 680.

In *Cowdin v. Huff*, 10 Ind. 83, the court said: "There are now, and were at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood. Fees are compensation for particular acts or services, as the fees of clerks, sheriffs, lawyers, physicians, etc. Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. Salaries are the per annum compensation to men in official and some other situations. The word salary is derived from *salarium*, which is from the word *sal*, salt, being an article in which the Roman soldiers were paid. See (the dictionaries of) *Richardson*, *Webster*, *Bouvier*, and *Wharton*." To the same effect see *Seiler v. State*, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; *Blick v. Mercantile Trust*, etc. Co. 113 Md. 487, 77 Atl. 844. But in *Board of School Com'rs v. Wasson*, 74 Ind. 133, the court after quoting the foregoing passage from *Cowdin v. Huff*, said: "Looking to the dictionaries, we find in *Webster's Unabridged* the word 'salary' is defined to be 'the recompense or consideration, stipulated to be paid to a person for services; annual or periodical wages or pay; hire;' and the synonyms given are, 'stipend; pay; wages; allowance;' and in *Worcester's Dictionary* the definition is, 'an annual or periodical payment for services, a stipulated periodical recompense; a stipend; wages; hire; an allowance.'"

The distinction between wages and salary has also been expressed in the following language: "Salary and wages are in their legal

application recognized as independent and distinct terms. 'Salary' has been defined to mean 'annual or periodical recompense or pay,' and 'wages' as a 'compensation given to a hired person for services rendered.' *Webst. Dict.* In ordinary language, the term 'wages' is applied to designate the sums paid to persons hired to perform manual labor; while the phrase 'salary' applies to those holding official station." *Cane v. New York*, 34 N. Y. S. 675. To the same effect see *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *People v. Myers*, 25 Abb. N. Cas. 368, 11 N. Y. S. 217, 42 Alb. L. J. 332. So, it has been held that a property clerk and assistant paymaster in a city department was not an "employee" of the city, "earning wages" within the meaning of the statute (Laws 1890, c. 388) requiring the weekly payment of wages. *People v. Myers*, 25 Abb. N. Cas. 368, 11 N. Y. S. 217, 42 Alb. L. J. 332.

The Georgia statute of 1872 with respect to exemption of "wages" from garnishment has been held to contemplate persons who have wages due them and whose wages were exempt from garnishment under previous acts, and it has been held that the salary of a public officer is in no fair sense of the word "wages." *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276.

In *State v. Duncan*, 1 Tenn. Ch. 334, in determining whether the defendant was a salaried employee of a quasi-public corporation, and therefore ineligible to hold any city office, the court said, after distinguishing between wages and salary: "The authorities that we have quoted differ to some extent but only with respect to the fullness or meagerness with which they state the contents of the thought in attempting to give a definition. If they all be taken together, we think the substance of the definition thus found, being at the same time the true result of all of these constructions, as well as by the common judgment of men, is that the term 'salary' contains three elements and that they are all required to round out and complete the thought. These three elements are. the dignity in popular estimation of the duty involved, as distinguished from purely mechanical or subaltern service; a fixed term, usually not less than one year; and compensation by contract. 'Salary' is therefore a compensation agreed upon between employer and employee (or settled by law in the case of public officers) for a fixed term of service of one year or some aliquot part thereof, as a half year or quarter year (usually, however, for a year) and for services that are not menial in their nature. We do not think that the periods of actual payment are material elements of the definition. . . . Now, let us apply the definition to the present case. So far as the nature of the service goes, Mr.

Duncan's employment easily falls within the definition. He not only had the duty of attending to the inspection and repair of the whole of the company's line of railway, but he had gang foremen and fifty men under him; and these men he employed and discharged at his discretion, and so long as they were in the service of the company he had the direction and supervision of their work. But the element of a contract for a fixed term of service is not proven. The fact that Mr. Duncan was paid weekly is not tantamount to saying that he was employed by the week, or the contrary. This fact is consistent with either a mere employment by the week or with a contract for a much longer term, say a year, payable in weekly instalments. Being consistent with each view, it proves neither. Nor does the fact that Mr. Duncan had been in the company's service for three years tend to prove the nature of his contract as to the term of service. He may have worked during all that time under an employment from week to week, or by the year. The latter is, of course, the more probable of the two, but in the state of the proof we are not justified in finding that such is the fact. Under the testimony, then, as it stands before us, we are unable to find whether he was a salaried employee of the company or not."

In the case of *In re Gay*, 233 Fed. 604, it was held that the salary of a mining engineer, who was employed as such at a salary of \$4,000 per annum, payable monthly, which was unpaid at the time of the bankruptcy of the employer, was not entitled to priority under the Bankruptcy Act (Act July 1, 1898, c. 541, § 64b (4); 30 Stat. L. 563, 1 Fed. St. Ann. 685, as amended 1 Fed. St. Ann. (2d ed) 1090), as being "wages due to a workman, clerk or servant." The court said: "In a sense, everybody who works may be said to be a workman, and everybody who serves to be a servant; but as used in this section the words have a much narrower meaning, and include only those who work, labor or serve in a more or less subordinate capacity. . . . I doubt whether the earnings of a professional man, employed primarily because of his learning and his ability to advise helpfully, are properly described as 'wages;' and I do not think that the man himself is a 'workman, clerk or servant,' within this section."

Under an Alabama statute (Acts 1868, p. 249) providing that "the wages of laborers and employees shall not be subject to garnishment or attachment, except for public dues," it has been held that the salary of the president of a railroad corporation was not exempt from garnishment or attachment though the president could not be said to be a laborer or employee within the meaning of the law. *South, etc. R. Co. v. Falkner*, 49 Ala. 115.

In the case of *Ex p. Bowes*, 34 N. Bruns. 76, it was held that the salary of a deputy sheriff and gaol keeper was not "wages" under the provisions of the statute (45 Vict. c. 17, § 33) providing for garnishee or trustee process, and so was not exempt thereunder.

The New York statute (Laws 1888, c. 119, as amended by Laws 1892, c. 577) providing that no honorably discharged soldier, sailor or marine, who "served as such in the Union army or navy during the War of the Rebellion, or the Mexican war," etc., who holds "a position by appointment in any city or county of this state, receiving a salary from such city or county," shall be removed except for cause shown after a hearing had, has been held to relate to salaried positions only and not to apply to persons employed by the day for wages. *Meyers v. New York*, 69 Hun 291, 23 N. Y. S. 484; *Nuttall v. Simis*, 22 Misc. 19, 47 N. Y. S. 1097, *affirmed* 31 App. Div. 503, 52 N. Y. S. 308.

In the case of *In re Jones* [1891] 2 Q. B. 231, it was held that the wages of a working man did not come within the words "salary or income" in the Bankruptcy Act (52 & 53 Vict. c. 52, sec. 53, sub-s. 2) and that therefore an order could not be made to pay any part of his earnings to his trustee in bankruptcy for the benefit of his creditors. In the case of *In re Earle's Shipbuilding, etc. Co.* [1901] W. N. 78, it appeared that workmen employed by the company were paid for their services in part by a fixed salary and in part by commissions on the tonnage of ships built in the yards. On the voluntary dissolution of the company; it was held that the amounts then due to and claimed by the employees, were "wages" and entitled to priority within the meaning of the Bankruptcy Act (51 & 52 Vict. c. 62, sec. 1, sub-a. 1 (b)).

"Salary" and "Wages" Held to Be Synonymous.

It has been held in same cases that the words "salary" and "wages" are synonymous; that both mean a sum of money periodically paid for services rendered. *White v. Hayden*, 126 Cal. 621, 59 Pac. 118; *San Juan County v. Oliver*, 7 Colo. App. 515, 44 Pac. 362; *Morse v. Robertson*, 9 Hawaii 195; *Koppen v. Union Iron, etc. Co.* 181 Mo. App. 72, 163 S. W. 560; *Com. v. Butler*, 99 Pa. St. 535; *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22. See also *Bovard v. Ford*, 83 Mo. App. 498; *Dayton v. Ewart*, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549. And it is immaterial how the value of the services is ascertained. *White v. Hayden*, 126 Cal. 621, 59 Pac. 118. In *Com. v. Butler*, supra, the court said: "According to the most approved lexicographers, the words 'wages' and 'salary' are synony-

mous. They both mean one and the same thing: 'a sum of money periodically paid for services rendered.' . . . The truth is, and this the lexicographers seem to hold, that if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. A farmer pays his farm hands in common speech wages—whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called a salary. An ironmaster pays his workmen wages, his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire and runs his errands, but he compensates his salesman or clerk by a salary. How can it make any difference in what way the compensation is ascertained?" And in *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22, in construing a statute (Act of April 15, 1845) providing that "the wages of any laborers, or the salary of any person . . . shall not be liable to attachment," the court said: "'Wages' is defined to be 'a compensation given to the hired person for his or her services,' *Bouvier's Law Dictionary*; 'Compensation for services by the day, week or month; compensation to a hired person for services,' *Kenney's Law Dictionary*; 'The compensation agreed upon by the master to be paid to a servant, or to any other person hired to do business for him,' *Wharton*. 'Salary' is said to be 'a reward or recompense for services performed,' *Bouvier's Law Dictionary*; 'a recompense or consideration made to a person for his pains and industry in another person's business,' *Cowel*, *Wharton*. It will thus be seen that, according to these definitions, there is substantially no difference in the meaning of the words. The essential of both is compensation for services rendered. In the common use of those terms the word 'salary' is employed in referring to a stated allowance for services of a superior grade, or for longer than a daily period; while the word 'wages' seems to be applied generally to compensation for short periods or for smaller sums. Taken together, they are broad enough to cover all compensation for services rendered in whatever occupation or capacity, no matter how extended or short the period of employment, or how large or small the amount. Whatever may be paid as to the extension of the application of either, when considered separately, there can be no doubt that within their united scope is included all remuneration for services performed by one person for another. It seems that in some states a distinction is made as to their legal import, but they are practically regarded as synonymous by the court of Pennsylvania."

Under the Missouri statute (Rev. St. 1889, § 5220; Rev. St. 1909, §§ 2415, 2416) provid-

ing for the exemption from garnishment of wages due for the last thirty days' service which is restricted to the heads of families, it has been held that the word "wages" is synonymous with "salary" and includes the salary or compensation due a comptroller and auditor and a general manager of a corporation. *Bovard v. Ford*, 83 Mo. App. 498; *Koppen v. Union Iron, etc. Co.* 181 Mo. App. 72, 183 S. W. 560. In the case last cited, the court said: "Section 89, Rood on Garnishment (ed. 1896), is quoted approvingly in the *Bovard* case, *supra*. That section reads: 'The manifest object of the statutes is to exempt the personal earnings of the defendant, as contradistinguished from any income or profits derived from speculative, mercantile or other business transactions; and it makes no difference by what means they are reckoned or ascertained, or what they may be termed. "If there is any difference, in the popular sense, between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. . . . A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs on errands, but he compensates his salesman or clerk by a salary.'" It is further said by the same author (section 93): 'The courts have no authority to make restrictions or limitations upon the exemption statutes other than those contained in the statutes themselves. . . . Likewise, the benefits of the statute may be claimed by all classes of persons, professional men as well as laborers, unless the statute excludes them by its own limitations.' . . . There are decisions in other jurisdictions which draw a line between the terms 'wages' and 'salary,' but we think that appellate courts of our own state have adopted the much broader use of the words, treating them as synonymous. Surely that is the more reasonable rule. Every one who works for another in any capacity for a stated compensation is a wage earner and the compensation wages. We may, out of a kind of pride, call it compensation or salary, and claim we are employed, not hired, but after all it amounts to the same thing—when we are employed, working, doing service, whether menial or of a higher grade, for another for pay, we are hired and are working, rendering service, for wages." However, in *Bigley v. Bellevue Borough*, 158 Pa. St. 495, 28 Atl. 23, it was held that wages of two dollars a day paid a constable to light the street lamps and patrol the streets, could not be regarded as an official salary within a constitutional provision prohibiting the decrease of an officer's salary during his term of office. It has been said that strictly, a salary is an agreed compensation for services, payable at regular intervals, but that a more liberal meaning is frequently given to the word; and that its synonyms are stipend, hire, wages, pay, al-

lowance. *San Juan County v. Oliver*, 7 Colo. App. 515, 44 Pac. 362; *Com. v. Bailey*, 3 Ky. L. Rep. 110.

In *Com. v. Cuyler*, 5 Watts & S. (Pa.) 275, it was held that a tax on salaries was a tax on wages, no matter how it was disguised.

McKINNEY

v.

ADAMS.

Florida Supreme Court—November 6, 1914.

68 Fla. 208; 66 So. 988.

Bathing Resorts — Liability of Keeper — Failure to Provide Life Lines.

Under the laws of this state an action may be maintained against a person who operates or maintains a bathhouse where bathing suits are furnished for hire, at the seaside resorts in the state, for negligence in failing to maintain proper and safe life lines and life rafts for the protection of his patrons, when the patrons who are not guilty of contributory negligence are injured as a proximate result of the negligence of such operator or his agents.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Duval county: GIBBS, Judge.

Action by Louise McKinney, administratrix, plaintiff, against W. H. Adams, defendant. Judgment for defendant. Plaintiff brings error. REVERSED.

[209] The declaration herein is as follows: "Louise McKinney, as Administratrix of the Estate of Mary E. Proctor, deceased, plaintiff, by her attorneys, in this the first count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on to wit, July 7th, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent, at Pablo Beach, a seaside resort in the State of Florida, situated in the County of Duval and State of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic Ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits and to avail them-

selves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic Ocean situated directly in front of said pavilion and bath house and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing and to bathe in the waters of the Atlantic Ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7th, A. D. 1912, one Mary E. Proctor, did [210] rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic Ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic Ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic Ocean, which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide and maintain proper and safe life lines and life rafts for the protection of the patrons of its patrons, bathers at the said seaside resort, contrary to the statutes of the State of Florida in such cases made and provided: that by reason thereof and by reason of the carelessness and negligence of the defendant the said Mary E. Proctor was then and there drowned in the waters of the Atlantic Ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic Ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died, leaving neither husband nor minor child or children nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on to wit, the seventeenth day of July, 1912, duly appointed as Administratrix of the estate of Mary E. Proctor.

Wherefore, the plaintiff brings this her suit and claims Fifty Thousand (\$50,000.00) Dollars damages.

2. And the plaintiff by her attorneys in this the second [211] count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on to wit, July 7th, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the State of Florida, situated in the County of Duval and State of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic Ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits and to avail themselves of the dressing rooms and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic Ocean situated directly in front of said pavilion and bath house and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing and to bathe in the waters of the Atlantic Ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on to wit, July 7th, A. D. 1912, one Mary E. Proctor, did rent from said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic Ocean [212] adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic Ocean adjacent to said bath house and pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic Ocean, which constituted defendant's facilities as aforesaid; that the defendant negligently and carelessly failed to provide suitable and proper persons to superintend and watch over bathing in the waters customarily used by the patrons of said bath house, and in which waters deceased was bathing, and to watch over and superintend its, defendant's, patrons, who were bathing in such waters; that by reason thereof and by reason of the care-

lessness and negligence of the defendant the said Mary E. Proctor was then and there drowned in the waters of the Atlantic Ocean, near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic Ocean, in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on to wit, the seventeenth day of July, 1912, duly appointed as administratrix of the Estate of Mary E. Proctor.

Wherefore, the plaintiff brings this her suit, and claims Fifty Thousand (\$50,000.00) Dollars damages.

3. And the plaintiff, by her attorneys, in this the third count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on to wit, July 7th, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion [213] where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the State of Florida, situated in the County of Duval and State of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic Ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic Ocean, situated directly in front of said pavilion and bath house and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing and to bathe in the waters of the Atlantic Ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on to wit, July 7th, A. D. 1912, one Mary E. Proctor, did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic Ocean adjacent to which the defendant's said bath house and bathing pavilion was

located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic Ocean adjacent [214] to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limits of the waters of said Atlantic Ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide proper persons or appliances to rescue his patrons in the said waters customarily used by his said patrons, which constituted the facilities for bathing offered to such patrons by the defendant, and in which waters deceased was bathing, when such patrons were or might have been in danger of drowning; that by reason thereof and by reason of the carelessness and negligence of the defendant the said Mary E. Proctor was then and there drowned in the waters of the Atlantic Ocean near the bath house and bathing pavilion of the defendant and while within the waters of the Atlantic Ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died, leaving neither husband nor minor child or children nor any person or persons dependent upon her for the said Mary E. Proctor for support; that the said Louise McKinney, plaintiff, was heretofore, on to wit, the seventeenth day of July, 1912, duly appointed administratrix of the estate of Mary E. Proctor.

Wherefore, the plaintiff brings this her suit and claims Fifty Thousand (\$50,000.00) Dollars damages.

4. And the plaintiff by her attorneys in this the fourth count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on to wit, July 7th, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the State of Florida, situated in the County of Duval and State of Florida; that the defendant had exclusive control and management [215] of said bath house and bathing pavilion at or near the waters of the Atlantic Ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic Ocean situated directly in front of said pavilion and bath house and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant by renting said bathing suits, invited such

members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing and to bathe in the waters of the Atlantic Ocean in front of and adjacent to the said pavilion as aforesaid, that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on to wit, July 7th, A. D. 1912, one Mary E. Proctor, did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic Ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic Ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic Ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed [216] to provide a proper person or persons and to have such person or persons present on behalf of said defendant to search for and recover any of the patrons of said bath house, when such patrons were bathing in the waters customarily used by said patrons and which constituted the facilities for bathing offered said patrons by the defendant in which waters deceased was bathing, when such persons were or might have been in danger of drowning; that by reason thereof and by reason of the carelessness and negligence of the defendant the said Mary E. Proctor was then and there drowned in the waters of the Atlantic Ocean near the bath house and bathing pavilion of the defendant and while within the waters of the Atlantic Ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children nor any person or persons dependent upon her the said Mary E. Proctor for support; that the said Louise McKinney, plaintiff, was heretofore, on to wit the seventeenth day of July, 1912, duly appointed as Administratrix of the Estate of Mary E. Proctor.

Wherefore, the plaintiff brings this her suit and claims Fifty Thousand (\$50,000.00) Dollars damages."

To this declaration the following demurrer was filed:

"1. The allegations of the second amended declaration show that the administratrix, as such, has no right of action in this cause.

2. The second amended declaration does not state any facts or circumstances or conditions

that authorize an administratrix to maintain the action.

3. Each count of the second amended declaration shows and sets forth that the deceased intended to bathe and was attempting to bathe in the Atlantic Ocean, and [217] the Atlantic Ocean is in no sense a bathing place or resort operated or controlled by defendant.

4. The facts stated in the second amended declaration show and establish that the defendant could not and would not invite the deceased to bathe in any bathing resort controlled by defendant, and defendant is in no wise responsible for any alleged lack of facilities for bathing in the Atlantic Ocean, as mentioned in the second amended declaration.

5. The defendant, a private individual renting bathing suits, is not required to provide protection or safeguards for bathers in the Atlantic Ocean, as described in the second amended declaration.

6. The mere renting of a bathing suit to deceased, as mentioned in said second amended declaration, is not sufficient to create any obligation or duty on the part of the defendant to provide the alleged lines, persons, appliances, rafts or other safeguards, as alleged in the second amended declaration.

7. The duty, if any, to provide such safeguards or persons to guard or rescue bathers in the Atlantic Ocean is a public duty, if any such duty exists, incumbent upon the State or Municipality, but not upon private individuals.

8. The deceased, attempting to bathe in the Atlantic Ocean, took the risk of any damages in so doing and there is no obligations or duty upon any person or public authority to provide safeguards for such bathers in such ocean.

9. That the second amended declaration, and each count thereof, fails entirely to show or set forth that the deceased or the public were invited by the defendant to bathe in the Atlantic Ocean, or that the defendant had any such proprietorship over the Atlantic Ocean as that [218] he could or did invite bathers to bathe therein as to become responsible for any danger to such bathers from bathing in said ocean.

10. That persons bathing in the Atlantic Ocean are not the guests of the defendant, or under any protection of the defendant, or licensees of the defendant, but voluntarily bathe in the said ocean and take all risks therefrom.

11. That neither of the said counts allege or set forth any facts, by reason of which the plaintiff, as an administratrix, has any interest in or right of action on account of the said alleged death of the said Mary E. Proctor.

12. That the said counts and each of them fail to allege or state any facts showing that

any estate of Mary E. Proctor would be added to or increased by reason of the said alleged facts set forth in said counts of said second amended declaration.

13. That the waters of the Atlantic Ocean were in no sense the premises of or property of the defendant and were not under his control, and were not, as a matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

14. That each count of said second amended declaration fails to allege or show that the house of the defendant described as a pavilion and bath house were in the Atlantic Ocean or immediately next to the waters of the Atlantic Ocean, but allege that same extended up and down the beach and not in the waters of the ocean.

AS TO FIRST COUNT.

In addition to the foregoing above mentioned grounds as to each of the counts of the second amended declaration, defendant states the following as to the first count:

[219] 1. Said count does not allege or set forth that at the time of the alleged renting of said bathing suit by the said Mary E. Proctor that the defendant owned or operated any private bathing place where the deceased, Mary E. Proctor, at that time intended to bathe or did bathe.

2. Said count does not allege or set forth that the defendant paid a consideration for any right to bathe in the waters of the Atlantic Ocean at said resort but only alleged that she hired from defendant a certain bathing suit.

3. That there is no valid and constitutional statute of the State of Florida that required defendant to maintain life lines or life rafts for the protection of bathers or of deceased attempting to bathe in the Atlantic Ocean.

4. That the said statute referred to in said first count is in violation of the Constitution of the State of Florida and of the Constitution of the United States in attempting to interfere with and restrict legitimate business, and deprives the person engaged in the business of renting suits of his property without due process of law, and is a taking of such property without due compensation.

5. The said statute is unconstitutional in that it undertakes to put a burden or tax upon said business therein mentioned not authorized by the Constitution of Florida.

6. That said statute of Florida referred to in said count does not provide or give private individuals any right of action or provide any penalty to be paid to private individuals for failure to comply therewith.

7. That said statute referred to is in violation of the Constitution of the State of Florida, in that it undertakes to compel per-

sons renting bathing suits to perform certain public duties, to wit, to provide safeguards to bathers.

8. That the said statute has no application to and does [220] not relate to persons who themselves and of their own accord undertake to bathe in public waters, to wit, in the Atlantic Ocean.

9. That the waters of the Atlantic Ocean were in no sense the premises or property of the defendant and were not under his control, and were not, as matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

10. That the said count fails to allege or show that the house of the defendant described as a pavilion and bath house was in the Atlantic Ocean or immediately next to the waters of the Atlantic Ocean, but alleges that same extended up and down the beach and not in the waters of the ocean.

AS TO SECOND COUNT.

1. As to the second count defendant repeats each of the grounds hereinabove mentioned, and in addition the following:

That there is no duty or obligation, statutory or otherwise, upon the defendant to provide a suitable person or persons to superintend bathing in the waters of the Atlantic Ocean.

2. The said count does not show or set forth that the waters where deceased was bathing were the property of or controlled by or in the possession of the defendant.

3. That said count shows no duty or obligation of the defendant to the deceased at the time of said alleged drowning of deceased.

4. That the waters of the Atlantic Ocean were in no sense the premises of or property of the defendant and were not under his control, and were not, as a matter of [221] law, facilities which the defendant did or could provide to the deceased for bathing purposes.

5. That said count fails to allege or show that the house of the defendant described as a pavilion or bath house was in the Atlantic Ocean or immediately next to the waters of the Atlantic Ocean, but alleges that same extended up and down the beach and not in the waters of the ocean.

AS TO THIRD COUNT.

As to the third count defendant repeats each of the grounds hereinbefore mentioned, and in addition the following:

1. That there was no legal duty upon the defendant to provide persons or appliances to rescue persons bathing in the said waters of the Atlantic Ocean, as alleged in said count.

2. That said count states a conclusion in said allegation, to wit, that the defendant did not provide persons or appliances to

rescue persons bathing in the waters customarily used by patrons of said bathing house.

3. That the said count does not show or set forth that the waters in which deceased was bathing were owned, possessed or controlled by the defendant, but does show that they were public waters of the Atlantic Ocean not under the control of the defendant.

4. That said count shows no duty or obligation of the defendant to the deceased at the time of such alleged drowning of deceased.

5. That the waters of the Atlantic Ocean were in no sense the premises of or property of the defendant and were not under his control, and were not, as a matter of [222] law, facilities which the defendant did or could provide to the deceased for bathing purposes.

6. That said count fails to allege or show that the house of the defendant, described as a pavilion and bath house, was in the Atlantic Ocean or immediately next to the waters of the Atlantic Ocean, but alleges that same extended up and down the beach and not in the waters of the ocean.

AS TO FOURTH COUNT.

As to the fourth count defendant repeats each of the grounds hereinbefore mentioned, and in addition the following:

1. That there was no legal duty of or obligation on the defendant to provide a person or persons and to have such person or persons present on behalf of the defendant to search for and recover patrons of said bath house in said waters mentioned in said count.

2. That the waters of the Atlantic Ocean were in no sense the premises of or property of the defendant and were not under his control, and were not, as a matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

3. That said count fails to allege or show that the house of the defendant described as a pavilion and bath house was in the Atlantic Ocean or immediately next to the waters of the Atlantic Ocean, but alleges that same extended up and down the beach and not in the waters of the ocean."

The demurrer was sustained, and the plaintiff declining to plead further, final judgment on the demurrer was rendered for the defendant, and the plaintiff took writ of error.

Bryan & Carson and *J. M. Carson* for plaintiff in error.

John C. Cooper & Son for defendant in error.

[223] *WHITFIELD, J.* (after stating the facts).—This action is brought under Sections 3145 and 3146 of the General Statutes

of 1906, to recover "such damages as the party entitled to sue may have sustained by reason of the death of the party killed." When the decedent could have recovered for her injury if her "death had not ensued," then her administrator has a right of action under the statute, the decedent leaving no husband or minor child, nor any person dependent on her for a support. The question here is the right to recover, not the amount of the "damages . . . sustained by reason of the death." *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 45 So. 755, 15 L.R.A. (N.S.) 451.

When this alleged cause of action accrued, the following statute had been enacted:

"Chapter 6189—(No. 70).

AN ACT to Require Persons, Firms and Corporations Maintaining and Operating Public Bath Houses, Bathing Pavilions, and Other Similar Places at Seaside Resorts, to Maintain Life Lines and Life Rafts for Protection of Bathers and Providing a Penalty for Failure to Do So.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Any person, persons, firm or corporation operating or maintaining public bath houses, bathing pavilions, [224] or other similar places, where bathing suits are furnished for hire or rent, at the seaside resorts in the State of Florida, are hereby required to maintain at all times proper and safe life lines and life rafts for the protection of the bathers at such seaside resorts.

Sec. 2. Any person or persons, and the officers of any corporation violating the provisions of Section 1 of this Act shall be subject to a fine of not more than five hundred dollars or by imprisonment in the county jail of not more than six months, or by both such fine and imprisonment at the discretion of the court.

Approved May 23, 1911."

The effectiveness of this statute as defining a crime and prescribing a penalty for the offense cannot be considered here, but the policy of the statute has its influence upon the general principles of law applicable to the duties and correlative liabilities of persons engaged in business as is alleged in this case, even though the particular things required to be done may not have been required at common law. The statute recognizes the use of the public waters of the State, "by persons, firms and corporations who are" "operating or maintaining public bath houses, bathing pavilions, or other similar places, where bathing suits are furnished for hire or rent at the seaside resorts in the State of Florida," and defines specific duties required

of those who so use the public waters of the State, which specific duties are designed to protect the patrons of the particular business and are not inconsistent with duties that may be imposed by implication of law upon those engaged in such business.

Where one assumes to offer the use of public waters for purposes of profit by establishing bath houses or dressing rooms on the shore and furnishing bathing suits for hire [225] to persons who are expressly or impliedly invited to use the bathing suits by bathing or swimming in the public waters, and a patron uses the waters in the usual and ordinary way consistent with the express or implied invitation, and without his fault, is injured because of the unsafe condition of the premises on which patrons are invited to bathe or swim, or because of the negligence of the proprietor in performing his duties to patrons, the one so offering the use of the waters for profit may be liable in damages for such injury.

The liability proceeds from the duty imposed by law upon one who thus assumes to offer the use of public waters for profit, to exercise due care to prevent injury to patrons who without fault use the waters in the customary way. One will not be permitted to establish for profit a business of furnishing facilities and inviting persons to use public waters for bathing or swimming and to escape liability for injuries caused by the unsafe condition of the premises so used, of which unsafe condition the patron may not know or have due appreciation, but of which proprietor of the business should know. The patron has a right to rely upon the due performance of the implied legal duty of the one furnishing the facilities and extending the implied invitation to use the premises, to keep the same in a reasonably safe condition or to give due warning as to and protection against dangers. Though the waters are public and no governmental authority be expressly given to so offer them for use, one who assumes to so offer the use of the waters also assumes the legal duties and liabilities that are commensurate with such offer of the use. The nature of the use fixes the duties and correlative liabilities. An invitation may be implied from a continued and general custom in using the premises by the patrons of the business. The nature of [226] the use and the extent of the premises covered by an implied invitation to use, may be determined by the continued and general custom of the patrons of the place.

It may not be presumed from an injury that the keeper of the place failed to do his legal duty and consequently was negligent; but negligence of the keeper that proximately caused the injury must be duly alleged and proven; and any applicable contributory neg-

ligence on the part of the person injured will bar a recovery for a merely negligent injury. In determining whether the injured person is guilty of contributory negligence the practical capabilities of such person for self-protection under the particular circumstances should be considered, together with facts if any that should charge the keeper of the place or his employees with notice or knowledge of the same, when the injured person was invited to use the premises.

If a negligent failure to perform a statutory or a common law duty with reference to the safe condition of the premises customarily used by the patrons of a particular business enterprise, is a proximate cause of an injury to a patron who is not guilty of contributory negligence, the proprietor of the business may be liable in damages for such negligent injury.

It is alleged that the defendant "was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the State of Florida; . . . that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic Ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits and [227] to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic Ocean situated directly in front of said pavilion and bath house and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion where the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suit, invited such members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing and to bathe in the waters of the Atlantic Ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7th, A. D. 1912, one Mary E. Proctor, did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor; which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic Ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as

aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic Ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic Ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide and maintain proper and safe life lines and life rafts for the protection of the patrons of its patrons, bathers at the said seaside resort, contrary to the Statutes of the State of Florida in [228] such cases made and provided; and also (2) that the defendant negligently and carelessly failed to provide suitable and proper persons to superintend and watch over bathing in the waters customarily used by the patrons of said bath house, and in which waters deceased was bathing, and to watch over and superintend its, defendant's patrons who were bathing in such waters; and also (3) "that the defendant negligently and carelessly failed to provide proper persons or appliances to rescue his patrons in the said waters customarily used by his said patrons, which constituted the facilities for bathing offered to such patrons by the defendant, and in which waters deceased was bathing, when such patrons were or might have been in danger of drowning; and also (4) that the defendant negligently and carelessly failed to provide a proper person or persons and to have such person or persons present on behalf of said defendant to search for and recover any of the patrons of said bath house, when such patrons were bathing in the waters customarily used by said patrons and which constituted the facilities for bathing offered said patrons by the defendant in which waters deceased was bathing, when such persons were or might have been in danger of drowning; that by reason thereof and by reason of the carelessness and negligence of the defendant the said Mary E. Proctor was then and there drowned in the waters of the Atlantic Ocean, near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic Ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on to wit, [229] the seventeenth day of July, 1912, duly appointed as Administratrix of the estate of Mary E. Proctor."

The facts alleged as to the relation of patron and operator of a public bath house and bathing pavilion at a seaside resort, where bathing suits are furnished for hire, make it under the quoted statute a breach of duty for the defendant operator of a public bathing

place to "negligently and carelessly fail to provide and maintain proper and safe life lines and life rafts for the protection of" his patrons. For this alleged breach of duty the defendant may be liable in damages, even if he is not liable for negligently and carelessly failing to provide proper supervision and proper persons and appliances to rescue his patrons in said waters customarily used by patrons, when such patrons are without their fault in danger of drowning. All of these precautions may be duties of the operator of the place who offers its use to the public if the circumstances make such precautions reasonably necessary or expedient for the safety to those who use the waters in the customary way. See *Larkin v. Saltair Beach Co.* 30 Utah 86, 83 Pac. 686, 3 L.R.A. (N.S.) 982, 8 Ann. Cas. 977, 116 Am. St. Rep. 818; *Boyce v. Union Pac. R. Co.* 8 Utah 353, 31 Pac. 450, 18 L.R.A. 353; *Bass v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95; *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448; *Turlington v. Tampa Electric Co.* 62 Fla. 398, 56 So. 696, 38 L.R.A. (N.S.) 72, Ann. Cas. 1913D 1213, 1 Neg. & Comp. Cas. 490; *Brotherton v. Manhattan Beach Imp. Co.* 50 Neb. 214, 69 N. W. 757, 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 673, 33 L.R.A. 598; *Dinnihan v. Lake Ontario Beach Imp. Co.* 8 App. Div. 509, 40 N. Y. S. 764.

The defense of contributory negligence should be shown by the defendant.

Ownership of premises is not essential to liability for injuries proximately caused by the dangerous condition of premises, the use of which is expressly or impliedly offered [230] to others. Liability may be imposed upon those who offer the use of premises under such circumstances as raise a legal duty to those who accept the offer and are injured because of the dangerous condition of the premises, where the negligence of the injured party does not contribute to the injury.

If at any time peculiar conditions at the usual place for bathing and swimming make the customary use patently or obviously dangerous, it may be contributory negligence to encounter the dangers. When the negligence of a plaintiff or those whom he represents contributes appreciably in producing the injury complained of the law affords no right of recovery in the absence of a statute covering the case. If a patron who is injured is not free from fault both of omission and commission while using the bathing facilities, there can be no recovery of damages from the party who provides the facilities for hire and invites or offers the use of the waters, even though such party is negligent in performing his duty to the patron.

The declaration in this case is sufficient as a lawful basis for proofs consistent with the allegation of negligence in the performance

of legal duties due to a patron from one who furnishes facilities and offers the use of public waters for bathing purposes. If negligence within the scope of the allegations is shown to have proximately caused the death of the plaintiff's decedent, and such decedent was free from fault, there may be a recovery of damages in a proper amount as contemplated by the statute. See *Florida East Coast R. Co. v. Hayea*, 67 Fla. 101, 64 So. 504.

The judgment is reversed.

Shackleford, C. J., and Taylor and Cockrell, JJ., concur.

[231] HOCKER, J. (*dissenting*).—I dissent from the opinion in this case because I do not think the administratrix has shown any right to sue and for a thorough discussion of my views, see dissenting opinion in the case of *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, text 477, 45 So. 755, 15 L.R.A. (N.S.) 451.

NOTE.

Duty to Patrons of Proprietor of Bathing Resort or Beach.

It was held in *Turlington v. Tampa Electric Co.* Ann. Cas. 1913D 1213, that the keeper of a public diving and swimming place who maintained a spring board for the use and accommodation of his patrons was burdened with the duty to exercise proper care, precaution and diligence to provide and maintain a reasonably suitable and safe spring board, and water of reasonably suitable and safe depth under and about the spring board.

It appears in the reported case that a Florida statute requires under a penalty of fine and imprisonment the operator of a public bathing place at seaside resorts, where bathing suits are furnished for hire or rent, to maintain at all times proper and safe life lines and life rafts for the protection of bathers. It is held that a failure to comply with the statute was negligence warranting a recovery by the personal representative of a patron who was drowned by reason of the absence of the statutory precautions against accident.

Two recent decisions have laid down the rule that a person maintaining a natatorium which is open to the public for swimming, diving and bathing for hire should maintain it in a condition reasonably safe for such purposes. *Johnson v. Hot Springs Land, etc. Co.* 76 Ore. 333, 148 Pac. 1137, L.R.A.1915F 689; *Anderson v. Seattle Park Co.* 79 Wash. 575, 140 Pac. 698. In the case last cited it appeared that the respondent paid his entrance fee for the use of a natatorium owned and operated by the appellant, and shortly thereafter attempted to enter a large swim-

ming tank by means of a flight of five concrete steps leading from the main floor of the natatorium. The steps were about fifteen or sixteen inches in width, with eight-inch risers. The concrete finish on each tread was smooth, and there was an iron handrail running down the side of the steps. The water in the tank was maintained at a level with the top of the third step, but when the tank was used by bathers, all the steps were wet. Respondent started down these steps without taking hold of the handrail, as bathers were in his way. He slipped upon the second step, and in falling sustained the injuries complained of. The respondent sought to show that the steps were in a slimy or slippery condition and that a concrete surface when wet constituted a dangerous footing. The appellant introduced uncontradicted evidence to the effect that the tank was emptied, washed and scrubbed three times a week; that there was a constant circulation of water at all times; that thousands of people had gone up and down the steps on which the respondent was injured without falling; that the steps were constructed in accordance with the universal custom of similar natatoriums; and that the steps were not found to be in a slimy or slippery condition by others who had used them at about the time of the accident. It was held that the undisputed evidence showed that the appellant had kept the steps and tank in a reasonably safe condition and that the respondent's fall was an accident. In *Johnson v. Hot Springs Land, etc. Co.* 76 Ore, 333, 148 Pac. 1137, L.R.A.1915F 689, it appeared that the plaintiff's intestate, Arthur Johnson, dived from a spring-board into a public swimming pool maintained by the defendant, struck his head on the bottom, was seriously injured, and thereafter died from the effects of the injury. It further appeared that at the time of the injury the tank was being refilled and the water beneath the spring-board was not at its usual depth. The court held that if the water beneath the spring-board was so shallow as to make diving therefrom unsafe it was the defendant's duty to notify his patrons and his failure to do so would be negligence, but where as in the case of the plaintiff's intestate the dive was made with actual knowledge of the shallowness of the water no recovery could be had because of the patron's contributory negligence. The court said: "Where a person, however, provides accommodations of a public nature, that person is required to use reasonable care and diligence in furnishing and maintaining such accommodations in a reasonably safe condition for the purpose for which they are apparently designed and to which they are adapted. If for any reason the accommodations are not reasonably safe and suitable for the purposes for which they are

ordinarily used in a customary way, then the public should be excluded entirely, or appropriate notice of the unsafe and unsuitable condition should be given, and persons warned of the dangers in using them. The spring-board and the water beneath it constituted the accommodations which the defendant furnished to the deceased, who was a patron for hire, and, as such, was using them for diving purposes, to which they were adapted, and in the way in which they were customarily used. Persons patronizing the natatorium have a right to assume that the defendant has performed its duty, and that reasonably safe and suitable accommodations have been furnished.

. . . If by reason of the shallowness of the water the spring-board and the water beneath it were not reasonably safe for diving, then it was the duty of defendant to warn Arthur Johnson of the unsafe condition in order that he might be made aware of the danger; and therefore, if defendant failed to perform its duty, it was guilty of negligence which would be actionable if proximately causing the injury, unless the deceased was himself chargeable with contributory negligence. . . . One of the objects of the rule requiring the owner of a place of amusement like the one maintained by defendant to warn patrons of danger is to acquaint the patron with the hazard so that he may avoid injury. If the deceased had knowledge of the shallowness of the water and the danger incident to diving from the spring-board, then he knew all and no less than he could have known had defendant expressly warned him of the risk. If the defendant had, in fact, cautioned Johnson against the peril, and, notwithstanding such warning, the latter dived off the spring-board, then, on the facts of the instant case, the defendant would not be liable because of the knowledge imparted to Johnson; and so, too, the same result follows if Johnson did, in fact, know of the danger, even though not told by the defendant. If, with knowledge of the danger, Johnson placed himself in peril, and, on account thereof, was injured, he was chargeable with contributory negligence.

. . . Arthur Johnson was a good diver; he had been in the plunge at least on two prior occasions when the water was at its usual depth of about seven feet; he and his friends were told, upon making inquiry, that the water was between 3 and 3½ feet deep, and that it was shallow, but that the water was coming in fast; he and his companions sat around and waited for the water to fill up, because the shallowness was apparent; he could not well have avoided seeing his friends standing up in the water; and consequently he must have known the depth of the water. It is also clear that he knew and realized the danger of diving off the spring-board into the water at the same time because, as Hal-

vorsen said, Johnson was going 'to make a long dive to make it shallow in the water,' and his feet slipped, or he lost his balance in the air, and he came down straight. . . . The fact that he attempted 'to make a long dive to make it shallow in the water' reflects the knowledge then had by the deceased. After making due allowance for the difference in temperament, knowledge and judgment of different men, it is plain that reasonable minds would draw no other inference or conclusion from the unchallenged facts than that the deceased was guilty of contributory negligence because he dived off the spring-board with knowledge of the existing conditions and a realization of the hazard."

EX PARTE McDANIEL.

Texas Court of Criminal Appeals—February 3, 1915.

76 Tex. Crim. 184; 173 S. W. 1018.

Extradition — Scope of Inquiry — Guilt of Fugitive.

The court, on habeas corpus by one in custody under a requisition warrant for his arrest as a fugitive from the justice of another state, will not go into the facts of his guilt or innocence of the offense charged by the demanding state.

Who Is Fugitive.

A person who commits a crime in one state and departs therefrom and is found in another is a "fugitive from justice."

[See 7 Ann. Cas. 1076; 13 Ann. Cas. 907; 112 Am. St. Rep. 122.]

Legality of Warrant — Burden of Proof.

An extradition warrant for the arrest of a fugitive from the justice of the demanding state makes a prima facie case on habeas corpus for the discharge of accused, and the burden is on him to show that the warrant was not legally issued.

[See 112 Am. St. Rep. 124.]

Sufficiency of Warrant — Recital as to Affidavit.

An extradition warrant, which recites that the demand was accompanied by a "complaint," instead of by a copy of an affidavit duly certified as authentic by the governor of the demanding state, is sufficient on habeas corpus.

Presumption of Authority of Magistrate Taking Affidavit.

An extradition warrant, which recites that accused stands charged by complaint before the proper authorities of the demanding state and that the demand is accompanied by a copy of a complaint sworn to before a justice of the peace, duly certified as authentic by

the governor of the demanding state, presents a prima facie case of the authority of a justice of the peace to act as magistrate, and accused has the burden of showing the contrary to obtain his discharge on habeas corpus.

[See generally, 16 Ann. Cas. 1100; Ann. Cas. 1916A 526.]

Persons Subject to Extradition — Person in Custody on Another Charge.

Where accused detained under an extradition warrant sought his discharge on habeas corpus and showed that two indictments found in the state were pending against him, the court must order the detention of accused until the indictments are disposed of, with direction for his delivery under the extradition warrant.

[See note at end of this case.]

Appeal from District Court, Fannin county: DENTON, Judge.

Habeas corpus proceeding. W. L. McDaniel relator. From judgment rendered, relator appeals. The facts are stated in the opinion. **AFFIRMED.**

Cunningham & McMahon for appellant.
C. C. McDonald and R. T. Lipscomb for appellee.

[185] HARPER, J.—Upon application made by the Governor of New Mexico, His Excellency, Governor O. B. Colquitt, granted the requisition, in language as follows:

"IN THE NAME AND BY AUTHORITY OF THE
STATE OF TEXAS.

EXECUTIVE DEPARTMENT.

"To all and singular the sheriffs, constables, and other civil officers of said State:

"Whereas, It has been made known to me by the Governor of the State of New Mexico that W. L. McDaniel stands charged by complaint before the proper authorities, with the crime of drawing and uttering a worthless draft in the sum of four hundred dollars committed in said [186] State, and that the said defendant has taken refuge in the State of Texas; and, whereas, the said Governor, in pursuance of the Constitution and laws of the United States, has demanded of me that I cause the said fugitive to be arrested and delivered to James W. Johnson, who is, as is satisfactorily shown, duly authorized to receive him into custody and convey him back to said State; and, whereas, said demand is accompanied by copy of said complaint duly certified as authentic by the Governor of said State.

"Now, therefore, I, O. B. Colquitt, Governor of Texas, by virtue of the authority vested in me by the Constitution and laws of this State and the United States, do issue this my warrant, commanding all sheriffs,

constables, and other civil officers of this State, to arrest and aid and assist in arresting said fugitive and to deliver W. L. McDaniel when arrested to the said agent in order that he may be taken back to said State to be dealt with for said crime.

"In testimony whereof, I have hereunto signed my name and have caused the seal of State to be hereon impressed, at Austin, Texas, this 14th day of January, A. D. 1915.

"O. B. Colquitt,

"Governor.

"By the Governor:

"D. A. Gregg,

[L. s.] "Secretary of State."

Under this authority relator was arrested and delivered to Mr. Johnson. Relator sued out a writ of habeas corpus before Judge Denton. When a hearing was had Judge Denton remanded the relator to the custody of Mr. Johnson, from which judgment he prosecutes this appeal.

Upon the hearing relator desired to go into the facts upon which the complaint or affidavit was founded, and show that he was guilty of no offense. This the court declined to permit him, and he presents this matter for review by bills of exception. It has been uniformly held by this court and the Supreme Court of the United States that the question of the guilt or innocence of a person of the offense charged will not be inquired into on habeas corpus in this character of case. This question came before the Supreme Court recently in the case of *Drew v. Thaw*, 235 U. S. 432, and it was held that on the habeas corpus hearing the question of guilt or innocence will not be inquired into, that court saying: "When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once." In the same case the court also passed on the question that motive of the person in leaving the demanding State was wholly immaterial, it holding: "If [187] the conspiracy constituted a crime, there is no doubt that Thaw is a fugitive from justice. He was a party to the crime in New York, and afterwards left the State. It long has been established that, for purposes of extradition between the States, it does not matter what motive induced the departure. *Roberts v. Reilly*, 116 U. S. 80,

29 U. S. (L. ed.) 544, 6 S. Ct. 291; *Apple- yard v. Massachusetts*, 203 U. S. 222, 226, 227, 51 U. S. (L. ed.) 161-163, 27 S. Ct. 122, 7 Ann. Cas. 1073."

In *Ex p. Denning*, 50 Tex. Crim. 629, 100 S. W. 401, this court held it was not error to refuse to hear evidence as to the guilt or innocence of the defendant, that being a question for the courts of the demanding State, the court saying: "The question of the guilt of the relator or any other ulterior purpose behind the prosecution cannot be inquired into." In *Coleman v. State*, 53 Tex. Crim. 93, 113 S. W. 17, and *Hibler v. State*, 43 Tex. 197, this court and the Supreme Court have both held that a person who commits a crime in one State and departs therefrom, and is found in another State, may be regarded as a fugitive from justice.

There is no contention that relator was not in the State of New Mexico when the crime charged is alleged to have been committed, and subsequently left and came to this State.

While in *Ex p. Cheatham*, 50 Tex. Crim. 51, 95 S. W. 1077, it is held that the courts may go behind the Governor's warrant and review the grounds upon which the Governor may have issued the warrant, and in that case, because the offense was alleged in the affidavit "upon information and belief" the relator was discharged, in this case the affidavit contains no such words, it being in the following language:

"STATE OF NEW MEXICO

vs.

W. L. McDANIEL.

"State of New Mexico,

"County of Chaves.

"On this 26th day of December, A. D. 1914, personally appeared Roy Ammerman before the court of R. D. Bell, justice of the peace in and for precinct No. 2 of the County of Chaves, in the State of New Mexico, and after having been duly sworn in conformity with law, says that W. L. McDaniel did violate the laws of New Mexico by giving to the First State Bank and Trust Company of Roswell, N. M., a check or draft in the sum of \$400 on the Farmers Bank of New Hope, Texas, and receiving the money on same knowing the same would not be paid and that this happened on or near Roswell of the 10th day of December, A. D. 1914, in the County of Chaves and State of New Mexico, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of New Mexico.

(Signed) "Roy Ammerman,

"Complainant.

[188] "Sworn to and subscribed before me on the 26th day of December, A. D. 1914.

(Signed) "R. D. Bell,

"Justice of the Peace."

And while it is held that the courts may go behind the Governor's warrant, yet it has always been held that the warrant issued by the Governor makes a *prima facie* case on habeas corpus and the burden is on the defendant to show that the warrant was not legally issued. (Ex p. White, 39 Tex. Crim. 497, 46 S. W. 639; Hibler v. State, 43 Tex. 197; Ex p. Stanley, 25 Tex. App. 372, 8 S. W. 645.)

Relator indulges in a criticism of the Governor's warrant for using the word "complaint" instead of reciting that the "demand was accompanied by a copy of an affidavit duly certified as authentic by the Governor of New Mexico." This question was decided adversely to relator's contention in the case of Ex p. White, 39 Tex. Crim. 497, 46 S. W. 639. In addition to this, the complaint or affidavit was introduced in evidence, as heretofore shown, and it is such an affidavit as is required by law.

Relator also contends that as the affidavit was sworn to before a justice of the peace, it was incumbent on the State to show affirmatively that under the laws of New Mexico that a justice of the peace is a "magistrate" in that State. As the Governor's warrant recites, "relator stands charged by complaint before the proper authorities, and whereas said demand is accompanied by a copy of the complaint duly certified as authentic by the Governor of that State," it presents a *prima facie* case, and if in fact a justice of the peace is not a magistrate in New Mexico, it was incumbent upon relator to show that fact. Ex p. Stanley, 25 Tex. App. 372, 8 S. W. 645; White v. State, 39 Tex. Crim. 497, 46 S. W. 639.

The only other question we deem it necessary to discuss is the one wherein relator shows there are two indictments pending against him in the District Court of Fannin County; that he has been arrested on such indictments, and given bond, and he contends that he should not be turned over to the New Mexico authorities while such indictments are pending. This record discloses that the two indictments are pending in the court over which Judge Denton presides; that he was the judge who heard the application for habeas corpus, and when relator introduced the two indictments in evidence, the district attorney filed motions asking leave to dismiss both of said cases, giving reasons therefor, with the knowledge and consent of the district judge. In approving the bill showing these facts, Judge Denton states when the district attorney filed those motions to dismiss the cases, and he consented and agreed that he might do so, the relator objected to it being done in vacation, and this is the only reason why the order of dismissal was not entered at that time. He further states

Ann. Cas. 1917B.—22.

that the order of dismissal will be entered in term time. In the case of Ex p. Hobbs, 32 Tex. Crim. 312, 22 S. W. 1035, 40 Am. St. Rep. 782, wherein the relator was under arrest for an offense against the laws of this State, it was held that the relator should not be extradited during [189] the pendency of that case, but he should be held without bail until that case was disposed of and then surrendered to the Tennessee authorities. If relator objects to a dismissal being entered in vacation, under the authority of the Hobbs case, *supra*, he is not entitled to be released from custody, but should be remanded to jail in Fannin County to be held until the order of dismissal is entered, or the two cases pending against him are otherwise disposed of, and then be delivered by the sheriff of Fannin County to the officer authorized to receive him by the Governor's warrant, and it is so ordered.

Affirmed and relator is remanded to the custody of the sheriff of Fannin County to be held and dealt with in accordance with this opinion.

Relator remanded to custody.

NOTE.

Person in Custody on Charge of Other Crime as Subject to Extradition.

Generally.

The Constitution of the United States (Art. 4, § 2; 9 Fed. St. Ann. 184) provides as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be bound in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." That provision imposes an imperative duty on the governor of a state to deliver up a person charged in another state with treason, felony, or other crime who has fled from justice and is found in the state and is demanded by the executive authority of the state from which he has fled. In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A. (N.S.) 799; State v. Allen, 2 Humph. (Tenn.) 258. However, while the obvious purpose of the provision is to prevent an offender against the justice of one state from obtaining immunity from punishment by fleeing to another state, it does not create a preference in the enforcement of the laws in favor of the demanding state, and the duty to surrender imposed thereunder is not absolute and unqualified. In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A. (N.S.) 799. See also Taylor v. Taintor, 16 Wall. 366, 21 U. S. (L. ed.) 287, *affirming*

36 Conn. 242, 4 Am. Rep. 58. Therefore, the foregoing section of the Constitution has no application to a case where the offender is, at the time, held to answer for an offense against the laws of the state in which he has taken refuge, and so long as he is held to answer to the demands of justice in the state wherein he is found, the demand of the executive authority of the other state is subordinate to the operation of the laws of his place of refuge. It is only after the demands of the laws of the latter have been satisfied that the duty of obedience to the constitutional provision to surrender the fugitive arises. Hence it is well settled that a state need not surrender, on the requisition of another state, and because of a crime committed by him therein, a prisoner held in actual custody under criminal process to answer to or suffer punishment for a crime committed within its jurisdiction. In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A. (N.S.) 799; *People v. Hagan*, 34 Misc. 85, 15 N. Y. Crim. 346, 69 N. Y. S. 475; *Ex p. Hobbs*, 32 Tex. Crim. 312, 22 S. W. 1035, 40 Am. St. Rep. 782. See also *Taylor v. Taintor*, 16 Wall. 366, 21 U. S. (L. ed.) 287, affirming 36 Conn. 242, 4 Am. Rep. 58; *Matter of Troutman*, 24 N. J. L. 634; *State v. Allen*, 2 Humph. (Tenn.) 258. And see the reported case. In *Taylor v. Taintor*, supra, an action against the sureties on a recognizance, the court said: "Where a demand is properly made by the governor of one state upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before." And in *People v. Hagan*, 34 Misc. 85, 15 N. Y. Crim. 346, 69 N. Y. S. 475, after quoting the foregoing language from the opinion in *Taylor v. Taintor*, supra, the court said: "The fact that in this particular case the relator, although under conviction, is actually at large on bail, does not, in my opinion, affect the application of the rule. He still owes to this state a debt of imprisonment as a punishment for the crime against the laws of this state of which he has been convicted. He is still theoretically in the grasp and custody of the law. Having given bail, he is merely regarded as delivered into the custody of his sureties and their dominion over him is but a continuance of his original imprisonment. . . . It is not the fact of actual physical incarceration, but the fact that the person sought to be extradited has been held to answer for a debt due to the law of the state in which he is found, that justifies the refusal of that state to surrender

him until its demands upon him have been satisfied. I have no doubt, therefore, that the proper authorities of this state could have lawfully refused to deliver up the relator to the state of New Jersey until he had served the term of imprisonment to which he has been sentenced, or, if his present conviction be reversed, until he had been finally acquitted of the crime with which he stands charged in this state."

In *Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101, it appeared that the petitioner for a writ of habeas corpus had committed a crime in the state of Michigan, and fleeing from justice in that state, voluntarily came into Indiana, where he committed another felony, for which he was indicted, convicted and imprisoned. While he was in confinement in Indiana, a warrant issued on a requisition from the state of Michigan was received by the sheriff in whose custody he then was, but he escaped from jail and fled into Ohio, whence he was brought back to the jail from which he had escaped on a warrant issued on a requisition by the governor of Indiana. Subsequently a nolle prosequi was entered in Indiana. The court said: "If he had not escaped, it is quite clear that he could have been rightfully surrendered under the warrant issued by the governor of this state." And it was held that he was rightfully delivered to the state of Michigan on its requisition. In the case of *Ex p. Walters*, 106 Miss. 439, 64 So. 2, it was held that the contention of the relator in an application for a habeas corpus for his release from a warrant issued on a requisition from the governor of Louisiana, that he should not be delivered to Louisiana for trial because he was charged with the same offense in Mississippi, was answered by the fact that the charge pending in Mississippi had been dismissed on the motion of the district attorney and the county prosecuting attorney, before the date of the hearing of his habeas corpus application, with the result that when the case was heard he was not held in Mississippi for an alleged violation of a criminal law of that state.

Likewise, it is well settled that, if a person is on trial or in duress for a criminal offense—that is, in actual custody—under the authority of a state court, no other state court and no United States court should, except in an urgent case, take him from that custody for trial for another crime, prior to an actual release or relinquishment of custody on the part of the court before which the matter is pending. *Ex p. Marrin*, 164 Fed. 631; *Cozart v. Wolf* (Ind.) 112 N. E. 241. See also *People v. Benham*, 71 Misc. 345, 128 N. Y. S. 610.

In *England* a distinction apparently is drawn by statute between the extradition of

a person who is in custody there to another government by which his surrender has been demanded, and the surrender of a person charged with crime in one portion of the British Dominions, to another portion thereof. The first situation is provided for in the Extradition Act, 1870 [33 & 34 Vict. c. 52, sec. 3 (3)] which declares that "a fugitive criminal who has been accused or convicted of an offense within English jurisdiction other than that for which his surrender has been demanded by the foreign state cannot be surrendered until his acquittal or the expiry of his sentence, as the case may be." See 14 Halsbury's Laws of England, p. 417, par. 969, tit. *Extradition*. Provision is made for the second situation in the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 690, sec. 35) which declares that "where a person accused of an offense is in custody in some part of His Majesty's dominions, and the offense is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may be tried in some other part of His Majesty's dominions, in such case a superior court, and also, if such person is in the United Kingdom, a secretary of state, and, if he is in a British possession, the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defense are to be found and to all the circumstances of the case, it would be conducive to the interest of justice so to do, may by warrant direct the removal of such offender to some other part of His Majesty's dominions in which he can be tried, and the offender may be returned and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of part I. of the act, and the warrant were a warrant for the return of such fugitive, and the provisions of the Act apply accordingly." See 14 Halsbury's Laws of England, p. 426, par. 999, tit. *Surrender of Fugitive Offenders*.

Waiver by State Having Custody.

It has been said that the state in which a fugitive is found may waive its right to punish him for a violation of its own laws and deliver him to the authorities of the other state. In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A.(N.S.) 799. In that case it was, however, said that it does not follow that any one of the three departments, the executive, legislative or judicial, which together represent the sovereignty of the people in their government can waive this right alone. But see *People v. Hagan*, 34 Misc. 85, 15 N. Y. Crim. 346, 69 N. Y. S. 475, wherein the court said: "In

the very nature of things, it is desirable that the power should rest somewhere in the state to refuse to give up a prisoner until he has satisfied the claims of the state against him or to waive the enforcement of those claims and surrender him to another state for the satisfaction of its laws. If such power did not exist, a criminal might easily evade, or postpone, his just punishment for the gravest of crimes committed in one state by the commission of a crime of much less magnitude in another. If a state may waive the enforcement of its claims upon a prisoner, in favor of the claims of another state upon him, it becomes important to determine who is authorized to act for the state in that regard. Herein is to be observed a distinction between persons held under civil, and those held under criminal process. In the first case the individuals having, under the laws of this state, the right to resort to the body of their debtor in satisfaction of their claims, are entitled to be protected in that right, and it is a proper function of the judicial authorities of the state to protect the rights of creditors even to the extent of preventing the extradition of a debtor until the claims against him, enforceable under our laws by process against his body, have been satisfied. . . . In such a case there can be no doubt that if the creditors see fit to consent to the debtor's enlargement, he would at once become amenable to the writ of extradition. In the case of a person held for an offense against the criminal law, there are no private rights to be considered and no claims to be satisfied except those of the state. The question whether or not those claims ought or ought not to be waived in favor of the claims of a sister state is no longer a question for the judicial but for the executive branch of the government. Indeed the determination of the question, in the case of a prisoner convicted of a crime as is the relator, rests necessarily with the governor, for even if the court should deem it to be its duty to release a convicted prisoner from the operation of a writ of extradition, because he owed the state a term of imprisonment in consequence of his conviction, the governor, if for any reason he deemed the extradition to be desirable, could by a pardon wipe out the conviction, the debt due to the state, and the only obstacle to the enforcement of the writ. So in the case of a prisoner held to answer, but who had not been convicted the district attorney could remove all obstacles to his extradition by procuring a dismissal of the indictment. Practically, therefore, it rests with the executive power of the state to determine whether a person who has committed crimes both in this state and in another should be held here to answer before he is extradited, or be extradited

without considering the charge against him here, and in determining that question the offender has no voice, and will not be heard. In the present case the governor, by issuing the writ of extradition, has determined that this relator should be sent to answer for his crime in New Jersey. With his reason for that determination the court has nothing to do. If because of the relator's use of different names the writ was issued in ignorance of the fact that he stood convicted of crime here, the governor may, if he sees fit, revoke his warrant. So long as it stands unrevoked, however, it justifies the relator's detention."

Of course, the acceptance of bail while a prosecution is pending is a waiver of the right of the state, for the time being, to insist on the custody of the person of the accused, and a permission to go at large in such a way that his person is liable to be taken on any lawful warrant for his arrest. In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A. (N.S.) 799. So, it has been held that, where the governor of a state issues his warrant under a requisition from another state against a person who is at large under bail and is therefore subject to arrest on a proper process, it not appearing that the governor has knowledge that a prosecution has been begun in his state and the offender held to bail, a delivery under a warrant so issued should be treated as a waiver of its right by the state that delivers up the fugitive. In re Hess, 5 Kan. App. 763, 48 Pac. 596; People v. Hagan, 34 Misc. 85, 15 N. Y. Crim. 346, 69 N. Y. S. 475. See also In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L.R.A. (N.S.) 799; State v. Allen, 2 Humph. (Tenn.) 258.

CLARK

v.

E. I. DU PONT DE NEMOURS POWDER COMPANY.

Kansas Supreme Court—February 6, 1915.

94 Kan. 268; 146 Pac. 320.

Explosives — Negligence — Leaving Small Quantity Exposed — Injury to Child.

It is gross negligence for an agent of a powder company, after shooting an oil well with solidified glycerine, to leave a quart of that explosive lying near the well; and the act of a workman, unskilled in the use of

such substances, in removing the dangerous article and placing it in the stone fence of a nearby graveyard to prevent injury to himself and his fellow workmen, does not amount to an unrelated, intervening and efficient cause so as to excuse the powder company from its liability for damages to children who afterwards find the solidified glycerine and are injured by it.

[See note at end of this case.]

Same.

The owner of so inherently dangerous a commodity as solidified glycerine is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences which flow from any breach of that duty.

[See note at end of this case.]

Same.

The rules heretofore announced by this court for the determination of proximate cause adhered to.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Chautauqua county: AYERS, Judge.

Action by Steve Clark, plaintiff, against E. I. DuPont de Nemours Powder Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

J. E. Brooks, A. H. Skidmore and S. L. Walker for appellant.

W. H. Sproul, J. A. Farrell, Charles W. Pennel and Charles E. Webster for appellee.

[269] DAWSON, J.—This is an appeal from an award of \$1632.75 as damages for expenses and loss of services to the appellee on account of injuries received by his two minor sons through an explosion of solidified glycerine which was the property of the appellant. The circumstances leading up to the unfortunate occurrence which gave rise to this lawsuit may be briefly stated: On November 25, 1909, one L. H. Small was engaged in drilling an oil well upon the farm of J. McDowell in Chautauqua county near the home of Steve Clark, the appellee. The appellant, E. I. Dupont de Nemours Powder Company, is a New Jersey corporation, authorized to do business in Kansas and engaged in the business of manufacture and sale of exploding powders, nitroglycerine, solidified glycerine, and shooting of oil and gas wells with nitroglycerine, solidified glycerine and other powerful explosives of the nature of dynamite. On said date the agent of the appellant, one Van Gray, came from Bartlesville, Okla., to shoot the well with solidified glycerine, and after this was done

he carelessly left near the well about a quart of solidified glycerine. One Joe McDowell, a son of the owner of the farm, and who was in the employ of the contractor who was boring the well, saw the explosive lying near, and, fearing that it would cause injury to himself or his fellow workmen who were still busy about the well, took charge of it and carried it home with him at the dinner hour. His mother protested against keeping this dangerous article about the premises, and he immediately took the solidified glycerine to an abandoned graveyard on the McDowell [270] farm at some considerable distance from his home. The graveyard was quite small, containing only three or four bodies, and was surrounded by a stone fence. It had not been used as a burial ground for many years. Young McDowell climbed the stone fence and placed the dynamite in a crevice therein near the ground, and laid another stone in front of the recess in the fence, partially covering the explosive.

Neither the powder company nor its agent, Van Gray, ever gave the nitroglycerine any further concern, and it remained in the stone fence of the old graveyard for over two years, and until December 23, 1911, when it was found by the children of the appellee and two other boys who were passing that way. One of the sons of the appellee climbed over the stone fence and found the nitroglycerine and handed it to the boys on the outside. They did not know its nature, and after handling it to some extent they left it at the graveyard. That evening one of the boys, Fred Clark, spoke to his uncle about it and described it to him, and the uncle ventured the opinion that it was some sort of tallow and not dynamite. The next morning, Sunday, the two Clark boys and another boy were out hunting and returned to the graveyard and one of them picked up the article and hit it on a rock for the purpose of breaking off a piece to take home. This caused the explosion.

The father grounds his action upon actual damages on account of expenditures for medical and surgical services, medicine and drugs, for his own service and that of his wife and hired help in nursing and caring for his sons, and for the loss of the services of his sons for five months of each year until they are twenty-one years of age.

Appellant assigns error on various grounds, but they are all argued together and are conceded to be substantially the same or relating to the same principle [271] and may be considered as one question. What was the approximate cause of the injury to plaintiff's sons?

There can be no doubt of the negligence of the powder company and its agent, Van Gray, in carelessly leaving by the oil well an ar-

ticle so inherently dangerous as solidified glycerine. The highest degree of care is required of all responsible persons having ownership or control of dangerous explosives such as dynamite and firearms. The utmost prudence and caution should be exercised to see that so dangerous an instrumentality does not work mischief to persons or property. The degree of care must be commensurate with the dangerous character of the commodity, and the duty to exercise this highest degree of care in keeping close custody of an article like dynamite never ceases.

In *Mattson v. Minnesota*, etc. R. Co. 95 Minn. 477, 5 Ann. Cas. 498, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L.R.A. 503, it was said:

"The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite, is of the highest. The utmost caution must be used to the end that harm may not come to others in coming in contact with them." (111 Am. St. Rep. 483, syl. ¶ 2.)

This principle is virtually admitted by appellant and its counsel, but in an exhaustive and scholarly brief they attempt to show that the negligence of the agent was not the proximate cause of the damage; and that there was an independent and efficient intervening agency growing out of the act of the young man McDowell, who to save himself and his fellow workmen from danger carried the dynamite first to his home, and then hid it in the abandoned graveyard; and that the acts of McDowell in removing the solidified glycerine from the place where he found it and in taking it home and hiding it in the old graveyard, where it was found by the children of appellee, innocent though young McDowell's acts might be, were the proximate cause of the damages which ensued.

[272] The doctrine of remote and proximate cause is well established, and the difficulty in this case does not arise from a dispute as to the principle but as to its application. In *1 Cooley on Torts* it is said:

"If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences

with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile." (3d ed. p. 99.)

Our attention is directed to many cases, including former decisions of this court, where the principle laid down by Judge Cooley is recognized. *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 300, 69 Pac. 338, 58 L.R.A. 399; *Atchison, etc. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Rodgers v. Missouri Pac. R. Co.* 75 Kan. 222, 12 Ann. Cas. 441, 88 Pac. 885, 121 Am. St. Rep. 416, 10 L.R.A. 658; *Home Oil, etc. Co. v. Dabney*, 79 Kan. 820, 102 Pac. 488; *St. Louis, etc. R. Co. v. Justice*, 80 Kan. 10, 101 Pac. 469; *Barnett v. United Kansas Portland Cement Co.* 91 Kan. 719, 139 Pac. 484.

Running through all the precedents in analogous cases the test appears to be: Is the injury or damage the natural and probable consequence of the original negligence? The mere intrusion of an intervening agency does not always excuse the original wrongdoer. On this subject the supreme court of Massachusetts has spoken with such accuracy and precision that its ideas are settled law. Thus in *Stone v. Boston, etc. R. Co.* 171 Mass. 536, 51 N. E. 1, 41 L.R.A. 794, it was said:

"It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent [273] human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane v. Atlantic Works*, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court say: 'In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which

were to be anticipated, not in the number of subsequent events and agencies which might arise.' According to this statement of the law, the questions in the present case are, Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him [274] bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.

"There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *The Joseph B. Thomas*, 81 Fed. 578; when sheep, allowed to escape from a pasture and stray away in a region frequented by bears, were killed by the bears; *Gilman v. Noyes*, 57 N. H. 627; and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas; *Koelsch v. Philadelphia Co.* 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L.R.A. 759; and in other cases not necessary to be specially referred to. In all of these cases, the real ground of decision has been that the result was or might be found to be probable, according to common experience.

"Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated. (*Davidson v. Nichols*, 11 Allen (Mass.) 514; *McDonald v. Snelling*, 14 Al-

len (Mass.) 290; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am. Rep. 106; Hill v. Winsor, 118 Mass. 251; Derry v. Flitner, 118 Mass. 131; Freeman v. Mercantile Mut. Acc. Assoc. 156 Mass. 351, 30 N. E. 1013, 17 L.R.A. 753; Spade v. Lynn, etc. R. Co. 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L.R.A. 512, and cases there cited; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475; Rhodes v. Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Hoag v. Lake Shore, etc., Southern R. 55 Pa. St. 293, 27 Am. Rep. 653; Behling v. Southwest Pennsylvania Pipe Lines, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724; Goodlander Mill Co. v. Standard Oil Co. 63 Fed. 400, 405, 406, 24 U. S. App. 7, 11 C. C. A. 253, 27 L.R.A. 583; Haile v. Texas, etc. R. Co. 60 Fed. 557, 23 U. S. App. 80, 9 C. C. A. 134, 23 L.R.A. 774; Clark v. Chambers, 3 Q. B. D. (Eng.) 327; Whart. Negl., 2d ed., §§ 74, 76, 78, 138-145, 155, 955; Cooley, Torts, 69, 70; Add. Torts, 40; Pollock, Torts, 388; Mayne, Damages, 39, 47, 48.)" (p. 540.)

[275] Our attention is directed by counsel for appellant to many cases where on account of an independent intervening agency the original wrongdoer was excused. (Goodlander Mill Co. v. Standard Oil Co. 63 Fed. 400, 24 U. S. App. 7, 11 C. C. A. 253, 27 L.R.A. 583; Carter v. Towne, 103 Mass. 507; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Cole v. German Sav. etc., Soc. 124 Fed. 113, 59 C. C. A. 593, 63 L.R.A. 416; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97; Jennings v. Davis, 187 Fed. 703, 713, 109 C. C. A. 451; Finkbeiner v. Solomon, 225 Pa. St. 333, 74 Atl. 170, 24 L.R.A. (N.S.) 1257; Harriman v. Pittsburgh, etc. R. Co. 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Harton v. Forest City Telephone Co. 146 N. C. 429, 59 S. E. 1022, 14 Ann. Cas. 390, 14 L.R.A. (N.S.) 660; Pollard v. Oklahoma City R. Co. 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A 140.)

On the other hand, counsel for appellee cite and quote from an impressive list of authorities beginning with the well-known Squib case, decided in 1770, and closing with the last expression of this court on analogous cases where the original cause was held to be the principal and proximate cause and where the intermediate incidents did not avoid the consequences arising from the acts or delicts of the original wrongdoer.

We do not think the facts in the Squib case (Scott v. Shepherd, 2 W. Bl. (Eng.) 892) are quite the same as here. In that case the burning squib was thrown by the original wrongdoer on the market stand of Yates, who instinctively and immediately

picked it up and threw it on the stand of Willis, and Willis immediately threw it upon the stand of Ryal, and Ryal immediately and in self-defense threw it away from him so that it struck the eye of plaintiff, Scott, and put out his eye. In that case the intervening agents had no time for reflection. But part of the opinion in that case is pertinent here:

"That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. . . . Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate [276] or immediate. . . . The defendant . . . is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis, or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort of the defendant. But he who does the first wrong is answerable for all the consequential damages." (p. 893.)

Here we reach the crux of the matter. No new power of doing mischief was communicated to the solidified glycerine by the acts of Young McDowell. The power of doing mischief was inherent in the glycerine all the time. That some terrible accident was likely to happen in letting it out of the close custody of some one skilled in its use was not only natural and probable but almost inevitable. McDowell had no skill or experience in handling the dangerous article. He did the best he could to prevent the damage impending on account of Van Gray's negligence. That he attempted to prevent its doing damage, but failed on account of lack of sufficient knowledge to dispose of it effectively, does not amount to an unrelated and efficient agency to shift the proximate cause from the delict of the powder company to a new proximate cause of his own making.

It may be said, however, that this is mere argument. If so, then the question clearly resolves itself into one of fact for the jury; and this is in harmony with the authorities.

In Atchison, etc. Co. v. Parry, 67 Kan. 515, 73 Pac. 105, it was said:

"Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. The question whether negligence is the [277] proximate cause of an

injury is ordinarily one of fact for the jury." (Syl. ¶ 2.)

In that case a passenger on the train became seriously ill, and the conductor called the depot-master at Newton, who, with the assistance of the porter, removed the sick man from the train and the conductor told the depot-master to care for him. About four hours afterward the sick man was run over and killed about five miles from Newton. The railway company insisted that even if there was culpable negligence it was not the proximate cause of the injury. In its opinion the court said:

"At most, the question whether the negligence of the depot-master was the proximate cause is one upon which the minds of different parties might reasonably disagree; and such being the case, and the whole matter having been submitted to the jury under proper instructions, and they having found that it was, we may not disregard these findings of fact. We are of the opinion that, upon both questions, there was sufficient evidence to go to the jury and to sustain the general findings in favor of the defendant in error." (p. 520.)

Another good case holding that the determination of proximate cause is a question for the jury, and which also contains a strong and logical analogy to the case at bar, is *Filson v. Pacific Express Co.* 84 Kan. 614, 114 Pac. 863, where the syllabus reads:

"The owner of an express package failed to call at the express office for it and the agent of the express company placed it in the company's office, which was located in a railroad depot consisting of a frame building, the doors and windows of which were locked. The depot had been used for years for depositing freight and express matter. It was entered during the night by a burglar breaking the glass of one of the windows, and the package with its contents was stolen. The package was a canvas-covered telescope containing moving-picture films. It weighed fifty-five pounds and was valued at \$600, and the value was marked on the outside of the package in plain figures. In an action to recover against the company for its loss it was conceded [278] that the liability of the company was that of a warehouseman. Held, that it was a question for the jury to determine from all the evidence and circumstances whether the express company failed to exercise ordinary care, and whether such failure was the proximate cause of the loss." (Syl. ¶ 2.)

In the opinion, Mr. Justice Porter said:

"Whether persons in the exercise of ordinary care would have left it there over night, in a building which could be easily entered by burglars and which the evidence shows had been burglarized at least once

before, to the knowledge of the express agent, was, under all the circumstances, a question for the jury.

"It was also for the jury to determine whether the negligence of the company was the proximate cause of the loss. It was the proximate cause if the loss by burglary was the natural and probable consequence of the failure of the company to exercise ordinary care—that is, if it might have been foreseen by ordinary forecast." (p. 618.)

In the still later case (*Barnett v. United Kansas Portland Cement Co.* 91 Kan. 719, 139 Pac. 484) the same proposition was adhered to, although two dissenting justices urged that the determination of the jury as to which was the remote and which the proximate cause is not necessarily conclusive. If that be a qualification of the general rule, it takes nothing from the strength of appellee's position in this case, for the trial court was satisfied that the negligence of the appellant was the proximate cause of the injury, and so are we.

Among other cases examined in arriving at these conclusions, the following may be noted: *Eberhardt v. Glasgow Mut. Telephone Assoc.* 91 Kan. 763, 139 Pac. 416; *Broseghini v. Sheridan Coal Co.* 92 Kan. 113, 139 Pac. 1025; *Kleebauer v. Western Fuse, etc., Co.* 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L.R.A. 377, 69 Pac. 246; *District of Columbia v. Dempsey*, 13 App. Cas. (D. C.) 533; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Lane v. Atlantic Works*, 111 Mass. 136; *Filer v. Smith*, 96 Mich. 347, 55 N. W. 1002, 35 Am. St. Rep. 603; *Skinn v. Reutter*, 135 Mich. 57, 97 N. W. 152, 106 Am. St. Rep. 403, 64 L.R.A. 673; *Iamurri v. Saginaw* [279] *City Gas Co.* 148 Mich. 27, 111 N. W. 884; *Villa v. Cloquet*, 119 Minn. 277, 138 N. W. 33; *Quigley v. Delaware, etc. Canal Co.* 142 Pa. St. 388, 21 Atl. 827, 24 Am. St. Rep. 504; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; *Williams v. Koehler*, 41 App. Div. 426, 58 N. Y. S. 863; *Olson v. Gill Home Invest. Co.* 58 Wash. 151, 108 Pac. 140, 27 L.R.A. (N.S.) 884; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 272; *Dixon v. Bell*, 5 M. & S. (Eng.) 198; *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422.

The other errors assigned are all incidental to the main question. The fact that the boys were hunting on Sunday, or that they might be trespassers, does not affect the case. The jury found that they were not trespassing; but the damage did not arise from the trespass nor the Sabbath breaking, nor did they contribute in the slightest degree to the accident and its consequences.

No substantial error appearing in the record, the judgment is affirmed.

NOTE.**Liability as for Negligence of One Throwing Away Small Quantity of Explosive.**

Scope of Note, 345.

Generally, 345.

Proximate Cause, 348.

Scope of Note.

The earlier cases discussing the liability as for negligence of one throwing away a small quantity of explosive are reviewed in the note to Pollard v. Oklahoma City R. Co. Ann. Cas. 1915A 140. This note presents the recent cases on that subject.

The liability of a railroad company to a person other than a servant injured by a railroad torpedo is exhaustively discussed in the note to Mills v. Central of Georgia R. Co. Ann. Cas. 1914C 1098.

Generally.

In a number of cases a liability for a personal injury resulting from the act of a person in throwing away, or leaving about or abandoning a small quantity of an explosive has been predicated on the doctrine of attractive nuisance. *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33; *Juntti v. Oliver Iron Min. Co.* 119 Minn. 518, 138 N. W. 673, 42 L.R.A.(N.S.) 840; *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826; *Little v. James McCord Co.* (Tex.) 151 S. W. 835; *Akin v. Bradley Engineering, etc. Co.* 48 Wash. 97, 92 Pac. 903, 14 L.R.A.(N.S.) 586; *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Tibbits v. Spokane*, 64 Wash. 570, 117 Pac. 397. See also *Wallace v. Matthewson*, 143 Ga. 236, 237, 84 S. E. 450; *Victor v. Smilanich*, 54 Colo. 479, 131 Pac. 392. In *Little v. James McCord Co.* (Tex.) *supra*, it appeared that the defendant owned a magazine in which were stored skyrockets, firecrackers, Roman candles, dynamite caps, and other explosives; that the defendant carried from its magazine a quantity of explosives and deposited them in an open lot; that this lot was in a pecan grove near a public highway and possessed peculiar attractions for children of tender years and was a place to which they were accustomed to resort; that the plaintiff, a boy of twelve years, was attracted to the place when the explosives had been left scattered on the ground, and was prompted by his childish impulses to appropriate some of them; and that in attempting to break one of the pieces on a rock, it exploded with great violence and blew off his hand. The court said: "In order

to establish a legal liability in a case like this, it is necessary that the evidence be sufficient to support a finding by the jury that the defendant owed the plaintiff a legal duty and had negligently failed to perform it. . . . In the well-known 'turntable cases' it is held that the owner cannot escape liability for a resulting injury if he places on his premises and leaves unguarded dangerous machinery unusually attractive to children, even though the injured child was there without express permission. . . . There is no sound reason for restricting that rule to injuries resulting from unguarded turntables. It is not because the object which furnished the attraction and caused the injury is a turntable, and the owner of the premises a railroad corporation, that the duty of exercising due care to save children from their own indiscretion is imposed in such cases; but the rule is regarded as a salutary requirement which should be enforced for the protection of the lives and limbs of those too young to be held responsible, under all conditions, for their own lack of judgment. Human life and personal safety are the most important objects of governmental protection, and the policy of imposing civil liability upon those whose carelessness or indifference may cause the loss of either is one of the most effective means of inspiring a proper degree of diligence to avoid injurious or fatal accidents resulting from exposure to dangerous agencies and hazardous situations. There was evidence offered upon the trial of this case sufficient to warrant the jury in finding the following facts: That a box containing dangerous explosives was taken by agents of the appellee from its magazines and dumped upon the ground in a lot which was at the time under the management and control of a third party; that this lot, though inclosed and posted, was frequently visited by children, some of whom went there by invitation from the occupants, and a large number of others either as licensees or trespassers; that the chief attraction which caused children to resort to that place was the large number of pecan trees growing thereon, and a desire to gather nuts during the pecan season; that this attraction was so strong that those in charge of the premises were unable to keep children away. If an ordinary turntable may be looked upon as such an unusually attractive object as to impose upon owners the duty of guarding against its use by children, we see no good reason why Roman candles, skyrockets and other explosives made for the purpose of amusing children at Christmas times and on holiday occasions should not also be so regarded. Hence the jury would have been justified in this case in concluding that the

defendants had placed upon this lot, to which large numbers of children resorted, dangerous explosives unusually attractive to them. It would seem that these facts are sufficient to show the existence of the legal duty before referred to, and a failure in its performance." In *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807, it was said, with reference to dynamite caps: "In handling explosives the law imposes upon the operator a high degree of care, and especially so where children are involved. Unfortunate as the results prove, it is undoubtedly true that explosives of this character are exceedingly attractive to small boys, whether on account of the loud noise that follows the concussion, or from a commendable appreciation of the quick and effective results, we know not. But the fact remains that the attraction is so controlling that it must be taken into consideration by people who are using the dangerous explosives in a locality where children congregate." The court held the defendant to be liable for negligence as the facts showed that the plaintiff and some other boys had picked up four dynamite caps on the ground some twenty-five feet from a drill used by the defendant's employees in drilling wells. In *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33, it appeared that the defendant city had constructed a toolhouse near a quarry, which it subsequently abandoned, leaving in it some fuse caps in a box on a shelf, which caps were taken out by a couple of boys who had crawled into the toolhouse and were thrown at a companion, and later the plaintiff's son, while playing around the toolhouse, found one of the caps and proceeded to "flatten it out." The court held that the doctrine of the so-called "turntable" cases was applicable, saying: "Several reasons are urged to support defendant's argument that this doctrine does not apply to the facts in the case at bar. It is urged that the evidence does not justify a conclusion that defendant left the fuse caps in the shed, but we think it does. It is argued that defendant used due care to conceal and guard the fuse caps when it locked the tool shed and fastened the windows. But in this we cannot concur, considering the high degree of care required of defendant respecting the care and custody of such a dangerous explosive, and the easy access to the box of caps through the hole under the shed. It is sought to make a distinction between sticks of dynamite and these fuse caps. But undoubtedly the latter were highly explosive and very dangerous to children playing with them. They were clearly highly attractive, and it was natural to expect that young children whose curiosity or mischievous propensities led them into the shed would

seize upon the caps as fine things to make a noise with, or as pretty playthings. It is true that the six-year-old plaintiff had no idea that the cap was explosive, and merely tried to flatten it out, but this does not seem an important feature. It was something new, bright and alluring, and something that was very dangerous in the hands of a six-year-old boy. We think the evidence fully justified the jury in finding that defendant ought to have anticipated that children might enter the shed, get into the box of caps left exposed on a shelf, leave some of them around where they might be found by other children, and that injury might result. In other words, the finding that defendant was negligent is sustained by the evidence."

In other cases a liability has been asserted irrespective of the attractive nuisance doctrine, on the ground that the law imposes a high degree of care on persons having the possession and control of explosives, and especially so where children are involved. *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826; *Folsom-Morris Coal Min. Co. v. De Vork (Okla.)* 160 Pac. 64; *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Tibbits v. Spokane*, 64 Wash. 570, 117 Pac. 397; *Mathis v. Granger Brick, etc. Co.* 85 Wash. 634, 149 Pac. 3; *Davis v. Wenatchee*, 86 Wash. 13, 149 Pac. 337. And see the reported case. In *Davis v. Wenatchee*, supra, it appeared that the workmen employed by a contractor who was engaged in digging trenches in the city streets for water mains left an untied gunny sack containing some fuse, dynamite, and dynamite caps on the parking strip near the plaintiff's home when they left the ditch and street at five o'clock that day; that the plaintiff and a younger boy spied the sack while playing about the street, opened it and took out one of the caps and a piece of fuse, and thinking to hold it without burning his hand, he inserted the fuse in the dynamite cap and held the cap in his hand, with the result that it exploded and injured him. The court held that the city was liable. In *Tibbits v. Spokane*, 64 Wash. 570, 117 Pac. 397, it appeared that the plaintiffs were injured by the explosion of certain caps and fuses, claimed to have been left negligently by city employees on the ground near a place where they were making certain excavations. It was held that an instruction that it was "the duty of the defendant and its servants to exercise a high degree of care to prevent anyone, particularly boys of tender years, from finding or getting the possession of such explosives, and particularly so if such explosive appliances were of such a character as to be attractive to boys and to excite their curiosity and cause them to

examine, handle, and investigate such explosives," defined the care necessary to be exercised by the defendant, and properly left the jury to say whether the explosives were attractive to children; that while the instruction assumed that they were dangerous, the question whether they were attractive depended on facts which the jury must determine.

In *Sandeen v. Tschider*, 205 Fed. 252, 123 C. C. A. 456, it appeared that it was necessary for a contractor, constructing and grading a new track for a railroad company, to do some blasting, and that the dynamite was exploded by the use of caps. A large number of persons including children were allowed on the new grade to view the work without objection by the contractor, except when they interfered with the work. After the work was concluded the contractor's foreman left a tin can containing these caps on a bank near some railroad ties; and about three weeks later a boy eleven years of age took one of the caps and tried to remove the inside of it with a safety pin, when it exploded, tearing away part of his hand. It was held that the act of the foreman in leaving the caps where the child could find them, was negligence.

In *Sroka v. Halliday* (R. I.) 97 Atl. 965, it was held that it was actionable negligence to leave bombs or other explosives in a position where they were liable to be found and exploded by children to their injury.

In *Frost v. Topeka*, 98 Kan. 641, 161 Pac. 936, it appeared that while the plaintiff's parents were being detained and treated for smallpox in a hospital established, owned and maintained by the city, the plaintiff, a child of nine years, was taken there also but was allowed to play about the hospital grounds. While doing so, he found a sack of dynamite caps which the city employees had used in excavating for the hospital water and sewer systems, located entirely on the hospital grounds, and which they had neglected to remove or render inaccessible. The child, accidentally exploding a cap, was injured. It was held that, inasmuch as the negligence of the city's employees in leaving the dynamite caps where they might be picked up and exploded by the plaintiff was exhibited in connection with the performance by the city of governmental and not proprietary functions, it was not liable. The court said: "While the hospital, with its equipment and grounds, was property of the city, it was property held and maintained in a public and governmental capacity, and not in a private proprietary capacity. The sole object in establishing and maintaining the hospital was to conserve the public health, a purely governmental function exercised under the police power of the state.

The enterprise was public and governmental from its inception, and in doing the work of constructing the building and installing the water and sewer systems the city acted as a mere agency of the state in promoting the general welfare. While the dynamite caps were property of the city, they were mere contributions to the enterprise, the same as building material, water pipe, sewer pipe, and other articles necessary to secure the ultimate end in view. If in performing the work of constructing and equipping the hospital and putting the grounds in condition for occupancy, materials of any kind were used or disposed of in a negligent or unsafe way, the capacity in which the city acted shielded it from pecuniary liability. When construction was completed and maintenance of the institution as a detention hospital was begun, the relation of the city to the project remained the same, and if for any reason the premises were not safe for occupancy by persons detained in the hospital, the same exemption from liability existed. . . . It makes no difference in principle whether the building or the grounds appurtenant to the building be defective, and it makes no difference whether the dangerous agency act by penetration or by concussion. The employees of the city who caused the hospital grounds to be unsafe by negligently failing to remove the portion of the supply of dynamite caps not consumed in blasting may be personally responsible for the consequences of their conduct, but the city is not."

Where there is no evidence imputing negligence to the defendant in leaving a small quantity of explosives on his property or near property which he has used, the defendant cannot be charged with any liability with respect to it. *Gralka v. Worth Bros. Co.* 245 Pa. St. 467, 91 Atl. 860; *Birnbaum v. Philadelphia*, etc. R. Co. 249 Pa. St. 238, 94 Atl. 925. However, direct evidence of negligence is not required, but it may be inferred by the jury from the facts and attendant circumstances. *Eckart v. Kiel*, 123 Minn. 114, 143 N. W. 122; *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826; *Mathis v. Granger Brick, etc. Co.* 85 Wash. 634, 149 Pac. 3. In *Eckart v. Kiel*, supra, it appeared that the defendant had been using dynamite and dynamite caps on his farm, which he later sold to the plaintiff. Some time later, one of the plaintiff's children found a dynamite cap while playing on the ground near the granary door, which he gave to an older brother who kept it for some time, and then undertook to clean out what he thought was dirt in the bottom of it, thereby causing an explosion which injured him. The defendant testified that he had put the package containing the four caps

left over after the blasting, in his vest pocket, and two or three days later had taken both the caps and the sticks of dynamite which he had put in an iron kettle in the granary to a hardware store and exchanged them for nails. The court held that the jury might fairly infer that the cap picked up by the plaintiff's son was one of those in the package of four caps last seen in the possession of the defendant, and considering the facts proved, might also fairly infer negligence on the part of the defendant.

Proximate Cause.

As is said in the reported case, the doctrine of remote and proximate cause is well settled, and the difficulty in cases involving the negligence of persons in throwing away or leaving explosives in small quantities where children are likely to find them, does not arise from a dispute as to the principle, but as to its application. The reported case states that the test as to the liability of the wrongdoer, as found in precedents and analogous cases, appears to be: Is the injury or damage the natural and probable consequence of the original negligence?

Thus, if the act of the defendant, or the original cause of the injury, is the principal and proximate cause, the rule is that the defendant will be held answerable for all the damages arising from the natural and probable consequences of his act in either throwing away or leaving small quantities of explosives in a place accessible to children, and that he cannot avoid them by reason of the mere intrusion of an intermediate cause, not amounting to an independent, intervening agency or incident. *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33; *Folsom-Morris Coal Min. Co. v. De Vork* (Okla.) 160 Pac. 64; *Akin v. Bradley Engineering, etc. Co.* 48 Wash. 97, 92 Pac. 903, 14 L.R.A.(N.S.) 586. *Mathis v. Granger Brick, etc. Co.* 85 Wash. 634, 149 Pac. 3. And see the reported case. In *Mathis v. Granger Brick, etc. Co.* supra, it appeared that a boy found a dynamite cap which had been negligently left by the defendant near a school house. He lost it from his pocket and it was found by the plaintiff, another boy, who carried it for a few days in a pocket of his overalls, showing it to no one. He did not know what it was. On Saturday the plaintiff's mother washed these overalls and removed the cap, with a large number of other trinkets, from the pockets, placing them on a desk in the sitting room. The plaintiff finding it there, picked it up and undertook to pick the substance out of it with a hair pin, when it exploded injuring him severely. The court said: "We think that when it was shown by positive evidence that these boys found

the caps on the premises and in the soil pit, where they were habitually used by the respondent's employees and where they were, from time to time, left for indefinite periods, the evidence indicating that no one in particular was held responsible by the respondent for their care and custody, it was for the jury to say whether or not the caps were left by some of the employees of the respondent where they were found by the boys. In such a case the negligence of the employees is imputed to the master. There can hardly be reasonable doubt that the caps found belonged to the respondent. There can be no doubt that if they did, they would not have been found there had the respondent kept its explosives under lock or securely safeguarded, which was its positive non-delegable duty. There was ample evidence to take the case to the jury on the question of the respondent's negligence." In holding that the acts of the plaintiff's mother did not constitute an intervening cause, the court said further: "The respondent's primary negligence, which we have seen was a question for the jury, consisted in abandoning this cap in such manner that it was likely to fall into irresponsible hands, thus setting in motion a chain of causation from which might have been reasonably anticipated just such an injury as actually resulted. To say that this chain was broken, as a matter of law, by the unwitting failure of the mother to interrupt it, is to lose the logical perspective and take a distorted view of the relative importance of the incidents. It would be to eclipse the duty of one who knows of the dangerous character of an agency to control it, by magnifying the innocent failure of another to imagine a danger of which she had no knowledge, into a positive duty to know and avoid it. It would be to miss entirely the basic principle of the exercise of reasonable care, which measures the duty by the magnitude of the danger reasonably to be anticipated by one possessed of the knowledge necessary to foresee it." In *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33, it appeared that the defendant city had constructed a toolhouse near a quarry which it subsequently abandoned, leaving in it some fuse caps in a box on a shelf under one of the windows. These caps were taken out by a couple of boys who had crawled into the toolhouse and thrown at a companion. Later, the plaintiff's son, while playing around the house, found one of the caps, which were bright and attractive, on the ground, and proceeded to hammer it with a stone to "flatten it out," as he testified, whereupon it exploded injuring him. The court held that the claim that the defendant's negligence was not the proximate cause of the injury, rested on the proposition that there

was an intervening, independent cause, to wit, the act of the boys other than the plaintiff's son in bringing the caps out of the toolhouse and scattering them on the ground, and that this contention was disposed of by the holding that the defendant ought to have anticipated such acts on the part of children and that injury might result, and should have guarded against such an occurrence.

It has been said that the courts should not look too narrowly for independent intervening causes where the negligence is in the use or care of extremely dangerous agencies, such as explosives, and the disastrous results of such negligence might reasonably be anticipated. *Mathis v. Granger Brick, etc. Co.* 85 Wash. 634, 149 Pac. 3. So it has been held that a person leaving explosives where they are accessible to children, is liable for his negligence, though the injury complained of is brought about by an intervening cause, where the intervening cause is set in motion by his own act. *Folsom-Morris Coal Min. Co. v. DeVork (Okla.)* 160 Pac. 64. In that case it appeared that the defendant was engaged in coal mining, and in connection therewith maintained a powder magazine or powder house, located on its premises; that the powder was inclosed in large black cans, each of which contained about twenty-five pounds of powder; that the cans were opened by the defendant and the powder emptied therefrom and furnished to its employees; that the cans, still containing small quantities of powder, were thrown out on the ground near and around the powder house; that the place where the cans were thrown after being emptied was unfenced, unprotected, and unguarded; that the plaintiff, who was at the time about twelve years of age, together with other small boys, obtained from the powder cans small quantities of powder, and thereby obtained a quantity of powder which they placed in two cans; that the plaintiff carried away one of the cans containing the powder in his arms, and one of the other boys carried the other can and emptied the powder on the ground, stringing it along for some distance; that the plaintiff attempted to pick up some of the powder so emptied on the ground to put it in the can carried by him; and that while so doing the other boy struck a match and touched it to the powder emptied on the ground, and the powder instantly ignited, and a flash of the fire therefrom entered the powder contained in the can held by the plaintiff in his arms, which instantly exploded. The court held that the action of the defendant in permitting the throwing out of cans containing powder where they were accessible to the plaintiff and other boys was actionable negligence, especially in view of the fact that the "powder monkey"

in charge of the powder house was cognizant of the action of the boys in taking the powder, which knowledge must be imputed to the defendant, and that while it was true that the injury complained of was brought about by an intervening cause, the intervening cause was set in motion by the wrongdoing of the defendant in throwing out the cans containing the powder.

Likewise, a person is liable for his negligence in throwing away or leaving explosives in a place where children are liable to pick them up, though the negligence of a third person constitutes a concurrent or contributing cause of injury. *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33. See also *Mathis v. Granger Brick, etc. Co.* 85 Wash. 634, 149 Pac. 3; *Akin v. Bradley Engineering, etc. Co.* 48 Wash. 97, 92 Pac. 903, 14 L.R.A. (N.S.) 586. Thus in the case last cited, it appeared that a corporation engaged in selling mining supplies, among which were dynamite caps, had thrown a large number of these caps back of its place of business, on some vacant ground, through which a pathway ran that was used by large numbers of children going to and from a public school situated near by; that these caps were very attractive to children, and that the school children were in the habit of picking them up and afterwards throwing them against rocks, or in other ways exploding them; that on the way from school one day, the plaintiff picked up several of these caps; that he and another boy discovered some dry batteries in an alley near an automobile garage, and proceeded to make an experiment of touching off the cap with the battery, with the result that the cap exploded and injured the plaintiff's hand. The court held that, if the owner of the dry batteries was guilty of negligence in leaving them where the children could get possession of one, this negligence would not constitute an intervening cause that would relieve the defendant from liability, but was rather a concurrent or contributing cause. The court said: "It is fundamental, of course, that one cannot recover for injuries against another whose act or omission was not, or did not contribute to, the proximate cause of such injury. But it is equally true that, where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause, or to have contributed thereto. It seems to be conceded that respondent would have been liable had the boy been injured by exploding the cartridge against a rock or with a hammer. It would seem that any natural, available method which the boy himself, through his inexperience and lack of knowledge, would adopt for the purpose of creating an explosion,

would bring the case into the same category as one where the explosion was made by a rock or a hammer. For instance, if the boy had struck a match and exploded the cap with the heat thereof, or had deposited the cartridge upon a hot stove, it would seem, in principle to be the same as if he had exploded it with a hammer or with a battery. An intervening cause, to be a defense in an action of this kind, must ordinarily come from an outside source as an act of God or of some human or other agency, independent of the ignorant and inexperienced conduct or omission of the boy in question. The ignorance and inexperience of this boy, if found as stated by his counsel, relieves him from the charge of contributory negligence. If he knew or suspected that this cartridge would explode when brought in contact with the battery, and was old enough and intelligent or experienced sufficiently to understand that such an explosion would probably do him serious injury, then he would not be entitled to recover. . . . We think that, when the respondent left these dangerous explosives by the wayside where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown herein did not constitute an intervening cause that should relieve respondent from liability. If, as urged by respondent, the owner of these dry batteries was guilty of negligence in leaving them where the children could get possession of one, it seems to us that this negligence would constitute a concurrent or contributing, rather than an intervening, cause. That the immediate agency by which the explosion was occasioned was a dry battery instead of a rock, a hammer, a match, or a coal of fire, is in our opinion a matter of detail that does not change the principle involved or justify a defense under the rule by respondent invoked."

The act of a child in tampering with explosives which have been thrown away or left about has, however, been held to be an independent intervening cause, relieving the original wrongdoer from liability. *Jacobs v. New York, etc. R. Co.* 212 Mass. 96, 98 N. E. 688, 40 L.R.A.(N.S.) 41; *Carpenter v. Miller*, 232 Pa. St. 362, 81 Atl. 439, 36 L.R.A.(N.S.) 932. In the case last cited it appeared that a wholesale dealer in confections and fireworks had the refuse from his business put into barrels and taken to and deposited on a dumping ground, for which privilege he paid the lessee of the ground—the refuse, as soon as it was deposited be-

coming the property of the lessee. Out of this refuse, a boy then twelve years of age picked a piece of fireworks known as a "flowerpot," which he carried home and later in the day and after it had become dark, took it to a stone wall and lighted it, whereupon an explosion followed, resulting in injury. The court held that the dealer was not liable, as the boy's own act was the direct, proximate cause of his injuries, saying: "The dumping by the appellee of refuse containing fireworks on a lot where boys gathered to play is the negligence of which the appellant complains. Whether his doing so was negligence is a question upon which we need not pass, as it clearly appeared that the direct, proximate cause of the injuries sustained was something else. Under the uncontradicted testimony, the refuse, as soon as deposited upon the ground, became the property of Ludlow. In addition to receiving a stipulated sum for the privilege of depositing it, whatever was in it became his property as soon as it was deposited on the lot. Counsel for the appellee contends, and with reason, that after the refuse was thus sold to Ludlow, he alone was responsible for what was done with it. But on this we need not dwell. In dumping the refuse on the lot no injury was done to the boy. After it had been dumped on the lot nothing in it injured him there, and nothing in it would have injured him elsewhere if he had left it alone. Instead of doing so he and his companions dug out of it candy and fireworks; but in digging these out no injury was done to any one of them. Nothing done or left undone by the appellee caused injury to the boy on the lot where the alleged negligent act was committed. After taking out the flowerpot he carried it to his home, without informing his parents that he had it, and, without their knowledge, later in the day took it to a stone wall for the purpose of lighting or setting it off. This he did, and the very serious consequences complained of followed from his act. There was nothing unlawful or unusual in appellee's dumping refuse upon the public dumping ground. He did what is and has been constantly done in all thickly settled communities. In all rubbish heaps on dumping grounds there are to be found rusty iron, broken knives, bottles and glass and innumerable other useless articles, always likely to cause injury to boys who may dig them out and handle them, but it has never yet been held that one who thus does what is usual and customary is guilty of any negligence. Though there were unexploded fireworks in the refuse deposited by the appellee, they could have caused no injury unless fire was applied to them, while all the other articles enumerated might have caused injury without any intervening agency. The appel-

lant and his companion might have handled the flowerpot on the premises without the slightest danger of any injury to them unless they lighted it. The injury to young Carpenter was not the immediate consequence of the deposit of the refuse on the dumping ground, but resulted from his independent, intervening act in taking the flowerpot from his home, to which place he had safely carried it, and setting fire to it sometime afterwards. His injury could not reasonably have been contemplated as the result of the appellee's act in placing the rubbish on the lot. The boy's own act was the direct, proximate cause of his injuries."

The rule is that the proven injury must be shown to have been the direct or proximate result of the proven negligence, and that unless the evidence shows such a connection either directly or by fair inference, there can be no recovery. *Conley v. Ennis*, 170 Ky. 125, 185 S. W. 501. In that case the court reviewed the evidence as follows: "Summarizing the evidence then we have on Tuesday morning Conley's [a contractor engaged in roadway construction] motor house passing the residence of Ennis . . . proceeding along that rough street on an up grade; we find that some three or four squares after passing the Ennis home the rear door to that motor house is swinging open and there is a part of a box of dynamite caps in it; we have three and one-half days later, on Friday afternoon at half past three o'clock, the children finding a part of a box of dynamite caps opposite the Ennis home four or five feet outside of the curb at a place used by persons in the neighborhood for a trash dump; we have a failure of evidence as to the door of the motor house being open when it passed the Ennis home, and we have a failure to trace the dynamite caps found opposite the Ennis home to the motor house or the custody of Conley. In other words, we have the negligence of Conley shown at a point several squares from the Ennis home on Tuesday morning, and on the Friday afternoon thereafter the death of the boy, and the only question in this case is whether by any reasonable inference the boy's death could be said to have occurred as the result of that negligence. There is no evidence that more than a part of one box of caps was at that time stored in the motor house, and the evidence of Miller [a witness] shows that there was still a part of a box of dynamite caps in the motor house three or four squares after it passed the Ennis home." Holding that there could be no recovery, the court said: "The rule has always been, and, as we apprehend, will always be, that the proven injury must be shown to have been the direct or proximate result of the proven negligence, and

unless the evidence shows such connection either directly or by fair inference there can be no recovery. . . . Measured by this rule should the plaintiff recover in this action? He has failed to show anything fell out of Conley's wagon as it passed at any point along Western avenue; he has failed to show that the door of the motor house was open at a point any nearer than three or four squares from the place where the caps were found; he has failed to show that there were more than one box of caps in the motor house, and has shown by his own evidence that there was still a box in it several squares after it passed the Ennis home; he has failed to show that the caps found near his home were ever in the motor house or were ever in the possession of Conley; he has shown that three days and one-half elapsed after Conley's motor house passed up Western avenue before the children found the dynamite caps; he has only shown a state of case from which a suspicion might be indulged that the dynamite caps found three and one-half days later had fallen from the motor house; but has signally failed to show such a connection between the dynamite caps found on Friday afternoon and the motor house which passed his home on Tuesday morning as would authorize a fair inference or deduction that the caps fell from it. . . . After a careful and conscientious consideration of the evidence we have reached the conclusion that there was no such connection shown between the boy's death and the negligence of Conley as authorized a submission of the case to the jury."

WILLETT ET AL.

v.

JANECKE.

Washington Supreme Court—May 29, 1915.

85 Wash. 654; 149 Pac. 17.

Receivers — Personal Liability for Attorneys' Fees.

Where attorneys were employed by a receiver of an insolvent corporation under an order of the court authorizing such employment, and where the receiver, the attorneys participating, in good faith endeavored to procure a proper allowance of attorneys' fees from the court, and paid over to the attorneys the entire amount allowed by the court, such attorneys cannot hold the receiver personally liable for the value of their services

[See note at end of this case.]

of courts of equity, and in this respect as well as his relations to the court appointed him and the consequent restriction upon his powers, a receiver occupies a somewhat different position from that of an executor or administrator. Strictly, a receiver has no right to incur any liability or in any way hazard the fund in his custody without the consent of the court. . . .

"We cannot conceive that any attorney at law, whose every act must be with full knowledge that he is acting for an officer of the court, will complain that in accepting employment for a receiver he is held to do so with the understanding that his compensation will depend upon the amount that may be allowed him therefor by the court upon the final accounting of the receiver. Any other rule would subject the receiver to expensive litigation after his final accounting and discharge from his trust by the court. We do not mean, however, to be understood as holding that a receiver, while acting as such, cannot make himself personally liable upon his contracts or otherwise, but simply that he will be protected so long as he acts strictly under the orders of the court appointing him."

Counsel for respondent call our attention to, and rely upon, observations made by this court in *In re Sullivan*, 36 Wash. 217, 78 Pac. 945, as follows:

"The allowance for attorney's fees is not made to the attorney, but to the administrator, as a necessary expenditure incidental to his settlement of the estate. There is no relation between the administrator's attorney and the estate, and he can assert no claim against the estate for his services, but the administrator is himself liable in a suit by the attorney.

[660] These remarks were made in connection with the administration of an estate of a decedent where there was involved nothing but the right of the administrator to an allowance as against the estate. The question of whether the attorney could recover from the administrator more than the amount allowed by the court in the settlement of his account was not there involved. The above quotation from *Walsh v. Raymond*, pointing out the difference between the powers of administrators and receivers, we think is, in any event, sufficient to show that the remarks of the court in *In re Sullivan*, would not be controlling here.

We conclude that, under the facts disclosed by this record, the respondents have no right of recovery whatever against appellant personally. The judgment of the trial court is reversed.

Morris, C.J., Mount, Chadwick, and Holcomb, JJ., concur.

NOTE.

Personal Liability of Receiver for Attorney's Fees.

With respect to an executor or administrator the rule seems to be that such a fiduciary is personally liable for the value of the services of an attorney employed by him, and must look to the court for an allowance by way of reimbursement. See the notes to *Painter v. Kaiser*, 1 Ann. Cas. 765, and *Brown v. Quinton*, 18 Ann. Cas. 290. See also 11 R. C. L. tit. *Executors and Administrators*, p. 235. But while the reasons on which that rule is based would appear to be equally applicable to a contract by a receiver, the few cases which have passed on the subject are in accord in holding that an attorney employed by a receiver must look for his compensation to the allowance which may be made by the court and cannot hold the receiver personally liable. *Walsh v. Raymond*, 58 Conn. 251, 20 Atl. 464, 18 Am. St. Rep. 264. See also *State v. Edgefield*, etc. R. Co. 4 Baxt. (Tenn.) 92. And see the reported case. Thus in the case first cited the court said: "We cannot conceive that any attorney at law, whose every act must be with full knowledge that he is acting for an officer of the court, will complain that in accepting employment for a receiver he is held to do so with the understanding that his compensation will depend upon the amount that may be allowed him therefor by the court upon the final accounting of the receiver." And in *State v. Edgefield*, etc. R. Co. 4 Baxt. (Tenn.) 92, the court said that the solicitors who were the petitioners must look first to the receiver who employed them, and he would, no doubt, have the right to pay his counsel fees out of any funds that might come to his hands as receiver, and would be entitled to a credit for the same on settling his accounts as receiver. In the case of *In re Trueman*, L. R. 14 Eq. (Eng.) 278, it was held that a liquidator was not personally liable to a solicitor for services rendered by him in the liquidation. The court said: "It is clear to me, beyond the possibility of doubt, that he never does incur any liability; that it is not his intention, nor the intention of any solicitor whom he employs in that business, ever to assert that there did exist any personal liability between them. The business of the liquidator is to realize and administer the assets: if there are enough, well and good; if not enough, people must go unpaid. The solicitor knows that that is the end and object of the appointment of the voluntary liquidator. The liquidator has no interest in the matter, except simply for his remuneration, which is to come afterwards; he has no right or inter-

est in any particle of the assets he is to realize, receive, and distribute, and to do the best he can with; and the solicitor undertakes the employment with a perfect knowledge on the subject." See to the same effect *In re Anglo-Moravian Hungarian Junction R. Co.* 1 Ch. (Eng.) 130, 45 L. J. Ch. 115.

On the other hand where the services rendered by an attorney are such as the receiver should perform in person, he is liable personally to the attorney. *Henry v. Henry*, 103 Ala. 582, 15 So. 916. In that case it was held that a receiver who employed attorneys to advise and assist him in performing duties which he was supposed to perform himself must pay them himself. The court said: "A trustee has no authority to employ attorneys, at the expense of the estate, to perform the ordinary duties of the trust or office which any ordinarily competent business man is presumed to be capable of performing. Those are his duties, and he is paid for them. It is for services requiring special legal skill that he will be allowed counsel fees."

In *Dalliba v. Winschell*, 11 Idaho 364, 82 Pac. 107, 114 Am. St. Rep. 267, it was held that a receiver who had without authority employed an attorney was not entitled to any allowance for attorney's fees and that a charge of that kind must be borne by him individually and out of his private estate. The court said: "He has never at any time, so far as it appears from this record, been authorized to employ an attorney in the administration of his office, nor does it appear that he has ever had occasion for an attorney other than in presenting this account and securing an order and judgment allowing the same, and for such services the estate should not be charged." See to the same effect *Wilkinson v. Washington Trust Co.* 102 Fed. 28, 42 C. C. A. 140.

In *Klebisch v. Siedler*, 7 Misc. 144, 27 N. Y. S. 417, it appeared that the plaintiff was the attorney for a brickworks company and that when the defendant was appointed receiver of the company the plaintiff continued to render him professional and other services. The court said: "All of the transactions between the parties had reference to the receivership and the management of its property, no personal or private interest of the receiver being involved; but he contracted personally with the plaintiff, and is liable in a personal action."

EX PARTE UNITED STATES.

United States Supreme Court—December 4, 1916.

242 U. S. 27; 37 S. Ct. 72.

Mandamus — To Court — Exceeding Jurisdiction.

Mandamus is the proper remedy where a federal district court has exceeded its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the conviction.

Same.

A rule to show cause why mandamus should not issue where a federal district court has exceeded its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction is properly directed to the judge, to compel the vacation of the order of suspension, rather than to the clerk of the court, to compel him to issue a commitment.

Sentence and Punishment — Suspension of Sentence.

A federal district court exceeds its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction.

[See note at end of this case.]

Action for mandamus. *United States*, petitioner, and *John M. Killits*, District Judge, respondent. The facts are stated in the opinion. WRIT GRANTED.

Attorney General Gregory, *Assistant Attorney General Wallace* and *Solicitor General Davis* for *United States*.

Edwin J. Marshall for respondent.

John M. Killits, in propria persona, also for respondent.

Richard W. Hale, *Frank W. Grinnell*, *Homer Folks* and *Charles L. Chute* as amici curiae.

[37] WHITE, C. J.—The accused pleading guilty to an indictment charging him in several counts with embezzling the money of a national bank of which he was an officer and making false entries in its books in violation of § 5209, Revised Statutes (5 Fed. St. Ann. 145) was sentenced to imprisonment in the penitentiary for five years, the shortest term which under the statute could have been imposed upon him. At once at his request over the objection of the *United States District Attorney* the court ordered "that the execu-

tion of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years." The United States moved to set this order aside on the ground that as it was not a mere temporary suspension of the sentence to enable legal proceedings pending or contemplated to revise it to be taken, or application for pardon to be made, or any other legal relief against the sentence to be resorted to, but on the contrary as it was a permanent suspension based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence, the order of suspension was void as it was equivalent to a refusal to carry out the statute. The motion was denied. In the opinion giving its reasons for so doing the court, conceding that the suspension was permanent, stated that the [38] general considerations which it deemed it was required to take into view in deciding whether the sentence should be enforced, conceding the legality of the conviction and sentence and their finality, as follows:

"Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies."

After pointing out the peculiar aptitude possessed by a trial judge for the appreciation of such conditions and the imperative duty which rested upon such judge to consider and weigh the matters stated and to determine as an inherent attribute of judicial power whether a permanent suspension of the term of imprisonment fixed by the statute should be ordered, the circumstances upon which it was concluded that a permanent suspension should be directed were stated in part as follows:

"We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We

find that otherwise than for this crime, his disposition, character and habits have so strongly commended [39] him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him."

After further elaborating considerations of a like nature and stating very many circumstances confirming those mentioned, to leave no room for doubt that its action was intended to be permanent and was based alone on the extraneous circumstances stated, the court said:

"Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent 'an abuse of the court's process, or to prevent an injustice being done to the defendant' so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed."

Following a written demand which was thereafter made upon the clerk to issue a commitment which was refused by him on the ground that the sentence had been suspended and the further refusal of the judge to direct the clerk to issue such commitment, the United States sought and obtained a rule to show cause why a mandamus should not be awarded directing the judge to vacate the order of suspension, under which the subject is now before us for consideration.

The remedial appropriateness of the writ of mandamus is at the threshold questioned, but we dispose of the subject by a mere reference to adjudged cases conclusively establishing the want of foundation for the contention. *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214; *Matter of L. etc. Ins. Co. v. Wilson*, 8 Pet. 291, 8 U. S. (L. ed.) 949; *In re Winn*, 213 U. S. [40] 458; *In re Metropolitan Trust Co.* 218 U. S. 312, 31 S. Ct. 18, 54 U. S. (L. ed.) 1051; *Ex p. Metropolitan Water Co.* 220 U. S. 539, 31 S. Ct. 600, 55 U. S. (L. ed.) 575. In addition, however, it is urged that as the right to resort to the extraordinary remedy by mandamus must rest upon the assumption that the order of suspension was absolutely void, therefore the rule for the writ should have been directed not against the judge, but against the clerk to compel him to issue the commitment. But we pass from its consideration, as we are of opinion that its want of merit will be completely

demonstrated by the slightest appreciation of the judicial duties of the court below and the ministerial relation of the clerk of the court to the same.

The return to the rule and the statement in support of the same lucidly portray the contentions involved in the question of power to be decided and the subject in all its aspects has been elaborately discussed, not only by the printed arguments of the parties, but in addition light has been thrown on the general question by an argument submitted by the New York State Probation Commission, explaining the statutory system of parole prevailing in that State, and by an able argument presented by members of the Bar of the First Circuit in behalf of a practice of mitigating or pretermittting, when deemed necessary, the statutory punishment for crimes which it is declared has prevailed in the United States courts in that circuit for many years.

The argument on behalf of the respondent concedes that the order of suspension was permanent and absolutely removed the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an absolute and permanent refusal to impose under the statute any sentence whatever. However absolute may be the right thus asserted, it is nevertheless said it is not without limitation, since it may not be capriciously called [41] into play. Passing the question whether this assumed restriction is not in the nature of things imaginary as the result of the scope of the authority asserted, let us come to dispose of the contention made by examining the propositions relied upon to sustain it.

They are: 1. That the right to refuse to impose a sentence fixed by statute or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial power to try and punish violations of the criminal law. 2. That even if there be doubt on this subject as an original proposition, such doubt is dispelled as the right was recognized and frequently exerted at common law. 3. That the power claimed has also been recognized by decisions of state courts and of United States courts of original jurisdiction to such an extent that the doctrine is now to be considered as not open to controversy. 4. That whatever may be the possibility of dispute as to this last view, at least it cannot be denied that in both the state and federal courts, over a very long period of time, the power here asserted has been exercised often with the express, and constantly with the tacit, approval of the administrative officers of the state and federal governments, and has been also tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an ex-

tent that the authority claimed has in practice become a part of the administration of criminal law both state and federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions upon which it is founded.

1. *The contention as to inherent judicial power.*

Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess [42] ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

The proposition might well be left with the demonstration which results from these considerations, but the disregard of the Constitution which would result from sustaining the proposition is made if possible plainer by considering that, if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

2. *The contention as to support for the proposition at common law.*

[43] The common law is thus stated in Hale's Pleas of the Crown, vol. 2, chap. 58, p. 412:

"Reprieves or stays of judgment or execution are of three kinds, viz:

"I. *Ex mandato regis*. . . .

"II. *Ex arbitrio judicis*. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. *Crompt. Just.* 22, b. and these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, altho their sessions be adjourned or finished, and this by reason of common usage. *Dy.* 205 a.

"III. *Ex necessitate legis*, which is in case of pregnancy, where a woman is convict of felony or treason."

Blackstone thus expresses it:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

"I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence of an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis*; either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right.

[44] "Reprieve may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*." (*Book IV. ch. xxxi, pp. 304-395.*)

While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that at common law the courts possessed or claimed the right which is here insisted upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that,

owing to the want of power in common law courts to grant new trials and to the absence of a right to review convictions in a higher court, it is we think to be conceded: (a) That both suspensions of sentence and suspensions of the enforcement of sentence, temporary in character, were often resorted to on grounds of error or miscarriage of justice which under our system would be corrected either by new trials or by the exercise of the power to review. (b) That not infrequently, where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon had been sought or obtained, the punishment fixed by law was escaped. But neither of these conditions serves to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law.

[45] And we can deduce no support for the contrary contention from the rulings in 2 *Dyer*, 165a, 205a and 235a, since those cases but illustrate the exercise of the conceded, reasonable, discretionary power to reprieve to enable a lawful end to be attained. Nor from the fact that common law courts possessed the power by recognizances to secure good behavior, that is, to enforce the law, do we think any support is afforded for the proposition that those courts possessed the arbitrary discretion to permanently decline to enforce the law. The cases of *Rex v. Hart*, 30 *How. St. Tr.* 1344, and *Reg. v. Dunn*, 12 *Q. B.* 1026, 64 *E. C. L.* 1026, 1041, certainly do not tend to so establish, since they simply manifest the exertion of the power of the courts after a conviction and the suffering of the legal penalty to exact from the convicted person a bond for his good behavior thereafter.

3. *The support for the power asserted claimed to be derived from the adjudication of state and federal courts.*

Coming first to the state courts, undoubtedly there is conflict in the decisions. The area, however, of conflict will be narrowed by briefly stating and contrasting the cases. We shall do so by referring chronologically to the cases denying the power, and then to those relied upon to establish it.

In 1838 the Supreme Court of North Carolina in *State v. Bennett*, 20 *N. C.* 170, was called upon to decide whether a trial court had the right to permanently remit upon condition a part of a criminal sentence fixed by statute. The court said:

"We know that a practice has prevailed to some extent of inflicting fines with the provision that they should be diminished or re-

mitted altogether upon matter thereafter to be done, or shown to the Court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound, upon this first occasion when it is brought judicially to our notice, to declare it illegal."

[46] In 1860 in *People v. Morrisette*, 20 How. Pr. (N. Y.) 118, an accused after pleading guilty asked a suspension of sentence and to be then discharged from custody. The court said:

"I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor."

In *People v. Brown*, 54 Mich. 15, 19 N. W. 571, in deciding that no power to permanently suspend a sentence existed, speaking through Mr. Chief Justice Cooley, the court said:

"Now it is no doubt competent for a criminal court, after conviction, to stay for a

time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be: *Com. v. Dowdican's Bail*, 115 Mass. 133; but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty indirectly but to complete effect grant to the respondent a pardon for his crime."

And, considering the doctrine as to the want of power [47] thus expounded from the point of view of the common law and of every argument here relied upon, state courts have in the cases which are in the margin in careful opinions denied the existence of the power now claimed.¹

The cases to the contrary are these, omitting one in a court of original jurisdiction in Massachusetts referred to by counsel but in which there is no written opinion:

In 1874 in *Com. v. Dowdican's Bail*, 115 Mass. 133, the right in a criminal case "to lay the case on file" and postpone the sentence

¹ *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318 (1885); *Gray v. State*, 107 Ind. 177, 8 N. E. 16 (1886); *People v. Blackburn*, 6 Utah 347, 23 Pac. 759 (1890); *State v. Voss*, 86 Ia. 467, 45 N. W. 898, 8 L.R.A. 767 (1890); *People v. Court of Sessions*, 8 N. Y. Crim. 355, 19 N. Y. S. 508 (1892), *affirmed* in 66 Hun 550, 21 N. Y. S. 659 (1893); *In re Strickler*, 51 Kan. 700, 33 Pac. 620 (1893); *People v. Allen*, 155 Ill. 61, 39 N. E. 568, 41 L.R.A. 473 (1895); *In re Markuson*, 5 N. D. 180, 64 N. W. 939 (1895); *In re Webb*, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L.R.A. 356 (1895); *U. S. v. Folsom*, 8 N. M. 651, 46 Pac. 447 (1896); *State v. Murphy*, 23 Nev. 390, 48 Pac. 628 (1897); *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 69 Am. St. Rep. 175, 42 L.R.A. 190 (1898); *Hawaii v. Pedro*, 11 Hawaii 287 (1898); *In re Beck*, 63 Kan. 57, 64 Pac. 971 (1901); *Miller v. Evans*, 115 Ia. 101, 88 N. W. 198, 91 Am. St. Rep. 143, 56 L.R.A. 101 (1901); *People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, 63 L.R.A. 82 (1903); *In re Flint*, 25 Utah 338, 71 Pac. 531, 95 Am. St. Rep. 853 (1903); *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456 (1902); *Grundel v. People*, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75 (1905); *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892 (1905); *McCampbell v. State*, 116 Tenn. 98, 93 S. W. 100 (1905); *St. Hilaire Petitioner*, 101 Me. 522, 64 Atl. 882 (1906); *Tanner v. Wiggins*, 54 Fla. 203, 14

Ann. Cas. 718, 45 So. 459 (1907); *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599 (1908); *Ex p. Clendenning*, 22 Okla. 108, 97 Pac. 650, 132 Am. St. Rep. 628, 19 L.R.A. (N.S.) 1041 (1908); *Ex p. Cornwall*, 223 Mo. 259, 122 S. W. 666, 135 Am. St. Rep. 507 (1909); *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548 (1910); *State v. Smith*, 173 Ind. 388, 90 N. E. 607 (1910); *State v. Langum*, 112 Minn. 121, 127 N. W. 465 (1910); *Ex p. Peterson*, 19 Idaho 433, 113 Pac. 729, 33 L.R.A. (N.S.) 1067 (1911); *State v. Abbott*, 87 S. C. 466, Ann. Cas. 1912B, 1189, 70 S. E. 6, 33 L.R.A. (N.S.) 112 (1911); *Spencer v. State*, 125 Tenn. 64, 140 S. W. 597, 38 L.R.A. (N.S.) 680 (1911); *State v. Sapp*, 87 Kan. 740, 125 Pac. 78, 42 L.R.A. (N.S.) 249 (1912); *Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260 (1912); *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L.R.A. (N.S.) 443 (1912); *State v. Talberth*, 109 Me. 575, 85 Atl. 296 (1912); *Fuller v. State*, 100 Miss. 811, Ann. Cas. 1914A 98, 39 L.R.A. (N.S.) 242 (1912); *Ex p. Bugg*, 163 Mo. App. 44, 145 S. W. 831 (1912); *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S. W. 162 (1912); *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654 (1912); *Hancock v. Rogers*, 140 Ga. 688, 79 S. E. 558 (1913); *Brabandt v. Com.* 157 Ky. 130, 162 S. W. 786 (1914); *Matter of Hart*, 29 N. D. 38, 149 N. W. 568, L.R.A. 1915C 1169 (1914); *Reese v. Olsen*, 44 Utah 318, 139 Pac. 941 (1914).

was sustained, the court declaring that the practice had long existed, and was recognized by statutes one of which regulated the granting of parole by courts in liquor cases.

[48] The case just cited was approvingly referred to in *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954, and declared to express the practice long prevailing in New Hampshire.

In 1894, in *People ex rel. Forsyth v. Monroe County*, 141 N. Y. 288, 36 N. E. 386, 23 L.R.A. 856 in holding that a trial court had power to permanently suspend a sentence for reasons dehors the legality of the conviction, it was declared that such power existed at common law and hence prevailed in the State, this being supported by a quotation from Hale's *Pleas of the Crown*. In addition it was said, referring to a state parole statute enacted subsequent to the conviction, that such statute, while it conferred no new or other power than that possessed at common law, nevertheless imposed the duty to see to it that the power was not lost to impose future punishment after the release if the condition of suspension was violated.

In the cases cited in the margin the power was upheld upon the rulings in *Com. v. Dowdican's Bail*, *supra*, and the *Forsyth* case, *supra*, or because of a practice long prevailing.¹

Leaving aside the question of the asserted duty to sustain the doctrine because of the long established practice, [49] which we shall hereafter consider, we think it clear that the long and settled line of authority to which we have previously referred denying the existence of the power is in no way weakened by the rulings which lie at the basis of the cases relied upon to the contrary. In the first place, on the face of the opinion in *Com. v. Dowdican's Bail*, *supra*, it would seem certain that that case treated the power as being brought by the state legislation which was referred to within the domain of reasonable discretion, since by the effect of that legislation the right to exert such power, if not directly authorized, was at least by essential implication sanctioned by the state law. In the second place, in so far as the *Forsyth* case, *supra*, is concerned and its declaration as to what was the common law upon the

subject, the error thus fallen into is not only demonstrated by what we have said as to the common law, but is additionally shown by the fact that the quotation from Hale's *Pleas of the Crown* made in the opinion contains clauses supporting the opinion expressed as to the common law when in fact the clauses in question, it would seem, were by some error of citation mistakenly attributed to Hale. We say this because the clauses referred to and attributed to Hale in the quotation are not found in any edition of the *Pleas of the Crown* which we have been able to examine, and it is stated by counsel for the United States that after diligent search no passage containing the clauses has been discovered, and the existence of any edition of the work containing them is not pointed out by opposing counsel. But whether this be well founded or not, as the conclusion concerning the common law which the case expressed is we think obviously unsound, we are unable on the authority of such a mistaken view to disregard the long established and sound rule laid down in the many state cases which we have quoted.

So far as the courts of the United States are concerned, [50] it suffices to say that we have been referred to no opinion maintaining the asserted power, and on the contrary in the opinion in the only case in which the subject was considered it was expressly decided the power was wanting. *U. S. v. Wilson*, 46 Fed. 748 (1891). It is true that in the District of Columbia the existence of the power was maintained. *Miller v. U. S.* 41 App. (D. C.) 52 (1913). But the unsoundness of the grounds upon which the conclusion was based is demonstrated by what we have previously said; and aside from this, as the subject was covered by an Act of Congress conferring power of parole (Act of July 25, 1910, 36 Stat. 864), the case requires no further consideration.

4. *The duty to recognize the power as lawful because of its exertion in practice by the state and federal courts and the implications arising therefrom.*

There is no doubt that in some States, without reference to probation legislation or an affirmative recognition of any doctrine

¹ *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547 (1881); *People v. Mueller*, 15 Chicago Leg. N. 364 (1883); *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482 (1887); *Ex p. Williams*, 26 Fla. 310, 8 So. 425 (1890); *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L.R.A. 260 (1894); *State v. Whitt*, 117 N. C. 804, 23 S. E. 452 (1895); *People v. Webster*, 14 Misc. 617, 36 N. Y. S. 745 (1895); *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L.R.A. 472 (1898); *Shaefer v. Ohio*, 7 Ohio Cir. Ct. (N. S.) 292 (1905); *In re Clara Lee*, 3 Ohio N. P. (N. S.) 533 (1905); *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011 (1909); *State v. Drew*, 75 N. H.

402, 74 Atl. 875 (1909); *State v. Drew*, 75 N. H. 604, 76 Atl. 191 (1910); *In re Hinson*, 156 N. C. 250, 72 S. E. 310, 36 L.R.A. (N.S.) 352 (1911); *State v. Osborne*, 79 N. J. Eq. 430, 82 Atl. 424 (1911); *People v. Goodrich*, 149 N. Y. S. 406 (1914); *State v. Tripp*, 168 N. C. 150, 83 S. E. 630 (1914); *State v. Johnson*, 169 N. C. 311, 84 S. E. 767 (1915). See *Greene v. State*, 88 Ark. 290, 114 S. W. 477 (1908); *Joiner v. State*, 94 Ark. 198, 126 S. W. 723 (1910); *People v. Patrick*, 118 Cal. 332, 50 Pac. 425 (1897); *Com. v. Keeper*, 6 Pa. Super. Ct. 420 (1898); *Com. v. Dunleavy*, 16 Pa. Super. Ct. 380 (1901).

supporting the power, it was originally exerted and the right to continue to do so came to be recognized solely as the result of the prior practice. *State v. Osborne*, Warden, 79 N. J. Eq. 430, 82 Atl. 424.

As to the courts of the United States, in one of the circuits, the first, especially in the Massachusetts district, it is admitted the practice has in substance existed for probably sixty years as the result of a system styled "laying the case on file." The origin of this system is not explained, but it is stated in the brief supporting the practice that courts of the United States have considered the existing state laws as to probation and have endeavored in a certain manner to conform their action thereto. It is true also, that in the courts of the United States, sometimes in one or more districts in a circuit and sometimes in other circuits, in many instances the power here asserted was exerted, it would seem without any question, there being no objection raised by the representatives of [51] the United States; indeed it is said that in Ohio where the power, as we have seen, was recognized as existing, it was exerted by Mr. Justice Matthews of this court when sitting at circuit, and there and elsewhere, it is pointed out, the power was also exerted in some instances by other judges then or subsequently members of this court. But yet it is also true that, numerous as are the instances of the exertion of the power, the practice was by no means universal, many United States judges, even in a district where the power had been exerted, on a change of incumbency persistently refusing to exert the power on the ground that it was not possessed. Indeed so far was this the case that we think it may be said that the exertion of the power under the circumstances stated was intermittent and was not universal but partial.

As amply shown by the case before us, we think also it is apparent that the situation thus described was brought about by the scrupulous desire of judges not to abuse their undoubted discretion as to granting new trials, and yet to provide a remedy for conditions in cases where a remedy was called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well being,—conditions arising in the nature of things from the state of proof in cases coming before them which could not possibly have been foreseen and taken into consideration by the law-making mind in fixing in advance the penalty to be imposed for a particular crime. And the force of this conclusion will become more manifest by considering that nowhere except sporadically was any objection made to the practice by the prosecuting officers of the United States, who indeed it is said not infrequently in-

voked its exercise. Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise in the very nature of things [52] amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete.

While the conclusions just stated inevitably exact that the rule which is before us be made absolute and that the mandamus issue, nevertheless we are of opinion that the exceptional conditions which we have described require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ, so as to afford ample time for executive clemency or such other action as may be required to meet the situation. [53] And for this purpose the issue of the writ will be stayed until the end of this term, unless the United States otherwise requests, when it will go as a matter of course.

Rule made absolute.

NOTE.

In the reported case the federal supreme court passes for the first time on the much mooted question whether a trial court has the

power to suspend the operation of a sentence imposed on a conviction of crime or the imposition of such a sentence. Holding that no such power exists, the court discusses serially the grounds on which the power was asserted, viz.: (1) That it is an inherent judicial power; (2) that it is recognized and exercised at common law; (3) that it is established by a long course of judicial recognition; and (4) that it is sanctioned by long practice in the trial courts and by the acquiescence of the administrative officers of the government in its exercise. The inherent nature of the power and its practice at common law the court denies; the decisions it finds to be conflicting, and those upholding the power it considers to have been decided on erroneous principles. As to the sanction of usage, the conclusion of the court is summed up in these words: "But we are admonished that no authority exists to cure wrongs resulting from violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future."

The particular order under consideration in the reported case is held to amount to a permanent refusal to impose sentence, and the validity of a mere postponement of the imposition of sentence which does not contemplate a possible permanent liberation of the convicted person without punishment is not settled by the decision.

The earlier cases passing on the power of a court to suspend sentence in a criminal case are reviewed in the notes to the following cases: *St. Hilaire, Petitioner*, 8 Ann. Cas. 385; *Tanner v. Wiggins*, 14 Ann. Cas. 718; *State v. Abbott*, Ann. Cas. 1912B 1189; and *Ex p. Clendenning*, 132 Am. St. Rep. 628.

NEW ET AL.

v.

SMITH.

Kansas Supreme Court—January 9, 1915.

94 Kan. 6; 145 Pac. 380.

Witnesses — Transaction with Person Since Deceased — Evidence at Former Trial.

In an action to recover possession of certain real estate on the ground that a deed therefor had been procured by fraud and that the defendant took his title with notice of such fraud the plaintiff testified to transactions and communications had personally by her with one of the defendant's grantors who

was charged with the fraud, such grantor being present as an attorney in the case. At a subsequent trial, such grantor having died, the plaintiff was, on the defendant's objection, precluded from testifying to the matters covered by such former testimony, and thereupon offered in evidence the stenographer's transcript thereof. Held, that an objection thereto, on the grounds of incompetency and because it concerned transactions and communications had personally with a deceased grantor from whom the defendant claimed title was properly overruled.

[See note at end of this case.]

Evidence — Testimony at Former Trial.

The statute permitting the use of the stenographer's transcript of testimony (Gen. Stat. 1909, § 2407) does not restrict such use to the limitations which attach to a deposition under sections 337 and 358 of the Civil Code.

Trial — Election between Defenses — Assertion of Title from Two Sources.

The defendant claimed title by virtue of his purchase, and also claimed the right to possession by reason of having paid off certain incumbrances which had been placed thereon by the plaintiff. Upon motion of the plaintiff the defendant, over his protest, was required to elect between these defenses and elected to stand upon his claim of title. At a subsequent trial he was held bound by such previous election. Held, that the two defenses are not inconsistent and the election was improperly required, and for that reason as well as because it was compulsory the defendant should not have been held bound thereby.

Estates — Merger — Purchaser Paying Incumbrance.

Such payment did not as a matter of law work a merger of the interests of the mortgagees and the owner—merger under the circumstances being optional with the owner.

Subrogation — Purchaser Paying Mortgage — Rights against Holder of Paramount Title.

Although it was determined that the defendant took his title with notice of facts sufficient to put him upon inquiry leading to knowledge of the fraud of one of his grantors so that he must yield up possession and lose what he paid for the land, still having paid off certain mortgages placed thereon by the plaintiff the latter cannot oust him from possession until she has accounted to him for the amount thus paid, his right of subrogation being similar to that of a mortgagee in possession and based upon the same principles of equity and fair dealing.

(Syllabus by court.)

Appeal from District Court, Greenwood county: AYRES, Judge.

Action by Emelia New et al., plaintiffs, against J. A. Smith, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. MODIFIED.

T. A. Kramer for appellant.

John Stowell, Robert H. Clogston, Lew E. Clogston, E. D. Woodburn, P. T. Woodburn and *A. E. Crane* for appellees.

[7] WEST, J.—This is in form an action in ejectment to recover title and possession of a two-hundred-and-forty-acre tract of land in Greenwood county. The defendant in his answer denies the allegations of the petition and admits his possession of the real estate. Beneath the surface of these pleadings the real issue is the validity of a conveyance from the plaintiff, Emelia New, to E. C. Schultz, the wife of James Schultz, formerly an attorney at Eureka, and a conveyance by E. C. Schultz and husband to the defendant, J. A. Smith, the claim of the plaintiff being that her deed was procured by the fraud of James Schultz, and that J. A. Smith took with knowledge or with notice of sufficient facts to have put him upon inquiry leading to knowledge of such fraudulent transaction. When the case was reached for trial the defendant's counsel, in his statement to the jury, said, among other things, that his client, Smith, took his deed in good faith, having paid good money for it, and went into possession, [8] and afterwards made improvements and paid the taxes; that he paid off the three mortgages upon the land out of his own funds; whereupon the plaintiff moved that the defendant be required to elect whether he would rely upon his claim of title or upon his claim of being a mortgagee in possession, and being required so to do the defendant under protest elected to stand upon the former. At a subsequent trial the court ruled that he was bound by his previous election. The jury returned a verdict in favor of the plaintiff, and from the judgment thereon the defendant appeals, and assigns many alleged errors touching rulings upon the admission of evidence in giving and refusing instructions, in requiring the defendant to elect, and in refusing to consider his rights as a mortgagee in possession. Upon the last trial the plaintiff was called as a witness and asked if after she was brought to Eureka under arrest for the murder of her former husband she saw James Schultz, and upon objection was forbidden to state what conversation she had with him. One of the plaintiff's counsel testified that before the former trial Mrs. New's testimony was taken, and that on that trial Mr. Schultz was present in the court room and appeared as one of the attorneys in the case; that Mr. Smith, the defendant, was also present at that time; that Mr. Schultz was not sworn and did not testify on that trial. Then the counsel offered a transcript of this testimony in which the witness stated that she saw Mr. Schultz the day she was brought to Eureka under

arrest; that he came to visit her and said a few words; that after she was taken to the jail at Wichita Mr. Schultz visited her there about three times, during one of which visits she signed a paper, which he said was to protect her property, but she did not know at the time what the paper was; that he called Mary Williams in the hall to come in and sign the paper. There was a tall slender man there. Mr. Schultz then said, "You signed this paper, Mrs. New?" to which she answered, "Yes." That she at no time made an agreement with him that he was [9] to have her farm if he would defend her in the criminal case or had any agreement as to what she was to pay him for his services. When this transcript was offered in evidence Mr. Schultz was no longer alive, and the defendant contends that it was error to admit this testimony, and that under the statute which provides that the transcript of the stenographer's notes may be introduced in evidence under like circumstances and with like effect as the deposition of the witness, Mrs. New, being present in court could not have testified by deposition, and that it was not competent because in respect to a transaction had personally with a deceased person prohibited by section 320 of the code as amended by chapter 229 of the Laws of 1911.

The defendant offered in evidence the record of all mortgages that were on the real estate when deeded to Mrs. Schultz and to the defendant; also assignments, releases and foreclosure proceedings concerning them, and offered to show that such mortgages were paid by the defendant. These were excluded from consideration on the theory that he was bound by his former election to stand on his claim of title.

It is earnestly contended by the defendant that he not only had a right to have this evidence received and considered, but that his payment of the mortgages with his own money gave him the right to be subrogated to that extent and to be treated as a mortgagee in possession. To this the plaintiff replies that having procured the land by fraud, or rather that having taken it with notice of the fraud by which Schultz procured it to be conveyed to his wife, the defendant is barred from consideration as a mortgagee in possession.

The matter of election must be determined by the rightfulness of the order requiring it in the first place, for it was then made under compulsion and protest, and hence the defendant could not be held bound by it on a subsequent trial on the mere ground that having once elected he must stand by such election. The very [10] word signifies a free choice, and an election by compulsion is an anomaly. (3 Words & Phrases, p. 2336.) An election which involves no freedom of

choice is known as Hobson's choice, which is defined as "A choice without an alternative." (Webster's New International Dictionary, 1911 ed.) It must follow, therefore, that an involuntary election in obedience to the order of the court was not such a choice as would bind the party on a subsequent trial unless for the sole reason that it was rightfully ordered at the first trial. But when one defends an action for the recovery of land on the grounds that he has a paper title which he desires held good, and is also in possession of mortgages on such land which he has paid, we can see nothing necessarily irreconcilable about the two defenses. It is proper in an action for specific performance to plead in the alternative and ask for damages for nonperformance. (Henry v. McKittrick, 42 Kan. 485, 22 Pac. 576; Naugle v. Naugle, 89 Kan. 622, 132 Pac. 164.) And it is quite possible for one to purchase incumbered land, the title to which may be uncertain, and by purchasing the incumbrance hold both as owner and mortgagee, the matter of merger usually being one of choice and not one of compulsion. (Building, etc. Assoc. v. Palatine Ins. Co. 74 Kan. 272, 86 Pac. 142; Carson v. Fulbright, 80 Kan. 624, 103 Pac. 139; Williams v. Bricker, 83 Kan. 53, 58, 59, 109 Pac. 998, 30 L.R.A. (N.S.) 343; Zuege v. Nebraska Mortg. Co. 92 Kan. 272, Ann. Cas. 1916B 865, 140 Pac. 855, 52 L.R.A. (N.S.) 877.)

As to the admissibility of the transcript of the evidence, aside from the competency of the witness, it should be observed that when this testimony was originally offered Mr. Schultz was present as one of the attorneys in the case, although he did not testify. Mrs. New had then testified about her interviews with Mr. Schultz at one of which she had signed and acknowledged a paper which turned out to be a deed, and about other transactions with him when he acted as her attorney. This was followed by a cross-examination by her counsel, covering in detail her dealings with Mr. [11] Schultz after his motion that her examination in chief be stricken out was overruled. It is contended that the only basis for admitting this transcript is the statute providing that a transcript of the court stenographer's notes of one testimony, properly verified and certified, may be introduced under like circumstances and with like effect as the deposition of such witness. (Gen. Stat. 1909, § 2407.) The circumstances under which depositions may be used are set forth in sections 337 and 358 of the civil code, an essential one being that the witness is not and cannot be in attendance. The witness was present and placed on the stand, but an objection to testimony by her was sustained, and plaintiffs' counsel argue that having been deprived

of her evidence by this objection it was proper to introduce the transcript of her former testimony. The objection was on the ground of the incompetency of the evidence and also the incompetency of the witness to testify concerning a transaction with a deceased person, and it does not appear on which ground it was sustained. The fact that the transcript was received indicates, however, that it was on the ground of the present incompetency of the witness. Of course, aside from this the transcript was properly received like evidence of any other statement made by the plaintiff in the presence and hearing of Mr. Schultz and undenied by him. Fullenwider v. Ewing, 30 Kan. 15, 1 Pac. 300, is cited. There on the second trial of a case a deposition taken on a former trial was offered as the affidavit of a witness, and it was held that this was properly rejected, the witness being present in court. It was also held proper to prove certain conduct and language on the part of the original plaintiff had in the presence of the original defendant. See, also, Chicago, etc. R. Co. v. Prouty, 55 Kan. 503, 40 Pac. 909, to the effect that it is error to admit the deposition of a witness who resides outside the county, but who is present in court and ready and willing to testify.

[12] Before the enactment of section 2407 it had been held that the stenographer's notes of evidence formerly taken could be read in evidence, and the statute makes it proper to introduce the transcript made and certified by him. In State v. Stewart, 85 Kan. 404, 116 Pac. 489, the testimony of a witness voluntarily given in the preliminary examination of the charge for which the accused was on trial was held admissible, the accused having originally had full opportunity to cross-examine, and the direct testimony of the witness having become unavailable by reason of his claiming his statutory privilege of withholding the same. The previous decisions were referred to and followed. It was said that this admissibility did not depend so much on the presence or the availability of the witness as on the availability of the testimony; that the testimony of Stewart, the husband of the defendant, was as unavailable as if he were over the state line. The case of Pratt v. Patterson, 81 Pa. St. 114, was cited, in which both parties to an action having testified and the verdict having been set aside and one of the parties having died and his executor having been substituted, it was held competent at the next trial to read the testimony given by the deceased at the former trial. Section 337 of the code provides that the deposition of a witness may be used only when he is a nonresident or absent from the county or unable to attend court or dead. Section 2407 has reference not so

much to the matter of using a deposition in the absence of witnesses as using a transcript of the stenographer's notes instead of reading them, and while it provides that such transcript may be introduced under like circumstances and with like effect as a deposition, it does not restrict such use to instances in which depositions only may be used. In other words, the object of section 2407 is not to confine transcripts to the limits applied to depositions, but to provide a more convenient way to use testimony formerly taken than by reading the notes which would be [13] unintelligible to the jury, and which reading might in many cases be tedious and unsatisfactory.

The question remains whether or not this testimony was incompetent because it related to a transaction had by the plaintiff with a deceased person "where either (formerly the "adverse" party) party to the action claims to have acquired title directly or indirectly from such deceased person." (Laws 1911, ch. 229, § 1.) The defendant claimed to have acquired title from the wife of the deceased, but as the husband joined in the deed he could well claim to have acquired title either directly or indirectly from him. When this testimony was originally given it did not relate to any transaction or communication had with a person then deceased and hence it was not barred by the statute invoked by the defendant. At the subsequent trial the testimony by the witness was excluded by reason of this statute, and then it became as unavailable as if Mrs. New had been absent in another state or helpless on a bed of sickness, the situation thus approaching very nearly the one presented in *State v. Stewart*, supra, so nearly, indeed, that the same rule must be held to apply. Authorities are cited which would lead to a different conclusion and which go to the extent of holding that Mrs. New should be deemed to have been actually testifying when her former testimony was read, but we are not persuaded or convinced by their reasoning. In *Collins v. McGuire*, 76 App. Div. 443, 78 N. Y. S. 527, it was held by the appellate division of the supreme court of New York that the competency of a witness depends upon the facts as they exist when his testimony is given. A defendant had testified on his own behalf to personal transactions had with the plaintiff, who died before being called as a witness, and his administrator was substituted and it was sought to strike out the evidence under a statute similar to ours, but the motion was denied and this ruling was affirmed, following *Comins v. Hetfield*, 80 N. Y. 261. It is suggested [14] that when this evidence was originally given it was with the understanding that Mr. Schultz should be allowed to testify concern-

ing the same matters, but as a demurrer was sustained to the plaintiff's evidence the opportunity did not arise in that trial; and that the objection that it covered a conversation between attorney and client was waived in view of the understanding. But this cannot mend matters for the defendant for the statute does not preclude the client but only the attorney from giving such conversation. (Civ. Code, § 321, subdiv. 4.)

It is insisted that the court erred in sustaining an objection to questions in substance whether or not the defendant when he bought the land believed that the plaintiff had in good faith parted with all her interest in it. It was competent to show his motive, belief and state of mind, and no one could know so well as he what they were. (*Baker v. Missouri*, etc. R. Co. 85 Kan. 263, Ann. Cas. 1912D 1042, 116 Pac. 816, 35 L.R.A.(N.S.) 822.) But he was permitted to testify that he did not then know there was any claim made by Mrs. New of fraud or failure of consideration, and that he had never heard anything about any controversy as to how Schultz got the deed. No offer was made to show what was indicated by these questions and no affidavit or showing thereof was produced in support of the motion for a new trial, and it cannot be said that material prejudice appears as to the ruling in question. (*Clark v. Morris*, 88 Kan. 752, 129 Pac. 1195; *Caldwell v. Modern Woodmen of America*, 89 Kan. 11, 130 Pac. 642; *Cheek v. Missouri*, etc. R. Co. 89 Kan. 247, 131 Pac. 617; *McIntosh v. Standard Oil Co.* 89 Kan. 289, Ann. Cas. 1914D 112, 131 Pac. 151, 47 L.R.A.(N.S.) 730; *Treiber v. McCormack*, 90 Kan. 675, Ann. Cas. 1915B 943, 136 Pac. 268; *Leavens v. Hoover*, 93 Kan. 661, 145 Pac. 877.

We have examined the instructions given and refused with reference to the complaints made concerning them and to ascertain whether the jury were properly charged, and while now and then an expression might have been bettered or properly omitted, it appears that the issues were fairly and sufficiently presented and no [15] material error was committed either in those refused or in those given. The only remaining point requiring consideration is the rightfulness of the defendant's claim to be treated as a mortgagee in possession. This term is a familiar one, but it bears no talismanic charm or potency to confer benefits regardless of the dictates of fairness and equity; on the contrary, it is an expression used to describe a situation in which those very dictates demand that one be made whole for what he has benefited an estate before being required to yield it up to another who would thereby enjoy an unearned advantage. When Mrs. Schultz took her deed to the land it was

incumbered, and these incumbrances remained when Mr. Smith purchased the land. They represented money loaned to a former owner and never paid by such owner, so that the utmost title Mrs. New could ever rightfully claim is the equity or the fee burdened with these incumbrances. These Mr. Smith has paid, not on account of or at the behest of the plaintiff, but presumably because they had to be paid to save the land, which he claimed to own. Is there any reason why if he should be compelled to turn the land over to Mrs. New he should also present her with the amount of these mortgages? The only possible reason assigned is that he is tainted with the fraud by which the title was procured from her. But this is not an action for punitive damages. It is one to set aside a deed, and regain possession of land on which he has expended, under color and claim of title, enough money to clear such title from all the incumbrances which his adversary voluntarily placed upon the land. He is not the actor in this drama, but the party assailed, and if his assailant recovers everything which he ever procured from her directly or indirectly it would seem enough. And to this effect are the authorities. In *Hofman v. Demple*, 52 Kan. 756, 35 Pac. 803, the defendant had furnished liquor to make the husband of the plaintiff drunk for the purpose of inducing him to convey the homestead, whereupon the husband procured [16] the wife's signature by duress, and it was held that the plaintiff had no right to recover the land freed from an incumbrance cleared by the defendant. True, the grantors had acquiesced for more than a year and a half, but this was not deemed sufficient to bar the recovery of the land, and it was stated to be inequitable that more should be recovered. In *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 104 Am. St. Rep. 396, 64 L.R.A. 320, many decisions were reviewed, and it was said that whatever may be the historical source of the rule, it should be acted upon except where one has acquired possession of property "under such circumstances that it would be inequitable to permit him to assert a right under it." (p. 145.) In *Walters v. Chance*, 73 Kan. 680, 885, 85 Pac. 779, it was said that if one obtain possession by force, intimidation, deceit or fraud, a court of equity will not permit him to profit thereby. Here there is no claim that the defendant obtained possession by fraud committed by him upon Mrs. New—only that he took his title with the knowledge or means of knowledge that one of his grantors had defrauded her. While this may be good ground for requiring him to give up what he obtained and to lose all he paid for it, no reason is apparent why in addition he should lose what he had paid out to clear the land from liens placed thereon

by the plaintiff. Of course it is not and cannot be claimed that the defendant is a mortgagee in possession—only that he should be treated as if he were. More correctly stated, the question is, Should he be subrogated to the rights of the creditors whose liens he satisfied? As said in *Olson v. Peterson*, 88 Kan. 350, 128 Pac. 191: "Subrogation is a creature of equity, invented to prevent a failure of justice" (p. 361) and it was there said to be broad enough to include "every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter." (p. 361.) The doctrine of subrogation or equitable assignment was considered in *Fidelity, etc. Co. v. Stafford*, 93 Kan. [17] 539, 144 Pac. 852. (See also *Young v. Ward*, 115 Ind. 264, 3 N. E. 512; and *Arnold v. Hoschildt*, 69 Minn. 101, 71 N. W. 829.) As a matter of simple fairness and in line with the essential principles of equity we hold that the defendant should not be ousted until made whole for the incumbrances which he has satisfied.

Litigation resulting from the homicide of Joseph New is no new thing in this court. (*Dobbs v. State*, 62 Kan. 108, 61 Pac. 408; *Smith v. Becker*, 62 Kan. 541, 64 Pac. 70, 53 L.R.A. 141; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *New v. Smith*, 68 Kan. 807, 74 Pac. 610; *New v. Smith*, 73 Kan. 174, 84 Pac. 1030; *New v. Smith*, 86 Kan. 1, 119 Pac. 380.)

In order that this litigation may be ended, and in view of the circumstances shown, the amount due the defendant on account of the mortgages paid by him should be ascertained and satisfied before the plaintiff is let into possession. If there is a claim for rents and profits there is no reason why proper pleadings and proceedings can not be filed and had to close the entire controversy.

Finding no material error except in the one respect indicated, the case is remanded with directions to modify the judgment in accordance herewith.

NOTE.

Admissibility of Evidence Given at Former Trial Concerning Transaction with Person Since Deceased.

Introductory, 366.

View that Evidence is Admissible, 367.

View that Evidence is Not Admissible, 367.

Introductory.

There is a radical conflict of authority with respect to the general question whether

testimony taken during the lifetime of a party to an action as to a transaction with him is admissible on a trial had after his death. That conflict is exemplified in the cases relating to the admissibility after the death of a party of a deposition with respect to a transaction with him which was taken before his death. See the notes to *Boyd v. Gore*, 21 Ann. Cas. 1263, and *Beaston v. Portland Trust, etc. Bank*, reported post, this volume, at page 488. The same contrariety of opinion appears with respect to the subject of the present note, viz.: the admissibility of evidence given at a former trial concerning a transaction with a person since deceased. That question apparently involves considerations identical with those on which were based the cases collated in the notes heretofore referred to, and those cases can profitably be consulted as to jurisdictions wherein the precise question here considered has not been decided.

View that Evidence Is Admissible.

Evidence given at a former trial concerning a transaction with a person since deceased has been held in several jurisdictions to be admissible. *Bowie v. Hume*, 13 App. Cas. (D. C.) 286; *Armitage v. Snowden*, 41 Md. 119; *Pratt v. Patterson*, 81 Pa. St. 114. And see the reported case. See also *Walbridge v. Knipper*, 96 Pa. St. 48. Thus in the case first cited it was held that the testimony of the defendant given on a former trial, when the then plaintiff was living and was examined as a witness, was properly admitted in evidence. The court said: "We come lastly to the question as to the admissibility of the testimony given by the defendant on the former trial and reported stenographically, and when *Bowie*, the then plaintiff, was present and was also examined as a witness for himself. The right of cross-examination in respect to both parties was fully exercised; and the present plaintiff at the last trial produced and read in evidence the testimony given on the former trial by the then plaintiff *Bowie*, as the testimony of a deceased witness. The testimony of the defendant then given is objected to upon the ground that the party giving the evidence on the former trial is still living. But we do not think the objection a sound one. If the defendant, like his original adversary, had been dead at the last trial, there could have been no question of the admissibility of his testimony given on the former trial. But though still in life, there has supervened a cause of disqualification to his right to testify as a living witness without any fault or agency of his own. As matter of principle, in what respect does the case differ from that of a disqualifying interest acquired by a witness after he has testified in a cause, and

subsequently on a new trial his testimony is found to be essential to the party for whom he originally testified?" In *Armitage v. Snowden*, 41 Md. 119, the court said: "The objection to the testimony of the appellant cannot be sustained. The admissibility of testimony depends upon the competency of the witness at the time he testifies, and cannot be affected by what may happen afterwards. When the testimony of *Armitage* was taken, *Knell*, the testator was alive, and under the Evidence Acts of 1864, c. 109, and 1868, c. 116, he was a competent witness. The fact that *Knell* died before the hearing cannot render the testimony thus taken inadmissible." So in *Pratt v. Patterson*, 81 Pa. St. 114, the plaintiff sued to recover commissions as a real estate broker. Before the trial the defendant died and his executors were substituted. On the trial the notes of the plaintiff's testimony taken in a former suit between the same parties and involving the same subject-matter were offered in evidence and rejected by the court. Holding that the rejection of the evidence was error the court said: "This evidence was taken on due notice, with ample opportunity for cross-examination. It was not testimony that could have been fabricated after the death of the party whose interest might be injuriously affected thereby. When taken the parties stood on an equal footing. Each had the right to perpetuate his own testimony."

In *Comins v. Hetfield*, 80 N. Y. 261, a motion was made to strike out testimony of the plaintiff in his own behalf taken prior to the decease of one of the defendants, *Culver*, which occurred during proceedings before a referee. Holding that the admissibility of testimony was to be determined as of the time when it was given the court, denying the motion, said: "The death of *Culver*, after the testimony had been given and before it was completed, would not justify the striking out of the testimony which had already been taken. Section 399 of the code has no application to such a case, and cannot be invoked to sustain the motion. The testimony being entirely competent when it was admitted, and the plaintiff entitled to the benefit to be derived from the facts sworn to, the subsequent death of one of the defendants would not render it inadmissible. The disqualification of the witness depended entirely upon the facts as they existed when he gave his testimony, and not upon any change which subsequently occurred before the examination was completed."

View that Evidence Is Not Admissible.

In some jurisdictions evidence given at a former trial concerning a transaction with a person since deceased is not admissible. *Trunkey v. Hedstrom*, 131 Ill. 204, 23 N. E.

587, *affirming* 33 Ill. App. 397; Russell v. Happ, 76 Ill. App. 417; Greenlee v. Mosnat, 136 Ia. 639, 111 N. W. 996, 14 L.R.A.(N.S.) 488; Barker v. Hebbard, 81 Mich. 267, 45 N. W. 964. Thus in Greenlee v. Mosnat, *supra*, the court said: "Much is said by counsel for appellee in favor of the general proposition that, as plaintiff was competent to testify when his former testimony was given and has only been rendered incompetent by subsequent events, his former testimony ought to be accepted. But the policy of the statute seems not to be in harmony with this view. It is not on account of anything which has happened to the witness that he is unable to testify on this trial. It is because an obstacle has arisen to the enforcement of his claim as based on his own testimony by reason of the death of the other party, and that obstacle, as the statute provides, renders his testimony incompetent, unless in some way such obstacle is removed. If in this conclusion there is any apparent injustice, it is one incident to the application of the code provision. . . . True it is that the testimony of plaintiff was competent testimony, so far as its relation to the issues was concerned, but it was incompetent as the testimony of plaintiff with reference to a subject-matter as to which he was forbidden to testify after the death of the adverse party, and for that reason it was incompetent testimony; that is, testimony of an incompetent witness." So, in Trunkey v. Hedstrom, 131 Ill. 204, 23 N. E. 587, *affirming* 33 Ill. App. 397, it appeared that Trunkey, one of the plaintiffs in the action, testified on the first trial of the cause that he made the contract sued on with one Pratt, the agent of the defendants, and Pratt also testified. Before the next trial it was stipulated between the parties that in any future trial Pratt's testimony might be read in evidence by the defendants as though regularly taken as a deposition in the cause. Before the next trial, Pratt died. Trunkey, on the final trial, was called as a witness by the plaintiffs, but the trial court held him to be incompetent. Sustaining that ruling it was said: "The court below held Trunkey thereby disqualified as a witness, under section 4 of chapter 51 of the Revised Statutes, which provides: 'And in every action, suit or proceeding, a party to the same who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness as to any conversation or transaction between himself and such agent.' Plaintiffs thereupon offered his testimony as reported upon the first trial, and insisted upon its competency, on the theory that, being competent at the time he testified, his subsequent disqualification did not preclude plaintiffs from using it on the subsequent

trial. . . . That Trunkey would have been an incompetent witness at common law, must be conceded. That incompetency is removed by our statute, with certain exceptions, among which is the one above quoted. While the policy of this statute is to allow all persons to testify in civil suits, regardless of their interest in the event thereof, there is a studied purpose manifested in its various sections, to put the parties upon an equality as to the evidence of such interested witnesses. . . . Whether Trunkey was allowed to testify on this trial, or his former evidence was read to the jury, could make no difference. In either case the equality between the parties would be destroyed, Pratt being dead.

. . . The fact that in this particular case the testimony of the deceased agent was available to the defendants, cannot change the rule prescribed by the statute. It was necessary for plaintiffs to make out their case, in the first instance, by competent proof. Until they had done so, the defendants were not called upon to introduce any evidence. Plaintiffs could not avail themselves of proof made incompetent by the statute, simply because defendants had in their possession testimony which would tend to overcome such incompetent evidence. Defendants were not called upon to thus aid plaintiffs in making their case. The offered testimony was incompetent, and properly excluded."

LUTHY ET AL.

v.

REAM ET AL.

Illinois Supreme Court—October 27, 1915.

270 ILL. 170; 110 N. E. 373.

Corporations — Compensation of Officer — Allowed by Vote of Officer Benefited.

Compensation voted to an officer of a corporation is illegal, if the resolution fixing it is carried by his vote, and such compensation may be recovered.

[See 11 Ann. Cas. 773; 19 Ann. Cas. 1260.]

Stock Voting Agreement — Validity.

It is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling it.

[See note at end of this case.]

Same.

A stockholder may withdraw from a combination to control the majority of the stock of the corporation, though it is expressly stated therein that the agreement shall be irrevocable.

[See note at end of this case.]

Same.

As stockholders cannot divest themselves of their duty to participate in controlling the corporation, and as there is no such thing as an irrevocable proxy to vote stock not coupled with an interest, a trust agreement, whereby the owner of less than one per cent of the stock of a corporation had absolute power to vote a majority of the stock as he saw fit, which power was made irrevocable for ten years, is invalid and can be repudiated.

[See note at end of this case.]

Same.

Where a trust agreement provided that the trustee should have absolute power for ten years of voting corporate stock, parties to the agreement may repudiate it, and so may purchasers of stock with knowledge.

[See note at end of this case.]

Appeal from Appellate Court, Second District.

Action by Ferd. Luthy et al., plaintiffs, against Henry Ream et al., defendants. Judgment for plaintiffs in Circuit Court, Peoria county: NIEHAUS, Judge. Judgment modified by Appellate Court. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

Chiperfield & Chiperfield and Evans & Evans for appellants.

Jack, Irwin, Jack & Miles for appellees.

Thomas F. Doyle for Peru Plow and Wheel Company.

[172] DUNN, J.—Ferd. Luthy, Daniel W. Voorhees, George T. Page and Thomas Cahill filed a bill in chancery in the circuit court of Peoria county against Henry Ream, Benjamin D. Brewster, William Holly, the Peru Plow and Wheel Company (a corporation), and other persons, stockholders in the corporation, the object of which was to procure the cancellation of a certain voting trust agreement of stockholders of the corporation as to Thomas Cahill, the setting aside of the action of the directors of the corporation fixing salaries of Henry Ream, Benjamin D. Brewster and William Holly, as president, vice-president and treasurer, respectively, of the corporation, a return of the amount of the salaries received by them, and the issue of a certificate of 70 shares of the capital stock of the corporation to Thomas Cahill. Answers were filed, and after a hearing the court rendered a decree granting the relief prayed for. Upon an appeal by some of the defendants the Appellate Court for the Second District reversed the decree except so far as it held the fixing of the salaries of the officers illegal and required the amount received by them to be refunded. Complainants have appealed from this judgment, the

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court having certified that the case involves questions of law of such importance that it should be passed upon by the Supreme Court.

The Peru Plow and Wheel Company is a corporation organized under the laws of Illinois, having a capital stock of \$400,000, engaged in the manufacture of plows, metal wheels and farm implements. The complainants are the owners of 2027 of the 4000 shares of its stock, Thomas Cahill being the owner of 70 shares purchased in November, [173] 1912. In September, 1912, forty-one of the stockholders, owning 2001 shares of the stock, entered into the trust agreement in controversy. After reciting that the stockholders deemed it to their interest that all of their stock should be voted as a unit upon all questions affecting the business and management of the company and that Henry Ream had consented to hold and vote such stock on behalf of the stockholders, the agreement provided:

"That for a valuable consideration, the receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants and agreements expressed in this agreement, the stockholders hereby assign, convey and transfer unto the trustee above named, the number of shares of stock of the Peru Plow and Wheel Company, a corporation of the State of Illinois, as set opposite their respective names, to be held in trust by the said trustee for the respective stockholders by whom it is severally assigned, their personal representatives and assigns, upon the following terms and conditions:

"(1) The said trustee shall hold, control and vote said stock as if he was the owner of all of said stock.

"(2) Said trustee shall determine how said stock shall be voted upon any question, at any time and every meeting of the stockholders.

"(3) All of said stock so held by the trustees shall be voted as a unit.

"(4) At all elections of directors of the Peru Plow and Wheel Company said trustee shall nominate three directors to be voted for at such election, and said trustee shall vote all said stock held by him as a unit for each and all of the directors so nominated by him.

"(5) A vacancy in the office of trustee, as herein provided for, shall be filled in the following manner, viz.: In the event of the death, resignation or removal, for any cause whatever, of said trustee herein, the vacancy in the office of trustee shall be filled by a majority in amount of the then holders of the stock now owned by the following stockholders [174] [here appear the names of the signers of the agreement], parties to this agreement, as appears set opposite their respective names subscribed hereto.

"(6) Said trustee shall prepare and issue to the stockholders, certificates showing the amount of stock held on behalf of each stockholder, respectively, and the stock so held may be divided and transferred in like manner as if it had not been assigned in trust, subject to the rights and powers of the trustee under this agreement. But no such assignment or transfer of stock shall be effective for any purpose until surrender of the certificate issued by said trustee and the issue of a new certificate to the purchaser or assignee thereof.

"(7) No fees shall be charged by such trustee herein designated for any services performed in connection with the trust hereby created.

"(8) Said trustee shall collect and receive all dividends on the stock transferred to and held by him and shall immediately pay over the same to the holders of trust certificates representing such stock as their respective interests appear. The trustee shall not demand or receive any compensation for receiving and paying over such dividends.

"(9) The rights, duties and powers hereby conferred upon said trustee shall expire and wholly cease on the first day of September, A. D. 1922, and the trustee shall at said time assign and transfer to the persons who then hold trustee's certificates evidencing their ownership of shares of stock, the amount of stock to which each holder thereof is shown by his trustee's certificate to be entitled.

"(10) Said trustee hereby accepts the trust hereby created by the above and foregoing instrument, and hereby undertakes to hold, own and vote said stock as therein provided, and to re-transfer the same on the first day of September, A. D. 1922, to the holders of trustee's certificates evidencing their right to receive the same. Said trustee further undertakes at all times to vote the said stock by himself [175] or by proxy, and exercise his powers as trustee in such manner as he shall deem to be for the best interests of the stockholders of the Peru Plow and Wheel Company. Said trustee further undertakes to accept additional assignments of stock from any and all stockholders of the Peru Plow and Wheel Company, and to permit any stockholder thereof to become a subscriber to this agreement. It is expressly understood and agreed that Henry Ream, trustee herein referred to, shall not be liable, either directly or indirectly, to any person, firm or corporation for any loss or damage whatever occurring on account of the trusteeship or from any act done by the said trustee in connection with the duties and trusts herein imposed upon him."

The certificates of stock of the stockholders signing the agreement were canceled and

two certificates for 2001 shares, in the aggregate, were issued to Ream as trustee. He issued to each stockholder a trustee's certificate stating that the stockholder to whom it was issued was the owner of a certain number of shares of the capital stock of the Peru Plow and Wheel Company held by him as trustee, subject and pursuant to the terms, conditions and stipulations of a certain agreement between him, as trustee, and certain stockholders of the said Peru Plow and Wheel Company joining in the said agreement of date September 4, 1912, a copy of which agreement was on file with the trustee and reference was had to it as to all the terms, conditions and requirements of the trust. The certificates were stated to be transferable only on the books of the trustee by the owner thereof in person or by attorney, upon its surrender properly indorsed, when like new certificates would be issued to the proper owner of record. On the back of each certificate was a form for its assignment.

Among the stockholders signing the agreement were Kate Cahill, John D. Cahill and Cornelius J. Cahill, who together owned 70 shares of the stock. They sold their shares to the appellant Thomas Cahill and assigned to him their [176] trust certificate. He presented the certificate so assigned to him to Henry Ream, who was president of the corporation, and demanded that a certificate should be issued to him by the president and secretary of the corporation for 70 shares of its capital stock, but the said Henry Ream refused to issue such certificate, and stated that said 70 shares of stock were included in the trust agreement, and that he could not and would not issue a certificate for them to Thomas Cahill for that reason. Thomas Cahill thereupon notified him that as the owner of 70 shares he withdrew the same from the said trust agreement and would no longer be bound thereby, and demanded that a certificate be issued to him free from any restraint, obligation or condition under said trust agreement, but said Henry Ream refused to issue such certificate.

The annual stockholders' meeting of the corporation was held on September 10, 1912. The trust agreement had not then been signed by all the parties to it but Ream held a proxy from them all. The board of directors, consisting of five members (Henry Ream, Benjamin D. Brewster, William Holly, Ferdinand Luthy and D. W. Voorhees), was unanimously re-elected. The annual meeting of the directors was held on October 22, 1912. Ream, Brewster, Holly and Voorhees were unanimously re-elected to the respective offices of president, vice-president, treasurer and secretary which they had previously held. Upon the motion of Brewster, seconded by

Holly, the salaries of the president, vice-president and treasurer were fixed at \$2400 a year each, payable monthly, commencing with November, 1912. Brewster, Holly and Ream voted for the motion and Luthy and Voorhees against it. The persons holding these offices had never received any salary before this time, and the services performed by the incumbents after November, 1912, were nominal, as they had been before that date. Voorhees had been employed in February, 1912, as manager of the company at a salary of \$6000 a year under a written contract for five years, and the business of the company was [177] conducted by him and under his direction. He received no salary as secretary.

Compensation voted to an officer of a corporation is illegal if the resolution fixing such compensation is carried by his vote. (*McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056.) The salaries voted to the three officers by their own votes were therefore illegal, and the decree of the circuit court properly required the amounts which had been paid on account of such salaries to be refunded. No assignment of cross-errors has been made upon this part of the decree and the only question for determination is the validity of the trust agreement.

The effect of the agreement was to place the legal title of the majority of the stock in Henry Ream, who was given the power to vote the stock for ten years upon all questions and at every meeting of the stockholders according to his own discretion, uncontrolled by the stockholders in any way. He then owned 37 shares of stock, and thus the entire control of the corporation was conferred upon the owner of less than one per cent of the stock, with no power in the owners of the remaining ninety-nine per cent to interfere in any way. We have held that it is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling the corporation. (*Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24; *Venner v. Chicago City R. Co.* 258 Ill. 523, 101 N. E. 949.) In this case, however, the agreement goes much farther than any case which has heretofore arisen in this court. The voting power of the stock is absolutely separated from its ownership for a term of years, so that the real owners of the property are during that time entirely divested of its management and control or of any participation therein. Our law contemplates that corporations shall be controlled by a majority of the stockholders acting through directors elected by them in person or by proxy, and it has been held that a by-law of a corporation which authorizes bondholders to vote for directors at stockholders'

meetings is in violation [178] of both the constitutional and statutory provisions requiring directors to be elected by a majority of the shares of stock of the corporation. (*Durkee v. People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340.) The power to vote for directors can be exercised only by stockholders in person or by proxy, and they cannot be deprived or deprive themselves of this power. Stockholders cannot evade the duty imposed upon them by law of using their power as stockholders for the welfare of the corporation and the general interest of its stockholders. A stockholder may refuse to exercise his right to vote and participate in stockholders' meetings but he cannot deprive himself of the power to do so. It was said in *Shepaug Voting Trust Cases*, 60 Conn. 576, 24 Atl. 32: "It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as someone who has no beneficial interest or title in or to the stock directs, saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation; and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which [179] each stockholder owes his fellow-stockholders to so use such power and means as the law and his ownership of stock give him that the general interest of stockholders shall be protected and the general welfare of the corporation sustained and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles and with just as little temptation to and opportunity for fraud and the seeking of individual gains at the sacrifice of the general welfare as is possible. This, I take it, is the duty that one stock-

holder in a corporation owes to his fellow-stockholders, and he cannot be allowed to disburden himself of it in this way. He may shirk it, perhaps, by refusing to attend stockholders' meetings or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in fiduciary relation to his fellow-stockholders."

"The theory upon which the capital of numerous persons is associated in various proportions, in the shape of a trading corporation, to be managed by a committee of the stockholders, is that such committee shall truly represent and be subject to the will of the majority in the interest of the stockholders. The security of the small stockholders is found in the natural disposition of each stockholder to promote the best interests of all, in order to promote his individual interests. A member of an ordinary partnership has an additional security in the personal character of each of his partners and may decline to be associated with any whom he does not know and approve. But a stockholder in a corporation cannot control the personnel of his associates and must rely upon their self-interest, alone. Upon the foundation of the natural disposition of persons to promote their own interests rests the rule established in this State in the famous case of *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33, that a trading corporation could not, without special legislative authority, make a by-law authorizing a stockholder to vote [180] by proxy. The principle established by that case is, 'that the obligation and duty of corporators to attend in person and execute the trust or franchise reposed in or granted to them is implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed;' and the reason given by Chief Justice Hornblower at page 227, and again by Justice Ford at page 250, is, that the good of the stockholders as well as of the public requires that each stockholder should exercise his individual judgment as to all matters presented." *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847.

A stockholder may ordinarily withdraw from a combination to control the majority of the stock of a corporation and a contract not to transfer his shares to the opposition or vote against the combination, although it is expressly agreed that the contract shall be irrevocable. (1 *Beach on Corporations*, sec. 305.) In section 306 of the same work it is said: "On general principles, the right to vote on stock cannot be separated from the ownership in such sense that the elective franchise shall be in one man and the entire beneficial interest in another, nor to any ex-

tent unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives, and if such a severance were permissible it might be abused."

While the pooling of stock for the purpose of electing directors and officers and controlling the management and business of the corporation is not necessarily illegal, an agreement the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders or by a minority of its own stockholders is invalid. (*Shepaug Voting Trust Cases*, supra; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *White v. Thomas Inflatable Tire Co.* 52 N. J. Eq. 178, 28 Atl. 75; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Bache v. Central Leather Co.* 78 N. J. Eq. 484, 81 Atl. 571; *Morel v. Hoge*, 130 Ga. 625, 14 Ann. Cas. 935, 61 S. E. 487, 16 L.R.A.(N.S.) 1136; *Harvey v. Linville* [181] Imp. Co. 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L.R.A. 265; *Bridgers v. Tarboro First Nat. Bank*, 152 N. C. 293, 67 S. E. 770, 31 L.R.A.(N.S.) 1199.) The principle to be deduced from these cases is that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it shall, be managed by the majority; that the power to vote is inherently attached to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation; that each stockholder must be free to cast his vote, whether by himself or by proxy, for the best interest of the corporation, and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract.

We held in *Venner v. Chicago City R. Co.* supra, that the election of directors under the provisions of the trust agreement there involved, in the manner therein provided, was really an election by the stockholders through their proxies and so was not in violation of any constitutional or statutory provisions. There is no such thing as an irrevocable proxy to vote stock not coupled with any interest in the stock itself other than the right to vote it. A proxy, though stated to be irrevocable, may be revoked at any time. (1 *Cook on Corporations*, sec. 610.) This contract gave to Henry Ream, alone, the power for ten years to elect three of the five direc-

tors of the corporation and to formulate and determine its policy, unrestrained and uninfluenced by all the other stockholders or any of them. The surrender of their duties by the stockholders is complete, and the majority have no power to direct the trustee, for he, alone, is to determine how the stock shall be voted, and to vote it, upon any question, at any time and every meeting of the stockholders. He no longer represents the majority of the stock, [182] for 70 shares have been sold to the complainant Cahill, who has the entire beneficial interest therein. Other shares may be sold, so that before the expiration of the trust the trustee, who originally represented a majority of the stock but now represents only a minority, may represent only his own 37 shares, and yet, if the trust agreement is to be enforced, have absolute management and control of the corporation.

In *Smith v. San Francisco*, etc. R. Co. 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L.R.A. 309, it was held that an agreement by several purchasers of stock in a corporation to vote it as a unit for five years, in accordance with the decision of the majority, is binding upon the parties and irrevocable. In *Carnegie Trust Co. v. Security L. Ins. Co. of America*, 111 Va. 1, 21 Ann. Cas. 1287, 68 S. E. 412, 31 L.R.A.(N.S.) 1186, the Supreme Court of Virginia held that an agreement among stockholders to place their stock in the hands of trustees for twenty-five years, to enable the trustees to manage the corporation, constituted a valid trust. These cases are inconsistent with the views which we have expressed and the cases cited in support of them, but in our judgment the latter cases state the true rule.

Although Thomas Cahill purchased his stock with notice of the agreement, that agreement was not binding upon him or his vendors if he or they wished to withdraw from it, and upon his demand for a certificate of stock he was entitled to receive it. The other complainants have a right, also, as stockholders, to prevent the trustee from voting stock which he has no right to vote.

The Appellate Court erred in reversing the decree of the circuit court in part, and its judgment will be reversed and the decree of the circuit court will be affirmed.

Judgment reversed.

Rehearing denied December 10, 1915.

NOTE.

The reported case, while recognizing the right of the owners of a majority of the stock in a corporation to combine for the purpose of controlling the corporation, holds to be invalid an agreement whereby the owners of a majority of the stock confers on a

person who owns less than one per cent thereof an irrevocable right to vote their stock at his discretion for a period of ten years. Such a separation of the voting power from the ownership is, the court holds, contrary to public policy. The cases discussing the validity of stock voting agreements are collated in the notes to the following cases: *Morel v. Hoge*, 14 Ann. Cas. 935; *Carnegie Trust Co. v. Security L. Ins. Co.* 21 Ann. Cas. 1287; *Palmbaum v. Magulsky*, Ann. Cas. 1915D 799; and *Smith v. San Francisco*, etc. R. Co. 56 Am. St. Rep. 119.

SCHWORM.

v.

FRATERNAL BANKERS RESERVE SOCIETY.

Iowa Supreme Court—January 25, 1915.

168 Iowa 579; 150 N. W. 714.

Pleading — Reply — Necessity of Denial.

Code 1897, § 3576, provides there shall be no reply except when new matter is alleged, or some matter is alleged in the answer to which plaintiff claims to have a defense because of a fact avoiding it. Section 3577 declares that an allegation in the reply of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law. It is held that plaintiff, whose reply avoided some of the allegations of the answer, need not deny the others in order to claim the benefit of the statute.

Appeal and Error — Matters Considered — Documents Excluded at Trial.

Documentary evidence excluded below cannot be considered on appeal, though incorporated in the abstract.

Beneficial Association — What Constitutes Membership — Necessity of Initiation.

Under Code 1897, § 1822, defining a "fraternal beneficiary association" as a corporation, society, or voluntary association, formed for the sole benefit of its members and their beneficiaries, and having a lodge system with ritualistic form of work and a representative form of government, a fraternal association need not require members to be initiated in order to entitle them to recover on their certificates.

[See note at end of this case.]

Trial — Admission of Evidence for Restricted Purpose.

Evidence may be restricted to a special purpose, instead of admitted generally, and

evidence admitted for a particular purpose cannot be considered for other purposes.

Witnesses — Cross-examination — Use of Documents Not Admissible in Evidence.

Upon cross-examination of a witness who was a deputy of the defendant insurance association, a copy of the association's by-laws may be received to show under what authority the witness claimed to act, though the copy was not admissible, being secondary evidence, to prove the by-law.

Evidence — Burden of Proof — New Matter in Answer.

Defendant has the burden of proving matters set up by the answer and denied by the reply.

Insurance — Actions — Necessity of Pleading Waiver of Payment of Premiums.

Waiver of a matter relied on as a defense must be pleaded to be availed of; and hence, where plaintiff did not plead waiver of the provisions in an insurance certificate requiring payment of premiums, evidence of waiver is inadmissible.

[See 14 R. C. L. tit. *Insurance*, p. 1431.]

Appeal from District Court, Wapello county: VERMILLION, Judge.

Action by Katherine Schworm, plaintiff, against Fraternal Bankers Reserve Society, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

M. H. Kelly and Roberts & Webber for appellant.

A. W. Enoch, J. C. Mitchell and Gilmore & Moon for appellee.

[581] GAYNOR, J.—The plaintiff is the beneficiary in a benefit certificate for \$1,000.00 issued by the defendant to her daughter, Fern Teter. The daughter died and the defendant refuses to pay, and plaintiff brings this action upon the certificate to recover the amount therein provided.

The defendant is a fraternal benefit society organized under the laws of this state, and doing business in this state.

On the 22d day of September, 1911, Fern Teter applied to the defendant to become a member of defendant's society, and for a certificate therein, and on the 13th day of October, 1911, the defendant company issued to said Fern Teter a certificate, the material parts of which are as follows:

"Witnesseth: That in the pursuance of the Articles of Incorporation and Constitution and By-Laws of said Society, and upon the representations contained in the application for this certificate, a copy of which is hereto attached, which articles of incorporation, constitution and by-laws, and all amend-

ments hereinafter made thereto, and the said application are hereby referred to and made a part of this contract, Fern Teter of Ottumwa, Iowa, is accepted as a member of Home Lodge No. 1 located at Cedar Rapids, State of Iowa, and is entitled to all the rights, benefits, and privileges of a beneficial membership in the Fraternal Bankers Reserve Society, and has designated as beneficiary under this certificate, Katherine Teter, Mother, to whom shall be paid, upon satisfactory proof of the death of said member while in good standing, the sum of One Thousand Dollars, less the amounts of any and all disability benefits paid to said member during her lifetime, said payment to be made in accordance with the provisions of the By-Laws of the Fraternal Bankers Reserve Society."

To which certificate was attached the following provisions and made a part thereof:

"1. One monthly payment or assessment of the amount stated on the face hereof shall be paid upon the acceptance [582] of this certificate, and at least one monthly payment or assessment of like amount shall be due and payable each and every calendar month thereafter, without notice of any kind or character from anyone whomsoever, and in addition to said monthly payment or assessment, each and every beneficial member shall pay to the local lodge, of which he shall be a member, local lodge dues in such sums and amounts and at such times, as shall be determined and provided by the by-laws of said local lodge. All payments must be made to a duly authorized secretary or collector.

"2. Any beneficial member of this society, who, on the expiration of the last day of any calendar month, shall have failed to make such payments as have been regularly required as provided by the Constitution and By-Laws of this Society, or shall have failed to pay the amount of local lodge dues required by the lodge to which such member belongs, shall immediately be and become suspended without any notice whatever, and the certificate of membership of such member shall be absolutely null and void from the date of such suspension, and this Society shall not be liable for any benefits whatever under said certificate unless and until said member shall have fully complied with the requirements and provisions set forth in the Constitution and By-Laws of this Society for the reinstatement and restoration of said member and said benefit certificate.

"3. A member who has been suspended for a period not exceeding one month, may be reinstated by furnishing a certificate of good health on the form provided by the Supreme Lodge, and paying arrearages and making payment on certificate at least one month in advance.

"A member who has been suspended for a period exceeding one month but not exceeding three months, shall, in addition to the above requirements for reinstatement, also furnish a certificate of good health from a physician, satisfactory to the society.

"A member who has been suspended for a period exceeding [583] three months may become reinstated only by application and examination as if applying for original membership, and on payment of all assessments and local dues for which he may be in arrears.

"Provided that no reinstatement shall be deemed complete, restoring a suspended member to beneficial membership until his application for reinstatement and certificate of good health shall have been received and approved by the Supreme Medical Examiner."

This is the certificate and the conditions of the certificate upon which suit is brought.

The plaintiff in her petition says that the defendant is a fraternal benefit society, organized in this state and under the laws thereof, with its principal place of business at Cedar Rapids, Linn county, Iowa; that the plaintiff's daughter procured a policy in said defendant company for the benefit of this plaintiff; that the home of the plaintiff and her daughter was at Wapello, Iowa; that due proof of death has been made and the company refuses to pay; and she asks judgment for the amount of the policy.

The defendant admits that on the 22nd day of September, 1911, Fern Teter made application to the defendant for membership in said society; that the application was made for membership in the home lodge of defendant, which is located at Cedar Rapids; that a certificate of membership, in compliance with such application, was written by defendant and forwarded by one R. D. Taylor, Acting Secretary of the Home Lodge, to one Gale B. Brown at Ottumwa, a duly authorized and acting deputy of the defendant, for delivery to said Fern Teter upon her compliance with the rules, regulations, requirements and conditions of such certificate, and the constitution and by-laws of the defendant association. (Defendant hereupon sets out the by-laws to which reference is made.)

Defendant further alleges that the by-laws provide that [584] the Supreme Secretary, as soon as the certificate of membership is issued, shall forward the same to the local secretary of the local lodge. Upon receipt of the certificate, the secretary shall notify the applicant, who shall present him or herself for initiation or obligation, and when he is initiated or obligated, and has paid not less than one monthly payment and one month's local dues in advance, and has, in all other particulars, complied with the laws, the certificate shall be delivered, and shall be in

full force and effect, and no certificate shall be delivered unless the applicant is in good health at the time of the delivery; that said Fern Teter never presented herself for initiation or obligation, and in fact, was never initiated or obligated in defendant association, or to any lodge thereof; never paid any assessments of any kind or character, but has wholly failed and neglected and refused to make payments and to comply, in any particular, with the terms and requirements necessary and essential to membership in the association.

Defendant further states that if she ever became a member she forfeited all rights or claims against the defendant, if any she had, by reason of her suspension on account of her failure, neglect and refusal to make the monthly payments, and to comply with the provisions of the certificate and of the constitution and by-laws of the association, and that she never made application to be reinstated, and never was reinstated, and the defendant denies that Fern Teter was, at the time of her death, or at any other time, a member of the association or entitled to any of its benefits.

Defendant also sets out what it claims to be the provisions of its constitution and by-laws.

The plaintiff for reply says, that without waiving or in any manner foregoing the denials, or any of the denials, implied by law in her behalf to the allegations, all and singular, in defendant's answer, and inconsistently with such denial or denials, pleads and replies to said answer as follows:

[585] "That the defendant, as to the said Fern Teter and as to the beneficial certificate in question, waived each and all the requirements and provisions contained in the sections of defendant's constitution, that are copied and set forth in defendant's answer, in that the defendant, well knowing that the said Fern Teter had never been presented for initiation or obligation in any of defendant's local lodges, and in fact never had been initiated or obligated in any of defendant's local lodges, nevertheless placed said certificate in the hands of one Gale B. Brown, a duly authorized and acting deputy of defendant, for delivery to said Fern Teter, and the said Gail B. Brown, deputy as aforesaid, well knowing that the said Fern Teter had never been initiated or obligated in any of defendant's local lodges, and without requiring her to sign her name to the formal acceptance written or printed in said certificate, delivered to her the said certificate, and she accepted the same from him, said deputy, and in consideration of the same, paid to him all moneys and dues required of and from regular holders of certificates of such class by the defendant's constitution, and the mon-

eyes so paid by said Fern Teter in consideration of said certificate, delivered as aforesaid to her, were accepted by the defendant by and through its said deputy, Gale B. Brown.

"And at the time said certificate was delivered to said Fern Teter, it was not contemplated by either herself or the defendant, that she should ever be ritualistically initiated or obligated in defendant's local lodge, known as Home Lodge of Cedar Rapids, but it was contemplated by both defendant and herself, that she should be taken, held, and considered a member of said Home Lodge of Cedar Rapids, as fully, to all intents and purposes pertaining to insurance, as if regularly initiated and obligated in the ritualistic work of said Home Lodge.

"Wherefore, plaintiff prays for judgment as in her original petition."

[586] Upon the issues thus tendered, the cause was tried to a jury, and upon the conclusion of the testimony, the court directed a verdict for the plaintiff, and judgment being entered thereon, defendant appeals.

All affirmative matters set out by defendant in its answer, by which it seeks to defeat recovery upon the policy, were denied by operation of law, and the burden of proof rested upon the defendant to show the facts therein alleged. Without proof these allegations cannot be taken as true in the face of the denial. Nor does the pleading by the plaintiff in reply waive this requirement on the part of the defendant, or relieve it of the burden of proving its affirmative defense by evidence offered and admitted upon the trial.

The plaintiff in its reply was particular to insist (though perhaps this was not necessary) upon the statutory denial of affirmative matters pleaded in the answer.

Section 3567 of the Code of 1897 provides: "There shall be no reply except:

"1st. Where a counterclaim is alleged.

"2d. Where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer."

Section 3577 provides for the pleading of new matter in the reply "not inconsistent with the petition, constituting a defense to the matter alleged in the answer; . . . but an allegation of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law."

In *Parno v. Iowa Merchants' Mut. Ins. Co.* 114 Ia. 132, 86 N. W. 210, this court had occasion to pass upon this question, and in the first division of the opinion in that case it is said: "It is insisted the matter contained in the reply is insufficient because there is no denial and neither is there a confession with the avoidance. [587] Where one

sets up the matter of waiver or estoppel in a reply, we do not understand that he must couple with it a denial. The law denies all affirmative allegations of the answer, save where a counterclaim is pleaded. *Cassidy v. Caton*, 47 Ia. 22. Manifestly, plaintiff did not wish to confess the averments of the answer. She intended to deny their truth and set up matters which would estop defendant from proving the answers that appear on the face of the application. The law made the denial and the reply set out the facts constituting the estoppel."

The defendant upon the trial offered in evidence what is marked Exhibit D-1, being a printed booklet with paper binding, on the outside of which was written, "Constitution and By-Laws of the Fraternal Banker's Reserve Society, Cedar Rapids, Iowa, for the guidance of the Supreme and Subordinate Lodges and members thereof, Revised October, 1908, by the Supreme Lodge at Sioux City, Iowa." Objection was made to this booklet on the ground that it was not the best evidence, and this objection was sustained, and on the making of plaintiff's case, none of the claimed provisions of the Constitution and By-Laws were admitted in evidence upon the trial. Whether the ruling of the court in this respect be right or wrong, it precludes us from a consideration of this claimed Constitution and By-Laws (although fully set out in the abstract) because by the ruling of the court they never became a part of the record in this cause.

Section 94 contained in the booklet and offered in evidence, as set out in the abstract, is the only provision of the Constitution and By-Laws offered in evidence which makes any provision for the initiation of an applicant in the lodge, and that provision is substantially as follows:

"When the applicant is approved by this society, the Supreme Secretary will, forthwith, issue a certificate of membership, which shall be under the seal of the Supreme Lodge [588] and signed by the Supreme President and Supreme Secretary, and upon the back of such certificate there shall be a copy of the application for membership in a regularly instituted lodge of this society. The Supreme Secretary shall, as soon as issued, forward the certificate to the local secretary of such local lodge. Upon the receipt of the certificate, the secretary shall notify the applicant, who shall present himself for initiation or obligation, and when he is initiated or obligated, and has paid not less than one monthly payment of the certificate, and one month's local dues in advance, and he has in all other particulars complied with the laws, the certificate shall be delivered and shall be in full force and effect upon such delivery. Said certificate shall be signed by

the local president and secretary and the member adopted. No certificate shall be delivered to an applicant unless he shall be in good health at the time of delivery."

It is claimed by the defendant in its answer that Fern Teter never presented herself for initiation or obligation, and in fact, was never initiated in the lodge, and that, therefore, she never became a member of the lodge or entitled to any of its benefits.

The legal effect upon the rights of the certificate holder arising from a failure to present herself for initiation into a lodge cannot be determined in this case for the reason that there is in the record no provision of the by-laws or constitution of the order requiring this as a condition precedent to the full enjoyment of all the rights of a member.

The statute under which societies of this kind are organized, Sec. 1822 of the Code of 1897, provides as follows:

"A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, *and having a lodge system*, with ritualistic form of work and representative form of government."

[589] While the law requires that societies of this sort have a lodge system and a ritualistic form of government, the statute does not require that those who present themselves for membership in the lodge shall, before becoming members of the lodge, avail themselves of the lodge laws or initiation and take the ritualistic work, if any, provided. What the ritualistic work may be, or what shall be required of an applicant to become a member of a local lodge, through the instrumentality of initiation and ritualistic work, is left to the organization itself to determine and prescribe.

It will be noticed that in the certificate issued, the rights of the plaintiff were not made to depend upon initiation. The initiation, if any provided for, may be waived and the applicant may be made a full member of the lodge (which we consider essential) without going through formal initiation and without taking the ritualistic work. The certificate provides:

"Fern Teter of Ottumwa, Iowa, is accepted as a member of the Home Lodge No. 101, located at Cedar Rapids, State of Iowa, and is entitled to all the rights, benefits, and privileges of a beneficial member in the Fraternal Banker's Reserve Society, and has designated as beneficiary under this certificate, Catherine Teter, mother, to whom shall be paid, upon satisfactory proofs of the death of said member while in good standing, the sum of \$1,000.00."

Therefore, in the absence of any showing of the existence of any law of the order re-

quiring initiation as a condition precedent to the right of enjoying all the rights, privileges and immunities of a member, we must hold, under this certificate, that Fern Teter was a member of the order upon the receipt of the certificate from the Supreme Lodge. We do not mean to hold that the lodge cannot make initiation a condition precedent to membership. Where this is done it is essential to constitute an applicant a member of the lodge and entitled to its privileges, unless waived by the order itself. [590] See *Shartle v. Modern Brotherhood of America*, reported in 139 Mo. App. 433, 122 S. W. 1139, and cases therein cited.

It is next contended that the certificate to be effectual must not only be signed by the local president and secretary, but by the member adopted.

This contention is based on the provisions of what is claimed to be Sec. 94, but this section not having been admitted in evidence, and not properly before this court for consideration, we cannot say that this was made a condition precedent to plaintiff's right, and therefore cannot base any finding against plaintiff upon this contention.

It is contended by the defendant, however, that after the adverse ruling of the court was made excluding Exhibit D-1, the court did admit in evidence the sections of Exhibit D-1 relied upon; that they are before the court for consideration. This, we think, is a misapprehension of the record. The sections relied upon by the defendant, and which it claims were introduced in evidence, subsequent to the adverse ruling, are Secs. 98, 99, 100 and 133. Before coming to a consideration of this claim, we will say that the court may, in admitting evidence, limit it to a particular purpose, and for the purpose of establishing a particular fact, although not admitted upon the general issue.

Sections 98, 99, and 100, which were found in Exhibit D-1, the book hereinbefore referred to, were admitted in this way. Gale B. Brown, who was called as a witness for further cross-examination by the defendant, said: "These sections in Exhibit D-1 (which were shown to the witness) were contained in the book that was given me. My best recollection is, that that book that I had was a little book like this (Exhibit D-1). I supposed it contained these sections just as they are here in D-1." Thereupon the court allowed these sections to go into the record, not for the purpose of proving that they were in fact the by-laws of the society, but for the purpose of showing what the witness claimed was the authority under [591] which he acted in the matters and things done and performed by him as deputy. The court said: "These sections now offered in evidence are permitted for the purpose of showing the understanding of the witness as to the by-

laws and constitution in this respect." The court had already held that the proper foundation for the introduction of Exhibit D-1, containing these sections, had not been laid by the defendant and the book was not shown to contain the by-laws and constitution of the society,—not the original and best evidence, at least, of that fact.

Section 133 was contained in Exhibit D-1, and was offered in evidence by the defendant as part of the cross-examination of the witness, Gale B. Brown, called by the plaintiff in rebuttal, and was admitted as a part of the cross-examination. This section reads as follows: "They shall have authority to organize local lodges within their respective territories, and in such territory to collect and receipt for the membership fee as specified in the laws of this society, but have no authority whatever to make any other collections as deputy, and they shall not act outside of their specified territory without written instructions from the superintendent." This refers to the authority of deputies.

The witness Brown testified: "Exhibit D-1 is a copy of the one that I had. I was given this constitution and by-laws and advised of my duty and authority in accordance with this Sec. 133. I think I followed that by-law. I understand that that was my rule to follow, and did follow it." Thereupon it was offered as part of the cross-examination and admitted, limiting it, however, as evidence of what the plaintiff claimed to be his authority, and not substantive evidence that it was in fact a part of the by-law.

We do not find that the constitution or any of the by-laws were properly before the court, except as above limited. We are not, therefore, in a position to determine or say what the by-laws and constitution of this order were. The defendant in its answer had alleged that it had by-laws and had a [592] constitution, and set out in its answer what defendant claimed to be the by-laws and constitution of the order, and to defeat plaintiff's recovery, claimed that she had not complied with the by-laws and constitution therein set out and the contract sued on. The existence of these by-laws and constitution being denied by the plaintiff in its reply, or the law having denied these affirmative allegations of the defendant, it was incumbent upon the defendant to prove their existence, what they were and what they contained, before the court or jury were in any position to say that the plaintiff had not complied with their provisions.

The defendant, however, alleged in its answer that Fern Teter never paid any assessments of any kind or character; that she wholly failed, neglected, and refused to make any payments whatsoever, and that by reason thereof, she had forfeited all rights or claims against the defendant association; that she

had been suspended by such failure and refusal to pay, in compliance with the certificate. This was denied by the reply, and the burden was on the defendant to show this fact in order to defeat recovery.

Plaintiff further in its reply alleged that the defendant had waived each and all the requirements and provisions contained in the *sections of defendant's constitution that are copied and set forth in the answer.*

There is no plea on the part of the plaintiff of any waiver by the defendant of any of the conditions attached to the certificate set out by the plaintiff in her petition. The constitution and by-laws were not in evidence. We are not in a position, under this record, to say what they are, whether waived or not waived. Proof of waiver of the constitution and by-laws became necessary only upon a showing of what this constitution and by-laws were. Therefore, so far as the record in this case is concerned, we need not consider whether they were waived or not.

Waiver of any particular matter relied upon as a defense [593] must be pleaded in order to be available as a waiver. The conditions attached to the certificate on which suit is brought, are essentially a part of the certificate, as also the application attached. The conditions of the certificate are hereinbefore set out. The application is as follows: "I declare that I am, to the best of my knowledge and belief, in sound physical condition, and I further declare and warrant that the above statements, together with the answers made or to be made on the reverse side of the application by me to the physician, are true and shall form the basis of the contract for membership and certificate between me and my beneficiary and all parties who may at any time have an interest therein, and the said society, and any untrue and fraudulent answers, or suppression of facts in regard to my health, personal habits or physical condition, in this application or in any application for restoration to membership made hereafter, or *neglect to make my payments of money on or before the day it becomes due, shall immediately make said benefit certificate null and void, and forfeit all payments made thereon*, except as provided therein. I further agree that the certificate hereby applied for shall not be in force until the actual payment to said society of all advance fees and assessments required by its laws, rules and regulations, and the actual delivery of the certificate of me during my good health. I also agree that all the terms and conditions of the certificate hereby applied for shall be binding on me and any further legal holder of the same."

The terms of this application are made a part of the certificate by its terms, as are also the conditions attached to the certificate,

all of which are set out by plaintiff in her petition.

The waiver pleaded does not refer to any waiver of any conditions of the certificate, or the application which is made a part of the certificate. The plaintiff says in her reply in which she pleads the waiver, that the defendant waived each and all the requirements and provisions contained in the sections of defendant's constitution that are copied and set forth [594] in defendant's answer, in that the defendant, well knowing that said Fern Teter had never been present for initiation or obligation . . . in any of defendant's local lodges, and had never been initiated or obligated . . . in any of the defendant's lodges, nevertheless placed the certificate in the hands of its deputy for delivery to Fern Teter, and she accepted the same from him, and paid him all moneys and dues required of and from regular holders of certificates in her class. This reply seems to plead a waiver of a condition alleged in defendant's answer: that to entitle her to become a member and share the benefits of a member under the certificate, it is necessary that she be initiated and obligated. It seems to be the claim of the plaintiff in this reply that this condition was waived by the defendant with a further affirmative allegation that she had, in fact, paid all the money required of her as a holder. Conceding for the purposes of this case that the evidence shows that the defendant did waive this condition of its by-laws, and that upon receipt of the certificate she became a full member of the society, there is no plea that the defendant waived that requirement of its certificate and the conditions attached, and her agreement in the application, that she pay the dues (the monthly payments), at least one month's payment or assessment of a like amount as that which she paid to be initiated, each and every calendar month thereafter, without notice of any kind or character from anyone whomsoever, and her agreement in the application that if she neglected to make any of the payments on or before the day it became due, the certificate should be null and void, and all payments forfeited.

Of course, there was evidence introduced for the purpose of showing a waiver of this obligation to pay, but there was no allegation of such waiver to support such evidence, and without an allegation of the waiver of these provisions of the policy, no evidence of such waiver can be considered. A plea of waiver in effect says that certain matters alleged by the defendant as constituting a default were waived by the defendant, [595] and therefore cannot be considered, but nothing can be held waived of which no plea of waiver has been filed. Proof of a waiver

of other and different matters than that alleged cannot be considered as proof of a waiver of matters not alleged to have been waived.

It is true in this case that if the constitution and by-laws were before us in this record for our consideration, we might be able to say that the provisions of the contract are the same as the provisions of the by-laws and constitution, or that the by-laws and constitution were incorporated in and made a part of the certificate and were practically the same, but this we cannot say, for the reason that on the objection of plaintiff they were not allowed to come into this record. Or, in other words, an allegation of a waiver of certain matters is not sustained by proof of the waiver of other matters. The proof must correspond with the allegation made, and be confined to the point in issue.

The question before the court was, what matters alleged by the defendant does the plaintiff claim in its reply were waived?

The plaintiff does not allege that any provisions of the contract sued on, and especially set out in the contract, were waived by the defendant, but simply pleads that the defendant waived the provisions of its by-laws and constitution set out by the defendant in its answer, and seems to limit this waiver to the fact of initiation. It was the duty of the court to dispose of this case on the issues tendered, and upon none other. Proof cannot be considered which does not have its foundation in the allegations made in the pleading. A fact, though proven, if not alleged as a basis for recovery, or a basis for avoiding matters set up by the opposite party, cannot be considered. Where a waiver is relied upon as a matter of defense, or to avoid matters set out in an answer, the waiver must be pleaded and the facts alleged, upon which it is predicated, and if not so pleaded, the party cannot avail himself of the waiver, though it may appear in the evidence.

This question was considered in *Parsons v. Grand Lodge* [596] A. O. U. W., reported in 108 Ia. 6, 78 N. W. 676, the part referred to being on page 9, second division. The court said: "The petition alleges that due notice of death of the deceased was presented to the proper officers of the defendant. This is denied in the answer. To sustain the allegation the plaintiff introduced a letter written by her attorney to the Grand Recorder of the defendant at Waterloo, in which the association was informed of Parson's death, and asked what was needed by way of proofs. To this the recorder responded by saying that Parsons had been suspended for nonpayment of dues and other delinquencies, further stating that if the attor-

ney 'understood the laws of Iowa governing this class of insurance, he would undoubtedly hesitate to have taken an action in the case without further evidence.' Undoubtedly this amounted to a waiver of proofs of loss" (citing cases). "But as a waiver was not pleaded, it cannot be relied upon" (citing cases).

See also *Wilson v. Riddick*, 100 Ia. 697, 69 N. W. 1039; *Jones v. Peebles*, 130 Ala. 269, 30 So. 564.

We think the court erred in directing a verdict for the plaintiff upon the issues and proofs submitted. For this reason the case must be reversed.

Other matters argued depend entirely upon the by-laws and constitution of the order, proof of which, as said before, was rejected by the court. We think, however, sufficient showing was made to entitle the plaintiff to have Exhibit D-1, containing what purported to be the constitution and by-laws of the society, admitted in evidence; but that matter is not argued here, and we do not give it further consideration. In view of another trial, we refrain from commenting on the evidence, and we do not give consideration to other questions urged by counsel in argument, as it is not likely that they will occur on another trial.

For the error pointed out we think the case must be reversed and is

Reversed.

Deemer, C. J., and Ladd and Salinger, JJ., concur.

NOTE.

What Constitutes Membership in Beneficial Association.

Introductory, 380.

Initiation, 380.

Certificate of Membership, 387.

Payment of Fee, 393.

Miscellaneous, 394.

Introductory.

The formalities through which one must go in order to become a member of a benevolent association vary with each association. Each society has its own constitution and by-laws, and each enforces them with varying degrees of strictness. The relationship between the member and the association is based on "a sort of glorified insurance contract," and the applicant for membership must conform to all of the requisites which are considered to be conditions precedent to the inception of the contract. In speaking of this relationship the court in *Devins v. Royal Templars of Temperance*, 20 Ont. App.

259, said: "It was a matter of contract, and though it may savour a little of absurdity that the omission of a mere formal ceremony should prevent this contract becoming operative, it is not competent for us to make new contracts for the parties or to dispense with conditions which they deem essential." And in *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346, the following general principles were laid down: "Contracts of this class, entered into by benevolent fraternal organizations, have been before our courts so often that it is unnecessary to review or repeat the law as announced in the numerous decisions which is to be applied to the contracts of like organizations. A few fundamental propositions lie at the foundation of all these decisions. One of these is, that contracts of indemnity or insurance, such as evidenced by these benefit certificates and the laws of the order which enter into the contract, just as are policies issued by regular insurance companies, are to be construed strictly against the organization, the courts being reluctant to decree forfeiture, and that the organization, although one formed to carry out a scheme of benevolent aid, is still an insurer and to be so treated. Another is that while parties enter into these organizations voluntarily and are presumed to have assented to the rules and regulations of the order, they are entitled to have those rules and regulations applied to them as they are to other members, and not to have their rights forfeited on a strained, harsh or too technical interpretation or application thereof. Another rule and following the above is, that these orders, like all bodies, whether corporate or individual, may be estopped from claiming a strict enforcement and application of the rules of the order, when to effect such will work a forfeiture, when by their course of conduct they have led those dealing with them as members to believe and to act upon the belief that a strict compliance with the rules would not be required, nor their rights lost by failure to comply. These are particularly so when the organization has treated the party as a member in good standing up to the time of his death, accepting from him dues and assessments paid by him during his life, and retained by the organization."

Initiation.

The general rule is that when an initiation is required in the by-laws of a beneficial association the requirement is considered to be a condition precedent to membership. *Supreme Knights, etc. v. Johnson*, 81 Ark. 512, 99 S. W. 834; *Bruner v. Brotherhood of American Yeoman*, 136 Ia. 612, 111 N. W.

977; Triple Tie Ben. Assoc. v. Wood, 73 Kan. 124, 84 Pac. 565; Kolosinski v. Modern Brotherhood of America, 175 Mich. 684, 141 N. W. 589; Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425; Hiatt v. Fraternal Home, 99 Mo. App. 105, 72 S. W. 463; Loyd v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Shartle v. Modern Brotherhood of America, 139 Mo. App. 433, 122 S. W. 1139; Porter v. Loyal Americans of Republic, 180 Mo. App. 538, 167 S. W. 578; Gilmore v. Modern Brotherhood of America, 186 Mo. App. 445, 171 S. W. 629; Loyal Mystic Legion of America v. Richardson, 76 Neb. 562, 107 N. W. 795; Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158; Matkin v. Supreme Lodge, etc. 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886; McWilliams v. Modern Woodmen of America (Tex.) 142 S. W. 641; Sterling v. Head Camp, etc. 28 Utah 505, 80 Pac. 375; Devins v. Royal Templars of Temperance, 20 Ont. App. 259; Hoefner v. Canadian Order of Chosen Friends, 29 Ont. 125, 18 Can. L. T. 86.

In *Devins v. Royal Templars of Temperance*, supra, it appeared that the defendant society was composed of two classes of members, royal degree and select degree. The latter was the higher class. In order to become a member of the select degree the course of proceedings was as follows: "A person was first of all required to become a member of the royal degree; then, if he desired to do so, he might be raised to the select degree. No person could hold a policy of insurance, called a beneficiary certificate, unless he belonged to the select degree; and no person could belong to the select degree who did not hold a policy of insurance; therefore, persons belonging to the royal degree who desired to get a policy of insurance had, first of all, to apply to be admitted into the select degree; then the application was balloted upon by the other members of the degree to which they all belonged; if the ballot was in favor of the admission of the applicant into the select degree, then he applied to be examined by the medical examiner of the court; if the medical examination proved to be satisfactory, the application and report were forwarded to the council of the head body in Hamilton—the head council or grand or dominion council it is called in the rules—to be approved of or rejected by them; with that was forwarded the application for a policy of insurance, which the applicant desired to have, because the amounts varied. If the grand or dominion council passed the application they drew a policy and forwarded it to the local body, that is to say, they sent it to the beneficiary secretary of the local court." The applicant was a royal degree member and applied for

the higher degree. He was elected and passed the medical examination. A policy was made out at the head office and sent to the secretary of the local lodge. It was provided that "when the beneficiary secretary has received the certificate of an applicant, . . . he shall advise the applicant to appear and receive the degree." On the back of the policy was printed the following: "This certificate does not go into force until it has been signed by the council, sealed with the council seal, and the applicant has been raised to the select degree, and has signified his acceptance by signing the certificate." At the time appointed for the initiation the applicant was ill and could not attend. His policy was sent him, however, and he signed the acceptance of it. It was held that there was no liability on the policy because the initiation was a condition precedent. The court said: "It is not at all easy to gather . . . that this ceremony of conferring the degree was actually one of the conditions to the raising of the brother to the select degree; but I think that it plainly appears from all the rules taken together; it appears with a reasonable degree of certainty that it was a necessary formality. It was a formality which, undoubtedly, the company had a right to stipulate for; they had the right to say, if they chose to do so, that the policy should not go into force, unless the applicant should attend at a particular time and place and go through a particular ceremony, and that if he did not do so the policy should not go into effect. That further appears to have been the intention from section 4, which says: 'Should the applicant fail to appear for the space of three months after such notice is given without a reasonable excuse, the fee shall be forfeited to the degree treasury, and a new election and medical examination will become necessary for admission.' It is indeed pointed out that under section 1, article 18, it is provided: 'No member of the order shall be raised to, or remain in connection with, the select degree unless he holds an unforfeited beneficiary certificate with the dominion council, and is in good standing in the royal degree of the council.' I think that cannot be taken to mean that he can hold it, and take the benefit of it, before he has actually been raised to the select degree, because it appears from section 3, in addition to the sections I have already referred to, that the assessments are not payable under the policy at all until the degree has actually been received; and it is evident that until the assessments are paid the policy does not go into effect; so that I think, under the rules, it was requisite that the deceased should appear and receive the degree before he became entitled to any benefit under the policy, and that not having

done so the policy never went into effect—never went into force. In order that there may be no question upon the point, and to show the construction of the rules which I think was the correct one, the dominion council, in issuing the certificate, put also this note on the back of it—that was a condition that they imposed precedent to the policy going into effect—and as the applicant never was raised to the select degree, I think the policy was never anything but an escrow, although it came into his hands.”

In *Hoefner v. Canadian Order of Chosen Friends*, 29 Ont. 125, 18 Can. L. T. 86, the evidence showed that the applicant had performed all of the requirements for membership in the defendant association except initiation. He became very ill and was somewhat unconscious. While in this condition an officer of the local lodge administered the required oath of initiation. The applicant was too weak to repeat the oath, but he assented to it. It was held that this did not constitute the required initiation, and the applicant was therefore not a member. The court said: “Hoefner was not present, nor could he be; he was then in bed in a very low state—not expected to live, and did only live six days thereafter; so that, in fact, the ceremony of initiation, as required, was never completed; nor, in fact, was it ever begun; nor was the obligation administered in the solemn form required in a duly constituted court of the council after certain other forms and proceedings had been strictly complied with; I am, therefore obliged to find as a fact that Hoefner never became a member of the order.”

In *Supreme Lodge, etc. v. Johnson*, 81 Ark. 512, 99 S. W. 834, the provisions of the constitution and laws of the association in question declared that membership should not be complete until the applicants should be duly obligated in lodge session. The applicant was elected a member, but he was never initiated nor did he ever attend a meeting. He paid one assessment in the relief fund, but failed to pay another. He was then reported as suspended for nonpayment. He had been elected to an office in the lodge, but had never served. It was held that the initiation was a prerequisite to membership, and that the applicant was not a member. The reasons for the decision were given as follows: “If it be conceded that the subordinate lodge had the power, by any action of that body, to waive this positive requirement of the constitution and laws of the supreme lodge, the mere election to office in the lodge of an applicant for membership, where he was never admitted and never attended meetings or performed any of the duties of the office, could not operate as a waiver of any prerequisites to complet-

ed membership in the order. Certainly, it could not be considered a waiver until there was an acceptance of the office and an installation therein. The laws of the order provide that ‘in all acts performed in complying with the relief fund laws of the order the subordinate lodge and its officers are the agents of the members, and not the agents of the supreme lodge.’ It may well be doubted whether the subordinate lodge could waive the provision with reference to obligation or initiation at all, but this we deem it unnecessary to decide now. We do hold, however, that it was not waived in this instance.”

In *Bruner v. Brotherhood of American Yeomen*, 136 Ia. 612, 111 N. W. 977, it appeared that the rules of the defendant governing admission provided that a candidate must make application in which certain questions would be asked. If he should be elected to membership by the local lodge he was to be examined, and the application and the report of the examination were to be sent to the medical director. If that official approved he would forward the papers to the secretary of the order who would make out a certificate and forward it to the local lodge. The local official would notify the candidate, who must then be initiated. The local lodge could refuse to initiate the candidate at any time prior to the initiation, and could return his application fee. Bruner's certificate was sent to the local lodge, but he never presented himself for initiation. However, the chief correspondent had written him addressing him as “brother” and telling him where his policy could be found. He was notified that an assessment had been made against him. It was held, however, that this did not constitute membership. The court said: “Is the evidence sufficient to sustain a finding that Ernest Bruner ever became a member of the defendant association and entitled to benefits as such? If, on the one hand, we are to rely wholly upon the written laws and rules of the association as to the requirements precedent to such membership, and upon the other upon the acts of Bruner in fulfilling such requirements, it is very clear that the contract never became complete. . . . That Bruner did not comply with all these conditions of membership will have to be admitted, and, if he is to be treated as a member and the appellee entitled to maintain an action as the beneficiary of his membership, it must be upon the theory of some waiver or estoppel on part of the appellant. . . . We are of the opinion that a literal compliance with the conditions may be waived by the association, and that circumstances may arise under which it will be held estopped to allege noncompliance with

such conditions in defense to an action for the recovery of benefits. If, for example, compliance with a given condition is habitually ignored by the association in its admission of members, or if an applicant upon a performance of part of the conditions is given recognition as a member, accorded entrance to its meeting, charged with accruing dues and benefit assessments and his payment thereof accepted and retained, we think no court would allow the society to escape payment of the benefits which pertain to membership simply because it may appear that one or more of the conditions prescribed in the formal rules or by-laws of such society as precedent to membership appear to have been omitted. Nor is the delivery of the policy or certificate in all cases essential to membership if the right to receive it is established by competent evidence. . . . But, as we read the record before us, it contains nothing upon which the court could find any habit or practice upon the part of the defendant association or of the local lodge to ignore or omit the requirement of 'adoption' as preliminary to the recognition of an applicant as a qualified member. Nor do we find sufficient to justify the conclusion that such recognition was accorded in this particular case to Ernest Bruner. . . . He is not shown to have claimed to be a member except as some inference of that nature may be drawn from an attempt in August to find the local correspondent in order to pay his dues, and from his inquiry of the chief correspondent in September; but both of these incidents are entirely consistent with an understanding on his part that he must be 'adopted' or initiated before his rights to the benefits of membership should become perfect. So far as we are told, he never attended a meeting of the lodge or claimed the right to do so, and, although the letter from the chief correspondent in September informed him where his policy could be found and where his payments should be made, there is no word or intimation given that he ever attempted to avail himself of this information. True, a few days prior to this letter the local correspondent had marked him in her record as 'suspended,' but, if this fact came to his knowledge, he seems to have accepted the situation, and thereafter until the date of his death, seven months later, conducted himself as an entire stranger to the association. Taken as a whole, we think the showing will not sustain the conclusion that Bruner ever became a member of the association."

In *Triple Tie Ben. Assoc. v. Wood*, 73 Kan. 124, 84 Pac. 565, the evidence showed that the application was made in December. It was accepted and the applicant was elected to membership. The certificate of member-

ship was signed by the grand officers on December 29, and the applicant was initiated on January 16. Then the certificate was countersigned by the local officers and was delivered to the applicant. The constitution of the order provided that no beneficiary certificate of the member of the association should be or become effective or in force until countersigned, and the conditions of the certificate accepted by the member to whom it was issued. It was held that the applicant must become a member before he would be entitled to the benefits of the order, and that he did not become a member until his initiation.

Initiation is a prerequisite to membership in the Modern Brotherhood society. Thus, in *Kolosinski v. Modern Brotherhood of America*, 175 Mich. 684, 141 N. W. 589, it appeared that the certificate of membership contained an agreement by the applicant whereby she waived any and all rights to any benefit certificate issued thereon, until she had been regularly adopted and initiated. A by-law provided that no benefit certificate should be issued until the initiation, and officers were forbidden to waive any provision. The right to refuse to initiate at any time prior to the initiation was given to the local lodge. The applicant was never initiated, but her certificate was given to her husband by an officer's assistant. This was held not to constitute her a member. The court said: "In view of this plain and unequivocal waiver on the part of the insured, and the undisputed fact that she was never initiated in the order, and never was (after the date of the application) in a condition of 'sound health and physical condition,' so that she could have been initiated, we are of opinion that she never became a member of the defendant society, and that the membership certificate obtained by her through plaintiff never became a binding contract." In *Louden v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W. 425, the evidence showed that a promoter of the defendant was organizing a local lodge. Before the organization was completed, he received from the head office the certificates of membership for some of the charter applicants. He delivered one of these to the plaintiff's wife, but she was never initiated. The plaintiff was elected to an office and reported his wife as being a member, and the head office accepted her dues. It was held that because of not being initiated the applicant did not become a member. The court said: "The association issues no certificates except to members, and there can be no members until they pass the local physician's examination, receive the approval of the main office, are initiated into the lodge, and receive the

obligation. Acceptance by a vote of the other members is a necessary step, but not the final act constituting membership. The by-laws also contain express stipulations, viz., that no certificate shall become binding until the applicant has become a member, and the certificate attested by the local officers and delivered to the applicant, in good health. The association reserves the right to cancel the application if, between the time of the physician's examination and the final act constituting membership, the applicant should become disqualified on account of sickness. The contract is that the applicant must be in good health at the time he completes the final act of membership. Then, and not till then, is he entitled to the certificate." In *Shartle v. Modern Brotherhood of America*, 139 Mo. App. 433, 122 S. W. 1139, it appeared that the applicant received his certificate from a local officer, and paid his dues. He died before he was initiated, and it was held that the initiation was a prerequisite to liability on the certificate. The court said: "It thus appears that there was delivered to deceased, and he accepted, a benefit certificate before he became initiated as a member of the defendant's subordinate lodge for Independence, and before he took upon himself any ritualistic work. The by-laws above quoted provide that, when the benefit certificate is received, the applicant therefor shall be initiated by the subordinate lodge. If initiation is refused, the certificate is to be returned to the supreme secretary at the home office. It will be seen that the by-laws further provide that no liability shall attach 'until all the acts, qualifications, and requirements prescribed, . . . and all the laws, rules, regulations and ritual shall have been fully complied with.' Such laws also provide that no officer is authorized to waive any provisions thereof. The deceased died without having complied with any of these prerequisites entitling him to a benefit certificate. . . . The question now under consideration has been before the courts in other states, and it is held that initiation into the lodge and compliance with essential terms of the by-laws of the association are necessary prerequisites to a valid and binding beneficiary certificate. . . . It cannot be denied, for the record conclusively shows, that deceased was never initiated into the society; nor were any of the essential matters done by him, required by the by-laws, which entitled him to a benefit certificate or obligated the society to pay the certificate after his death." In *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158, it appeared that the applicant by his own solicitation persuaded the local officer to give him his certificate.

He paid all of his dues. He was not initiated and was held not to be a member. The court said: "The constitution of the association, as well as the statute under which it is conceded it does business, restricts the benefits of the association to its members and their beneficiaries. It is a secret order and it is a matter of common knowledge that initiation is a condition precedent to membership in an order of that character. To speak of an uninitiated member of a secret order would involve a contradiction of terms."

In *Hiatt v. Fraternal Home*, 99 Mo. App. 105, 72 S. W. 463, it appeared that a by-law provided that a benefit certificate should be delivered to an applicant on his initiation. The local lodge had the right to refuse to initiate an applicant at any time. An applicant's certificate was obtained by fraud, and an assessment was paid. He was not initiated, and it was held that he was, therefore, not a member. The court said: "Section 1408, R. S. 1899, from which defendant derives its power to issue certificates of insurance, declares fraternal beneficiary associations to be corporations formed and carried on for the sole benefit of its members and their beneficiaries and not for profit; requires that they have a lodge system, a ritualistic form of work and a representative form of government. By requiring a lodge system the statute evidently intended that no person could become a member of these orders until he was initiated as a member of one of its lodges. The by-laws of the defendant expressly so provided. William Hiatt, never having been initiated into the lodge, never became a member of the association and was a person to whom the association could not rightfully issue a certificate of insurance. *Matkin v. Supreme Lodge*, etc. 82 Tex. 301. The only right that Hiatt had at any time was the right to become a member. Under a by-law of the order, which was a part of his contract, he lost this right by failing to present himself for initiation not later than the next meeting after his election. He let the time pass in which he might be initiated, notwithstanding his election, without first obtaining a dispensation from the supreme lodge permitting the local lodge to initiate him. This he did not procure. At the time of his death he was neither a member nor possessed of the right to become a member."

In *Loyd v. Modern Woodmen of America*, 113 Mo. App. 19, 87 S. W. 530, the evidence showed that a by-law provided that "upon receipt of the benefit certificate, the local clerk shall notify the candidate and he shall be adopted by the camp at the next or some regular or special meeting, . . . but such certificate shall not be in force or effect un-

til said adoption ceremony shall have been performed." It was held that initiation was a prerequisite to membership. The court said: "As a condition precedent to the delivery and taking effect of the certificate as a valid and binding contract, it was agreed and so stipulated in the by-laws that James W. Loyd should be adopted into the local camp and there was no way provided by which Loyd could become a member of the society except by being inducted into the order through the initiatory service and by taking upon himself the obligations required by the rules and laws of the society. This was as necessary to constitute him a member as is baptism necessary to induct one into the Christian church. The condition, therefore, that he should be adopted into the order before receiving a benefit certificate, was not a mere form or nonessential requirement, but was a necessary one under the charter of the society. Loyd could not be qualified to become a holder of a benefit certificate unless he was a member and he could not be a member until he was adopted. But respondent contends that the initiatory ceremonies were waived in Loyd's case. There is nothing in the record to show or tending to show a waiver. What it does show is that three officers of the local camp agreed to deliver the certificate and caused it to be done in violation of the by-laws of the order, and if their conduct should be upheld it would thwart the very purposes and objects of the society by sanctioning the issuance of benefit certificates to nonmembers. It was no more competent for these officers to sign and deliver the certificate to Loyd prior to his adoption into the camp than it would have been competent for a minister of the Baptist church to have received him into that ancient Christian denomination without baptism by immersion." In *McWilliams v. Modern Woodmen of America* (Tex.) 142 S. W. 641, it appeared that the applicant for membership contracted in his application as follows: 'I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the head physician, and I shall be regularly adopted in accordance with the ritual of this society and shall make the payments as required by its by-laws at adoption, and any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health.' The applicant was not initiated according to the ritual, and the certificate was not delivered. An officer gave him the secret work. The court said: "Not only is it to be presumed that the applicant, *McWilliams*, had notice of the by-laws of the society, but his application for membership made a part of the beneficiary certificate expressly agrees that the laws of the

society shall form the sole basis of his admission to membership therein, and of the benefit certificate issued to him. The by-laws expressly provided that an applicant must be adopted by the local camp, and that a benefit certificate should not be delivered until after such adoption. *John M. McWilliams* did not become a beneficial member of the society by reason of his not having been adopted as provided by the provisions of the by-laws of the order, and the benefit certificate was not binding on the society."

In *Porter v. Loyal Americans of Republic*, 180 Mo. App. 538, 167 S. W. 578, it appeared that by the laws of the association the beneficiary certificate could not be delivered until the candidate had been initiated into the local lodge and had receipted for the certificate, nor was the applicant entitled to the certificate unless he was in good health at the time of his initiation and the delivery of the certificate. In November a candidate applied. His certificate was forwarded and received by the promoter of the local lodge on December 19. He died on December 25. The initiation had been set for December 26. The applicant had paid a registry and an assessment fee. He was held not to be a member. The court said: "Section 7109, Revised Statutes 1909, which was then in force, governed this case, and provided that such an association is carried on for the 'sole benefit of its members.' The only source of revenue is the assessments paid by members. The payment of benefits must be to those sustaining certain relations to members. It is imperative that each association doing business under this law have a lodge system with ritualistic form of work and representative form of government. The whole scheme of such an association contemplates a course of dealing in regard to levying assessments and paying benefits only among members. Regular initiation is the birth of a member. Until such event occurs, the association is dealing with an outsider, a nonmember, and an assessment paid by such a person or a benefit paid to him is a course of dealing beyond the power given by law to such associations. It is a condition precedent that is necessary to give life to the beneficiary certificate."

In *Loyal Mystic Legion of America v. Richardson*, 76 Neb. 562, 107 N. W. 795, the evidence showed that the application contained the same oath that was administered in the initiation. It was contended that by signing the application, the applicant took the oath, and that, therefore, the formal initiation was not necessary. The formal initiation was held, however, to be requisite to membership.

In *Matkin v. Supreme Lodge, etc.* 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886, it appeared that the application contained the

following clause: "I further agree and contract that the payment of the proposition fee, or the entertaining of this application, unless I am duly elected and initiated according to the ritual and laws of the order, does not and shall not constitute membership, or give me any of the rights of a member." The applicant passed his medical examination and was elected to membership. He died before initiation. He was held not to be a member. The court gave the reasons for its decision as follows: "It is not difficult to see why there should be a regular initiation into the order, and why members only can participate in its benefits; that the ceremony of initiation is secret does not affect it; it is doubtless intended to bind the members to a performance of their duties in respect to the objects to be accomplished. We could not say that it is a useless and unreasonable requirement. The affiliation is close and confidential, for good purposes so far as can be seen from the testimony. Were the ceremonies open they could not be said to be unreasonable; because they are secret does not make them so. The entire system, its existence and objects, are based upon initiation. We think there can be no membership without it, and no benefit, pecuniary or otherwise, without it."

In *Sterling v. Head Camp, etc.* 28 Utah 505, 80 Pac. 375, the evidence showed that the applicant had formerly been a member, and that his membership had lapsed. The constitution provided that when a member had been suspended for more than six months, he could not be reinstated, but must apply for membership on the same terms as any person who had not been a member of the order except that he should not be required to be introduced again formally in the ritual of the protection degree. The laws required a candidate to be initiated formally or instructed formally in the secret work, to take oath that he would guard the interests of the local lodge, and to pay all dues and assessments. It was held that the applicant could not become a member until he complied with all of the original requirements of initiation except that of being formally instructed in the secret work. The court said: "We know of no principle of law where it can be said that because one party to a proposed contract had done everything to express entire willingness to enter into and make it, but the other party, no matter whether from refusal or neglect, had not done so, therefore the court can treat the proposed contract as completed, and as though in fact made, and declare something existing which in fact had no existence. Where there are conditions precedent to the completion or giving effect to a contract,

they must be fulfilled or waived before rights in or to the contract can vest or be legally asserted. . . . So far as we are able to gather from the laws of the society, section 110 of its constitution does not mean that a member who had been suspended for more than six months is not required to be reobligated, in order to renew membership on his application. The said section provides that he must 'apply for membership on the same terms as any person who has not been a member of the order except that he shall not be required to be again formally introduced in the ritual of the protection degree.' The terms 'introduced' and 'protection degree,' of course have here a technical meaning, and a meaning especially appropriate to the society. While this technical or special meaning has not been defined to us with such clearness as we would have liked, and in order to enable us to determine just what is embraced within it, yet sufficient is made to appear that the so-called obligation is quite apart from the contention counsel make. That is to say, while the applicant was not required to be formally initiated or instructed in the secret work of the protection degree or of the order, nevertheless he was required to take the obligation that he will guard the interests of the camp, and pay all dues and legal assessments; that he has not been rejected by or expelled from any camp of the order; and that he is in sound bodily health. And unless this obligation is taken, under the laws and rules of the society, when all its provisions are considered, the applicant cannot be said to have become a member. It can readily be seen that the exaction of these obligations or promises is just as requisite from such suspended member applying for membership as from a person who has not been a member."

In some cases, however, it has been held that initiation is not a condition precedent to membership. *Brown v. Bowman*, 10 Ga. App. 707, 73 S. E. 1078; *Traders' Mut. L. Ins. Co. v. Humphrey*, 109 Ill. App. 246; *O'Neal v. Sovereign Woodmen of World*, 130 Ky. 68, 113 S. W. 52; *Wagner v. Supreme Lodge, etc.* 128 Mich. 660, 87 N. W. 903; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346; *Fisher v. Supreme Lodge, etc.* 190 Mo. App. 606, 176 S. W. 269; *National Aid Assoc. v. Bratcher*, 65 Neb. 378, 91 N. W. 379, 93 N. W. 1122; *Supreme Ruling etc. v. Crawford*, 32 Tex. Civ. App. 603, 75 S. W. 844. And see the reported case. In *Brown v. Bowman*, *supra*, it appeared that the applicant had given a note for a premium due on his policy. He had never been initiated and had never been afforded an opportunity to be initiated. It was held that this would not invalidate

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either the policy or the note. In *Traders' Mut. L. Ins. Co. v. Humphrey*, supra, it appeared that the laws of the Sovereign Grand Lodge of the Order of Odd Fellows left the time when membership should begin to be regulated by local legislation. The lodge of the insured provided that a person might become a member on being elected and on paying certain fees. It was held that initiation was not a prerequisite to membership in the order.

Estoppel seems to be the basis of the ruling in several cases that an initiation or a formal initiation is not necessary to constitute one a member. Thus, in *O'Neal v. Sovereign Woodmen of World*, 130 Ky. 68, 113 S. W. 52, it appeared that the applicant had fulfilled all of the requirements set forth as prerequisite to membership. He presented himself for initiation, and because of a minor technicality it was urged that there could not be a valid initiation at that time. It was decided, however, that the technicality should not prevail. The candidate was initiated, was always considered to be a member, and was buried with the ceremony of the order. It was held that after his death it was too late to question the validity of the initiation. In *Wagner v. Supreme Lodge*, etc. 128 Mich. 660, 87 N. W. 903, the evidence showed that the society's laws provided that each applicant should undergo a medical examination to be made by a commissioned medical examiner, and that when the examination had been approved by the supreme medical examiner, and the applicant had paid the initial assessment and certificate fee, and had been initiated into the lodge, then such person should be entitled to any benefits that might be due in the event of death under the terms of the certificate issued. The applicant paid her dues, but was not initiated. There was a question whether the certificate had been issued. It was held that if the certificate was issued the initiation was waived and that she became a member from the time of the delivery of the certificate to the local lodge.

In *Fisher v. Supreme Lodge*, etc. 190 Mo. App. 606, 176 S. W. 269, it appeared that a by-law provided as follows: "No benefit certificate shall be issued by the supreme secretary until after the medical examination shall have been approved by the supreme medical examiner, and the person has been initiated in some lodge of this order or obligated in the first degree." The applicant was not formally initiated, but he was given the oath and the secret work. He was treated as a member, and received his certificate, and paid his dues. He was held to be a member, the court saying: "The contention that it is necessary for Fisher to be 'initiated' in

some way other than by being merely obligated cannot be sustained. It is argued that the testimony of O'Keefe shows that further 'initiatory ceremonies' were necessary in order to constitute Fisher a member. But plaintiff is not bound by everything that this witness may have said. Nor is there anything to make it appear that the further ceremonies thus referred to were in any wise necessary to membership in the order, or a prerequisite to the issuance of a benefit certificate. On the contrary the by-laws provide that no benefit certificate shall be issued until the applicant is initiated into some lodge of the order, or obligated in the first degree. It nowhere appears that the obligation taken by Fisher was not of the requisite 'degree'; and the membership certificate was issued on the strength of this obligation, as being a full compliance with the laws of the order, the applicant was thereafter treated as a member, and his dues and assessments received by defendant. Under the circumstances the defendant should not be heard to say that he did not duly become a member." In *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346, it appeared that the applicant had complied with all the requirements except as to initiation. It was provided that if an applicant could not attend a meeting and be initiated within sixty days, he should sign a blank to that effect. The applicant was given the oath at his home by the proper officer. He later attended meetings and was told that he had complied with the requirements for membership. He paid his dues. It was held that he became a member. In *Supreme Ruling*, etc. v. *Crawford*, 32 Tex. Civ. App. 603, 75 S. W. 844, it was held that even though the applicant had never been initiated into the order, yet by receiving his dues and assessments with full knowledge of the circumstances, the order waived the initiation, and it could not question his membership. The order had also issued a benefit certificate to the applicant.

Certificate of Membership.

The majority rule is that where the rules of a beneficial association require the delivery of a certificate of membership, that delivery is a condition precedent to membership. *Kohen v. Mutual Reserve Fund Assoc.* 28 Fed. 705; *Delaney v. Modern Accident Club*, 121 Ia. 528, 97 N. W. 91, 63 L.R.A. 603; *Patterson v. Supreme Commandery United Order*, etc. 104 Me. 355, 71 Atl. 1016; *Court of Honor v. Hering*, 178 Mich. 377, 144 N. W. 843; *Erickson v. Brotherhood of Locomotive Firemen*, etc. 129 Minn. 264, 152 N. W. 537; *Wilcox v. Sovereign Camp*, etc. 76 Mo. App. 573; *Crohn v. Order*

of United Commercial Travelers, etc. 170 Mo. App. 273, 156 S. W. 472; May v. New York Safety Reserve Fund Soc. 14 Daly (N. Y.) 389; Roblee v. Masonic L. Assoc. 38 Misc. 481, 77 N. Y. S. 1098; Home Forum Ben. Order v. Jones, 5 Okla. 598, 50 Pac. 165; McLendon v. Woodmen of World, 106 Tenn. 695, 64 S. W. 36, 52 L.R.A. 444; Modern Woodmen of America v. Owens (Tex.) 130 S. W. 858. In *Kohen v. Mutual Reserve Fund Assoc.* supra, it appeared that the application provided that under "no circumstances shall the certificate hereby applied for be in force until the actual payment to, and the acceptance of, the first annual dues by the association, and actual delivery of the certificate to the applicant, with a receipt for the payment of the first annual dues, signed by the president, secretary, or treasurer of the association, during the lifetime of the applicant." An application was made for membership and insurance. The application was filled out, the examination was had before the local physician, and the initiation fee, the annual dues, and the physician's fees were paid and receipted for. These papers were forwarded to the head office, but before the certificate was issued the applicant was shot. It was held that there was no liability. As to the time when the contract should take effect, the court said: "While it may be conceded that a contract was entered into between these parties, it was a contract to become operative upon the happening of a certain condition; and it is competent, of course, for parties to stipulate as to when their contract shall become operative. Suppose, for instance, that in this application it had been proposed by the applicant that the policy should become in force on the 20th of November. Such a policy, though issued by the company on the 10th, would not become operative until the time which the parties themselves had named; or if in the application had been a proposition that the policy should become operative ten days after its receipt at the home office in New York, then, although it were received on the 10th, and accepted on the 10th, the policy would not become operative as a contract of insurance until ten days thereafter. We all know that there have been cases in which, there being no stipulation of this kind in the application, there has been a question as to whether the insurance company had accepted the proposition, and uncertainty in the proof as to whether it had passed the final board of determination so as to constitute an acceptance, and therefore binding on the company. Doubtless, with that fact in view, this stipulation was incorporated into this application, so that there might be no question as to whether this officer or that officer had passed

upon the application, and that the contract should not become operative until the certificate of insurance had actually reached the applicant." In *Court of Honor v. Hering*, 178 Mich. 377, 144 N. W. 843, it appeared that the by-laws of the association provided as follows: "No certificate of benefit membership shall be in force until the applicant shall have been initiated . . . and until he shall have signed and accepted said certificate. . . . And before the recorder shall deliver a benefit certificate the initiate must, in person, while in good health, sign the certificate in his presence." The applicant was initiated, but his certificate was delayed. Before it arrived the applicant was in a sanitarium and did not recover from his sickness. It was held that there was no liability on the certificate. In *Wilcox v. Sovereign Camp*, etc. 76 Mo. App. 573, the constitution of the defendant association provided that the liability of the order for the payment of benefits on the death of a member should not begin until his application had been accepted by the head physician, his dues and fees had been paid, he had been initiated, and his certificate had been issued and delivered to him. Those requirements were expressly made conditions precedent to the liability. The applicant was a charter member. His certificate was mailed to the local lodge and was held for several weeks. On the day appointed for it to be countersigned by the local officers he applied to the officer who told him that one of the officers had not yet signed. The applicant agreed to come back later for the certificate. He told the officer that he was then ready to pay for the certificate. Before the applicant returned, he was drowned. It was held that there was no liability on the certificate. The court said: "Whether or not the payment of the assessment and dues and the delivery of the policy were conditions precedent, the performances of all which were necessary to entitle the beneficiaries to share in the beneficiary fund, or whether or not these conditions were but mere requirements, the noncompliance with or nonperformance of which were an absolute bar to any claim on the beneficiary fund, the result in this case is the same, namely: that the plaintiffs are not entitled to recover and therefore the judgment cannot be sustained; and especially so since the said requirements and the noncompliance therewith were specially pleaded in the answer. We think an examination of the authorities just adverted to will show that where a beneficial certificate embodies the conditions set forth in section 69 of the constitution and by-laws of the defendant, or where such conditions though contained in the constitution and by-laws are not set forth in the

certificate, but are by the terms of such certificate made part thereof, the same though intrusted to the subordinate lodge or camp for delivery to the member applying therefor does not become operative as the contract of the parties if such conditions are not complied with. Until the performance of stipulated conditions like those enumerated in section 69, the certificate though in the custody of the clerk of the local camp does not become operative."

In *Crohn v. Order of United Commercial Travelers, etc.* 170 Mo. App. 273, 156 S. W. 472, the evidence showed that a by-law provided as follows: "The applications of all candidates shall be forwarded to the supreme secretary within ten days after each candidate has been initiated . . . and the secretary of the supreme council shall issue a certificate of membership and forward the same to the subordinate council to which said applicant may be attached, with instructions for its delivery to said member, unless the forwarding of such certificate be ordered withheld by the supreme executive committee." An applicant joined a lodge in Kansas, but the certificate was forwarded to him at his home in Missouri. It was held that according to the by-law the contract was not completed until the delivery in Missouri, and that it was therefore a Missouri contract. The applicant committed suicide. Under the Missouri law, this would not excuse payment of the policy, but in Kansas the opposite rule prevailed. Holding that the association was liable, the court said: "Turning to the laws of the society which were made a part of the proposal of the applicant we find they expressly provide that the contract of insurance should not become binding until the delivery of the certificate to the applicant. What other reasonable construction could be given the stipulation that 'the right of indemnity . . . is conditional on the issuance to him of a certificate of membership by the supreme executive committee?' The term 'issuance to him' must be given its usual significance to persons of ordinary intelligence and that significance was to send forth the certificate and put it in the hand of Crohn. [*Perkins County v. Graff*, 114 Fed. 1, c. 444 (52 C. C. A. 243); *Brownell v. Greenwich* (114 N. Y. 518) 4 L.R.A. 1, c. 691.] Was the certificate issued to Crohn as long as it remained in the possession of defendant subject to be recalled by the executive committee? We answer the question in the negative. Let us suppose that after the local secretary had mailed the certificate to Crohn he had received a telegram from the committee cancelling and recalling it; would not this act, if communicated to Crohn before he received the letter, have had the effect of preventing

the creation of a contract of insurance, in view of the provisions that, in effect, made the manual delivery of the certificate a condition precedent to a contract of indemnity? We hold that it would."

In *May v. New York Safety Reserve Fund Soc.* 14 Daly (N. Y.) 389, it appeared that the company's agent made false representations, causing the plaintiff to join the defendant. The plaintiff thought that he was joining when he paid his advance fee. The receipt given for the fee contained a provision that if "the applicant" did not receive his certificate of membership within fifteen days he should notify the home office. It was held that the plaintiff could not be a member and an applicant for membership at the same time, and that the plaintiff did not become a member until he received his certificate of membership. In *McLendon v. Woodmen of World*, 106 Tenn. 695, 64 S. W. 36, 52 L.R.A. 444, it appeared that in an application it was agreed that the liability for the payment of benefits should not begin until after the application [for membership and participation in the benefit fund] should be accepted by the sovereign physician, a beneficiary certificate should be issued and personally delivered to the applicant, and until he should pay all fees, and should be duly initiated. The applicant was initiated, but the certificate was not delivered to him. Before it could be delivered, he died. It was held that the delivery was essential to membership. The court said: "We are of opinion that under the provisions of the application and certificate, as well as the constitution and by-laws of the order, plaintiff cannot recover under the facts in this record. The application signed by Mr. McLendon provides on its face that it, as well as the constitution and by-laws of the order, shall form the basis of the contract, and they enter into it and become a part of it as freely as if copied into it in so many words. . . . Under the terms of the application, certificate, constitution and by-laws the beneficiary certificate was not in force until, among other things, the certificate was delivered to the applicant. . . . And if the certificate, application, or constitution and rules so provide, he must at the time be in good health. . . . And if the applicant dies before delivery the certificate does not become binding by delivery to the beneficiary . . . and the unauthorized action of the local camp would not bind the order. . . . It is said there was unreasonable delay in returning the certificate, and it, having been actually signed and issued from the sovereign camp December 31, should be held to take effect at a prior date. It is only necessary to state that there does not appear to have

been any delay arising out of bad faith on the part of the company. Neither the application nor the constitution and rules of the order prescribe any limit within which the certificate shall be returned and contract completed. Before the certificate was signed the applicant had become sick. Before it was ready for delivery he was dead. There does not appear to have been any unnecessary or unreasonable delay, but only such as was required to perfect the application and examination. Beneficial societies may decide for themselves whom and when they will admit as members. Until an applicant is accepted under the constitution, by-laws, rules, and stipulations of the contract he does not become a beneficiary member, nor entitled to insurance. Mere delay in passing upon his application will give him no rights, and afford no presumption of its acceptance." In *Modern Woodmen of America v. Owens* (Tex.) 130 S. W. 858, the evidence showed that the by-laws and the application declared that the certificate should not take effect until it was delivered to the applicant while in good health. The applicant was ill when the certificate was returned to the local lodge, and the clerk refused delivery. He delivered it to the widow, however, after the applicant's death. It was held that delivery to the applicant was a condition precedent to validity.

If the applicant is dead at the time the supreme officers take favorable action on his application, this action does not waive the necessity for the certificate. Thus, in *Patterson v. Supreme Commandery United Order*, etc. 104 Me. 355, 71 Atl. 1016, it appeared that the laws of the association prescribed the following steps in order to obtain membership: The application was balloted on. If "elected to receive the degree," the applicant was subjected to a medical examination by the examiner of the local lodge. If this examination was satisfactory, he was initiated with the ritualistic ceremony, after paying his dues. The application and the report of the medical examination were then forwarded to the supreme medical examiner. If he approved, the application was returned to the local lodge who then sent it to the supreme secretary, and the fees were sent to the supreme treasurer. It was further provided that no right of membership in the order should accrue by initiation nor should a certificate be issued until the application should be approved by the supreme medical examiner and sent to the supreme secretary. The plaintiff's son was initiated, and his medical examination was forwarded to the supreme medical examiner. This was approved but before the approval the applicant was killed. He was never reported to the supreme secre-

tary as having been initiated. He was held not to be a member. The reasons for the decision were given as follows: "The defendant, if liable at all must be liable as upon a contract—a contract of insurance. The terms and conditions of the contracts of this defendant with its members are to be found, in part at least, in its constitution and laws. It had a right to impose terms and conditions upon those who sought membership. All applications must be held to have been made subject to those terms and conditions. In this case one of those terms and conditions was that the approval of the application by the supreme medical director should be a condition precedent to beneficial membership, and that until such approval neither the applicant nor his beneficiary should have any claim on the benefit fund. This was the *sine qua non*. The election was not sufficient, nor was a satisfactory medical examination by the local examiner. The initiation was not enough. It was a step, but it was only a step. It gave the applicant a certain status, as, if his medical examination was finally disapproved, the laws of the order gave him the option of remaining as a social member. Approval of the application by the supreme medical director was made essential. It was probably a wise requirement, but whether it was or not, it was one which the defendant had a right to make. Patterson died before this application was so approved. The intended contract was not completed in his lifetime. At the time he died the defendant was under no liability to his beneficiary." Similarly, in *Erickson v. Brotherhood of Locomotive Firemen*, etc. 129 Minn. 264, 152 N. W. 537, the applicant died before the supreme examiner had approved the application. The death was unknown at the time of the approval. In that association an applicant could not become a beneficiary member until his application had been approved by the supreme examiner. It was held that the death prior to the approval precluded membership. The court said: "Both the laws of the order and Erickson's application provided that no contract for insurance should exist until the chief medical officer approved Erickson's medical examination. This examination did not reach the grand officers until five days after Erickson's death. In ignorance of such death, it was, in form, approved and the usual certificate sent to the secretary of the local lodge. There is no provision that the insurance shall take effect as of the date of the application, but on the contrary there is an express provision that the applicant shall remain a nonbeneficiary member until the approval of his medical examination. Erickson's application was in substance a proposal to become a beneficiary

member, which did not ripen into a contract until accepted by the society. His death before such acceptance operated to withdraw and annul the proposal; and its acceptance, in form, thereafter, was a mere nullity, for no contract had been entered into at the time of his death, and no contract can be entered into with a dead man. Both the subject-matter of the proposed contract, namely, the life of Erickson, and one of the proposed parties thereto had ceased to exist before action was taken upon the proposition by the other proposed party, and therefore the contract was never consummated." In *Roblee v. Masonic L. Assoc.* 38 Misc. 481, 77 N. Y. S. 1098, the evidence showed that the application contained the following provision: "It is also understood that my membership shall not be in force until a certificate has been delivered to me during my life, and in good health." The application was accepted, but the applicant died before the certificate was mailed. It was held that he did not become a member. The court said: "It is well established in this state that a general agent of an insurance company may waive stipulations and provisions contained in a policy with respect to conditions upon which it shall have inception and go into operation by delivering the policy with knowledge of all the facts and receiving the premium. *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Forward v. Continental Ins. Co.* 142 N. Y. 382, 37 N. E. 615, 25 L.R.A. 637; *Wood v. American F. Ins. Co.* 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Gray v. Germania F. Ins. Co.* 155 N. Y. 180, 49 N. E. 675; *Ames v. Manhattan L. Ins. Co.* 40 App. Div. 465, 58 N. Y. S. 244. I see no reason why this rule should not have application to certificates of membership in benefit associations such as the defendant. The certificate issued by the defendant was in effect a policy of insurance upon the life of plaintiff's husband, and, if a delivery of the same to him had been effected at any time prior to his death, the question as to whether the defendant did or did not intend to waive its rights by making such delivery might very well be a question for the jury to pass upon. But in this case there was no delivery of the certificate to the husband of the plaintiff, or to any one for him during his life. There can be no delivery, either actual or constructive, to a person who is dead. Hence plaintiff's husband never became a member of the defendant association for the reason that the preliminary negotiations to that end were based upon the condition that his membership should not be in force until a certificate had been delivered to him during his life, and, as we have seen, he died before the defendant had performed any act tantamount to such delivery. In order to constitute a waiver of the condition con-

tained in the application of plaintiff's husband, upon which he was to become a member of defendant's association, there must have occurred something, as between him and the defendant, by which such condition was waived and he constituted a member without any delivery of the certificate. But there is no fact or circumstance from which any such result may be inferred." In *Home Forum Ben. Order v. Jones*, 5 Okla. 598, 50 Pac. 165, it appeared that a by-law provided as follows: "Persons shall not become beneficiary members of this order until their examinations have been approved by the chief medical examiner, and they have paid one mortuary assessment, and received a certificate of membership." An applicant for membership was elected. He was examined by a local medical examiner and passed. He was initiated and paid his assessment. His application was not forwarded to the home office until after his death, nor was it passed on by the supreme medical examiner, who had the power to reject the application. On receipt of the application, the head office refused to issue the certificate of membership, because the applicant was already dead. It was held that the contract of membership was not complete at the time of the death.

Under some circumstances, however, the delivery of a certificate of membership is not a condition precedent to membership. *Supreme Council, etc. v. Bailey* (Ky.) 55 S. W. 888; *Lorscher v. Supreme Lodge, etc.* 72 Mich. 316, 40 N. W. 545, 2 L.R.A. 206; *Perine v. Grand Lodge A. O. U. W.* 48 Minn. 82, 50 N. W. 1022; *Baldwin v. Golden Star Fraternity*, 47 N. J. L. 111; *Lathrop v. Modern Woodmen of America*, 63 Ore. 193, 126 Pac. 1002; *Pledger v. Sovereign Camp Woodmen of the World*, 17 Tex. Civ. App. 18, 42 S. W. 653. In *Supreme Council, etc. v. Bailey*, supra, it appeared that the members of the appellant were divided into an insured class and a social class. The appellee's husband applied for membership in the first class. He was initiated into the order and paid his assessments. He was subjected to a medical examination which was not required of the social candidates. Subsequent discovery of his physical infirmity caused the head office to order the local office not to accept any more assessments from him. The certificate of membership to the relief fund class was never delivered to him. It was held that he became a member of the insured class. In *Lorscher v. Supreme Lodge, etc.* supra, the evidence showed that in order to become a member of the defendant, the following steps were necessary: A candidate applied for membership. If he was found to be desirable, he submitted to a medical examination by the local examiner who made a certificate and forwarded it to the state medical

examiner. If the latter officer approved, the candidate was initiated after paying the required dues. After initiation, the local lodge forwarded the application for beneficiary membership to the head office together with a fee for the certificate. The certificate was then sent to the local lodge where it was registered. That certificate completed the contract between the corporation and the members of the local lodges. An applicant complied with the requirements, but the local lodge did not deliver the certificate to him. It was held that the local officer held the certificate for him, and that the beneficiary could collect. In *Perine v. Grand Lodge A. O. U. W.* 48 Minn. 82, 50 N. W. 1022, it appeared that an applicant joined the defendant's local lodge, and paid his dues and assessments. About a month later the local lodge was reorganized because of irregularities in the first organization. The applicant in question was not present at the reorganization, and no certificate was issued to him. He was recognized as a member and his dues were accepted. It was held that the defendant was estopped to deny his membership. In *Lathrop v. Modern Woodmen of America*, 63 Ore. 193, 126 Pac. 1002, it appeared that the applicant applied for beneficial membership. He was accepted and initiated and paid his fees. His policy was sent from the head office to an official of the local lodge. There was a provision that the local official was not the agent of the general order, and a provision that the policy was to be delivered to the applicant personally and while he was in good health. It was held that the local officer was the applicant's trustee, and that the applicant's membership was complete from the time that the officer received the certificate. The court said: "The clerk of the local camp is expressly declared by the by-laws not to be the agent of the head camp. He is a mere custodian of the policy for the purpose of exacting any dues or assessments that may be payable, and, if none are payable and the applicant is in good health, he is a mere, naked trustee for the applicant. We take it that from the date of its reception the applicant, whose current dues had been paid, was a full-fledged beneficial member, subject to all the liabilities and entitled to all the benefits of any other member, and that he would have been liable to the discipline of the camp, and perhaps to a civil action for the November dues had he failed to pay them before December 1st. The provision for delivering to him in person was intended (1) to secure the payment of current dues (which in this instance had been paid); and (2) to prevent the policy going astray by being placed in the custody of an improper person. The latter was for the protection of him and his beneficiary." In

Pledger v. Sovereign Camp Woodmen of the World, 17 Tex. Civ. App. 18, 42 S. W. 653, it appeared that the constitution and by-laws provided that the liability of the head camp for the payment of benefits on the death of a member should not begin until after his application had been accepted by the head physician, his certificate issued, and he should have paid all dues and assessments, have been initiated, and the certificate had been delivered to him. The applicant was approved, paid all fees, and was initiated. His certificate was issued and was wrongfully withheld by the local clerk. The applicant died before the delivery. It was held that the delivery was not a condition precedent to recovery. The court said: "We do not think that the actual delivery of the certificate was made a condition precedent by the constitution and laws of the order, and we are borne out in this construction of section 69 by the language of section 70, in which it is stated that the noncompliance with or the nonperformance of any requirement in the preceding section on the part of the applicant should be an absolute bar to any claim on the beneficiary fund of the order. If it had been intended that the actual delivery of the certificate to the member was necessary, it could have been so stated. When the money was tendered, there remained nothing to be done on the part of Pledger, and it was the duty of the clerk to deliver the certificate. Equity will treat that as done which ought to have been done. Since there is no controversy about the facts, and as the facts authorize a recovery by the appellant, the judgment of the court below will be reversed, and judgment will be here rendered in favor of the appellant for the amount provided for by the certificate." The case last cited was distinguished by the Missouri court in *Wilcox v. Sovereign Camp*, etc. 76 Mo. App. 573, wherein the court said: "In Pledger's case, already referred to, there was an offer to pay the advance assessment and dues accompanied with a demand for a delivery of the certificate which being rejected there was a formal tender made and rejected. But here there was no tender at all, but only a willingness and ability expressed to pay the advance assessment and dues. At the time of the expression of such willingness and ability the certificate had not then been signed by the local officers of the camp whose duty it was to sign it. In the Pledger case the certificate had been signed by every officer required to do so by the constitution and by-laws, while here as has already been shown it was not so signed at the time the delivery was requested of the clerk. The Pledger case though much relied on by the plaintiffs, for the above reasons, lends very little support to their contention. If the certificate had

been signed by the proper officers of the local camp and a payment, or even a tender, of the advance assessment and dues had been made, accompanied with a demand for the delivery of the certificate, a different case would have been presented and one that would have probably been entitled to a more favorable consideration at our hands."

In *Somers v. Kansas Protective Union*, 42 Kan. 619, 22 Pac. 702, it appeared that the application contained in small type the following provision: "Signature of the applicant. The applicant must personally sign, or the certificate, if issued, shall be invalid." Section 2 of the by-laws provided as follows: "Before a certificate of membership shall be issued, an application therefor, made upon a blank furnished by the union, must be . . . signed by the applicant by himself or herself." A husband applied for his wife's membership at her request. He signed the application for her, and she ratified it. The agent of the company knew of the circumstances, and he assured the husband that it was all right. The husband did not see the provision requiring the personal signature. The certificate was held to be binding.

It has been held that written acceptance of the certificate was unnecessary. *Sovereign Camp, etc. v. Brown* (Tex.) 88 S. W. 372.

Payment of Fee.

In some instances the payment of a fee is made a condition precedent to liability. *National Aid Assoc. v. Bratcher*, 65 Neb. 378, 91 N. W. 379, 93 N. W. 1122; *Modern Woodman Acc. Assoc. v. Kline*, 50 Neb. 345, 69 N. W. 943. In *National Aid Assoc. v. Bratcher*, supra, it appeared that an organizer told the plaintiff that he could give him and his wife a joint certificate of membership which would be good on the initiation of the husband, and that the wife could come in later. Apparently the organizer had unlimited power under such circumstances. In the application it was agreed that "under no circumstances shall the certificate hereby applied for be in force until . . . one assessment has been paid." The organizer was not empowered to receive dues. He owed the plaintiff money for horse hire and he agreed to pay it as the assessment. He did not pay until after the death of the wife. It was held that the payment to the local secretary was a condition precedent to membership, and, as the organizer did not make the payment until after the death, the wife was not a member. The reasons for the decision were given as follows: "In the case at bar, it was agreed that the applicants should not become members of the order, and the certificate in question should not be in force, until they were initiated into a local lodge and one as-

essment had been paid. Bratcher was initiated into the local lodge, but his wife was not. If this were the only question involved in this action, we would feel constrained to hold that, under the circumstances, the fact that Mrs. Bratcher was not obligated in, and did not receive the mysterious secrets of the local lodge, would not require a reversal of the judgment of the lower court. Stover represented to Bratcher that if he was initiated at the time the lodge was instituted, his wife could come in later, and that the certificate, so far as that matter was concerned, would be good. Stover was the organizer for the association, and his authority was apparently unlimited so far as this requirement was concerned, and Bratcher had a right to rely on this statement. Again, in cases like this one, where the joint certificate is applied for at the formation of a new lodge, we do not construe the by-laws as requiring both of the joint beneficiaries to be initiated at the same time. If the assessments and registry fees had been paid to the local secretary, and the certificate had been signed and delivered by him, before the death of Mrs. Bratcher, the contract would have been complete, and the fact that she died without having been initiated would not have prevented a recovery herein. . . . But it will be observed that it was expressly agreed that the applicants should not become members and entitled to their certificate until the lodge was regularly organized by a duly appointed organizer, officers elected and qualified, and the certificate signed and delivered by the local secretary, and their first assessments and registry fees were paid to the local secretary. It was necessary that these conditions precedent should be complied with during the lifetime of the applicant, before there was any binding contract of insurance. The lodge was regularly organized by a duly appointed organizer, and the officers thereof were duly elected and qualified; but the advance or first assessments and registry fees of the applicants were not paid or even tendered to the local secretary until two days after the death of Mrs. Bratcher. . . . It is thus established beyond question that the date of payment was too late to authorize the local secretary to sign and deliver the certificate, and thus put the same in force and make Mrs. Bratcher a member of the association. She certainly never was a member of the order. Therefore the certificate never had any binding force." In *Modern Woodman Acc. Assoc. v. Kline*, 50 Neb. 345, 69 N. W. 943, the evidence showed that the certificate of membership contained the following provision: "In consideration of . . . the agreement on the part of the certificate holder to accept the conditions contained in his application and this certificate, as the

basis of this contract, and in consideration of three dollars (\$3) paid by . . . [the plaintiff], the receipt whereof is hereby acknowledged, does hereby constitute the said applicant a certificate holder of said association, . . . provided that this certificate shall not take effect until all assessments as aforesaid, and payable prior to the accident for which indemnity or benefit is claimed, are received by the association previous to such accident." The certificate was received by the insured on November 18, and was dated November 17. The plaintiff was injured on November 19. On November 30 he paid to the local official the amount owed for the issuance of the certificate. This sum amounted to the required sum from November 30. It was held that the certificate did not become in force until the payment.

But in *Baldwin v. Golden Star Fraternity*, 47 N. J. L. 111, it was held that the payment of the assessment was not a condition precedent to membership under a provision that each member, on becoming a member of the beneficiary fund, should pay to the financial secretary (of the subordinate council) the amount of one assessment.

Miscellaneous.

Where the charter of the association prescribes certain qualifications, such as age, or the like, for the members of the society, applicants must conform to those qualifications before they can become members. *Sowersby v. Royal League*, 159 Ill. App. 626; *Alexander v. Chicago Bankers' Union*, 187 Ill. App. 469. And the same rule has been laid down where the limitation was contained only in the association's constitution or by-laws. *McCoy v. Roman Catholic Mut. Ins. Co.* 162 Mass. 272, 25 N. E. 289. See also *Pirrung v. Supreme Council*, etc. 93 N. Y. S. 575. Compare *Plattdeutsche Grot Gilde*, etc. v. *Ross*, 117 Ill. App. 247.

Where a favorable medical examination is made a condition of beneficial membership, the examination has been held to be a condition precedent. Thus, in *Asselto v. Supreme Tent of Knights*, etc. 192 Pa. St. 5, 43 Atl. 400, it appeared that the defendant had two kinds of members, social and beneficial. An applicant joined as a social member of whom no medical examination was required. He applied for beneficial membership, and paid one assessment on condition that the money should be returned to him if he was not elected. To be a beneficial member, every applicant must submit to a medical examination. The applicant was never examined. He was held not to be a beneficial member. But in *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 59 N. W. 747, 43 Am. St. Rep. 701, it was held

that the association could be estopped to demand the medical examination. In that case it appeared that the association required that there should be a written application for membership which should state the time at which the membership was desired to begin. A medical examination and the payment of a fee were required. A person applied for membership, and notices of his membership were sent to several officials. The amount of dues was deducted from his wages. He was taken sick before he could make the medical examination. On the day before his death, it was sought to declare that he was not a member. It was held that the association was estopped to deny the membership.

Where an association is disbanded, and subsequently a reorganization is attempted, the members of the old organization do not become members of the new association before its organization is completed even though they may pay dues to the new society. *Sloan v. Loyal Fraternal Home Assoc.* 139 Mo. App. 443, 123 S. W. 57. In that case, the court said: "Plaintiffs depend upon acts or promise of defendant as a corporation before there was a corporation. Those acts, as shown above, were principally in receiving payment of dues from Michael T. Sloan on September 6th and 28th, at which dates defendant had not come into existence, and it was without power or authority to accept the deceased beneficiary of the other company; or, as claimed by plaintiffs in the second count, to assume the payment of the certificate issued by the other company. . . . Under the law and rules of these statutory beneficiary associations, the benefit certificates are issued only to members of the association under certain prescribed conditions for initiation. [*Hiatt v. Fraternal Home*, 99 Mo. App. 105.] We do not find where the deceased ever became a member of the defendant body whereby he might have a right to claim its protection."

SHERMAN

v.

HAVENS ET AL.

Kansas Supreme Court—March 6, 1915.

94 Kan. 654; 146 Pac. 1030.

Trusts — Spendthrift Trust — Creation.

The doctrine of "spendthrift trusts" approved by the majority of the American courts by which it is settled that it is lawful

for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the income at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such income shall not be subject to alienation by the beneficiary, nor liable for his debts, accords with the general policy which this state has always followed respecting the right of creditors and debtors. It deprives the creditor of no security to which he has the right to look, and it recognizes the right which the owner of property has to dispose of it, either by an absolute gift or by a conditional one, and to make provision for the object of his bounty, provided he gives the use only without the absolute title, and therefore the testator's intention in this respect, when clearly expressed, will be carried out.

[See note at end of this case.]

Same.

A will contained the following clause: "To my brother, Arthur B. Havens, should he survive me, an annuity of one thousand dollars, and I direct my said executor trustees to pay him two hundred and fifty dollars quarterly in advance from my death until his; but should he predecease me, and in any event after his death, such annuity fund to be added to the trust estate hereinafter created for my said daughter Elizabeth and her issue."

Held, that proper construction of the will does not disclose an intention on the part of the testator to secure to his brother the life enjoyment of the income of the trust estate exempt from his brother's creditors.

[See note at end of this case.]

Same.

Without deciding that a letter written by the testator three years after the execution of the will was admissible in evidence for the purpose of showing the circumstances under which the will was executed, it is held that nothing contained in either the will or the letter shows that it was the testator's intention to protect the income from waste or dissipation, or to prevent the legacy from being subject to payment of the brother's debts.

[See note at end of this case.]

Garnishment — Funds Subject — Funds in Hands of Executor or Administrator.

Section 228 of the code authorizing creditors to proceed by garnishment against "any person" who shall be indebted to, or have any property, real or personal, in his possession or under his control belonging to, the debtor, is sufficiently broad in its terms to authorize an action in garnishment against an executor or administrator after an order of final distribution.

[See 2 Ann. Cas. 921.]

Same.

It being one of the agreed facts in the present case that the estate of the testator is solvent and able to respond to the quarterly

payments due to the beneficiary, and that they have made such payments to him in advance and recognized the provision, no order of distribution was necessary in order to authorize them to make the payments, and such quarterly payments are subject to attachment before final settlement.

Attorneys — Allowance of Fee.

Under section 247 of the code, the allowance by the court of \$25 attorney's fee for the plaintiff was proper.

(Syllabus by court.)

Appeal from District Court, Leavenworth county: WENDORFF, Judge.

Action by Nellie A. Sherman, plaintiff, against Ernest F. Havens et al., defendants. Judgment for plaintiff. Certain defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

L. O. Carter and Arthur M. Jackson for appellants.

Benjamin F. Endres for appellee.

[655] PORTER, J.—The plaintiff is a judgment creditor of the defendant, Arthur B. Havens. The executors of the will of Paul E. Havens, brother of the defendant, are garnishees in a proceeding to reach, and apply in payment of plaintiff's judgment, the income of a trust estate bequeathed by the will to the defendant.

[656] Two questions are involved: First, does the will properly construed disclose an intention on the part of the testator to create a "spendthrift trust" in favor of his brother; in other words, to secure to his brother the life enjoyment of the income of the trust estate exempt from the creditors of his brother? Second, if a proper construction of the will discloses such intention, can it be made effectual?

It seems more appropriate to consider the second of these questions first, because, in determining what is essential to the creation of a spendthrift trust, it becomes necessary to refer to the history of the law in relation to such estates.

Paul E. Havens, the testator, was a brother of the defendant and died on the 6th day of May, 1913, leaving a last will dated February 18, 1908, which has been duly probated. The following is the clause of the will upon which the defendant and the garnishees base their contention that it was the testator's intention to create a spendthrift trust:

"To my brother, Arthur B. Havens, should he survive me, an annuity of one thousand dollars, and I direct my said executor-trustees to pay him Two Hundred and Fifty Dollars quarterly in advance from my death until his; but should he pre-decease me, and in any event after his death, such annuity

fund to be added to the trust estate herein-after created for my said daughter Elizabeth and her issue."

Since the decision in *Brandon v. Robinson*, 18 Ves. (Eng.) 429, 433, the English courts have uniformly followed the rule of the common law, that a donor creating a life estate cannot take away its incidents, among which are the powers of voluntary and involuntary alienation. In England, however, as well as in those states where the English rule has been adopted, it is held that if the gift or devise contains a condition of cessor upon the bankruptcy or insolvency of the beneficiary, or upon an attempted alienation, the restraint is valid. (*Brandon* [657] v. *Robinson*, supra; *McKinster v. Smith*, 27 Conn. 628; *Tillinghast v. Bradford*, 5 K. I. 205; 26 Am. & Eng. Enc. of Law (2d ed.) 138.)

The grounds upon which the English decisions rest are two: First, that the right of alienation is a necessary incident to an equitable estate for life; and second, that it is contrary to public policy that one should have the right to enjoy the income of property to the exclusion of his creditors.

In *Sparhawk v. Cloon*, 125 Mass. 263, the opinion contains an exhaustive discussion of the subject, and it is there stated that from the time of Lord Eldon, the rule has been in the English court of chancery that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by and liable in equity to the debts of the *cestui que trust*. (p. 266.)

The English rule has been rejected by most of the state courts in this country and by the supreme court of the United States. (*Nichols v. Eaton*, 91 U. S. 716, 23 U. S. (L. ed.) 257; *Shankland's Appeal*, 47 Pa. St. 113; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Lampert v. Haydel*, 96 Mo. 439, 446, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L.R.A. 113; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398.)

The rule adopted by the majority of the American courts is that "it is lawful for a testator or grantor to create a trust estate for the life of the *cestui que trust*, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts. (26 Am. & Eng. Enc. of Law (2d ed.) 139.)

The argument upon which the American authorities are based is that a creditor of the donee has no right to look to the property of another man for the payment of his debts.

[658] "As to past debts, such creditors are no worse off after their debtor becomes the

donee of a spendthrift trust than they were before, and as to future debts it is their own folly if they choose to rely upon a fund which by the very terms of its donation it is impossible for them to reach, of which fact they are advised actually or constructively by the registry laws of the United States. Moreover, it is not deemed against public policy for a testator to provide a support for a spendthrift child, since it is the interest of the public that such child shall not become a public burden. The rights of creditors are not deemed any more sacred than the right of property involved in the execution of the trust; or the right which a testator has that the will he made should be carried out, and not one that the court makes for him." (26 Am. & Eng. Enc. of Law (2d ed.) 141.)

See also *Nichols v. Eaton*, 91 U. S. 716, 23 U. S. (L. ed.) 257; *Steib v. Whitehead*, 111 Ill. 247; *Partridge v. Cavender*, 96 Mo. 452, 9 S. W. 785; *Moore's Estate*, 198 Pa. St. 611, 612, 48 Atl. 884.

In *Nichols v. Eaton*, supra, Mr. Justice Miller said:

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." (p. 727.)

It cannot be doubted that by the great weight of authority in this country it is settled that the founder of such a trust may secure the enjoyment of it to the objects of his bounty by providing that it shall not be alienable by them or become subject to be taken by their creditors, and that the testator's intention in this [659] respect when clearly expressed by him will be carried out. (*Rife v. Geyer*, 59 Pa. St. 303, 98 Am. Dec. 351; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Sparhawk v. Cloon*, 125 Mass. 263; *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358; 2 L.R.A. 113; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398; *Nichols v. Eaton*, supra; *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L.R.A. 266; *Jourlmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Garland v. Garland*, 87 Va. 758, 13 S. E. 478, 24 Am. St. Rep. 682, 13 L.R.A. 212; *Wales v. Bowdish*, 61 Vt. 23, 27, 17 Atl. 1000, 4 L.R.A. 819; *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. 946, 41 L.R.A. 544.)

The supreme court of Iowa has approved the American rule, with the qualification that creditors cannot deprive the beneficiary of the support provided for him out of such property "so long as it is in accordance with his station in life." (Merchants Nat. Bank v. Crist, 140 Ia. 308, 313, 118 N. W. 394, 132 Am. St. Rep. 267, 23 L.R.A. (N.S.) 526.)

The question is a new one in this state. There is no statute or decision upon the subject, but we see no reason why the rule adopted by the majority of the courts of this country should not apply here. As was said by the Massachusetts court in Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504:

"We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary." (p. 173.)

It accords not only with the weight of authority in this country and with sound reasoning, but also with the general policy which the state has always maintained respecting the rights of creditors and debtors as shown in the liberal provisions of our exemption laws. It deprives the creditor of no security to which he had the right to look, and it recognizes the right [660] which the owner of property has to dispose of it, either by an absolute gift or by a conditional one, and to provide for the object of his bounty, provided he gives the use only without the absolute title.

The first question is perhaps the more difficult one. Does the will properly construed disclose an intention on the part of the testator to secure to his brother the life enjoyment of the income of the trust estate exempt from the creditors of his brother? In Bennett v. Bennett, 66 Ill. App. 28, it was said of a spendthrift trust that the "provisions against alienation of the trust fund by the voluntary act of the beneficiary, or *in invitum* by his creditors, are the usual incidents of such trusts." (p. 37; see also 26 Am. & Eng. Enc. of Law (2d ed.) 138.)

There is some conflict in the authorities as to what is essential to the creation of a spendthrift trust. It seems to be clearly established, however, that the intent need not be stated in express terms. (Baker v. Brown, 146 Mass. 369, 15 N. E. 783.) In that case the will gave to the daughters of the testator a devise or legacy on condition that they support their father, and it was held that he had no estate under the will which a creditor could reach.

In Wagner v. Wagner, 244 Ill. 101, 18 Ann. Cas. 490, 91 N. E. 66, it was held that it is not necessary to the creation of a spend-

thrift trust that the *cestui que trust* shall be denominated as spendthrift, or that the testator shall give his reasons for creating a trust, or that the will shall contain all the restrictions and qualifications incident to such trust, but if it appears from the whole will that the testator intended to create a spendthrift trust, that is sufficient.

In Roberts v. Stevens, 84 Me. 325, 24 Atl. 873, 17 L.R.A. 266, the question was whether such a trust was created in favor of the testator's son. The language of the will did not declare in so many words that the son's interest in the trust estate should be beyond the reach of his [661] creditors, but it was held that such express words were not essential to the creation of such a trust, and that the intention should be gathered from the whole instrument construed in the light of circumstances, and the intention to create a spendthrift trust was inferred in that case from the nature of the provisions annexed to the gift.

On the other hand, where a will created a trust for the benefit of a testator's son, directing the trustee to pay over the income at stated intervals to the *cestui que trust*, or to whomsoever he in writing might designate, it was held not to create a spendthrift trust, because the *cestui que trust* had the right of control of the income while in the hands of the trustee. (Decker v. Poor Directors, 120 Pa. St. 272, 13 Atl. 925.)

The trial court admitted in evidence a letter written by the testator to his brother, the defendant, under date of March 6, 1911, the material part of which reads as follows:

"You have reached that age when men ought to evade the worry and labor of business, and my thought is that you should pass the remainder of your days in quiet, and far from business cares. I am glad that I am able to assist you in doing so, and I will freely extend such aid as you require to that end, and your requirements will be responded to as you make them known to me.

"I know that you would do the same for me if conditions were reversed, and so there will be no obligation on your part for whatever you receive from me as long as I live, and provisions have been made in my will, in case you survive me."

It is the contention of the defendant that the will should be construed in connection with this letter, and that the letter itself is proof of the intention of the testator to provide support and maintenance for him, and that it establishes an intention to create a spendthrift trust. The letter was written three years after the execution of the will. Conceding, for the purposes [662] of the argument, that the letter is admissible to show the circumstances of the testator and his brother, there is no language in either

the will or the letter showing that it was the testator's intention to protect the income from waste or dissipation, or to prevent the legacy from being subject to the payment of the brother's debts. In order for us to declare this to have been the intention of the testator, we must look beyond the language of both instruments. The case differs in only one respect from the case of *Girard L. Ins. etc. Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513. There the direction was to pay over the net income "unto the *cestui que trust* for his own use and benefit, or to such person as by his order in writing he may authorize to receive the same" (syl. ¶ 1), and upon his decease to convey the estate so held as he by his last will shall appoint. The question in that case was whether the income for life was subject to the claims of creditors. In the opinion it was said:

"In the present case the income for life could have been secured to the son by provisions against alienation and liability for debts, but this has not been done, and we are reluctantly obliged to defeat the intention of the mother to provide a maintenance for her son, by giving the income during the life of the son to the attaching creditor, who can receive from the trustees only what the son would be entitled to." (p. 492.)

In *Underhill on the Law of Wills*, it is said:

"The trust provision which is designed to secure the income of a fund against the creditors of the beneficiary, or to prevent him from assigning or pledging it, need not, in this country, be an express direction in terms prohibiting anticipation. The testator is never required to state expressly that income or principal is not to be assignable or transferable, or subject to mortgage or pledge by the legatee; and it would seem from many of the cases that he is not compelled to state that it shall not be liable for the debts of the beneficiary, or that it shall be free from the interference and control of his creditors, in order to create a valid spendthrift trust." (Vol. 1, § 529.)

[663] In the same section, however, the author says:

"Any expression clearly evincing an intention on the part of the testator to protect the income from waste and dissipation, and to secure its application to the support and maintenance of the beneficiary, is sufficient."

It was, of course, within the power of the testator, had he seen fit, to provide that the payments to his brother should be exempt from all claims of creditors of the latter, or should be paid into his hands alone, and not upon any order or assignment of his. While the letter may be said to manifest a desire to provide for the support of the brother during the remaining years of his life, it

does not manifest an intention that he should not have the full control and ownership of the payments to use as he might see fit. Neither the will nor the letter, nor both taken together, disclose an intention to prohibit Arthur B. Havens from anticipating the income by assignment or transfer to another, and while there are many authorities which hold that no one of these particular things is essential to the creation of a spendthrift trust such a trust can be created only by the express language of the instrument itself, or by necessary implication from such language. The courts have no power to create such a trust or to make a will for the testator.

In *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320, it was declared that in order to give such a qualified estate "the language of the founder must be clear and unequivocal to that effect. The court held that the will in that case did not create such a trust. It differed from the one in the case at bar in only one respect; it contained no limitation over of the estate in any contingency to any other person. In the opinion it was said:

"There is no discretion given to the trustees, and there is no provision that the income or the estate shall not be alienable by the plaintiff or attachable by his creditors." (p. 397.)

[664] It is true in the present case there is a gift over of the estate to the daughter of the testator, but the trustees are given no discretion as to the amount they shall pay to the defendant, nor is there any provision that the income of the estate shall not be alienable by the brother, nor any provision that it shall not be liable for his debts. It will be found that in most of the instances where the rule has been declared that the intention to create such a trust need not be stated in express terms, there was language showing an intention that the fund, or the income from it, should be enjoyed for the support and maintenance of the beneficiary during his life or for a period of years. (*Wagner v. Wagner*, 244 Ill. 101, 18 Ann. Cas. 490, 91 N. E. 66; *Stambaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058.) The Pennsylvania court held that the intention of the testator to create a spendthrift trust might be ascertained from the will in the light of proof that the *cestui que trust* became insolvent a few months before the writing of the will, and that this intent should not be set aside because not clearly expressed by the scrivener, at least as between the trustee and the *cestui que trust*. The rights of creditors of the *cestui que trust* were not involved.

The case of *Pickens v. Dorris*, 20 Mo. App. 1, is directly in point. There the court, after approving the rule adopted by the majority

of the American courts, as well supported by reason and the weight of authority, held that the testator's intention to withdraw his gift from the creditors of the devisee will not be presumed from surrounding circumstances of which the creditor has not record notice, where such intention is not expressed in or necessarily implied from the terms of the instrument creating the trust. In the opinion it was said:

"In this case, however, we are asked to go further, and are asked to declare that where the surrounding circumstances of a trust, of which circumstance no record notice is brought home to the creditor, are such [665] as lead to the inference that it was the intention of the deviser to withdraw his gift from the claim of the devisee's creditors, we shall give effect to such intention, although not expressed in the instrument itself nor necessarily implied from anything expressed therein. This we must decline to do. The will of George P. Dorris does not expressly exempt the property devised for the benefit of his son, Thomas, from the claims of the latter's creditors. There is nothing in the will itself which would indicate that the trust thus created was in the nature of a spendthrift trust; and to seek in the surrounding circumstances a reason for declaring it to be such, the authorities do not warrant and a sound policy forbids." (p. 5.)

In the case at bar it seems certain from the language of the will that the income was and is assignable by the defendant, to whom it was made payable. There is no provision to the contrary, nor words which intimate an intention of the testator that the income should not be assignable. Of course, if it be assignable, it is because it belongs, when due, to the defendant; and if it belongs to him, it is liable for his debts. To construe the will otherwise would compel us to say that in all cases where the income of a fund is given to another for life, it is neither capable of assignment nor liable for the debts of the annuitant. The supreme court of Maryland had under consideration the same question in *Baker v. Keiser*, 75 Md. 332, 23 Atl. 735. In the opinion the court used this language:

"Without importing words into that will which are not there, and imputing an intention to the testator of which he has given no intimation by any verbal expression, we cannot say that the income was not and is not assignable by the life tenant; and if it is, there was error in holding it to be beyond the reach of creditors. Any other construction of this will and ruling in this case would be in effect saying that all life estates of like character, given in trust, are incapable of being alienated. This court went as far as they could in *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, to effect the intention of the

testator which was so expressly declared; but proper adherence to the policy of the law in [666] the state will not allow the extension of the doctrine of the *Towers*' case beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning; and this case does not." (p. 339.)

The action here was brought under section 228 of the code, which provides:

"Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person, excepting a municipal corporation, who shall be indebted to or have any property, real or personal, in his possession or under his control belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner hereinafter described."

In *Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590, it was held that an executor is not subject to garnishment under this section of the code before a final order of distribution. The court declined at that time to decide whether he would be subject to garnishment after such final order. The defendant makes the broad contention that an executor or administrator cannot be subject to garnishment in the absence of a special statute; and further, that under the decision just cited the executors are not liable to garnishment, because no order of distribution has been made. The code provision, *supra*, is broad enough in its terms to include executors and administrators after an order of distribution has been made. (*Hardesty v. Campbell*, 29 Md. 533; *Baker v. Keiser*, *supra*; *Arbaugh v. Myers*, 8 Ohio Dec. (Reprint) 617, 9 Cinc. L. Bul. 64, 20 Cyc. 1028.)

The will expressly directs the executor-trustees to make the quarterly payments to Arthur B. Havens in advance; and it is conceded that they have recognized this provision and have made the payments accordingly. No order of distribution was necessary in order to authorize the executors to make the payments. The rule exempting executors and administrators from [667] garnishment process before the final order of distribution rests upon the assumption that it cannot be known until the estate is settled and the order made whether there will be any assets sufficient to pay debts and expenses of administration. The reason for the rule in the *Stull* case, *supra*, being absent, the rule fails. It is one of the agreed facts in the present case that the estate of Paul E. Havens is solvent and able to respond to these quarterly payments due to Arthur B. Havens, without jeopardizing the rights of any creditor of the testator. In *Lorenz v. King*, 38 Pa. St. 93, it was held that a legacy or distributive share is subject to attachment before final settlement, where assets are admitted by the representative, and where there are ample funds in his

hands to pay a legacy after the discharge of all debts against the estate. An income for life from a trust estate is the absolute property of the beneficiary, and is therefore subject to garnishment by his creditors. (*Girard L. Ins. etc. Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Knefler v. Shreve*, 78 Ky. 297; *Pickens v. Dorris*, 20 Mo. App. 1; *Baker v. Keiser*, 75 Md. 332, 23 Atl. 735; 20 Cyc. 993, Note; 14 Am. & Eng. Enc. of Law (2d ed.) 763, Note.)

Section 247 of the code provides for the allowance of an attorney's fee to the extent of \$25 as costs of the plaintiff in garnishment proceedings, and the court properly allowed that sum as fees in the present case.

It follows that the judgment will be affirmed.

NOTE.

Sufficiency of Instrument to Create Spendthrift Trust.

Generally.

The earlier cases discussing the sufficiency of an instrument to create a spendthrift trust are reviewed in the notes to *Kessner v. Phillips*, 3 Ann. Cas. 1005; *Wagner v. Wagner*, 18 Ann. Cas. 490; and *Garland v. Garland*, 24 Am. St. Rep. 682. This note collates the recent cases on that point.

The various instruments passed on with respect to their sufficiency to create a spendthrift trust are of course widely variant in their phraseology, but the general rule deducible from the cases is that it is not necessary that the beneficiary should be designated a spendthrift in the instrument creating the trust, or that all the qualifications and restrictions incident to such a trust should be expressly stated. That rule is recognized in the reported case, though it is held therein that the instrument under consideration disclosed no intention to create such a trust.

The view that it is not necessary that the instrument should specifically exempt the income from the beneficiary's debts was exemplified in *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985, 50 L.R.A.(N.S.) 632, wherein the court said: "True, the law favors the vesting of estates, but this rule will not be permitted to defeat the intention of the testator. To constitute a valid spendthrift trust it is not necessary that the will should specifically provide that the income shall not be subject to the payment of the debts and liabilities of the cestui que trust. It is sufficient if the will, considered as a whole and viewed in the light of the circumstances under which it was made, discloses an intention on the part of the testator to provide for

the support and maintenance of his child and to secure the fund against his improvidence. The testator had a legal right to dispose of his property in this manner if he desired to do so, and if such was his intention, as appears from the will, it is the duty of the court to give effect to such intention." In the same case the court further declared that the denomination of the cestui que trust as a spendthrift was not indispensable to the creation of such a relation, saying in that regard: "To create a valid spendthrift trust it is not necessary that the cestui que trust should be designated a spendthrift in the will or that the testator should give his reasons for the creation of it, nor is it necessary that the will shall in express terms contain all the restrictions and qualifications incident to such trusts. If, upon a consideration of the will, it appears the intention of the testator was to create such a trust, effect will be given to that intention. *Baker v. Brown*, 146 Mass. 369." In *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127, it was declared that while it was not necessary to the creation of a spendthrift trust that the beneficiary should be designated a spendthrift it was essential that the settlor should be of the opinion that he was of that description. The court said: "But it is further argued that the entire fourth clause of the will is a spendthrift trust provision for the testator's children and grandchildren for a period of thirty years, and that this fact argues strongly in favor of contingency of the gift. A spendthrift trust is created with a view of providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity. Directions against alienation by the voluntary act of the beneficiary or through legal process by creditors are the usual incidents of such trusts. (*Steib v. Whitehead*, 111 Ill. 247; *Wagner v. Wagner*, 244 Ill. 101, 18 Ann. Cas. 490, 91 N. E. 66; *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985, 50 L.R.A.(N.S.) 632.) There is nothing in the wording of the will itself as to this trust that indicates that it is of a spendthrift character. We find no restraint on alienation and no discretion as to the payment of income or principal. It is true there is evidence tending to show that the testator had expressed doubts as to the son settling down to business and as to whether he would be able to take care of himself, and stated that the daughter, while in school, had been accustomed to spend a good deal of money which the father had provided; that she was under age at the time the will was drawn and that both the son and daughter had depended on their father for support. But it is also true that this fund referred to the grandchildren as well as the children, and the testator, naturally,

could not form any idea as to whether they would need the protection of a spendthrift trust. It is the intention of the testator that decides, under the authorities, the character of the trust. If it is shown that his intention indicates a spendthrift trust, the court will not inquire whether the beneficiary is, in fact, a spendthrift. (*Wagner v. Wagner*, supra.) The will does not indicate that the testator thought his children were spendthrifts. He gave to each of them valuable real estate and a large amount of other property. In addition to this he gave them the income from the trust fund, which tends strongly to show that he had no suspicions or apprehensions as to their ability to handle their own property. The reasoning of this court on a somewhat similar question in *Black v. Jones*, supra, lends strong support to the argument that the giving of large sums directly to them indicates that the trust was not of a spendthrift character. There is another reason that could be urged against the view that the testator considered this a spendthrift trust. He would hardly have appointed his son one of the executors if he had considered him a person not to be trusted with business matters. We think the conclusion might well be drawn that the reason for creating this trust was based on the desire of the testator to keep his property in his own descendants and prevent it from going, in the next generation, to strangers to his blood. This trust was certainly an appropriate method for bringing about this result." To the same effect see *Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968, wherein the court said: "It is not necessary that an instrument creating a spendthrift trust should contain an express declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of creditors, providing such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances. The court will look to the intention disclosed by the whole instrument, rather than to the language employed in any particular clause of it. 26 Am. & Eng. Enc. of Law (2d ed.) 141-142." See also *Dieke v. Dieke*, 182 Ill. App. 13.

Illustrations.

In *Anderson v. Williams*, 262 Ill. 308, Ann. Cas. 1915B 720, 104 N. E. 659, affirming 179 Ill. App. 398, a codicil, wherein the testator directed that one-sixth of the proceeds of his estate should be invested by certain persons named as trustees and executors and that the net income should be paid to his daughter semiannually during her life, was construed to create a spendthrift trust.

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In *Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968, it was held that a testator who by his will left certain land to his son subject to the provision that if the land should be sold after the son's majority there should be left in the hands of the purchaser the sum of \$2,500, as a lien on the land, the interest on which was for the sole use and support of the son during his natural life, created a spendthrift trust.

In *Leary v. Kerber*, 255 Ill. 433, 99 N. E. 662, the court construed the following provision in a will: "Third—After the death of my said wife I give and bequeath the rest, residue and remainder of all of my estate, both personal and real, to my children who may be then living, in equal shares, except as to my daughter Anna Leary, now married to William Leary, and as to her share it is my will that her said equal share shall be paid over and placed in control of my son Mathias Kerber, as her trustee, for her. And I hereby give and bequeath to my said son Mathias Kerber, as trustee for said Anna Leary, one equal undivided share of my estate, both real and personal after the death of my said wife, to be by him held for her as her trustee, and collect rents and profits thereof and to pay the same over to her during her natural life, free from any act or control of her said husband, William Leary; and at the death of my said daughter Anna, then the said share shall be paid over to her children, and if she should die without leaving any heirs of her body, then the said share so left in trust shall be turned over to the heirs of my body then living, to be distributed according to the statutes of the state of Illinois." It was held that this clearly created a spendthrift trust in favor of the testator's daughter, Anna Leary, the purpose being to protect the daughter's interest against dissipation by the husband.

In *Cady v. Lincoln*, 100 Miss. 765, 57 So. 213 wherein it appeared that a testator in one portion of his will devised certain property to a trustee for the purpose of applying the rents and profits for the use of the testator's son and grandson, and in another part of his will authorized the sale of the residue of his property and ordered that after the payment of certain debts one-fourth of the proceeds should be used in the same manner as the other property theretofore referred to, and directed other distribution of the remaining undisposed of portion of the residue, it was held that the directions as to the use and disposition of the funds to be set aside for his son and grandson constituted a spendthrift trust as to them.

In *Devin v. McCoy*, 48 Ind. App. 379, 93 N. E. 1013, it appeared that a testator left certain property to his two grandchildren and then appointed a trustee to manage the

same and apply the proceeds to the education and support of the children, subject to the condition that if either should die without issue surviving them such share was to go to the other, and if both died without issue then their share was to go to the testator's children. It was held that the testator did not intend to tie up the property of the grandchildren during their entire lives to prevent the property from going to others than his direct lineal descendants and therefore did not intend to create a spendthrift trust. The court said: "To our mind the provisions of the will under consideration do not evince an intention on the part of the testatrix to create a spendthrift trust. We do not think it was her intention to tie up the property in the hands of the trustee during the life of her grandchildren, for the purpose of providing for their maintenance, and at the same time securing it against their extravagance or improvidence. The provisions of item seven seem rather to indicate that it was her purpose to control the ultimate disposition of her property, so that it might not go to strangers or depart from those of her own blood, and that she created this trust for the purpose of securing this end. The provisions of this item in her will indicate that she contemplated that one or both her grandchildren might marry and die without issue, and that the property, if given to them absolutely, would go to the surviving husband or wife, to the exclusion of the kindred, who were of the blood of the testatrix. To prevent this result, she placed the property willed to her grandchildren in the hands of a trustee, and provided that he should take, hold and manage it until the happening of a contingency which would prevent this result." But compare *McCoy v. Houck*, 180 Ind. 634, 99 N. E. 97.

In *Millard v. Beaumont* (Mo.) 185 S. W. 547, it appeared that a testator made the following provision: "Second: I give, devise and bequeath to my nephew Homer S. Millard, during his life, the house, household furniture and grounds and all the appurtenances there-to belonging which constitute my home place, where I now reside in Houston, Texas county, Missouri, to have, hold, occupy and enjoy during his natural life; but without the power of incumbrance or alienation, and it is my will that he have full use and benefit of the same to occupy as his home if he so desires, and if not, to have the rents and income therefrom during his lifetime, and at his death, it is my wish and I hereby direct that said property real and personal shall pass to and become vested in the bodily heirs of the said Homer S. Millard, but without the power to encumber, alienate, lease or otherwise transfer or burden the title to said property until after the expiration of twenty-one years after the death of the said Homers S. Millard."

It was held that this did not create a spendthrift trust. The court said: "The decree just mentioned narrows too much the plaintiff's interest in the property covered by the insurance policy in question. We think the will clearly gives a life estate in such property to plaintiff, with remainder to his bodily heirs. The will attempts to deprive the life tenant, this plaintiff, of all power to encumber or alienate his interest in this property. But whether such restrictions be void or not, the plaintiff is given a vested life estate. His interest in this land, under the will, is more than that of a beneficiary of a spendthrift trust. Here the life tenant has title and ownership, and is given the possession of the property and the right to collect the rents and receive the income, and no trustee is appointed. There is no trust estate created, and the restrictions as to alienation or incumbrance of his interest in the property are void. *Kessner v. Phillips*, 189 Mo. 515, 524, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005."

FLANAGAN.

v.

NICHOLSON PUBLISHING COMPANY.

Louisiana Supreme Court—June 7, 1915.

137 La. 538; 68 So. 964.

Libel and Slander — What Constitutes Malice.

The "malice" imputed to a publisher of a libel is not personal ill will, but merely legal malice implied from wilfully and wantonly doing an unlawful act which results in injury to another.

[See 15 Am. St. Rep. 337.]

Interpretation of Defamatory Language.

Where a newspaper published an article concerning plaintiff, who was a resident of New Orleans and an international vice-president of a labor union, and who used his influence at Washington to assist San Francisco to obtain the Panama Fair as against New Orleans, stating that he was a traitor and a dangerous and suspicious character and should be driven out of town and given the cold shoulder by all self-respecting Orleanians, the words must be construed in the connection in which they were used, and not given the meaning they ordinarily possess.

Privilege — Comment on Matter of Public Interest.

Where plaintiff, a resident of New Orleans, and an international vice-president of a labor union, used his influence at Washing-

ton to aid San Francisco to secure the Panama Fair as against New Orleans, which contest attracted great public interest in New Orleans and in the state, severe comment on such acts, which included a designation of plaintiff as traitor by a New Orleans newspaper, was privileged as comment on a news matter of general public interest and on the acts of one who had in that connection made himself a public figure subject to such attack.

[See note at end of this case.]

Appeal from Circuit District Court, Parish of Orleans: PARKER, Judge.

Action by Thomas Flanagan, plaintiff, against Nicholson Publishing Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Buck, Walshe & Buck for appellant.

Caffery, Quintero, Gidiere & Brumby for appellee.

[589] PROVOSTY, J.—While the contest between New Orleans and San Francisco was going on in Washington before Congress for being chosen as the place where the Panama Exposition should be held, and at the moment when the contest was at its hottest and bitterest, Mr. R. E. Lee, one of the New Orleans delegates for conducting the contest in Washington, a representative more especially of the labor interests of New Orleans, met the plaintiff at the American Federation of Labor headquarters in Washington, and, in the course of a discussion which then took place between them on the question of the Exposition, the plaintiff expressed himself as favoring San Francisco, giving as his reason that the labor organization in [590] that city was better paid, and that its getting the Exposition would benefit labor more. Plaintiff was, at that time, the second vice president of the International Brotherhood and Helpers, which is a branch of the American Federation of Labor, and his influence as such was thought to be more or less potent in Washington with certain members of Congress. In view of that fact, and as he was a resident of New Orleans, and more or less a representative of the New Orleans labor organizations, the news of this attitude of his caused quite a commotion among the New Orleans delegation in Washington and excited a good deal of angry feeling. On that same day, as we understand, the plaintiff and Messrs. Lee and Harrison, the latter representing in Washington the labor interests of New Orleans in the endeavor to secure the Exposition for New Orleans, met in the room of the two latter at the hotel, and while they were discussing this hostile attitude of plaintiff, and seeking to

bring him over to the side of New Orleans, Mr. Denechaud, another of the New Orleans delegates, came into the room. Plaintiff was introduced to him as "the man who was knocking New Orleans," and Mr. Denechaud joined forces with Messrs. Lee and Harrison in the endeavor to bring him over. Plaintiff became violently angry; abused New Orleans in language too vile to be even orally repeated, let alone written; and announced his liberty of action and his determination to favor San Francisco. He denies all this on the witness stand, but the proof is positive from the other three. This hostile meddling of plaintiff in the fight was considered to be an ugly feature in the situation, and, naturally, was at once reported to the New Orleans papers; and the defendant company's paper, the Daily Picayune, in its issue of the next morning, January 20, 1911, referred to it in its column of Washington news as follows:

[591] "One of the embarrassing reports turned into the New Orleans headquarters today was that M. Flanagan, international vice president of the blacksmiths' order, whose home is in New Orleans, but who is on the road much of the time, is working in behalf of San Francisco among the laboring men. He was met in the lobby during the meeting of the executive committee of the American Federation of Labor today by New Orleans workers, and was heard to boast of his work for Mayor McCarthy, the labor mayor of San Francisco.

"It is feared that but one of the labor Congressmen in the House will come to the support of New Orleans when the vote is taken on the Estopinal bill."

One of the things said to plaintiff by Messrs. Lee, Harrison and Denechaud, in the course of their discussion, was that if plaintiff persisted in his hostile attitude to New Orleans he would certainly be written up by the New Orleans papers; and, sure enough, The Daily Picayune in its issue of January 20, 1911, contained the following, which appeared in a section of the paper devoted to the said contest going on in Washington: "

"Many of the prominent local labor unionists of the city of New Orleans are up in arms over the alleged glaring disloyalty to his home town of Tom Flanagan, international vice president of the Blacksmiths' and Helpers' Union, who, it is said, while in Washington, worked tooth and nail in the interest of San Francisco in the fight for the Panama Exposition, and even went so far as to flaunt in the faces of the gentlemen of the local committee the declaration that he was with Mayor McCarthy, of the city of the Golden Gate.

"There were many labor unionists spoken to yesterday who had a good word for Flanagan, and one man who is recognized as a leader in labor's ranks said that he was quite

certain that some action would be taken by the organization in New Orleans to call Flanagan to account for his action.

"Another prominent leader spoke of Flanagan as the rankest kind of traitor, and accused him of being in the service of the Southern Pacific Railroad Company, for which big corporation the men of the union worked in Algiers.

"Flanagan's antecedents were traced back as far as possible. It was discovered that he was born in this city, and lived the better part of his life in the First and Tenth wards. He was notoriously opposed to Mayor Behrman and all the leaders of the regular Democratic party, and carried his opposition to extreme ends, even declaring himself against the city in which he was born and where he made his living.

[592] "Flanagan's union is not very strong in New Orleans; in fact, it is practically nonexistent on this side of the river; but in Algiers the organization is known in a limited sphere, most of its members being in the employ of the Southern Pacific, for which corporation Flanagan is alleged to work.

"A recognized leader in the local labor movement said last night that Flanagan should be driven out of town and given the cold shoulder by all self-respecting Orleanians.

"Why, the Central Trades and Labor Council, the Building Trades Council, the Deck and Cotton Council and nearly every separate labor organization in the city have come out openly and loyally in an advancement of our home town,' said the leader; 'and now here comes this fellow and tries to discredit us in the eyes of our people. If I had my way with him, I'd pull him as a dangerous and suspicious character when he dares to show his brazen face in our midst again, and give him a term in jail.'

"As Flanagan's union is not affiliated with the central bodies in New Orleans, it is not thought that the unions can take any action against him in the way of expulsion or censure.

"Flanagan formerly lived in Magnolia street, near Erato; but now resides in Claiborne street, above Felicity, in the Tenth ward. The man spends much of his time on the road organizing unions, and was last here about four weeks ago."

And in the issue of the same paper on the next day appeared the following:

"A committee representing Local No. 229, International Brotherhood of Blacksmiths and Helpers, denounced Thomas J. Flanagan, fourth vice president of the union, last night. Frank Heuer, president of the local, said that Flanagan had no authority to represent the local in Washington.

"The members of our local have always been in favor of New Orleans, and we have in-

dorsed the city in resolutions,' he said. 'The disloyalty of Flanagan is distasteful to every true union man in the United States, and I am sure that he hurt the cause of San Francisco rather than assisted it. A traitor can not help any cause.'

"The committee also denied the statement that the local was of little consequence, and was almost nonexistent. President Heuer said that the local is in the best possible condition. There are seventy-five members in good standing, and the delegates have great influence in labor councils.

"The committee which denounced Flanagan was composed of Frank Heuer, George W. Creher, secretary, and T. J. Casey."

Messrs. Heuer and Creher, here named, deny that they made the statements attributed to them in the second paragraph of this last excerpt; but the city editor of the paper, and one of its local reporters, who was called [593] in for taking down the statements of the said committee, testify that the statements were taken down as made, and were read to the gentlemen in order to make sure of the correctness of the report. The third committeeman, Mr. Casey, did not testify. The reason of the committee calling was for procuring the correction of that part of the publication of the 21st where it was said:

"Flanagan's union is not very strong in New Orleans; in fact, it is practically nonexistent on this side of the river."

Plaintiff charges that the publications were a libel upon him, and sues in damages.

The answer, after denying that said publications were false or malicious, proceeds as follows:

"Defendant avers, on the contrary, that the statements made in said articles were true and correct, and were published without any malice or ill will toward the plaintiff.

"Defendant specially denies that it was actuated by any malice or ill will toward the plaintiff in publishing said article, and it avers that said plaintiff is not personally known to it, and that he has not been affected or injured in any degree or in any way by the said publications.

"Defendant further specially avers that the said article was published for the information and advantage of the public; that the statements therein contained were derived from responsible persons to whom and in whose presence the plaintiff had indulged in an awful tirade of abuse against the city of New Orleans, declaring, among other things, as follows:

"I don't owe New Orleans anything, and I'll work as hard as I — please for San Francisco. To hell with New Orleans.'

"And defendant in said article did report and comment on said acts of plaintiff without

malice toward the plaintiff, but in such terms as such acts naturally call forth.

"Defendant avers that the campaign between New Orleans and San Francisco for the Fair in celebration of the opening of the Panama Canal took on proportions of a mimic war, in which the spectacle of a resident of New Orleans openly opposing his own city was unique, and was an item of special news interest calling for fitting and defensive comment; that respondent, in its function of giving to public sentiment a voice, had a certain freedom and latitude, which it by no means exceeded, in dealing with the surprising and almost solitary stand taken against his home city by the plaintiff herein, who, by his attitude, made himself a public figure, subject to becoming animadversion and comment; that respondent imputed to [594] plaintiff nothing which was actually derogatory, but that, as a live and progressive newspaper, and as the leading advocate of the Exposition among the newspapers of the city, it devolved upon respondent to wit any Orleanian for not giving to New Orleans, over San Francisco, the benefit of the sentiment laid down in Scott's works, verbo 'Fatherland,' as follows:

"Breathes there a man with soul so dead
Who never to himself hath said:

This is my own, my native land?
Whose heart hath ne'er within him burned
As home his footsteps he hath turned
From wandering on a foreign strand?"

Referring to the second of the above-transcribed excerpts, the petition of the plaintiff alleges:

"That said publication, under guise of pretending to repeat what other persons whose names are not given, wickedly, maliciously and unlawfully without cause or justification attacks the personal character of petitioner for honesty; describes him as 'the rankest kind of a traitor' as influenced by improper motives in favor of the Southern Pacific Railroad Company: 'that he should be driven out of town and given the cold shoulder by all self-respecting citizens;' describes him as 'this fellow'—whom the undisclosed commentator 'if he had his way would have (him) pulled as a dangerous and suspicious character.'

"That from these expressions, and from the tenor of the entire article, it is manifest that the same was written and published in spite and malice; that it was so published for the express purpose to suggest dishonest motive (if the main charge were true, which is denied), to humiliate petitioner as a man, discredit him as a citizen and generally to cast upon him obloquy and contempt."

And in another paragraph the petition refers to the headline of the publication of January 22d, to wit, "Flanagan's own union here denounces him as a traitor," and charges that the same constituted a libel.

In the brief of plaintiff's learned counsel, it is said that the accusation against plaintiff of his having favored San Francisco is founded upon nothing but the idlest of rumor—not traced to any source—and that it is, as a matter of fact, false; and the case is summed up as follows:

"If the plain text of the articles and the great recklessness with which they were paraded in flashy headlines do not strike the fair and impartial mind with the conviction that unwarranted liberty was taken upon the name and person of this plaintiff, no refinement of definition [595] would assist to find the right solution. The obvious purpose was primarily to hold up the plaintiff to ridicule, scorn, contempt, and humiliation, and behind and within this there is an attack on his common honesty and worth as a man. The 'rankest kind of a traitor' . . . in the service of the Southern Pacific Railroad Company, etc. . . . 'Everybody knows that the S. P. R. Co. wanted San Francisco to get the Exposition.' The inference is self-evident: 'For which corporation Flanagan is alleged to work,' i. e., in getting the Exposition.

"And now here comes this fellow: . . . If I had my way with him I'd pull him as a dangerous and suspicious character when he dares to show his brazen face in our midst again and give him a term in jail.' 'The man (?) spends much of his time on the road organizing unions and was last here four weeks ago.'"

In the same brief, plaintiff is referred to as follows:

"The plaintiff, Thomas Flanagan, is a 'blacksmith by trade.' He has evidently distinguished himself among his 'Fellows,' for they advanced him to high office, viz., to that of vice president of 'The International Brotherhood and Helpers,' which is a 'Branch of the American Federation of Labor.' And thus he has been lifted from the soot and fire of the furnace and the clang of the hammer and anvil to the higher domain where mind and spirit and sympathy struggle to relieve hardships and ameliorate distress. This duty calls him from the workshop to council chambers and he is almost constantly 'abroad,' traveling from place to place, wherever called by co-workers or superiors, completely absorbed in his work.

"This is not a fancy sketch; it is one taken from the Record."

The malice imputed to the defendant company is not personal ill will, but merely legal malice, or that deduced by the law from the willfully and wantonly doing of an unlawful act resulting in injury to another.

The words "traitor," "dangerous and suspicious character," and "fellow," and "should be driven out of town and given the cold shoulder by all self-respecting Orleanians," do have a very disparaging meaning; and

their appreciation to a man of standing in a community, especially by a newspaper of large circulation in that community, is no doubt calculated ordinarily to injure. But the connection in which words are used control their signification, and the expressions [596] here in question might well be used in a connection altering their ordinary meaning; and we think they were so used in the present case. Their sum and substance in the present case amounts to nothing more than to the charge that the plaintiff, being in Washington and occupying there a position of influence which he might have used in the interest of New Orleans, his home town, chose to use it on the contrary in the interest of her rival in the bitter contest going on between them. This conduct appeared to the newspaper to be deserving of the condemnation thus visited upon it, and to call for the expression in question; and, doubtless, a majority of the people of New Orleans felt in the same way.

That words are to be understood in the connection in which they are used, and are not to be attributed a signification other than that which the context would show them to have, is abundantly established in the law of libel and slander.

"The leading English case on this subject is one cited in Lord Cromwell's Case (1578) 4 Rep. 13, 14: 'If a man brings an action, on the case calling the plaintiff murderer, the defendant will say that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, "Thou art a murderer" (innuendo the killing of the said hares). . . . Resolved by the whole court, that the justification was good. For in case of slander by words, the sense of the whole words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them, for sensus verborum ex causa dicendi accipiendus est et sermones semper accipiendi sunt, secundum subjectum. . . . And it was said, God forbid that a man's words should be by such strict and grammatical construction taken by parcels against the manifest intent of the party upon consideration of all the words which import the true cause and occasion which manifest the true sense of them; quia quae ad unum finem loquenda sunt, non debent ad alium detorqueri; and, therefore, in the said case of murder the court held the justification good; and that the defendant should never be put to the general issue when he confesses the words and justifies them, or confesses the words and by special matter shows that they are not actionable.' Shipley v. Todhunter, 7 C. & P. 680, 32 E. C. L. 685; Odgers on L. & S. 109." Newell on Slander and Libel, p. 275.

[597] To the same effect is the following:

"But where the words complained of are, 'Thou art a thief, for thou tookest my beasts by reason of an execution, and I will hang thee,' no action lies, for it is clear that the whole sentence taken together imports only a charge of trespass. Wilk's Case, 1 Roll. Abr. 51; Smith v. Ward, Cro. Jac. 674; Sibley v. Tomlins, 4 Tyrw. 90." Newell on Slander and Libel, p. 276.

The rule is generalized, and is thus laid down by Newell:

"Defamatory words which are apparently actionable, but which are susceptible of an explanation by reference to some particular transaction to which they are known by those in whose presence they were spoken to refer, are to be construed accordingly and with reference to such transaction." Newell on Slander and Libel, p. 292.

Newell also cites a case in illustration of the foregoing proposition.

"The declaration charging the defendant with speaking the following words: 'John Keating is as damned a rascal as ever lived, and all who joined his party and procession on the Fourth of July (meaning the said plaintiff, John Van Rensselaer, and the party and procession in which the said John Keating acted as captain on said Fourth of July) are a set of black-hearted highwaymen, robbers, and murderers.' At the trial the words were proved to have been spoken as alleged. On the part of the defendant it appeared that on the day previous to the speaking of the words there had been a public procession to a church in Lansingburgh, where the parties resided; and that Keating commanded an artillery company, which formed a part of the procession, attended with music; that a Mr. Bird claimed one of the instruments used, and went to the church to demand it. It was not given up, and a fray ensued, in which Mr. Bird was dangerously wounded. It also appeared that the conversation in which the words were spoken was understood by those who heard it to relate to the transactions of the preceding day, and that the terms 'highwaymen, robbers, and murderers' were used in reference to the treatment of Mr. Bird in withholding the instrument and wounding him. The jury having found a verdict for the plaintiff, on appeal to the Supreme Court it was held that, as the words spoken by defendant were clearly understood to apply to the transactions of the preceding day, and as these were known not to amount to charge which the words would otherwise import, the verdict was set aside." Van Rensselaer v. Dole, 1 Johns. Cas. (N. Y.) 279 (1800).

A case which goes even further than this is that of Artieta v. Artieta, 15 La. Ann. 48, where the court said:

[598] "The plaintiff's conduct in calling the defendant, his brother, a 'rogue,' within

the hearing of some bystanders, is certainly very reprehensible. But as this was done in a moment of irritation, and in reference to the defendant's unwillingness to reimburse what had been disbursed for his account, and as no injury appears to have resulted, or could have resulted, from his transient expression of angry feeling, the alleged case of defamation is not actionable."

Doubtless, the expressions were very forcible, but as said by this court in the case of *Tate v. Nicholson Pub. Co.* 122 La. 479, 47 So. 776:

"In determining the question of the liability of the defendant, it is our duty to take into consideration all the circumstances of the case. We should give weight to every fact having a legal bearing on the publication. We must consider the occasion on which it is made, to ascertain how far, in view of that occasion and of everything that was then said by the defendant with reference to the matters published, whether the publication should, as to its character, be held to be libelous or not. Our conclusion must be based upon the situation taken as a whole."

These publications were made at a time of great public excitement when exaggerated expressions were rather to be expected. Plaintiff himself says of the situation, in his petition:

"The city of New Orleans was an ardent and earnest applicant—her people expending much money and under sanction of a constitutional amendment, the people of the entire state of Louisiana had voted to tax themselves to provide means satisfactory to the government of the United States for holding said Exposition, . . . and much interest and excitement prevailed about the matter. Large delegations of the citizens of New Orleans at great expense went personally to the city of Washington, to protect and advance officially before the committees of Congress and by personal influence with members of Congress, the interests of the city of New Orleans in the premises. The entire public press of this city, and practically the state, manifested great interest, and all the newspapers were filled daily with news, comments, interviews, etc., concerning the progress of affairs at the Capital, in Congress before committees and executive officers."

In fact, the two Houses of the General Assembly as a whole adjourned over to Washington as a delegation or lobby committee.

These circumstances explain and go towards excusing the severity of the language used. The public mind was wrought up, and [599] plaintiff, a citizen of New Orleans, and a representative of her labor organizations, was using his position of vantage in Washington against New Orleans.

In the case of *Mihojevich v. Bodechtel*, 48 La. Ann. 618, 19 So. 672, this court said:

"Slanderous epithets are not always actionable. An exception to the general rule is found in the case of a single woman, eighty years of age, suffering from a real or fancied wrong, who makes use of vile epithets as a means of defense. The damages occasioned thereby are more seeming than real, and the cause of action may be appropriately relegated to the domain of *damnum absque injuria*."

"True it is that such words as 'dirty rat' and 'thief,' and 'swindler,' 'thief,' and 'rat,' are bad enough in their way, and little suited to ears polite; but, under all the circumstances surrounding this case, we do not feel disposed to give them the significance that is claimed for them by plaintiff's counsel. On the contrary, we are disposed to regard them as the irate and impulsive utterances of an old woman, whose only means of defense against a fancied or real wrong, which she had suffered at the hands of the plaintiff, was an unruly and mischievous tongue."

A similar question having arisen in *Simons v. Lewis*, 51 La. Ann. 327, 25 So. 406, the court again laid the rule down as follows:

"In suits for damages for slander, the defendant is entitled to the modification the words receive from the accompanying statements showing the meaning intended and understood by those to whom the words were addressed. *Newell on Slander*, p. 292 et seq."

"On the issue of malice, in such cases, as well as to mitigate damages, testimony is admissible to show the occasion, the sense of wrong, and other circumstances attending and prompting the expressions alleged to be slanderous. *Gilbert v. Palmer*, 8 La. Ann. 130; *Artieta v. Artieta*, 15 La. Ann. 48."

Be the foregoing as it may, however, there can be no doubt in this case that the publications were made from no wrong motives, or ill will towards the plaintiff, but simply in furtherance of the campaign that was then being carried on; and that, if not entirely justified, they were privileged.

Although plaintiff's mission in Washington was not connected with this particular campaign, yet the evidence shows that he was taking part in it; and, as he was the known [600] representative of labor organizations, he was not occupying an entirely private position. His status was more or less that of a public man, and entailing upon him a degree of public responsibility which privileged the public press to comment upon his acts. Oftentimes what is said or done by persons so situated—quasi public, as it were—becomes a matter of public concern. Thus:

"The action of a priest in the discharge of his duties and office, in conducting the public functions of his calling, is the proper subject of comment in the public press, for which, within proper limits, an action of libel will not lie." *Klos v. Zahorik*, 113 Ia. 161, 84 N. W. 1046, 53 L.R.A. 235.

"And such comments are privileged, no matter how severe, when made in support of some public contention, and in good faith." *Odgers, Libel and Slander*, 34-36.

"The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice." *Gott v. Pulsifer*, 122 Mass. 238, 23 Am. Rep. 322.

The article complained of being a privileged one, does it contain anything that is libelous per se? "Words ordinarily slanderous may not be so spoken by the party in the performance of public or official duty, upon a just occasion, and without malice." *Mayo v. Sample*, 18 Ia. 306.

The following subjects have been held to be legitimate subjects of newspaper comment and criticism:

A book and its author's views. *Cooper v. Stone*, 24 Wend. (N. Y.) 434.

The manager of an Italian opera. *Fry v. Bennett*, 28 N. Y. 324.

A clergyman in his ministerial duties. *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698.

A teacher of stenography who advertised publicly for pupils. *Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51.

The projector of a railway and his work. *Crane v. Waters*, 10 Fed. 619.

The "Cardiff Giant," a stone image of a [601] man, exhibited to the public. *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322.

A public dinner served by a caterer. *Dooling v. Budget Pub. Co.* 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83.

A public building being erected by a city. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

A flower show. *Green v. Chapman*, 4 Bing. N. Cas. 92, 33 E. C. L. 288, 5 Scott 340.

In a case from Iowa, the following criticism of a theatrical performance was held to be within the bounds of legitimate criticism:

"Effie is an old jade of fifty summers, Jessie a frisky filly of forty, and Addie, the flower of the family, a capering monstrosity of thirty-five. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailing of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot—strange creatures, with painted faces and hideous mien.

Effie is spavined, Addie is springhalt, and Jessie, the only one who showed her stockings, has legs with calves as classy in their outlines as the curves of a broom handle."

In passing upon the above article, the court said:

"One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticized. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. As said in the *Gott Case*, 122 Mass. 238, 23 Am. Rep. 322, the editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, [602] however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action will lie without proof of actual malice. See also *Eastwood v. Holmes*, 1 F. & F. (Eng.) 347; *Paris v. Levy*, 9 C. B. N. S. 342, 99 E. C. L. 342; *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397; *Carr v. Hood*, 1 Campb. (Eng.) 355, note. Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance. *Cooper v. Stone*, 24 Wend. (N. Y.) 434. Mere exaggeration, or even gross exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, 'The most vulgar, ignorant, and scurrilous journal ever published in Great Britain.'" *Cherry v. Des Moines Leader*, 114 Ia. 298, 86 N. W. 323, 54 L.R.A. 855, 89 Am. St. Rep. 365.

A similar ruling is found in *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N. E. 735, Ann. Cas. 1912B 985.

The privilege rests on two distinct grounds:

(1) It was within the province of the newspaper to comment on the incident as a matter of news and of general public interest.

(2) The appearance of plaintiff in the arena at Washington as a champion of San Francisco made him, *pro hac vice*, a public

figure subject to such attack, condemnation, and ridicule as is appropriate and necessary in a campaign where public opinion is sought to be molded.

The contention is made that after all has been said the circumstances can only mitigate defendant's conduct, and not justify it; and that therefore, even if punitive damages cannot be recovered, there should, at any rate, be awarded actual damages, such as for the injury to plaintiff's feelings. We think the publications were, under the circumstances, privileged; and therefore not actionable at all.

Judgment affirmed.

NOTE.

Comment on Matter of Public Interest as Libel or Slander.

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I. Introductory.

The present note in dealing with the question of comment on matters of public interest in the law of defamation excludes cases involving certain phases of that subject which have been treated in previous notes. It concerns itself principally with a consideration of the privilege or immunity accorded by the law to comment on the particular classes of matters of public interest which come within its scope, with an incidental consideration of the actionable or nonactionable qualities of certain particular comments where this question arises in the cases otherwise within the scope of the note. The present note excludes cases dealing with the following subjects:

—*literary criticism*, which is discussed in the note to Triggs v. Sun Printing, etc. Assoc. 1 Ann. Cas. 326;

—*dramatic criticism*, which is discussed in the note to Cleveland Leader Printing Co. v. Nethersole, Ann. Cas. 1912B 978;

—*political criticism*, which is discussed in the note to Black v. State Co. Ann. Cas. 1914C 989;

—*charge of burning or of arson*, which is discussed in the note to Greer v. White, 17 Ann. Cas. 270;

—*charge of robbery*, which is discussed in the notes to Flaacke v. Stratford, 5 Ann. Cas. 854, and Wooten v. Martin, Ann. Cas. 1912B 407;

—*disparagement of property or manufactured goods*, which is discussed in the notes to Victor Safe, etc. Co. v. Deright, 8 Ann. Cas. 809; Waters-Pierce Oil Co. v. Bridwell, Ann. Cas. 1914B 837; and Marino v. Di Marco, Ann. Cas. 1914D 1149;

—*comment on judicial or official proceedings*, which is discussed in the notes to the following cases; Nixon v. Dispatch Printing Co. 11 Ann. Cas. 161; Gazette Printing Co. v. Shallow, 15 Ann. Cas. 610; Flues v. New Nonpareil Co. Ann. Cas. 1915A 33; Meeker v. Post Printing, etc. Co. Ann. Cas. 1915A 126; and Stockman v. Leddy, Ann. Cas. 1916B 1052, 1065;

—*imputation on statement by clergyman*, which is discussed in the notes to Cole v. Millsapugh, 20 Ann. Cas. 717, and Hassett v. Carroll, Ann. Cas. 1913A 333;

—*comment to or on public officers*, which is discussed in the notes to Byrne v. Funk, 3 Ann. Cas. 647; Miller v. Nuckolls, 7 Ann. Cas. 110; Logan v. Hodges, 14 Ann. Cas. 103; Jozsa v. Moroney, 19 Ann. Cas. 1193; and Farr v. Valentine, Ann. Cas. 1913C 821;

—*constitutional liberty of speech and press*, which is discussed in the notes to Ex p. Harrison, 15 Ann. Cas. 1, and Schwartz v. Edrington, Ann. Cas. 1915B 1180;

—*imputation on lawyer*, which is discussed in the note to Montgomery v. New Era Printing Co. Ann. Cas. 1912A 375;

—*imputation of ignorance, incompetence, etc. to physician, dentist or druggist*, which is discussed in the note to Rood v. Dutcher, 20 Ann. Cas. 480.

The note also excludes cases treating of the privilege attaching to communications made in a matter of common interest, as distinct from public interest, and does not attempt to cover the question of the quantum of damages.

In view of the difference of opinion among judges and writers as to whether the right to comment on a matter of public interest is strictly a privilege, it has been deemed advisable to refer to this right, in classification

of the cases, by the term defeasible immunity rather than by the term qualified privilege.

II. Defeasible Immunity of Comment.

1. IN GENERAL.

The practically unanimous rule to be drawn from the cases is that comment on a matter of public interest is the subject of a defeasible immunity, which renders it not actionable in the absence of unfairness or express malice in the publication of the comment. The presence of those elements, however, will defeat the immunity.

England.—Eastwood v. Holmes, 1 F. & F. 347; Morrison v. Belcher, 3 F. & F. 614; Hedley v. Barlow, 4 F. & F. 224; Hunter v. Sharpe, 4 F. & F. 983, 15 L. T. N. S. 421; Soane v. Knight, M. & M. 74, 22 E. C. L. 255, 31 Rev. Rep. 714; Campbell v. Spottiswoode, 3 B. & S. 769, 113 E. C. L. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. N. S. 201, 11 W. R. 569; Henwood v. Harrison, L. R. 7 C. P. 606, 26 L. T. N. S. 938, 20 W. R. 1000; Risk Allah Bey v. Whitehurst, 18 L. T. N. S. 615; Dakhyll v. Labouchère [1908] 2 St. B. 325 note, 96 L. T. N. S. 399; South Hetton Coal Co. v. North Eastern News Assoc. [1894] 1 Q. B. 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. N. S. 844, 9 Rep. 240, 42 W. R. 322; Plymouth Mut. Co-operative, etc. Soc. v. Traders' Pub. Assoc. [1906] 1 K. B. 403; Mangena v. Wright [1909] 2 K. B. 958, 78 L. J. K. B. 879, 100 L. T. N. S. 960, 53 Sol. J. 485, 25 Times L. Rep. 534. See also Ryan v. Wood, 4 F. & F. 735; Green v. Chapman, 4 Bing. N. Cas. 92, 33 E. C. L. 288; Digby v. Financial News [1907] 1 K. B. 502.

Canada.—McIntire v. McBean, 13 U. C. Q. B. 534; Reg. v. Brazeau, 3 Can. Crim. Cas. (Quebec) 89; Winnipeg Steel Granary, etc. Co. v. Canada Ingot Iron Culvert Co. 22 Manitoba 576; Wilcocks v. Howell, 5 Ont. 361; Macdonell v. Robinson, 12 Ont. App. 270; Wilson v. Deane, 3 Alberta L. Rep. 186; Wiles v. Victoria Times Printing, etc. Co. 11 British Columbia 143; Lebreton v. Elie, 31 L. C. Jur. 54. See also Crow's Nest Pass Coal Co. v. Bell, 4 Ont. L. Rep. 660; Filiatrault v. La Patrie, 28 Quebec Super. Ct. 380; Marcotte v. Bolduc, 30 Quebec Super. Ct. 222; Dandurand v. La Publicite, 12 Quebec Pr. 330; Sandwith v. Cowper, 4 Sask. L. Rep. 12, 17 West. L. Rep. 1.

United States.—Whitney v. Janesville Gazette, 5 Biss. 330, 5 Chicago Leg. N. 469, 29 Fed. Cas. No. 17,590; Crane v. Waters, 10 Fed. 619; Commercial Pub. Co. v. Smith, 149 Fed. 704, 79 C. C. A. 410.

California.—See Edwards v. San Jose Printing, etc. Soc. 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Colorado.—Hoover v. Jordan, 27 Colo. App. 515, 160 Pac. 333.

Connecticut.—Barry v. McCollom, 81 Conn. 293, 70 Atl. 1035, 129 Am. St. Rep. 215.

District of Columbia.—Washington Post Co. v. Wells, 27 App. Cas. 495.

Illinois.—Rausch v. Anderson, 75 Ill. App. 526. See also Barth v. Hanna, 158 Ill. App. 20.

Indiana.—Henry v. Moberly, 6 Ind. App. 490, 33 N. E. 981, second appeal 23 Ind. App. 305, 51 N. E. 497.

Iowa.—See Morse v. Times-Republican Printing Co. 124 Ia. 707, 100 N. W. 867.

Kentucky.—Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, 30 L.R.A.(N.S.) 200; Spears v. McCoy, 155 Ky. 1, 159 S. W. 610, 49 L.R.A.(N.S.) 1033; Malone v. Carrico, 16 Ky. L. Rep. 155.

Louisiana.—See Perret v. New Orleans Times Newspaper, 25 La. Ann. 170; Cooke v. O'Malley, 109 La. 382, 33 So. 377; Levert v. Daily States Pub. Co. 123 La. 594, 49 So. 206, 131 Am. St. Rep. 356, 23 L.R.A.(N.S.) 726. And see the reported case.

Maine.—Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

Maryland.—Brinsfield v. Howeth, 107 Md. 278, 68 Atl. 566, 24 L.R.A.(N.S.) 583. See also Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314.

Massachusetts.—Smith v. Higgins, 16 Gray 251; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97; Robinson v. Coulter, 215 Mass. 566, 102 N. E. 938. See also Bodwell v. Osgood, 3 Pick. 379, 15 Am. Dec. 228; Curtis v. Mussey, 6 Gray 261; Sheckell v. Jackson, 10 Cush. 25; Haynes v. Clinton Printing Co. 169 Mass. 512, 48 N. E. 275; Fay v. Harrington, 176 Mass. 270, 57 N. E. 369; Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356.

Michigan.—Scripps v. Foster, 41 Mich. 742, 3 N. W. 216; Wieman v. Mabree, 45 Mich. 484, 8 N. W. 71, 40 Am. Rep. 477. See also Clair v. Battle Creek Journal Co. 168 Mich. 467, 134 N. W. 443.

Missouri.—Finley v. Steele, 159 Mo. 299, 60 S. W. 108, 52 L.R.A. 852; Tilles v. Pulitzer Pub. Co. 241 Mo. 609, 145 S. W. 1143.

Montana.—Kelly v. Independent Pub. Co. 45 Mont. 127, Ann. Cas. 1913D 1063, 122 Pac. 735, 38 L.R.A.(N.S.) 1160.

Nebraska.—See Vallery v. State, 42 Neb. 123, 60 N. W. 347.

New Hampshire.—See Barnes v. Campbell, 59 N. H. 128, 47 Am. Rep. 183.

New Jersey.—Schwarz Bros. Co. v. Evening News Pub. Co. 84 N. J. L. 486, 87 Atl. 148.

New York.—MacDonald v. Sun Printing, etc. Assoc. 111 App. Div. 467, 98 N. Y. S. 118; Outcault v. New York Herald Co. 117 App. Div. 534, 102 N. Y. S. 685;

Morah v. Steele, 157 App. Div. 109, 141 N. Y. S. 863; *Fry v. Bennett*, 5 Sandf. 54; *Harwood v. Keech*, 4 Hun 389; *Decker v. Gaylord*, 35 Hun 584; *Galligan v. Kelly*, 31 N. Y. S. 561, 64 N. Y. St. Rep. 197. See also *McLean v. New York Press Co.* 64 Hun 639 mem. 19 N. Y. S. 262.

Ohio.—*Nolan v. Kane*, 7 Ohio Cir. Dec. 520.

Pennsylvania.—*Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51; *Com. v. Featherston*, 9 Phila. 594, 29 Leg. Int. 125; *McGeary v. Leader Pub. Co.* 52 Pa. Super. Ct. 35. See also *Com. v. Murphy*, 8 Pa. Co. Ct. 394.

South Dakota.—See *Rood v. Dutcher*, 23 S. D. 70, 20 Ann. Cas. 480, 120 N. W. 772.

Utah.—See *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 45 Pac. 1097, 35 L.R.A. 611.

Virginia.—See *Butler v. News-Leader Co.* 104 Va. 1, 51 S. E. 213.

Washington.—*McClure v. Review Pub. Co.* 38 Wash. 160, 80 Pac. 303.

Whether an occasion is such as to give this defeasible immunity or qualified privilege is a question of law for the court. *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, second appeal 23 Ind. App. 305, 51 N. E. 497; *Ingram v. Reed*, 5 Pa. Super. Ct. 550, 41 W. N. C. 123. Compare *Cox v. Feeney*, 4 F. & F. (Eng.) 13, wherein the court left it to the jury to decide as a matter of fact whether the publication was privileged, first, as being with regard to a matter of public interest, and second, as having been published with the honest desire to afford the public information. In the course of his charge, *Cockburn, C. J.*, said: "Put it to yourselves, and see whether you can discover anything of the malicious and vindictive spirit which is imputed to him; and if you do this, and find that, instead of having published the report with an eye to the public good, he had published it from sinister motives, then your verdict will be for the plaintiff; but if you cannot see your way safely to that view—if you see it was a matter of public concern that the result of an inquiry like that of *Mr. Martin's* should be communicated to the public, and that it has been done honestly by the defendant, your verdict will be for him."

Since the privilege or immunity accorded to fair comment on a matter of public interest is not absolute but qualified only, actual malice in the making of the comment removes the privilege and makes the comment actionable if defamatory. *Brinsfield v. Howeth*, 107 Md. 278, 68 Atl. 566, 24 L.R.A. (N.S.) 583; *Robinson v. Coulter*, 215 Mass. 566, 102 N. E. 938.

Whether the publication is malicious is a question for the jury. *Bodwell v. Osgood*, 3 Pick. (Mass.) 379, 15 Am. Dec. 228. But

the fact that a comment contains defamatory matter which the publisher of the comment knows to be false, is conclusive of such actual malice as will remove the qualified privilege or defeasible immunity. *Bodwell v. Osgood*, 3 Pick. (Mass.) 379, 15 Am. Dec. 228.

2. THEORY ON WHICH IMMUNITY IS BASED.

The cases universally concede the right to make fair comment on matters of public interest and the general principle of the immunity of one making such a comment so long as it is fair and without malice. There is no such unanimity, however, on the question of the theory on which the immunity accorded such comment is predicated, and the variety of the attempts to formulate a scientific theory has left the law on this point in some confusion. See the cases cited in the foregoing subdivision.

For practical purposes it seems a great many of the cases treat this immunity from liability for fair comment on matters of public interest as a part of the general principle of qualified privilege which renders non-actionable in the absence of malice words spoken in pursuance of a duty to communicate, or in a matter in which the defendant has an interest to communicate and the person to whom the communication is directed has a corresponding interest. In other words, these cases consider the right to comment on matters of public interest as simply one application of the technical qualified privilege. *Henwood v. Harrison*, L. R. 7 C. P. (Eng.) 606, 41 L. J. C. P. 206, 26 L. T. N. S. 938, 20 W. R. 1000; *Eastwood v. Holmes*, 1 F. & F. (Eng.) 347; *Macdonnell v. Robinson*, 12 Ont. App. 270; *Wilcocks v. Howell*, 5 Ont. 361; *Crane v. Waters*, 10 Fed. 619; *Hoover v. Jordan*, 27 Colo. App. 515, 150 Pac. 333; *Barry v. McCollom*, 81 Conn. 293, 70 Atl. 1035, 129 Am. St. Rep. 215; *Bearce v. Bass*, 88 Me. 521, 36 Atl. 411, 51 Am. St. Rep. 446; *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Smith v. Higgins*, 16 Gray (Mass.) 251; *Com. v. Featherston*, 9 Phila. (Pa.) 594, 29 Leg. Int. 125. See also *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369; *Com. v. Murphy*, 8 Pa. Co. Ct. 399. In *Bearce v. Bass*, *supra*, the court said: "Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. Thus it has been held that books, prints, pictures and statuary publicly exhibited, and the architecture of public buildings, are all the legitimate subjects of newspaper criticism, and such criticism, fairly and honestly made, is not libelous, however strong the terms of censure may be, without the aver-

ment and proof of special damage, unless it goes further and attacks the individual."

Other cases, however, attempt to separate the defense of fair comment from that of qualified privilege and to treat them as different principles. *Campbell v. Spottiswoode*, 3 B. & S. 769, 113 E. C. L. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. N. S. 201, 11 W. R. 569; *Plymouth Mut. Co-operative, etc. Soc. v. Traders' Pub. Assoc.* [1906] 1 K. B. 403; *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97. And text writers on the subject have treated fair comment under a separate head and as distinct from qualified privilege. *Odgers on Libel and Slander*, pp. 34, 196-263; *Townshend on Slander and Libel*, p. 296 et seq., and p. 449 et seq. The subject of comment on matters of public interest is, however, treated as a part of the law of qualified privilege by *Starkie*. See *Starkie on Slander and Libel*, p. 233 et seq. And comment is regarded as privileged in *Newell on Defamation, Slander and Libel*, p. 564, § 1.

According to one view the question of fair comment vel non is really a question of libel or no libel, there being no libel if the comment is fair, whereas in the case of strict privilege, the privilege extends to words which are actually libelous but excuses them in the absence of malice. *Campbell v. Spottiswoode*, 3 B. & S. 769, 113 E. C. L. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. N. S. 201, 11 W. R. 569, wherein it was said, per *Crompton, J.*: "The first question is, whether the article on which this action is brought is a libel or no libel—not whether it is privileged or not. It is no libel if it is within the range of fair comment, that is, if a person might fairly and bona fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to

be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word 'privilege' is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not there was no privilege. In the present case it is clear, as found by the jury, that the article is beyond the range of fair comment, and, this not being a case within the rule as to privilege, the only other available mode of defense was by proving the truth of the article." See also *Patten v. Harper's Weekly Corp.* 93 Misc. 368, 158 N. Y. S. 70.

The distinction has been made that the right of fair comment is not a right to make false statements, whereas qualified privilege may excuse words actually untrue if made bona fide. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97. In *Bearce v. Bass*, *supra*, it was said: "It is sometimes said that fair and honest criticism in matters of public concern is privileged. But this is not true in a strict legal sense. The distinction between fair and reasonable comment and criticism, and privileged communications, is this: That in the latter case, the words may be defamatory but the defamation is excused or justified by reason of the occasion; while in the former case, the words are not defamatory of the plaintiff, and hence not libelous—the stricture or criticism is not upon the person himself, but upon his work." In that case, however, the court held comment on the character of the construction of a public building to be privileged. And in *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97, it was said: "But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a bona fide statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege

facts otherwise libelous, he will not be privileged if those facts are not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

The view of the foregoing cases is that there can be fair comment only when the comment is true, or in other words that if a plea of justification or of truth could not be maintained there could not be fair comment. This view, however, is contrary to the ruling made in the case of *Dakhyl v. Labouchere*, 96 L. T. N. S. (Eng.) 399, wherein it was held to be reversible error for the judge to direct the jury that they must find for the plaintiff unless the defendant proved the justification of truth and that, unless that justification was proved, the assertion could not come within the range of fair comment. The court said: "In the second place, the defendant was, in my opinion, entitled to have the jury's decision as to the plea of fair comment, whether or not, in all the circumstances proved, the libel went beyond a fair comment on the plaintiff and on the system of medical enterprise with which he associated himself, as a matter of public interest treated by defendant honestly and without malice. The plea of fair comment does not arise if the plea of justification is made good, nor can it arise unless there is an imputation on a plaintiff. It is precisely where the criticism would otherwise be actionable as a libel that the defense of fair comment comes in. But the learned judge put aside that defense, and told the jury that unless a justification was proved they were bound to find a verdict for the plaintiff, and that, unless justified, the libel is not fair comment and cannot come

within the region of fair comment." And in the case of *Hunter v. Sharpe*, 4 F. & F. (Eng.) 983, 15 L. T. N. S. 421, Cockburn, C. J., vigorously declared that where the occasion is privileged for comment as being a matter of public interest, one commenting honestly and with bona fides is still privileged although he may exceed the limits of strict truth in the fact or inferences. The comment involved in that case was a stricture on the system of advertisement of a physician who claimed to have a specific for consumption. The court said: "But suppose you cannot go that length, that will not conclude the case. It will bring the defendant to his second ground of defense, which, in that event, you must consider. Under that head of defense, he says that it was a matter of public interest and public concern; that the plaintiff, by his advertisements, invited people to submit to his system of treatment; and that if he, the defendant, really believed it to be a delusion, then he had a right to maintain that it was so; and that even if, in drawing inferences of imposture and bad intention, he fell into error, yet if he wrote honestly, and with the intention of exercising his vocation as a public writer fairly and with reasonable moderation and judgment, he is entitled to the verdict. And I entirely agree in that view. Here is a man challenging public criticism by bringing forward what professes to be a new system of treatment, and inviting the public to adopt it as the only means of curing the most destructive disease known among us. In doing this he challenges public criticism, and if a public writer, using a reasonable degree of temper and moderation, as behooves any one who makes imputations upon others—if a public writer, thus discussing the subject in the exercise of his vocation, falls into error as to the facts or the inferences, and goes beyond the limits of strict truth, he is nevertheless privileged. The occasion is a privileged one, and if the privilege is exercised honestly, faithfully, and with reasonable regard to what truth and justice require, then, though he may exceed the limits of what he can legally prove to be the truth, he is protected from liability. It is not, therefore, necessary that the justification should appear to you to be made out, if you think that the defendant, or the writer, was in the reasonable and honest exercise of his vocation as a public writer, even although he was not fully warranted in drawing the inferences he did as to the conduct of the plaintiff, and though it may be that he was not entirely justified by the absolute truth. . . . And if the writer of the article was satisfied in his own mind—as you cannot doubt he was—that the plaintiff's system was delusive, and that he himself was a pretender and a quack, then we

cannot wonder that in his honest indignation he should have put gall into the ink when he wrote to expose the conduct which he denounced. It was not the case of a man sitting down to gratify personal spite or professional malice, but a man writing honestly to denounce what he honestly believed to be a system of quackery and imposture, and to vindicate the honor and the character of the profession of which he was a member, and to do his duty to the public, in whose interest he was writing."

The view that the defense of fair comment is simply a defense of no libel, that there can be no libel if the comment is fair, and that unfair comment is necessarily libelous, was discountenanced in *Winnipeg Steel Granary, etc. Co. v. Canada Ingot Iron Culvert Co.* 22 Manitoba 576, wherein the court said: "It has been said that a fair comment on a matter of public interest is no libel. This, however, does not mean that the words are not defamatory, i. e., not injurious to the reputation. If they were not defamatory, of course no action would lie. It is only when the words do tend to injure the reputation that the question arises: Can they be excused as being a fair comment on a matter of public interest? The words may be in themselves libelous, but as soon as they are shown to be a fair and bona fide comment on a matter of public interest they cease to be actionable. *Odgers Ib.* 'It is precisely where the criticism would otherwise be actionable as a libel that the defense of fair comment comes in.' Per Lord Loreburn in *Dakhyl v. Labouchere* [1908] 2 K. B. (Eng.) 327 [note]."

The conflict between the two foregoing views may be partially reconciled on the ground that, granting that fair comment is a part of technical privilege, the reason privilege in general may cover false statements, while fair comment may not, is because the only comment that is privileged as such is fair comment, and only comment based on true statements is fair. The dispute seems to be largely a verbal one. If fair comment is a technically separate and substantive defense in itself, the qualified immunity which it gives is removed, in the first place, by proof that the comment is unfair, and it is unfair if it is based on a false statement of facts, or if it exceeds the realm of comment, as by making a personal attack. But if, on the other hand, the qualified immunity granted by the defense of fair comment is simply the immunity of qualified privilege, the rules governing it are, as a practical matter, the same. For the defense of privilege is defeated by proof of actual malice, by proof that the publication was in excess of the privileged occasion, and, as heretofore suggested, by proof that facts were falsely stated, in the

case of the privilege of comment, because only fair comment is privileged, granting that it is a question of privilege, and only comment on true facts is fair. See *Thomas v. Bradbury* [1906] 2 K. B. (Eng.) 627, 6 Ann. Cas. 135, which, though not strictly within the scope of this note, being a case involving literary criticism, is one of the few cases in which the view is elaborated that there is no practical difference between the defenses of fair comment and of qualified privilege. It was said therein, per Collins, M. R.: "Proof of malice may take a criticism *prima facie* fair outside the right of fair comment just as it takes a communication *prima facie* privileged outside the privilege. . . . If the analysis be strictly carried out it will be found that the two rights whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission on the part of the plaintiff, implied from the averment by him of publication of the work criticised, that the comment came into existence on a protected occasion. There is not even any decision that the word privilege, as used in *Hehwood v. Harrison* to which Lord Esher was himself a party, is not as good a word as any substitute that can be suggested to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of malice is negatived. For the reasons I have given the difference is one of words only, and could not be a matter of legal decision."

One practical objection to the attempted reconciliation of these two views was pointed out, however, in *Winnipeg Steel Granary, etc. Co. v. Canada Ingot Iron Culvert Co.* 22 Manitoba 576, wherein the distinction was made that the burden is on the plaintiff to show express malice, where words were spoken on a privileged occasion, but that where the defense of fair comment is interposed, the burden is on the defendant to prove that his comment was fair, and, in doing so, to prove that it was made without malice. The court said in that case, quoting Halsbury's *Laws of England*, vol. XVIII. p. 707: "A statement made on a qualified privileged occasion from feelings of spite or from some other wrongful and indirect motive is an abuse of the privilege and is not protected though there be no intrinsic evidence of actual malice in the actual words used. So, too, it may be said that the existence of malice in the mind of a commentator at the time of the publication of the comment suggests that the comment may not really have been made in the exercise of the right of fair comment on a matter of public interest, but to gratify personal spite; or, in other words, may have been an

abuse of the right, though the words used are not intrinsically unfair. In short, the abuse, whether of the right of comment or of a qualified privileged occasion, arising from a wrong state of mind actuating the publication, may avoid the defense of fair comment or privilege, though the language used is not intrinsically unfair in the one case nor in excess of the occasion in the other. The analogy, however, is far from close. The burden is on the plaintiff, by proving express malice, to rebut the protection *prima facie* arising as if words are spoken or written on a privileged occasion; whereas, on a defense of fair comment, the burden is on the defendant to show that the comment is fair and in so doing to negative the writing or publication of the comment being actuated by an unfair state of mind."

3. FAIRNESS OF COMMENT.

In order to be accorded this defeasible immunity, the comment on a matter of public interest must be fair. Unfair comment has no immunity or privilege. See *Sandwith v. Cowper*, 4 Sask. L. Rep. 12, 17 West. L. Rep. 1, and other cases cited *infra* in this subdivision.

When the defense of fair comment is interposed to an action for libel, the fairness of the comment is put in issue, and on that issue the information which the defendant had, and on which he based his comment, is material, but the question from whom he obtained the information is not material. *Plymouth Mut. Co-operative, etc. Soc. v. Traders' Pub. Assoc.* [1906] 1 K. B. (Eng.) 403.

Comment is not unfair simply because it is vigorous or is made in somewhat rough terms, and such comment on a matter of public interest is still privileged so long as it is conceived in a fair and honest spirit. *Hedely v. Barlow*, 4 F. & F. (Eng.) 224; *Hunter v. Sharpe*, 4 F. & F. (Eng.) 983.

Comment is not unfair simply because it uses the medium of ridicule, provided it is not intemperate or malicious. *Soane v. Knight, M. & M.* 74, 22 E. C. L. 255, 31 Rev. Rep. 714.

It is not fair comment to publish false statements of facts, and therefore comment on a matter of public interest containing such false statements is not privileged even though it is made in the honest belief that they are true. *Digby v. Financial News* [1907] 1 K. B. (Eng.) 502; *Morrison v. Belcher*, 3 F. & F. (Eng.) 614; *Crow's Nest Pass Coal Co. v. Bell*, 4 Ont. L. Rep. 660; *Sandwith v. Cowper*, 4 Sask. L. Rep. 12, 17 West. L. Rep. 1; *Dandurand v. La Publicite*, 12 Que. Pr. 330; *Lever v. Daily States Pub. Co.* 123 La. 594, 49 So. 206, 131 Am. St. Rep. 356, 23 L.R.A. (N.S.) 726; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170; *Sheckell v.*

Jackson, 10 Cush. (Mass.) 25; *Haynes v. Clinton Printing Co.* 169 Mass. 512, 48 N. E. 275; *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356; *Kelly v. Independent Pub. Co.* 45 Mont. 127, Ann. Cas. 1913D 1063, 122 Pac. 735, 38 L.R.A. (N.S.) 1160; *Schwarz Bros. Co. v. Evening News Pub. Co.* 84 N. J. L. 486, 87 Atl. 148; *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N. Y. S. 1089; *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 45 Pac. 1097, 35 L.R.A. 611. See also *Clair v. Battle Creek Journal Co.* 168 Mich. 467, 134 N. W. 443; *Butler v. News-Leader Co.* 104 Va. 1, 51 S. E. 213. In *Hubbard v. Allyn*, *supra*, the court said: "The right of the defendant was not to make false statements of fact because the subject-matter was of public interest, but only to criticise, discuss and comment upon the real acts of the plaintiff and the consequences likely to follow from them, or upon any other aspect of the case in a reasonable way. This may be done with severity. Ridicule, sarcasm and invective may be employed. But the basis must be a fact, and not a falsehood."

A false statement of fact made accidentally, through a typographical error, is nevertheless unfair comment although unintentionally made, and is not privileged. *McLean v. New York Press Co.* 64 Hun 639 mem. 19 N. Y. S. 62, wherein recovery was had for the publication in a newspaper of a map on which the plaintiff's house was marked as a disorderly house by mistake, the intention having been so to designate another house. The court said: "Therefore the public press may comment fully and freely upon all questions and matters of great public interest, provided they keep themselves within the limits of an honest intention to discharge a public duty. But in the case at bar the publishers of the newspaper did not believe that the house in question was a disorderly house. On the contrary, they say that they had no intention of referring to this house, but to some other house in the neighborhood. It has nowhere been decided, as yet, that where either an individual or a public newspaper, intending to refer to B, makes a slanderous attack upon A, it is a privileged communication. The plea of typographical error does not in any respect alter the situation. It may go to the question of exemplary damages; but, to the right of the plaintiff to recover, typographical errors form no answer. And this view of the case is strengthened when we consider the fact that as privileged communications are exceptions to the general rule, which implies malice in a libelous publication, it rests with the person claiming the privilege to show that the case comes within the exception."

It has been held, however, that where comment is made on such a matter of public interest as makes the comment conditionally privileged, the author or publisher is not

held to prove the exact truth thereof and the soundness of its inferences, provided there are reasonable grounds for the inferences, and provided he is not actuated by express malice. *Risk Alleh Bey v. Whitehurst*, 18 L. T. N. S. (Eng.) 615; *Crane v. Waters*, 10 Fed. 619.

And it has been held that in order to find for the defendant on a question whether the alleged libel was privileged as fair comment on a matter of public interest, the jury need not find that the inferences of fact in the comment were strictly true, but must be satisfied not only that the defendant honestly believed them to be true but also that he had such fair grounds for his imputation that his inference was not reckless. *Morrison v. Belcher*, 3 F. & F. (Eng.) 614, wherein the alleged libel imputed to the plaintiff that he had taken money for a fraudulent exhibition of a "magic chrysal."

A comment is unfair, and is hence without privilege, if it goes further than the occasion or the acts commented on warrant, or if it makes unfair exaggerations. *Ryan v. Wood*, 4 F. & F. (Eng.) 735; *South Hetton Coal Co. v. Northeastern News Assoc.* [1894] 1 Q. B. (Eng.) 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. N. S. 844, 9 Rep. 240, 42 W. R. 322; *Cooke v. O'Malley*, 109 La. 382, 33 So. 377. In *Ryan v. Wood*, supra, it was held that, although a public writer would be privileged to comment in severe terms on a system whereby musical critics secure the services of eminent artists gratuitously, as tending to bias criticism, the privilege is lost by a publication which so far exceeds the occasion as to brand an individual critic as a charlatan, and to accuse him of blackmailing the artists of the musical profession into giving him their services by threats of adverse criticism. For the publication with which this case is concerned see *infra*, subdivision IV. 2, *Words Held Actionable*. The court said: "If it had simply stated that 'Mr. Ryan has acquired the office of public critic, he writes in journals of extensive circulation, he criticises the performance of musical artists at concerts or at operas, and he is in the habit year by year of inviting the leading artists to sing gratuitously at concerts for his own benefit, and such a system is calculated to prevent the possibility of his excuse of a fair, free, and impartial judgment upon their performances, or indirectly on those of others—for, from a natural sense of gratitude he will be disposed to be favorable to those who render him such gratuitous services, and there will be at least a danger of his writing favorably of those who do not do so; and granting that he does not intend to do that which is partial and corrupt, the system is bad; but it must tend to engender a partial disposition in his mind, and also to engender a suspicion in the profession, when its exist-

ence is known, that criticism is unjust, and that either the censure or the praise which is meted out is undeserved.' If the libel had been limited to observations of this kind, upon the character of the system and its probable consequences, no one could have complained of the spirit of the tone of the article. But, unfortunately in this instance, the writer has gone much further. He has not satisfied himself with pointing out the bad consequences of the system which the plaintiff has adopted, but he has imputed to him that he does, in fact, mete out his criticism, favorable or unfavorable, according as these services are rendered to him or not; and that by this means, through the influence of his criticisms upon those artists who dread them if they do not submit to his demands, he is enabled to levy 'blackmail' upon them, and thus to be a kind of 'highwayman of the press.' Such being the scope of the libel, it assumes, as I have said, a serious character."

As a general rule comment is fair only when it confines itself to things, or to the acts or conduct of persons, and comment going so far as to attack personal character, or to impute immoral or corrupt motives, is unfair and not privileged. *Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Curtis v. Mussey*, 6 Gray (Mass.) 261; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183. See also *Kelly v. Independent Pub. Co.* 45 Mont. 127, Ann. Cas. 1913D 1063, 122 Pac. 735, 38 L.R.A. (N.S.) 1160. In *Snyder v. Fulton*, supra, the court said: "The proposition which they [the cases] maintain is, that any man, editor or private citizen, has a right honestly to discuss all matters of public interest, and to comment on and criticise fairly the public acts of official persons. Such a proposition we do not for a moment question. So far as the publication before us was confined to the statement of the riotous and violent assaults upon passengers, and reflected upon the delinquency of the police authorities and other officials, if made in good faith and upon reasonable grounds of information, the case comes within well-recognized principles, and the publication is, to that extent, privileged. But such privilege does not extend to the right of charging the plaintiff, a private citizen, with having been in collusion with the ruffians and wrongdoers, and aiding them in selecting the victims of their intended violence, by 'spotting the Republicans' for that purpose."

But it has been said that a personal attack may be a part of privileged fair comment on a matter of public interest if the facts as commented on are true, and if the personal attack can be reasonably inferred from those truly stated facts; and that whether it can be reasonably inferred from the facts is a question of law for the court, but that whether it

should so be inferred is for the jury. *Dakhyl v. Labouchere* [1908] 2 K. B. 325 note, 98 L. T. N. S. 399, wherein the court said: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts; in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

It should be noticed, parenthetically, that these rules do not apply strictly to comments or criticism on persons who stand in a peculiarly public relation to their fellowmen. Cases as to public officers have not been included, not being within the scope of this note. For cases regarding some other classes of public persons see *infra*, subdivision III. 1, *Comment on Public Person*.

Comment cannot be fair if it is made with express malice, to gratify the malice rather than the public interest. *Marcotte v. Bolduc*, 30 Quebec Super. Ct. 222.

Whether the limits of fair criticism have been transcended or whether the privileged occasion has been used for the utterance of a false and defamatory statement of fact present a question for the jury. *Cooney v. Edeveain*, 14 Times L. Rep. (Eng.) 34; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11, 41 L. J. Q. B. 14, 25 L. T. N. S. 464, 20 W. R. 181; *South Hetton Coal Co. v. North Eastern News Assoc.* [1894] 1 Q. B. 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. N. S. 844, 9 Rep. 240, 42 W. R. 322; *Wilcocks v. Howell*, 5 Ont. 360; *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N. Y. S. 1089. But where the occasion has been used for the utterance of conceded misstatements of material facts, defamatory in character, the court should rule as a matter of law that the privilege of fair comment has been exceeded. *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N. Y. S. 1089.

4. NEWSPAPER COMMENT.

It is well settled that a newspaper or other printed publication has, as such, no peculiar privilege in commenting on matters of public interest. It has no greater privilege with respect to such comment than has any private person. *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410; *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241; *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423; *Delaware State, F. etc. Ins. Co. v. Croasdale*, 6 Houst. (Del.) 181; *Washington Herald Co. v. Berry*, 41 App. Cas. (D. C.) Ann. Cas. 1917B.—27.

322; *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Ott v. Murphy*, 160 Ia. 730, 739, 141 N. W. 463; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170; *Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Sheckell v. Jackson*, 10 Cush. (Mass.) 25; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97; *Haynes v. Clinton Printing Co.* 169 Mass. 512, 48 N. E. 275; *McAllister v. Detroit Free Press Co.* 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; *Johnson v. St. Louis, Dispatch Co.* 65 Mo. 539, 27 Am. Rep. 293; *Arnold v. Star Sayings Co.* 76 Mo. App. 159; *Kelly v. Independent Pub. Co.* 45 Mont. 127, Ann. Cas. 1913D 1063, 122 Pac. 735, 38 L.R.A.(N.S.) 1160; *Smart v. Blanchard*, 42 N. H. 137; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Schwarz Bros. Co. v. Evening News Pub. Co.* 84 N. J. L. 486, 87 Atl. 148. See also *Dexter v. Spear*, 4 Mason 115, 7 Fed. Cas. No. 3,867. In *McAllister v. Detroit Free Press Co.* *supra*, the court said: "Nor was any care shown by the newspaper. It was, as far as the record shows, published as handed in by the reporter, without thought of verification. It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it has heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and wide-spread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise. The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby."

A defamatory publication in a public journal cannot be said to have been privileged

simply because it related to a subject-matter of public interest, and was published in good faith, without malice, and from laudable motives; but, while there is in such a case no privilege which will require proof of express malice by the plaintiff, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of information, and the motives which induced the publication. *Wilson v. Fitch*, 41 Cal. 363, wherein the court said: "Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case, that I am aware of, has ever gone so far. But whilst such publications cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publications in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff, in respect to malice, there would be but little security for private character. It is easy for the publisher to show the circumstances under which the publication was made, the sources of his information, and the motives for the publication, and thus to rebut the presumption of malice. But if the burden of proof was on the plaintiff, it would often, and perhaps generally, be very difficult, if not impossible, to prove express malice. I think the present rule, which allows to the publisher the fullest opportunity to rebut the presumption of malice, secures to him all the protection which is consistent with a due regard to the safety of private character."

The publication of defamatory matter by a newspaper is not privileged by reason of the fact that it is copied from another publication, or that it comes through the regular channels of news collection, without any notice of its falsity, and the newspaper publishing it is liable in damages to the person libeled, in the absence of other justification. *Edwards v. Kansas City Times Co.* 32 Fed. 813; *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241; *Morse v. Times-*

Republican Printing Co. 124 Ia. 707, 100 N. W. 867; *Haynes v. Clinton Printing Co.* 169 Mass. 512, 48 N. E. 275. See also *Long v. Tribune Printing Co.* 107 Mich. 207, 65 N. W. 108; *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476.

Nor is its publication justified by reason of the fact that it is published not as news but as a paid advertisement. *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170. In the case first cited, the court said: "A newspaper is a great power. There will doubtless appear no greater factor in the progress and development of our common country. Some men owe to the press the respect they exhibit for religion and morality; they fear its lash. The newspaper should discriminate; upon its lofty pedestal it should command respect for its high-toned thought, its justice, its conservatism and its moderation. The press should be free; it should not be deterred from its legitimate work. It leads thought; it moulds public opinion; it thinks for the people. Some men have illustrated this great calling; they have appreciated its duties and obligations; they have lent an ear to the right; their endeavors have kept time to the needs and necessities of the great millions who exemplify the virtue, religion and morality of this country. The man that sits in this high place, athirst for greed and gain, whose opinions depend upon the amount of money he gets in his wallet, who attacks private character when he is paid to do so, is a usurper and a public enemy. As well might Judas Iscariot exhibit the price of his perfidy as an excuse for his crime, as for a libeller to set up that he published the libel complained of for money."

But, although not a justification, the manner of acquirement and publication of the item, as that it was copied bona fide from another newspaper, may be considered in mitigation of the damages. *Edwards v. Kansas City Times Co.* 32 Fed. 813.

Where one assails another in the public press, the assailant impliedly invites the person attacked to answer to the public, and this answer is privileged. *Wilson v. Deane*, 3 Alberta L. Rep. 186, wherein it was said: "Where one assails another in the public press, the assailant impliedly invites the person attacked to answer to the public who then acquire an interest in contemplation of law, in the subject-matter of the original communication, and this constitutes a privileged occasion such as to constitute a defense if the person attacked confines himself to vindicating honestly and without malice his conduct or character though incidentally he may reflect upon that of his assailant."

And where one procures the publication in a newspaper of articles commendatory and laudatory of himself, he subjects himself to

fair criticism by other newspaper writers, which criticism is privileged if fair and without malice. *Thompson v. Matthiasen*, 150 App. Div. 739, 135 N. Y. S. 796.

It is not fair comment for a newspaper to publish statements without having made an adequate effort to discover whether they are false or true, and comment published under such circumstances is not privileged. *Ingram v. Reed*, 5 Pa. Super. Ct. 550, 41 W. N. C. 123; *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476. In the case last cited it appeared that a false report implicating the plaintiff, an entirely innocent person, in the commission of a murder had been published by the defendant's newspaper without any inquiry. Holding that the defendant was liable in substantial damages, the court said: "A person in Quebec told some newspaper men, who, in turn, told defendant's correspondent, that he, the informant, had received from plaintiff a despatch, stating that the latter had been arrested, charged with being implicated in the crime in question. Having received this information and seeing that a Quebec paper was also publishing it, defendant's correspondent, without a word of further inquiry, without ever seeing the original informant (who, as has been said, subsequently denied having given the information, though it is fair to state it is proved he did give it) still less asking to see the alleged despatch, rushed the news off to Montreal for publication. As he tells us himself, this was all done 'a la course.' His, to himself at least, all sufficient justification for this highly reprehensible conduct is, that he got the news at the last moment, that if he did not send it on at once it would be too late for that day's issue of defendant's paper. When the despatch arrived here, it was at once printed and published. No pretense of inquiry was made. The same justification is offered. It was the last moment before the 'forms' of the day's papers were closed. If this defamatory, and, as it proved, absolutely mendacious item of news, this 'brutale rumeur,' as defendant's editor himself calls it, when he finds it necessary to apologize, was not published at once, there might actually elapse another twenty-four hours before it could be served up to the readers of defendant's paper. Under these circumstances defendant's witnesses and employees evidently consider that no one could expect them to stop to inquire. A trifle such as the possible ruin of an innocent man's reputation, of course weighs nothing in the balance, when against it is the desire of being first in the field with a 'sensational' bit of news."

The immunity granted to newspaper comment on matters of public interest does not extend to publications made maliciously, to gratify a personal malice or vengeance.

Filiatrault v. La Patrie, 28 Quebec Super. Ct. 380; *Marcotte v. Bolduc*, 30 Quebec Super. Ct. 222. In the case last cited the court said that the law permits the publishing in public journals of all the facts it can be within public interest to become acquainted with, however damaging they may be to any person, but that this is on condition that they are published exclusively with the aim of being useful to the public, and not with the aim of satisfying the vengeance or malice of him who publishes them.

As to newspaper comment in particular classes of cases, see the following subdivision.

III. Application to Particular Occasions.

1. COMMENT ON PUBLIC PERSON.

a. In General.

Comments on the acts of persons who stand in such a relation to the public or to public affairs that their acts affect, or are of interest to, the general public, are accorded a defeasible immunity or qualified privilege within the rules hereinbefore set forth. *Mangena v. Wright* [1909] 2 K. B. 958, 78 L. J. K. B. 879, 100 L. T. N. S. 960, 53 Sol. J. 485, 25 Times L. Rep. 534; *Macdonell v. Robinson*, 12 Ont. App. 270; *Reg. v. Brazeau*, 3 Can. Crim. Cas. 89; *Crane v. Waters*, 10 Fed. 619; *Crane v. Boston Advertiser*, 13 Rep. 650, 6 Fed. Cas. No. 3,352a. And see the reported case. In *Mangena v. Wright*, supra, it was held that comment by a public officer on the conduct of one who had made himself of public interest by agitations in a rebellious colony, the comment being based on facts appearing in a parliamentary report, was privileged. The court said, per Phillimore, J.: "It is admitted by the defendant that there is no case where the privilege has been put exactly in the way in which he seeks to put it. This publication may be considered as a communication by a person having a social or public duty, the agent-general for Natal having a duty to communicate, in the interest of the colony which he represents and of union and harmony between it and the mother country, facts concerning the career of one who comes from Natal or its neighborhood and is not known in England, and who is interposing in England between the government of Natal and the government of the mother country. Or it may be considered as a communication by a person having a common interest to others having a like interest even though the community of interest is one shared with all the subjects of the King or all those in the mother country. If it is a public matter and one concerning a man taking for the time a public part, I think this may be so. It may come

within the language cited by Lopes, L. J., when delivering the judgment of the court in *Allbutt v. General Council of Medical Education and Registration* (1): 'The publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive.' I think that, at any rate where the communication is made by a public servant as to a matter within his province, it may be the subject of privilege in him, and if in him, then in *The Times*, because Sir William Arbuckle could only make the communication through some such medium. I think, therefore, that the defendant may go to trial upon this and the other pleas."

In *Crane v. Waters*, 10 Fed. 619, 13 Rep. 650, 6 Fed. Cas. No. 3,352a, it was held that a constructor and manager of railroads was a public person within this rule. The case involved the liability of a newspaper for an article intimating that the plaintiff intended to secure control of certain railroads by bringing them to bankruptcy and then buying them in. The court said: "The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can take with a private matter, or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury. . . . Some of the affairs of a railroad company are public and some are private. For instance, the honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public, in respect to the safety of the bridge, and as they cannot be pointed out, you may discuss the construction of the bridge in public, though you thereby reflect upon the character of the builder. . . . Perhaps the right of legislative interference may be taken as a fair test of the right of public discussion, since they both depend upon the same condition. The legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public. It cannot be doubted, I apprehend, that the legislatures of Connecticut and Massachusetts would have power to permit or to prohibit or to modify

a scheme such as is now in question. It interests the public, consisting of the unascertained persons who will be asked to take shares in it, and those through whose land it will pass or whose business will be helped or hindered by it, that such a line should be well, and even that it should be honestly, laid out, built, and carried through. For this reason the character of the plaintiff, as a constructor and manager of railroads, seems to me to be open to public discussion when he comes forward with so great and important a project affecting many interests besides those of the shareholders of one road; and that, therefore, the defendants, or any other persons, have the qualified privilege which attaches to discussions of public affairs. The distinction is this: that when a railroad is to be built, or a company to build it is to be chartered, the question whether it shall be authorized is a public one; when the company is organized and the stock is issued, anything which merely affects the value of the stock is private."

But the qualified privilege of commenting on the acts of a public man does not extend to the justification of a distinct false charge of crime, made against such a man, even though made in good faith and with an honest motive. *Smith v. Tribune Co.* 4 Biss. 477, 22 Fed. Cas. No. 13,118, wherein it was said: "It is not an answer to that to say that he is a public man; that he affects to be an educator of the youth of the nation, and that the defendants are the publishers of a newspaper, and that they can criticise his acts in the way that the declaration alleges that they did. Undoubtedly they can criticise his acts. They can hold him up to ridicule so far as they are justified in doing so by his public acts, by anything that he has done or said, but they have no right in doing so to make a distinct charge against him that he has committed a crime, and that, in order to avoid the consequences of it, he has feigned insanity. That would be allowing the license of a public journalist to go further, I think, than any adjudicated case would warrant. We all desire the entire freedom of the press, but it has never been understood as authorizing the bringing of charges against a man of his having committed a crime, unless those charges were true."

There is no privileged occasion in defamatory comment on the private character of a private person, there being no proper public interest therein. *Joynt v. Cycle Trade Pub. Co.* [1904] 2 K. B. (Eng.) 292, 73 L. J. K. B. 752, 91 L. T. N. S. 155; *Farmer v. Hamilton Tribune Printing, etc. Co.* 3 Ont. 538; *Morse v. Times Republican Printing Co.* 124 Ia. 707, 100 N. W. 867; *Harriman v. New Nonpareil Co.* 132 Ia. 616, 110 N. W. 33; *Tryon v. Evening News Ass'n*, 39 Mich. 636;

Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L.R.A. 532; Trebby v. Transcript Pub. Co. 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330; Pfister v. Milwaukee Free Press Co. 139 Wis. 627, 121 N. W. 938.

b. Educator or Teacher.

Where a person holds himself out as the head of a school for the instruction of the youth, he lays himself open to fair comment on his school as a public institution and a matter of public interest, and such comment is privileged if fair and without express malice. Press Co. v. Stewart, 119 Pa. St. 584, 14 Atl. 51, wherein the court stated the facts as follows: "The plaintiff brought an action on the case against the defendant below, The Press Company, Limited, to recover damages for the publication of an alleged libel in 'The Press,' a daily paper of the city of Philadelphia. The plaintiff had leased rooms in the vicinity of Thirteenth and Market streets, and fitted them up as a school for clerks, salesmen, and reporters, and he professed to be a teacher of shorthand writing, typewriting, and phono-scribing. The outside of his rooms appears to have been alluringly placarded with signs, and various devices in the way of circulars were scattered broadcast in the community calling attention to the merits of his system, and urging the young to engage with him as pupils. It must be conceded that some of these circulars were of a very extravagant nature. It so happened that the attention of the city editor of The Press was attracted by the peculiarity of the plaintiff's signs, and he detailed a reporter upon the staff of that paper to visit the establishment and ascertain its character. He did so, and The Press next day contained the report of the interview. It is this report which forms the subject of the alleged libel." Holding the article to be privileged the court said: "We are of opinion that the article in question is privileged, not absolutely but in a qualified sense; in that sense, however, which makes it the duty of the court to instruct the jury that it is privileged, and that because of such privilege no presumption of malice arises from the mere fact of publication, but malice must be proved as a fact in the cause before the plaintiff can recover. If we are asked why this article is so privileged, I answer, because it was proper for public information. This plaintiff was holding himself out to the world as a teacher and guide of youth; he was seeking to attract them to his place by signs, placards, and advertisements, some of them at least of an extraordinary nature. This gave him a quasi-public character. Whether he was a proper person to instruct the young, and whether his school was a

proper place for them to receive instruction, were matters of importance to the public, and The Press was in the strict line of its duty when it sought such information and gave it to the public. And if that information tended to show that the plaintiff was a charlatan and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it. Aside from this we do not regard the article as a libel. At most it is a harmless bit of pleasantry in which the reporter has succeeded in making himself somewhat ridiculous. The matter has been very much magnified and an importance attached to it which it does not deserve. An actionable libel cannot be created out of nothing."

The head of a college is such a public man that bona fide comment on his moral character, based on sufficient justification, is not actionable. Lebreton v. Elie, 31 L. C. Jur. 54, wherein the plaintiff sued to recover as for libel for statements made of him by the defendant, a taxpayer, urging that the plaintiff should be discharged as head of a college because of his immoral character. The court said that considering the shamelessness which the plaintiff had been proved to have shown on the subject of the animals of his farm and their reproduction, his lack of respect for pregnant and confined women, the licentious conversations which he held frequently, not to say habitually, conversations which would be shocking in the mouth of a layman but which become revolting in that of a clergyman and educator of the youth, these facts, which had spread rapidly in the public of La Baie and had been related to the defendant, constituted for the defendant in his capacity as the father of a family and a taxpayer a valid reason for opposing the engaging of the plaintiff by the commissioners of schools and justified him in saying in support of his opposition that which he had said against the plaintiff.

The character of a school teacher is of vital interest to the public, and comment on the character of a teacher by patrons of the school or other citizens, seeking the removal of, or to prevent the appointment of, that teacher, is conditionally privileged. Hoover v. Jordan, 27 Colo. App. 515, 150 Pac. 333; Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, 30 L.R.A.(N.S.) 200; Spears v. McCoy, 155 Ky. 1, 159 S. W. 610, 49 L.R.A.(N.S.) 1033; Malone v. Carrico, 16 Ky. L. Rep. 155; Wieman v. Mabey, 45 Mich. 484, 8 N. W. 71, 40 Am. Rep. 477; Harwood v. Keech, 4 Hun (N. Y.) 389; Decker v. Gaylord, 35 Hun (N. Y.) 584; Nolan v. Kane, 7 Ohio Cir. Dec. 520; McIntire v. McBean, 13 U. C. Q. B. 534. See also Vallery v. State, 42 Neb. 123, 60 N. W. 347. In Tanner v. Stevenson, supra, the court said: "Considering the case, then from

the standpoint that Tanner was acting merely in his capacity as a good citizen, interested in the welfare of the public schools of the state, let us see what his rights and privileges were. Upon this point we are of the opinion that he or any other good citizen of the state who has knowledge affecting the moral character of an applicant for a teacher's certificate may in good faith, based upon reasonable information, communicate what he knows to the person or board to whom the application is made or convey it to trustees who contemplate employing the person in the public schools, and in so doing he will be protected, unless it can be shown that he was actuated by express malice. This privilege finds ample support in the conviction that it is of the highest importance to the youth of the state who attend the public schools that their teachers shall be persons of good moral character. A person not of good moral character, holding the close and confidential relations to children that teachers do, has opportunities without number to poison the mind of the child at its most impressionable age and make a lasting influence for evil upon those put under their care. Outside of the home there is no person who has so much to do with inculcating in young minds sentiments of virtue and honor as the teacher. The state is deeply interested in the moral training and education of all her children, and is vitally concerned that they shall be brought up under clean and good influences, so that they will grow into men and women with pure ideals and high aspirations. In the welfare and usefulness of the common school system every citizen of the state should be personally interested. Whatever hurts the system in one place in the state injures it in a more or less degree in all other parts of the state. It is a piece of machinery in which every individual in the state is a part. . . . And so any good citizen, in good faith and upon reasonable grounds to believe that what he writes or speaks is true, if free from malice or ill will and actuated solely by his interest in the common schools, may safely bring to the notice of those who hold any place as officials in the system any information that will enable them to perform with more efficiency their duties, and he will be protected as coming within the scope of qualified privilege, although the communication may be false as well as *prima facie* libelous. But if the person making the publication is prompted by actual malice or ill will towards the person concerning whom it is written or spoken, then the fact that it was believed to be true, or the fact that it was made in good faith, or the fact that it was made under circumstances that except for this notice would make it privileged, will not be allowed to save the person making the publication from the consequences of his act." In *McIntire v.*

McBean, 13 U. C. Q. B. 534, it was said: "We look upon this case as one of very great importance in a public point of view. Nothing can be of more consequence to the community than that the teachers of youth should be men of temperate habits, and in other respects of good moral character. We know that there is a disposition in many people to be indulgent in the notice they choose to take of the vice of intemperance, so long as the person subject to the habit keeps within any tolerable bounds. Men are seen to be employed and trusted in almost every description of business who are notoriously intemperate, provided they have so much control over themselves as to be sober at times. Whether this disposition to overlook what is something worse than mere infirmity be fortunate or unfortunate, there is one thing very clear, that the instructors of youth in our public schools are required by positive law to be men of strictly temperate habits and good moral character; and no one who thinks at all upon the subject can doubt that it may have a most pernicious effect upon the character of young persons, if they see a person who is in authority over them, and to whom they look up for instruction and example, intoxicated in school while he is in discharge of his duty, and scarcely less pernicious as an example if they should see him habitually intoxicated while he is out of school, for in either case it must be destructive of discipline, by diminishing their respect for their master. One cannot but admit most readily that the parents of any children who have the misfortune to be placed under such a teacher, or any other of the inhabitants of the school division who are rated to the support of the school, are doing a commendable thing when without loss of time they bring any such case under the notice of the proper authority, in order that the public evil may be redressed; and if, under an erroneous impression, they should happen to address their complaint to the wrong quarter, they are safe from any prosecution at the instance of the party of whom they are complaining, so long as it appears that the representation was well founded, or that they had good reason to believe it was, and that they acted in sincerity and good faith, not maliciously and without just cause or excuse. We do not wish it indeed to be understood that any inhabitant of the province, even though he should have no interest in that particular school district, would not be regarded as privileged in making a communication of this nature to the proper quarter, if done in a proper spirit, and for the purpose of preventing a public evil. It is not necessary, however, to go into that question."

This privilege applies to a petition for the removal of a school trustee. *Morah v. Steele*, 157 App. Div. 109, 141 N. Y. S. 888.

And the qualified privilege likewise attaches to comment on the character of a teacher, by a superior or superintendent or by a member of the school board, made in an official connection. *Barry v. McCollom*, 81 Conn. 293, 70 Atl. 1035, 129 Am. St. Rep. 215; *Rausch v. Anderson*, 75 Ill. App. 526; *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, second appeal 23 Ind. App. 305, 51 N. E. 497; *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L.R.A. 852, *Galligan v. Kelly*, 31 N. Y. S. 561, 64 N. Y. St. Rep. 197. See also *Barth v. Hanna*, 158 Ill. App. 20.

But there is no privilege to attack the character of a school teacher and to publish the attack to the community in general. *Harwood v. Keech*, 4 Hun (N. Y.) 389.

c. Other Classes of Persons.

If an employer of workmen causes to be printed articles which picture him as a model employer and a benefactor toward his employees, he so brings himself into public attention that he becomes not only the object of the commendation which he seeks, but of criticism and adverse comment, and such comment is not actionable if fair and based on facts substantially true. *Reg. v. Brazeau*, 3 Can. Crim. Cas. (Quebec) 89.

The manager of an opera company is such a public man that his acts in the conduct of the company may be subjected to fair comment which will be privileged, only in so far, however, as it confines itself to the acts of the manager, but will not be privileged if it goes further and attacks his private character and motives. *Fry v. Bennett*, 5 Sandf. (N. Y.) 54.

But an officer in a private mining company is not such a public man as to bring comment on his acts within the foregoing rule. *Edwards v. San Jose Printing, etc. Soc.* 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

And an insurance agent is not one in whom and in whose character there is such a public interest as will give a privilege to comment on him. *Morse v. Times-Republican Printing Co.* 124 Ia. 707, 100 N. W. 867, wherein the court said: "The utmost extent to which these cases go is that where a person, knowing or honestly believing that a candidate for public office is guilty of conduct affecting his fitness for the position to which he aspires, communicates that knowledge or belief to the electors whose support the candidate seeks, acting in good faith in the discharge of his duty to the public, the communication is privileged—a doctrine the correctness of which we need not now consider. But there is no moral or legal duty resting upon any person to publish to the world defamatory matter affecting the character or reputation of one whose only relation to the public is that of a private cit-

izen in the pursuit of a lawful private business; and if one assumes the responsibility of proclaiming such matter from the housetops, or through the public print, the law affords him no defense except upon proof of the truth of the publication. An insurance agent as such is not a public officer, nor is his character a matter of general public interest, except as the public has an indirect interest in the private character and conduct of every member of society, but this interest is not sufficient to invoke the privilege of which we are speaking. To hold otherwise would be to destroy at one sweep the effectiveness of all law against slander and libel."

A physician is not, by reason of the public nature of his profession, such a public person that his character and abilities may be subjected to comment as a matter of public interest. *Sandwich v. Cowper*, 4 Sask. L. Rep. 12, 17 West. L. Rep. 1; *Rood v. Dutcher*, 23 S. D. 70, 20 Ann. Cas. 480, 120 N. W. 772. See also *Marcotte v. Bolduc*, 30 Quebec Super. Ct. 222. And he does not become a public person within the law of fair comment, simply because he advertises himself as a specialist in the treatment of certain diseases. *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 Ann. Cas. 480, wherein the court said: "However, the more important question is whether newspaper articles concerning the professional conduct of a practicing physician should be regarded as privileged communications merely because of the relation of the physician as such to the general public in the territory to which his practice extends. So far as applicable to this question, a privileged communication is defined by our civil code to be one 'made, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent.' Rev. Civ. Code, § 31. This court has held that this definition embraces newspaper articles relating to the official conduct of public officers and candidates for public office. *Boucher v. Clark Pub. Co.* 14 S. D. 72, 84 N. W. 237; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Ross v. Wood*, [14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746]. Does it also embrace newspaper articles relating to the professional conduct of physicians? We think not. The relation of a public officer to the public is substantially different from that of the physician. All are or may be affected by the official conduct of the former, and therefore are interested in any communication in relation thereto, while only such persons as desire to employ the latter are interested in communications relating to his professional conduct. Hence neither the proprietor of a newspaper nor any other person owes any duty to give informa-

tion concerning the same unless requested to do so by someone desiring to employ the physician. Indeed, no reason exists for extending the presumption of innocent motive to false statements regarding a physician which would not apply with equal force to a minister of the Gospel, an attorney at law, a banker, merchant, or other person whose vocation involves voluntary transactions with people generally in the community in which such person resides. Therefore the article involved in the case at bar should not have been regarded as a privileged communication, and the circuit court's instructions on the subject clearly were erroneous."

2. COMMENT ON CRIME OR CRIMINAL CHARGE.

a. *In General.*

It is within the qualified privilege of a newspaper to publish in good faith as current news all such matters as involve open violation of law or public misconduct such as justifies police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of a crime, even though the publication may reflect on the actors and tend to bring them into public disgrace or contempt. *Washington Post Co. v. Wells*, 27 App. Cas. (D. C.) 495; *Tilles v. Pulitzer Pub. Co.* 241 Mo. 609, 145 S. W. 1143; *McGeary v. Leader Pub. Co.* 52 Pa. Super. Ct. 35. In *Tilles v. Pulitzer Pub. Co.* supra, it was held that the defendant was privileged in publishing an article commenting on the violations of laws against race track gambling which at the time were of intense interest to the public, and in saying in that comment that "these men [race track bookmakers] are engaged in the commission of an open felony and the owners of the race track [the plaintiff and others] are equally guilty with the bookmakers under the statute." The court said: "Defendant contends that the matter published is privileged. It is urged that action was being taken by both the executive and legal departments of the state against the conduct of the Delmar Jockey Club. That the whole matter was of extreme public interest and for that reason the defendant was justified in publishing what the governor and attorney general said about the situation. To our mind there is much substance in this contention. The law under which the plaintiff and others, through the corporate entity of the Delmar Jockey Club, had been acting, had been repealed. Its repeal was effective June 16, 1905. It would seem that the Delmar Jockey Club was loath to give up the privileges and emoluments theretofore enjoyed. The situation had become so acute that the governor of the state had publicly indicated that the militia of the

state would be used to suppress gambling, if such existed at the Delmar race track. Not only so, but the governor had called upon the attorney general and held conference with him as to the enforcement of the law. It was upon an occasion of this kind that the article was published. The article truthfully represents the expression of the governor and also the expressions of the attorney general. Some quibble is made that the language quoted from Attorney General Hadley is not his language, but the evidence shows that it is substantially reported as by that official stated. The evidence discloses that the place at the race track would accommodate five thousand or more people and that it was generally filled. These visitors no doubt were from all parts of the state, as well as from other states. The governor of the state had investigated the facts and the attorney general and his assistant had likewise investigated the same. Conferences between these officials were being held, and contemplated action was pending. The public press had been for some time discussing conditions at Delmar race track. If the law was being violated, and gambling permitted, the public had an interest in knowing the facts. If contemplated action of any kind affecting this place of public amusement was about to be taken the public was entitled to know of such contemplated action. . . . Under these circumstances, we think that there was a privilege or at least a qualified privilege in the publication of the article containing this opinion of the chief law officer of the state."

A newspaper is privileged to publish the actual facts as to the commission of a crime, and the facts as to the arrest and charges made against a person suspected of the crime, provided the article does not go farther than a mere report of the news by making charges, directly, or by inference, insinuation, or assumption, that the person arrested is guilty of the crime. *Whitney v. Janesville Gazette*, 5 Biss. 330, 5 Chicago Leg. N. 469, 29 Fed. Cas. No. 17, 590; *McClure v. Review Pub. Co.* 38 Wash. 160, 80 Pac. 303. But if the account goes beyond a mere narration of the transaction recounted and makes injurious reflections on the private or business character of a party to the transaction, it is actionable, if untrue. *Whitney v. Janesville Gazette*, 5 Biss. 330, 5 Chicago Leg. N. 469, 29 Fed. Cas. No. 17, 590. In *McClure v. Review Pub. Co.* 38 Wash. 160, 80 Pac. 303, an action for libel alleged to be contained in a newspaper report of the arrest of the plaintiff on a charge of burglary, the plaintiff having been afterwards released on failure of proof that she was the person wanted, the court said: "It would be profitless to enter into a minute analysis of any or all of these articles. The law of libel is well understood. The only question

to be determined is whether there has been a sufficient charge of crime here to constitute the articles libelous. It will be seen, by a perusal of the articles, that there was no statement on the part of the newspapers of whether or not the said plaintiff was guilty of the crime with which she was charged; nothing which can be construed as imputing to her the commission of the crime; but that it only purported to be a statement of the acts and theories and representations of the officers of the law in relation to the pursuit, arrest, trial, and acquittal of the plaintiff; and while undoubtedly certain expressions in each of the publications, if construed without relation to the rest of the articles in which they appear, would be libelous, yet, if construed as they must be with reference to the whole text, the libelous character cannot be established. The articles are undoubtedly qualifiedly privileged. That being true, they are not libelous per se, and no express malice being alleged, and there being nothing in the articles themselves, or in the circumstances surrounding their publication, to indicate malice—the desire evidently being only to publish sensational news in a sensational and somewhat flamboyant and embellished style, the publishers are not legally responsible in damages.”

This privilege, however, does not extend to the gratuitous dragging in of the name of one not charged with the crime, *Washington Post Co. v. Wells*, 27 App. Cas. (D. C.) 495; or to the repeating of pure suspicions connecting the name of a person with the commission of a crime, *Haynes v. Clinton Printing Co.* 169 Mass. 512, 48 N. E. 275; or to garbled extracts and false reports, *Arnold v. Star Sayings Co.* 76 Mo. App. 159.

When a newspaper publishes an article as current news charging that a person has been arrested for, or in connection with, an indictable offense, in addition to showing that the matter was one of public interest and that it therefore had one element of qualified privilege, the newspaper must further show that there was reasonable or probable cause for the charge. *McGeary v. Leader Pub. Co.* 52 Pa. Super. Ct. 35, wherein the action was based on a news item imputing to the plaintiff the crime of kicking a pregnant woman causing the death of the unborn child. The court said: “So far as the question of privileged occasion is concerned, there is little difficulty. It is within the bounds of legitimate journalism for a newspaper to publish as current news all such matters as involve open violation of law or public misconduct of such character as justifies police interference, even though the doing so may reflect upon the actors and thus tend to bring them into public disgrace or contempt. . . . But in such case it is not enough

that the occasion supplied on element of the immunity of privilege, and that that privilege was not exceeded by the manner of publication; it is still incumbent on the defendant to prove that he has reasonable or probable cause.”

Therefore, although a newspaper may chronicle and comment on the arrest of a person charged with crime, if to the fact of arrest and the fact of the charge there are added by way of comment words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact of the actual arrest on the charge stated is no justification for the words imputing guilt, and they are libelous and actionable. *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410.

It is actionable libel for a newspaper to publish a news item falsely charging a person with the commission of crime, and such a publication is not privileged though it is made without express malice and in honest belief of its truth. *Edwards v. Kansas City Times Co.* 32 Fed. 813; *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241; *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423; *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Mallory v. Pioneer Press Co.* 34 Minn. 521, 26 N. W. 904; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N. Y. S. 1089; *McGeary v. Leader Pub. Co.* 52 Pa. Super. Ct. 35; *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652; *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476. In *Cox v. Strickland*, supra, it was held that a newspaper had no privilege to charge a person with being connected with acts of arson in the county on the ground that he had been accused of having been connected with such acts in another county. The court said: “The right to publish through the newspaper press such matters of interest as may be properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for so doing than the mere publication of the news. But false assertions, when they impute the commission of crime, are actionable; and when not based upon any facts legally tending to prove the crime imputed, the publication cannot be said to be privileged. It will not do to say that such a publication was made with reasonable care, however good the motive may have been.” In *Mallory v. Pioneer Press Co.* 34 Minn. 521, 26 N. W. 904, the court said: “It is claimed that the publication was privileged because made in good faith, as an item of news, and also because it was in aid of legal proceedings for the arrest of a person charged with crime. Upon neither

of the grounds thus suggested can the defense of privilege be sustained. The right to publish, through the newspaper press, such matters in interest as may be thus properly laid before the public, does not go to the extent of allowing the publication, concerning a person, of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose to publish the news." In *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N. Y. S. 1089, it was held that there was no privilege in a newspaper to publish a speech by a public officer in which the latter accused a newspaper owner of being a forger and falsifier although the facts on which the charge was made were fully set out and were not sufficient to constitute the crime of forgery.

Although there is a qualified privilege for a newspaper to comment on acts which amount to a public offense or crime, there is no such privilege to comment on the domestic occurrences of a private household, so long as they do not rise to the magnitude of crimes or breaches of the peace. *Com. v. Murphy*, 8 Pa. Co. Ct. 399; *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 45 Pac. 1097, 35 L.R.A. 611. In the case first cited, it was held that a newspaper article accusing a father of cruelty in the treatment of his seventeen-year old daughter was not privileged. The court said: "The subject-matter is not one proper for public information and discussion. Subjects that are proper for public information and discussion are only those in which the community has a public interest. The fact that a large number of people may have a private interest in the matter will not make it a matter proper for public investigation. If it were once admitted that every person, including those who publish newspapers, and who have not one particle more right than any other citizen, can penetrate into every man's house and family, and lay open to the public view the private griefs, passions, infelicities and dissensions, the petty wrongs and worriments of every household, then the public press, from being one of the strong supports of our liberties and brighteners of our homes, will become an instrument of oppression beyond any that has ever been known and will darken men's lives with constant dread of disgrace or public ridicule. Comment and disclosures upon such matters deserve no more respectable name than that of meddling gossip, utterly unjustifiable because it panders to a morbid curiosity of however great a number of persons. Nothing that happens in the privacy of a man's family, short of a crime, that calls for public interference, can justify the publicity of accusations or comment in the columns of a newspaper. The proper method of righting any minor wrong is by the legal course of

information lodged with a magistrate whose duty it is to look after such matters. The father of a family has an undoubted right to dictate with whom his child shall associate and with whom not; and he has an undoubted right to enforce obedience to his orders by such discipline as he may, in his honest judgment, think necessary, whether it be by chastisement by corporal punishment, or by confinement to the house or a particular portion of the house. Whatever may be said of the good taste or propriety of whipping a girl between seventeen and eighteen years of age, the fact remains, that so long as she is under twenty-one, and in his family, he has the legal right, if he thinks necessary, in his honest judgment, to do it, and he can be called to account only where he abuses the right in a flagrant way." In *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 45 Pac. 1097, 35 L.R.A. 611, it was held that a newspaper was not privileged to publish an article relating wholly to the private acts of a family, in the cruel treatment of a child, the court saying in the course of the opinion: "Counsel for the respondent upon the rehearing insisted that the article alleged by plaintiff to be libelous, and fully set forth in the former opinion, is of the class termed 'privileged publications,' and therefore no action for its publication can be maintained, in the absence of an allegation of malice in fact, and proof thereof. This point was not passed upon in the former opinion, and if tenable, it would be necessary to consider the nature and extent of the privilege, whether absolute or qualified, and the effect upon damages, whether to bar recovery entirely or otherwise. But it is unnecessary to decide these questions, for the reason that an extended examination of standard text books and of the cases on this branch of the law of privileged communications fails to reveal any authority for extending the doctrine relied upon to a case where the alleged libel is based upon charges against a private individual acting in a private capacity, or, as in this case, a family acting in private matters, notwithstanding that the public might have much interest in the publication as a matter of news. The publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news."

b. Rule in Michigan.

The rule granting conditional privilege to bona fide comments made in the public interest in connection with the exposure of wrongdoing and crime, is not recognized in Michigan. *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8, wherein the court said: "The doctrine that the publication by a newspaper of false and defamatory matter respecting an indi-

vidual may, by reason of public interest in the exposure of wrong doing and crime, be so far privileged as to relieve the publisher from responsibility, or that it is a sufficient answer, to an action based upon such publication, to prove that the publisher had reason to believe the allegations to be true, or that there was probable cause to believe them to be true, or that he, acting in good faith, supposed them to be true, has not been recognized in this state. On the contrary, it has repeatedly been held that publishers, in this class of cases, must be held responsible for the truth of what is published."

But, although in that state the circumstances of the publication, honesty of purpose, good faith, the sources of information and the reliability of such sources, and belief in the truth of the allegations made, will not give a qualified privilege, they are admissible as evidence to rebut the presumption of malice and to reduce the damages. *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8. In *Scripps v. Foster*, 41 Mich. 742, 3 N. W. 216, the court said: "In this state it is the settled doctrine that in an action like the present, where the plaintiff seeks to recover exemplary damages, the defendant on the trial may introduce facts and circumstances tending to show that he acted in the matter complained of in good faith, and that after using all proper precaution he had good reason to believe that the facts as published were true. In considering the question of good faith and reasonable belief for the publication of such an article as the one complained of, evidence of the publication thereof, upon the assurance of a third person that the facts stated therein are true, when standing alone would not be so likely in many cases to carry conviction to the mind of the ordinary juror, as though accompanied by previous facts and circumstances pertaining to the same subject-matter, and the tendency of which led in the same direction. In many instances it would be very difficult indeed to satisfy a juror that a distinct wrong had been done by a particular individual, or that any one could have had reason to believe such a person capable of committing such an act, upon proof of the direct evidence relating thereto. The reputation of the individual complained of and the nature of the act charged may be sufficient to overcome what in the case of some other individual might be considered more convincing proof. And yet in either case, when considered in the light of the surrounding circumstances, the previous acts and utterances of the person charged would be sufficient to remove all reasonable doubt upon the subject."

It has been held in Michigan that there is no privilege, in comment, to make a false statement of fact imputing the commission of

a crime. *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Peoples v. Detroit Post*, etc. Co. 54 Mich. 457, 20 N. W. 528; *McAllister v. Detroit Free Press Co.* 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8. In *Peoples v. Detroit Post*, etc. Co. *supra*, it was held to be actionable libel to publish of the plaintiff that he had murdered a girl, that he had committed fornication with her, that he had had a confederate steal a sack to put the body in, that he had given his wife to understand that the girl had been murdered to get rid of her, and that his wife had left him because he confessed adultery. The court said: "There can be no question at this late day but the public newspaper has the right (whether it shall be regarded as its duty or not) to discuss those matters which relate to the life, habits, comfort, happiness and welfare of the people. In doing so it may state facts, draw its own inferences and give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages can be shown; but false assertions when they impute the commission of crime are actionable, and when not based upon any facts legally tending to prove the crime imputed the publication cannot be said to be privileged, and such I think is shown to be the case in this record so far as it is sought to connect the plaintiff with the alleged murder. It will not do to say that such a publication was made with reasonable care, however good the motive may have been. The public welfare never required any such reckless disregard of the sacred right of enjoyment of a pure and spotless reputation, which no amount of property can command and which it often takes its possessor a lifetime to secure." In *McAllister v. Detroit Free Press Co.* 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, an action was brought for libel alleged to be contained in the following two articles of news: "A week ago, it will be remembered that a safe was cracked in Bothwell, and that \$2,000 in money and about \$30 worth of stamps were stolen. Yesterday two hard-looking citizens canvassed the entire business part of Windsor, in the effort to sell stamps at half price. They at last tried to sell the stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found \$30 worth of stamps. They gave their names as Edward H. McAllister and Lester B. French. Chief Bains will hold them to await developments." "Edward H. McAllister and Lester B. French, the men who were arrested on Saturday for trying to dispose of stamps at half price, have been released, as there was no evidence to show that they are the men who are wanted at Bothwell." It appeared that the

articles were untrue in several particulars and the court held that there was no privilege, saying: "It requires but a glance to discover a vast difference between the actual facts of this transaction, and the story as published. A true account would have shown the arrest of two reputable American citizens for the offense of selling stamps without a license, discharged by the magistrate of such offense as soon as the complaint was read, because the postmaster was satisfied that they meant no intentional violation of the law, but kept by the chief of police of Windsor for three hours afterwards, and treated by him with gross indignity; that he had suspicions that they were connected with the Bothwell robbery, because of the stamps and gold coin found upon their persons, but he refused to let them communicate with their friends or counsel in Detroit, and did not release them until he was obliged to by the order of the magistrate, although he had learned that they were all right—in short, an inexcusable outrage by the chief of police upon honest men, guilty of no crime, and innocent of any intentional wrong. The publication shows a couple of tramps, trying at every business place in Windsor to sell postage stamps at half price, having the same amount in their possession that was stolen at Bothwell the week before. At last they try the postmaster, who has them arrested. 'Chief Bains will hold them to await developments.' Before or about the time it was handed to the city editor, who, it seems, took no steps to ascertain its truth, these men had been discharged; and, when it was being read by people on Sunday in the Free Press, French and the plaintiff were at home in Detroit, as free from any restraint of the law, and from any suspicion of wrongdoing, except for this article, as the reporter who wrote it. If it were not possible, as contended, that a true statement of the whole of the facts could have been published at that time, certainly a little inquiry on Monday afterwards by this same reporter might have set the matter aright. But it was a matter of so small consequence to him that 'it had slipped his mind,' and he contents himself with the statement of a patrolman on the streets of Windsor, and the paper on Tuesday has an item that French and the plaintiff have been discharged because there was no evidence that they were the men wanted at Bothwell. In other words, it is published, not that they were discharged because their innocence was established, which was the fact, but because the charge or suspicion that they were concerned in the Bothwell robbery was 'not proven.' If the reporter had contented himself with stating that these men had been arrested, and a complaint made against them for selling stamps without a license, and that the fact of their offering to

sell the stamps, and having them in their possession when searched, led the chief of police to think that they might be connected with the Bothwell robbery, and that Chief Bains was holding them to await developments, it might have been privileged, although not true at the time it was published, and not the whole truth at any time, which the reporter had the means and opportunity to discover, but did not. But as the case stood, it was not privileged, and the only question for the jury was one of damages."

3. COMMENT ON OTHER MATTERS OF PUBLIC INTEREST.

The privilege of comment on matters of public interest extends to comment on property, as well as comment on the acts and conduct of persons, if the property is the subject of a public interest. *Eastwood v. Holmes*, 1 F. & F. (Eng.) 347; *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322. In the case first cited the alleged libel commented on certain statues purporting to have been exhumed from the Thames and to be antiquities, the comment declaring them to have been of recent fabrication. The court said: "But further, I am of opinion that this is no libel, for that it is protected by the privilege of fair discussion on a matter of public interest, it not appearing that it was malicious." In *Gott v. Pulsifer*, supra, the privilege was held to apply to an article published in a newspaper in humorous style purporting to expose as a hoax and fraud a colossal monument, the "Cardiff Giant," represented by its owner as being an antique.

The sanitary condition of cottages rented by the owners of a coal mining company to their workmen is a matter of public interest, and fair comment thereon is not actionable. *South Hetton Coal Co. v. North Eastern News Assoc.* [1894] 1 Q. B. (Eng.) 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. N. S. 844, 9 Rep. 240, 42 W. R. 322.

A proposal to the admiralty regarding the conversion of an old wooden line of battle ships of the navy into iron-clad turret ships, being a proposal concerning a vital question of naval policy, is a matter of public interest and fair comment thereon is privileged. *Henwood v. Harrison*, L. R. 7 C. P. (Eng.) 606, 41 L. J. C. P. 206, 26 L. T. N. S. 938, wherein it was said by Willes, J., writing for the majority of the court: "It was admitted at the trial, and upon the argument before this court, that the defendant acted in fact bona fide, and without malice; and no suggestion was made or evidence given of malice against the plaintiff at the admiralty or elsewhere; but it was insisted on the part of the plaintiff that the occasion was not a privileged one, and that, in spite of his

honesty and the absence of malice, the defendant was nevertheless liable, because the statement complained of was calculated, or might be thought by a jury to be calculated, to throw doubt upon the plaintiff's previous experience in the particular line of naval architecture upon which he assumed to give advice, which doubt (so far as it is expressed) constitutes the whole sting of the expressions complained of in the controller's letter. And the plaintiff insisted that good faith and absence of malice, however they might affect the amount of damages, did not justify or excuse the *prima facie* libelous matter. The learned judge, Brett, J., however, nonsuited the plaintiff, not upon the ground that the defendant was the Queen's printer, nor that he had acted in the ordinary course of business, nor that he had authority from a public department, nor upon the ground that the report was to be presented to parliament, and would at all events become public in a few days—all which palliations would, as was argued, have been insufficient; but upon the ground that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested—to state his own views and to advance those of others for the consideration of all or any of those who have a common interest in the subject; and that, whilst he does so, he has a privilege attaching to such right of free discussion, of the same character which has been held to attach in numerous instances in which liberty of speech has been allowed upon grounds of public and social convenience, where the speaker or writer and the person or persons addressed have had a duty or interest in common, the existence of which it held to rebut the inference of malice. . . . The principle . . . is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interest of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involved relevant comments condemnatory of individuals. . . . That decision necessarily involves the conclusion that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice."

Although one who makes a public exhibit of flowers in a floricultural show, making a bid for the award of prizes, subjects himself to fair comment and criticism on his exhibit the privilege so to comment does not extend to reflections on the personal character of the exhibitor. *Green v. Chapman*, 4 Bing. N. Cas. 92, 33 E. C. L. 288.

Whether, by petitioning the legislature to abolish quackery in the medical profession,

the petitioner lays himself open to the shafts of comment on his petition, qualifiedly privileged as discussing a matter of public interest, was left in doubt in the case of *Dunne v. Anderson*, 3 Bing. 88, 11 E. C. L. 43, 10 Moo. 407, R. & M. 287, 21 E. C. L. 440, 28 Rev. Rep. 591, wherein it was, however, held that whether such privilege exists or not, it does not extend to a matter which goes beyond the petition itself to attack the petitioner and accuse him of ignorance in his profession.

Where a medical practitioner inaugurates a wide campaign of advertisement claiming that he is possessed of a specific for the cure of a disease considered by the medical profession as quite incurable, his claims become a matter of public interest, and comment thereon is privileged if made honestly and in reasonable moderation, even though the language of the comment is vigorous. *Hunter v. Sharpe*, 3 F. & F. (Eng.) 983, 15 L. T. N. S. 421.

The efficacy of a widely advertised patent medicine is a legitimate subject of fair newspaper comment. *Willis v. O'Connell*, 231 Fed. 1004, wherein the court said: "Has not the defendant the right to question the efficacy of plaintiff's remedy—to expose it as a nostrum, if it be a nostrum? The plaintiff, on his side, informs us that he is spending large sums of money for advertising his remedy in the newspapers, and that he intends to continue this method for increasing the sale of the same. This he has a right to do, and the medicine may not be a nostrum; and it may be true that, if properly used in some cases, the medicine will prove of benefit to suffering men and women. In short, the plaintiff may be in every good sense rightfully earning such money; and the defendant may be endeavoring to injure, and may intend to continue to injure, the plaintiff in his right to accumulate a fortune by the sale of the medicine. But the plaintiff has questioned the right of the defendant to criticise the remedy, to make statements as to its therapeutic value; and the plaintiff has also questioned the right of the defendant to criticise the testimonials in laudation of his remedy, and, in connection with the criticisms of such laudations, to say something touching the personal history and habits of those who give such testimonials. May not a newspaper publisher expose, if he can, the plaintiff's medicine—if it be a quack medicine? May he not in good faith tell the public of the dishonesty and fraud practiced upon the public? Is there anything so sacred about proprietary medicines, or those who co-operate in a plan to further their sales and increase the profits of the vendor, that a newspaper man shall be required to cease publishing what he believes to be the truth, or cease to attack the business methods of medicine vendors, when and where he believes the co-operating testimonials, in the furtherance of the scheme

to sell such medicine, are sinister and not founded in truth? I think he may do so, but within the limits of the law which prescribes penalties, civil and criminal, for libelous publications." *Compare Patten v. Harper's Weekly Corp.* 93 Misc. 368, 158 N. Y. S. 70.

The work of an architect is a matter of public interest, and fair comment thereon, however mistaken it may be in point of artistic taste, is not actionable unless it is intemperate or malicious. *Soane v. Knight, M. & M. (Eng.)* 74, 22 E. C. L. 255, 31 Rev. Rep. 714, wherein it was said: "This publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case the censure is certainly strong, nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff."

The circulation and position of a newspaper are not matters of public interest, and a comment on the subject is not privileged if libelous. *Latimers v. Western Morning News Co.* 25 L. T. N. S. (Eng.) 44.

The methods employed in a public solicitation of subscriptions for an entertainment is a matter of public interest, and fair comment on such methods is not actionable. *Wiles v. Victoria Times Printing, etc. Co.* 11 British Columbia 143.

A trade circular, given such wide publication that it becomes a matter of public interest, is a proper subject of comment by a rival trading company, especially where the circular is written with particular reference to contracts of municipalities, and fair comment thereon without malice is privileged. *Winnipeg Steel Granary, etc. Co. v. Canada Ingot Iron Culvert Co.* 22 Manitoba 576, 22 West L. Rep. 387, 7 Dominion L. Rep. 707.

The publishing in a public journal of an advertisement makes it a matter of public interest to such an extent that it may be subjected to fair comment, and where the newspaper publishing a comment knows that the advertisement is going to appear in another paper, the fact that the advertisement commented on actually appears contemporaneously with the comment thereon, and hence

is not strictly public property when the comment is written and published, does not remove the privilege from the comment. *Graham v. McKimm*, 19 Ont. 475. In that case it appeared that the plaintiff had brought an advertisement to the defendant to be printed in the defendant's paper, that the defendant refused to publish it, deeming it unfit, whereupon the plaintiff stated that he would have it published in another paper; that the defendant thereupon published an adverse comment in his paper which appeared at the same time that the advertisement commented on appeared in the other paper. The court said: "The objection to the charge of the learned judge at the trial was that at the time the article complained of was written the plaintiff's advertisement had not become public property by having been published, and that the defendant was therefore not entitled to criticize it. I confess to having been strongly impressed upon the argument with this view of the matter, but further consideration has induced me to adopt as correct the view taken by my brother Falconbridge in his judgment. It is true that the advertisement commented upon had not been published at the time the article complained of was written, and that it is not identified in the article complained of as the article which appeared in the rival newspaper on the same day; but the identity of the advertisement actually published with that to which the comments related was not in fact disputed, and the defendant appears to have had ample reason for believing that it would appear in the other newspaper contemporaneously with his own article. It is not different in principle from a criticism upon a book the advance sheets of which had been shown to the critic with the information that the book was to be immediately published; if, in such a case, the criticism and the book had appeared simultaneously the author could hardly complain that the critic had not waited until the following day before publishing his remarks."

A petition to licensing commissioners praying them not to grant a liquor license to the plaintiff because his tavern was one of the worst drinking places in the county, was disorderly, and because the plaintiff was himself very much given to drinking, has been held to be a publication regarding a matter of public interest and the comment contained therein was held to be the subject of qualified privilege and not actionable in the absence of malice. *Wilcocks v. Howell*, 5 Ont. 360.

Fair comment on the character of the contracting work in the erection of a public building is conditionally privileged as being comment on a matter of public interest. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446, wherein it was said: "Up-

on a careful consideration of the circumstances attending the publication of the article in question, as disclosed from the evidence offered at the trial, we feel warranted in the conclusion that the occasion was one that rendered the publication justifiable and privileged. The defendants were citizens, taxpayers and publishers of a newspaper in Bangor. The city building was then in process of construction. It had not been accepted by the city. There was indubitable evidence that the mason work was of poor quality and not in conformity to the contract; that the mortar used in the construction of certain parts of the building and the foundation walls was poor and lifeless and in many instances the bricks were loose, on account of the inferior quality of the mortar. The building was of a public nature in which not only the defendants but every citizen of Bangor was interested. It was a legitimate subject of criticism by those interested in its construction. The people have a right to know how their municipal affairs are being conducted; how the money which they have contributed by way of taxes is being expended; and they have a right to know how the duties of those whom they have intrusted with the expenditure of such money are being performed, and it is one of the privileges of newspapers to give the people this information; and if the information so given is true, or if the publishers act in good faith, without malice, believing it to be true, and have reasonable and probable cause for so believing, the law protects them."

Newspapers, it seems, are privileged to discuss the means which should be employed to prevent the spread of a contagious disease. *Scripps v. Foster*, 41 Mich. 742, 3 N. W. 216, wherein the court said: "It would seem as though the public newspapers of the present day had not only the right, but that it was their duty to take part in the discussion of those matters which relate to the health, welfare, comfort and happiness of the people. The wisdom and propriety of the action taken by the public authorities, and the means and instruments to be adopted to check the spread of a malignant disease would seem to be of sufficient public importance as to be deemed a matter proper for comment and criticism."

When an artist and illustrator submits his work to the public he subjects his work to comment and criticism and such comment is privileged so long as it confines itself to a fair criticism of the work and does not go further and attack the artist personally. *Outcault v. New York Herald Co.* 117 App. Div. 534, 102 N. Y. S. 685.

The privilege of fair comment on the work of a scientific investigator does not extend to an imputation that his investigations are a cloak for the gratification of lascivious de-

sires. *MacDonald v. Sun Printing, etc. Assoc.* 111 App. Div. 467, 98 N. Y. S. 118.

Where an attorney who had just successfully conducted a personal injury litigation, resulting in a large verdict, gave an interview to a newspaper which was published as a highly commendatory article, lauding the skill and ability with which the litigation had been conducted, it was held that he thereby so brought himself into public notice and so invited criticism that a privilege of fair comment and criticism on his conduct was given the public; and, the limits of fairness in such comment being only barely crossed if at all, it was held that a verdict for merely nominal damages rendered in an action for libel by the attorney against the publisher of the comment would not be disturbed. *Thompson v. Matthiasen*, 150 App. Div. 739, 135 N. Y. S. 796, wherein the court said: "If a newspaper should originate an inquiry into the relations between an attorney and his client and criticize his charges and his relations with his client, quite a different question would be presented for decision. But here an article was published which was inspired in part, at least, by the plaintiff concerning himself and the Holm action, and commending his conduct with respect to the case, and conveying the erroneous impression that he was actuated by charitable motives and had 'won' \$20,000 for his client, when in fact he was to receive one-third for his services, and it became a fair subject for public comment and criticism. There is, no basis upon which it can be said that the plaintiff was entitled to a substantial verdict, for it is not at all certain that he sustained injury by the article. It is peculiarly a case in which the verdict of the jury for nominal damages should not be disturbed."

It has been held that newspaper comment on the sanitary condition of the kitchen of a restaurant is not privileged by reason of the public interest in keeping such places clean and sanitary to protect the public health. *Wilson v. Sun Pub. Co.* reported in full, post, this volume, at page 442.

IV. Application to Particular Words.

1. QUESTION FOR JUDGE OR JURY.

Whether words spoken in comment on a matter of public interest are defamatory is a question sometimes for the court and sometimes for the jury. The rule is that if, when the whole comment is read and construed together, its meaning is so unambiguous as reasonably to bear but one interpretation, it is for the court to say whether that signification is defamatory; but if, on the other hand, it is capable of two meanings, one of which would be libelous and actionable and

the other not, it is for the jury to say, under all the circumstances surrounding its publication, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. *Dakhyl v. Labouchere* [1908] 2 K. B. 325, note (Eng.) 96 L. T. N. S. 399; *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410; *Whitney v. Janesville Gazette*, 5 Biss. 330, 5 Chicago L. N. 469, 29 Fed. Cas. No. 17,590; *Washington Herald Co. v. Berry*, 41 App. Cas. (D. C.) 322; *Morse v. Times-Republican Printing Co.* 124 Ia. 707, 100 N. W. 867; *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369; *Brinsfield v. Howeth*, 107 Md. 278, 68 Atl. 566, 24 L.R.A. (N.S.) 583; *MacDonald v. Sun Printing, etc. Assoc.* 111 App. Div. 467, 98 N. Y. S. 118; *Outcault v. New York Herald Co.* 117 App. Div. 534, 102 N. Y. S. 685. In *Commercial Pub. Co. v. Smith*, supra, the following item published in a newspaper was declared by the innuendo to have charged the plaintiff with being a murderer: "Murderer Arrested. Augusta, Ark., Feb. 10th.—Sheriff Marshall Patterson arrested Fred Smith, camped in a tent ten miles north of Augusta, on White river. Smith is wanted at Kennett, Mo., for killing old man F. E. Porch, the incentive being robbery. The state of Missouri offered \$300, the county \$200, and the citizens of Malden \$600, for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing." It was held that the trial judge should not have ruled as a matter of law that the words were libelous per se, but should have left it to the jury to decide whether the words had a defamatory meaning. The court said: "The publication here involved was not so free from reasonable doubt as to its meaning and signification as to justify the learned circuit judge in ascribing to it as matter of law the signification sought to be put upon it by the innuendo. There was room for the jury, taking into consideration the display line and all other parts of the dispatch, and all the circumstances in evidence, to conclude that it would only convey to the readers of the paper the information that the plaintiff had been arrested under the charge of being the person accused with the murder of Porch, and for whom a reward was offered, and that plaintiff had admitted that he was the person wanted by the sheriff who made the arrest, but that he denied that he was the murderer of Porch." In *Whitney v. Janesville Gazette*, 5 Biss. 330, 5 Chicago Leg. N. 469, 29 Fed. Cas. No. 17,590, the court said, charging the jury: "Whether the particular publication which is the subject of this inquiry is within the rules which we have laid down for your guidance, and therefore libelous, is a question upon which you are to exercise your judgment, and pronounce your opinion as a ques-

tion of fact. The whole article is to be taken together in determining the character of it. It sets out with an account of a serious affray, in which the plaintiff and one Tompkins were concerned, and which produced great excitement in the community of Janesville. The writer then says that this man Whitney (the plaintiff in this action) has figured rather conspicuously for some time past, to the disadvantage of the business interests of Janesville, and then proceeds to give an account of Whitney's dealings with S. C. Spaulding, Mr. Denell, W. L. Gookins and Tompkins, upon whom the assault was made, and after stating that Tompkins, while Whitney was absent, locked the store door, to prevent Whitney from packing up the goods until some sort of a settlement was effected, says: 'This was the occasion of the assault which produced great excitement for a time, as the sympathies of the public are with the victims of this professional swindler.' The article winds up as follows: 'Mr. Whitney is a resident of New York city, and has his headquarters on Broadway. We understand that his ways are not as light as are those of good and honest men.' The account given by the writer of the occasion and circumstances attending this assault and battery are not complained of, and the evidence relating thereto offered by the defendant was excluded by the court, as not pertinent to the issue. This account, as an item of local news, if correctly given, could not be complained of. It may be that Whitney may have been the aggressor in this assault, and may have violated the law, and behaved badly; but this did not authorize the writer to go outside of this transaction and compose an article reflecting injuriously upon Whitney's personal and business character unless the strictures were true. It is for the statements contained in the portion of the article that the plaintiff sues. Taking the whole article together, what does it mean, and what would men of ordinary intelligence understand by it? It is for the jury to say. Do the words used convey the meaning that Whitney was guilty of dishonest practices in his business dealings with the several persons mentioned? If so, unless they are true, the plaintiff has suffered, and is entitled to compensation for publication." In *MacDonald v. Sun Printing, etc. Assoc.* 111 App. Div. 467, 98 N. Y. S. 118, the court held it to be a question for the jury whether an article was libelous which charged that a scientific investigator "carried his enthusiasm for the investigation of abnormal femininity to the extent of entrapping young girls and foolish married women by means of a personal advertisement, leading them on to the disclosure of their most intimate affairs of the heart or of sexual propensities, sometimes by letter to him and sometimes at a personal

interview which he arranged and then publishing their confidences in a book advertised by him for sale at fifty cents a copy through a lock box in the Washington post office," and further charged, by insinuation, that he carried on measurements of school children because of a lewd desire for manual contact with girls of over fourteen years of age.

The truth of the facts on which a comment is based is a question for the jury, and if the comment is fair, on a matter of public interest, and based on what the jury finds to have been a truthful representation of facts, the words of the comment are not actionable. *Reg. v. Brazeau*, 3 Can. Crim. Cas. (Quebec) 89. In that case it appeared that the plaintiff, a cigar manufacturer, had discharged all his employees, later agreeing to hire them again at reduced wages; that he caused a gratuitous distribution of 100 turkeys to be made among them and caused this fact to be recorded in a complimentary fashion in the public press; that the defendant then published an editorial in which he accused the plaintiff of humbugging his employees, and showed that the plaintiff had made a saving of from \$1 to \$2 on the already low wages of his employees and added: "How many of you would like to be presented once a year with a turkey which cost you \$50 to \$100?" Leaving it to the jury to determine whether the facts alleged in the editorial were true, the court said: "If it is true, as alleged by the defendant in his plea of justification, and the court at this stage of the proceedings is bound to admit this allegation as true that Fortier himself caused the publication of the several articles in the daily press signalizing his great liberality towards his employees, in order to win to himself admiration and public sympathy thereby in his fight against the union and its members, it seems to me that the union and the defendant were quite justified in resorting to publicity for the purposes of their own defense. In placing himself before the public as a public benefactor and a model master, the complainant has provoked criticism as well as admiration. If the criticism is proved to be unfair, malicious and founded on false representations, his vindication will be the more complete. If on the contrary it be fair and reasonable, and founded on a statement of facts substantially true, the complainant will have to bear with it. *Odgers* (on *Libel*, 3rd ed. page 56) says: 'Whoever seeks notoriety or invites public attention is said to challenge public criticism, and he cannot resort to the law courts if that criticism is less favorable than he anticipated.'"

In *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356, 22 L.R.A. (N.S.) 730, the libelous character of the following article published in certain newspapers was held to be for the jury: *Ann. Cas.* 1917B.—28.

"The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance—the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless articles. Pure vanilla wholesales at about \$12 per gallon. What can one expect for \$2.75? He who buys at this price is either criminally stupid or deliberately dishonest. . . . The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whisky. . . . A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character. It is the attitude of the local board of health to prosecute to the limit any such flagrant violation of public confidence and physical welfare."

2. WORDS HELD ACTIONABLE.

In *Green v. Chapman*, 4 Bing. N. Cas. 92, 33 E. C. L. 288, the following publication regarding an exhibitor in a floricultural society was held to be actionable as exceeding fair comment by making aspersions on private character: "Sir, you will recollect a mean shabby fellow, named Green, making a great noise about a fifteen shilling prize, and using gross language because he did not receive it directly. The name of Green is to be rendered famous, I believe, in all sorts of dirty work. The tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges more honest than usual; and Riley, Dunn and he, (meaning the plaintiff), being little kings of growers among the Bakers' Arms squad, have formed a new society in which none who can show against them will be allowed to compete. This is the way in which floriculture is to be supported in the East. Societies ought to obtain the list of members of this new club of amateurs, and carefully exclude from their ranks the knaves who promote, and the fools who join, such a despicable gang. Yours, &c.' If Green be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, all we have to say is, that it is a pity two such beggarly souls could not be crammed into the same carcass. Dunn and Riley ought to have known better."

In *Ryan v. Wood*, 4 F. & F. (Eng.) 735, the following publication regarding a musical critic was held to be actionable, as exceeding the bounds of fair comment: "Blackmail in Journalism. The ignoble army of charlatans boasts a goodly muster of rank and file. Its regiments are strong, its companies of

the maximum force, its officers adroit, and its men many. Several brigades and divisions compose it; there is, for instance, the brigade of Art Charlatans, the brigade of Medical Charlatans, the strong force of Divinity Charlatans, which serves as heavy artillery. Not only are the thousands of quacks and empiricists pressed into its ranks, but all the men who hold false positions; all who give themselves out to be greater than they are; all who trade on a pseudo-reputation; all who debase a fine, abstract principle (such as honesty, for instance) into a vendible commodity; all, in short, who sell their consciences every day for pounds, shillings, and pence. It is of these soldiers—and on this earth legions and maniples of them exist—that the ignoble army of Charlatans is composed. There are certain subdivisions of it which concern us nearly: certain officers holding high commissions in that army—in the regiment of Musical Empirics, and in the company of interested critics—who concern us nearest of all. When the lights of honest publicity are turned down and conscientious men are sleeping unconsciously, these creatures hold high revelry; they fatten and batten on the food provided for better purposes. Our readers will have detected to what principle (or rather want of principle) our remarks point. When a few weeks ago we held up Mr. Howard Glover as the type of a class, we regret to say we did not impale the only representative of that class. True, he is a shining light of his species, but he is not the only one. He has many imitators, even in journalistic literature. The master spirit has retired; the great giver of monster concerts has announced that the one he has given this season is his last, and an honest world gives him absolution, and leaves him in peace. But when Glover sleeps in the tomb of the Howards, behold Desmond Ryan arises in his stead. The latter is a true disciple, trained in the immemorial school. He is a little journalist with a soul for big concerts. Of no earthly account in this thronged world of London, where stronger, better men 'choke every roaring gate,' he yet manages to hold some moral magnifying glass before him, so that the weak-eyed are astonished at the magnitude of his influence. Were that influence tested, it would be found that though he dipped his pen in gall and fire, and though a hundred Desmond Ryans of the same calibre helped him, they could not keep down true merit, or deck with laurels the brow of incapacity. And yet certain weak, foolish, good-hearted artists think such men are powerful, and are glad to keep them in good humor. So when this Desmond Ryan conceives money would benefit him (and when will money not?) he goes, like his colleague and exemplar, to these plastic singers and

musicians, and the poor creatures are ready to lend their art and hearts and souls to obtain the critic's smile. Then the great concert comes off, and the critic nets the proceeds, and the honor of journalism is shamed. If the artists resisted, what could the critic do? What is his favor or his enmity worth? A paragraph read by perhaps two hundred persons, and remembered by ten. The great organs of public opinion are, be it gladly said, too honorable as a rule to use any such coercive and self-interested practices; the mighty dailies of London (with, perhaps, two shameful exceptions) are written by conscientious men. If they praise, their eulogy is deserved; if they blame, you may feel hurt, but you must respect. It is the small peddling fry, the hangers on to the cause of literature, the writers for a quire of circulated copies, whose humor is inscrutable, whose criticism is trivial, and whose power is nil—that do the things of which their better brethren are ashamed. The laxity of those imposed on allows this system of blackmail to flourish. A popgun is presented at their heads, and they suffer their pockets to be rifled. But let this easy negligence continue, and we shall see the blackmail extend too; for if artists can be written up or written down by the highwaymen of the press, why not men of all callings? A little more of this, and we shall have our Desmond Ryans getting gratuitous gloves, and boots, and joints of meat, by force of a paragraph levelled at their hosier, shoemaker, and butcher. Shall brigandage in the British press continue? Will not our brethren of the daily journals aid us indignantly to denounce it, and at the same time to open the eyes and encourage the hearts of the pusillanimous artists?"

It being left to the jury whether there were fair grounds for the imputation that the plaintiff had taken money for a fraudulent exhibit, it was held, in *Morrison v. Belcher*, 3 F. & F. (Eng.) 614, that there were no such fair grounds for the imputation, that it was not privileged therefor, and nominal damages of one farthing were awarded for the following libel: "Sir,—In your impression of this day you ask, 'Who is this Zadkiel?' and 'Are there no means of ferreting him out and handing him up to Bow-street under the statute as a rogue and vagabond?' I will aid you on the scent by first informing you he stands as a lieutenant on the Navy list, seniority 1815; next, that he has his admirers about Greenwich Hospital, who fancy him a prophet A 1; and that his mischievous propensities are not solely involved in that foolish publication, Zadkiel's Almanack. More, I think he gave his name not long since as president of some peculiar society connected with astrology (R. I. Morrison). A friend reminds me that 'the author of Zadkiel is the celebrated

crystal globe seer, who gulled many of our nobility about the year 1852.' Making use of a boy under fourteen, or a girl under twelve, he pretended, by their looking into the crystal globe, to hold converse with the spirits of the Apostles—even our Saviour, with all the angels of light as well as darkness, and to tell what was going on in any part of the world. Drawings were made of the objects seen in these visions. One noble lady gave one of these boys 5l. to give her intelligence respecting her boy, who was in the Mediterranean. That boy 'peached'—let the cat out of the bag. Of course the information was false. He took money, if he be really the same, for these profane acts, and made a good thing of it. If it was deemed sufficiently important there can be no doubt that he could be satisfactorily ferreted out. As to this position as a naval officer, excepting in the Coast Guard, he has not served afloat since 1815. Anti-Humbug."

In the case of *Campbell v. Spottiswoode*, 3 B. & S. 769, 113 E. C. L. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. N. S. 201, 11 W. R. 569, action was brought against the defendant for having published a comment on a scheme for the evangelization of the Chinese proposed by the plaintiff in his newspaper, the comment charging that the propaganda was a mere pretense in order to puff the newspaper's circulation. The following selections embody the substance of the comment: "To spread the knowledge of the gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation is a most scandalous and flagitious act; and it is this act, we fear, we must charge against Dr. Campbell. . . . There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty. Moreover, the well-known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking. 'R. G.' takes 240 copies, 'A London Minister' 120, 'An Old Soldier' 100, and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier,' . . . 'For, whatever may be the private views of the editor of *The Ensign*' (meaning the plaintiff), 'there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. It must take the sting out of many a sorrow, and smooth away many a trouble. The past cannot be very sad, nor the future very dreadful, to him who has the capacity for hoping all things and believing all things

without hesitation. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor' (meaning the plaintiff) 'more than an equivalent is provided in its freedom from doubts and suspicions, and the sense of security that it confers.' . . . 'No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled on many grounds to respect; but now and then this very credulity may be turned to good account. Dr. Campbell' (meaning the plaintiff) 'is just now making use of it for a very practical purpose, and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell' (meaning the plaintiff) 'has finished his Chinese letters, he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be doubt that he is making a very good thing indeed of the spiritual wants of the Chinese.'" This publication was held to be actionable as exceeding fair comment, in that it attacked the character of the plaintiff, even though the defendant believed the imputations to be well founded.

The jury having found the criticism contained in them to be unfair, the following words published with reference to an advertisement of a manufactured bag were held to be actionable: "Novelty and enough. Let us premise our remarks by declaring that they are not a planned advertisement, and then let us declare that Messrs. Jenner and Knewstubb' (meaning the plaintiffs), 'of St. James street, have introduced and largely advertised an article of their manufacture as the Bag of Bags' (meaning the said bag so manufactured and sold by the plaintiffs). 'As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam.'" *Jenner v. A'Beckett*, L. R. 7 Q. B. (Eng.) 11, 41 L. J. Q. B. 14, 25 L. T. N. S. 444, 20 W. R. 181.

In *Farmer v. Hamilton Tribune, etc. Co.* 3 Ont. 538, action was brought on the following publication: "Poor Bella Payne.' 'The deceased young lady's interment yesterday.' 'Letter from her mother, Mrs. Murray.' The pleasure seekers going to and from Dunburn yesterday about five o'clock might have noticed an undertaker's wagon in which were seated two men on the way up York street. This wagon contained the mortal remains of an accomplished young lady, the daughter of

highly respected parents, and one who but a short time ago commanded at once the esteem and love of all who knew her. In an unguarded moment she listened to the voice of the seducer, and like thousands of others of her sex, fell a victim to his wiles. Of all the friends who knew Miss Payne during life, not one was found to follow her poor remains to the grave, and she was buried in Burlington cemetery without a stone to mark the spot of her last resting place. Her mother was in the city till after the interment, but left last night for her home, carrying with her a terrible load of sorrow. Indeed, Mrs. Murray's actions and appearance would lead one to believe that she was partly demented at the terrible ordeal through which she had to pass. The following letter signed by her has been handed us for publication: 'As the mother of Bella Payne, in justice to Mr. Millman (meaning the defendant Millman) whose name is connected with the newspaper articles, I wish to state that from all the information I could obtain from the most reliable sources, the blame attaches solely to Mr. Thomas Farmer (meaning the plaintiff). I wish, also, further to say, that the legal proceedings were taken on my written instructions, and not by Mr. Millman. E. F. Murray.' The court held the words declared on to be actionable and that the defense of fair comment was not good, the private character of the plaintiff not being a matter of public interest.

An accusation in substance that the plaintiff, a physician had, either by his negligence, or by his incapacity as a physician, been the cause of twenty-five persons dying of diphtheria has been held to be libelous and actionable on proof that the comment was made through malice rather than in the public interest. *Marcotte v. Bolduc*, 30 Quebec Super. Ct. 222.

To charge that a man had participated in John Brown's raid and had feigned insanity for the purpose of avoiding the consequences has been held to be libelous per se. *Smith v. Tribune Co.* 4 Biss. 477, 22 Fed. Cas. No. 13,118.

To charge that the plaintiff has attempted assault on little girls is actionable per se. *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423, wherein the court held to be actionable per se the following words: "John Conroy was yesterday arrested by Detectives Ingersoll and Ustick for assault and battery. Conroy is one of the mean, low-lived counterfeits on manhood who make a practice of enticing little girls from their homes and then attempting assault. Two children living at 935 and 945 Seventh avenue, on Tuesday were decoyed by Conroy. He did not succeed in his bastardly purpose, being driven from it by the cries of the girls. Yesterday Conroy was identified by the girls' mothers and his arrest followed."

The following publication, printed in connection with the account of the investigation of a murder, was held to be libelous per se, as against the plaintiff Wells, therein referred to: "The police to-night succeeded in securing evidence that the murder occurred in the Tivoli building. The proprietor of the Tivoli is Monte Wells, alias 'Father Wells,' who is said to be well known in Washington, which is his home. The remainder of the building is occupied by the notorious Tivoli gamblers and the Hill woman as a gambling and disorderly house." *Washington Post Co. v. Wells*, 27 App. Cas. (D. C.) 495.

To charge a female school teacher in coarse terms with immoral conduct with her pupils has been held to be actionable. *Barth v. Hanna*, 158 Ill. App. 20. And to say of a teacher that he stole two books from the county teacher's library association is prima facie actionable per se. *Rausch v. Anderson*, 75 Ill. App. 526.

It has been held to be libelous per se for a newspaper to publish the following comment on the character of an insurance agent: "Another young man by the name of Morse is bringing to Marshalltown unsavory advertising. The appended article has reference to Frank N. Morse, a young man who came to the city about three years ago to accept a position with the Letts-Fletcher Company, but who, after losing his position, drifted into the life insurance business. His former friends and acquaintances in this city, where he posed as a ladies' man, and lived far beyond his means, would recognize him from the article from the Boone Republican, even were it not known that the circumstances related pertained to Morse's actions. The Republican says: 'Not long ago, the exact date of which has been forgotten, a Cholly-boy blew into town and took everything by storm. He was it with a big I. Swell parties were given in his honor, and he was carried around on a little narrow shingle all painted up in auburn hue. The young ladies bought him candy and gum and exchanged rings with Cholly, for he was just too cute for anything. The sweet little dear! He was the guest of honor of all the swell doin's, Cholly was. The evenings were too far apart and parties could not be planned often enough, so afternoon teas were given him. They were just the thing for Cholly, doncher know: Mercy, me, how he liked them! He had scarcely time to pick his beautiful teeth between meals, and just let 'em go. That was ill bred in Cholly, to go to parties with cigar-stained teeth, but the ladies didn't care; he would have been just as sweet without teeth. Charles came to Boone from Marshalltown, where all bad men who come to Boone are said to live. Charles was not in Boone for his health. Charles was in Boone for the other fellow's health, Charles was. The other fellow's

health is all that Charles left in Boone. He took everything else the other had. Charles was in the insurance business when he came to Boone. Since he has quit the town no one knows exactly what business Charles is in. The insurance company which Charles claimed employed him would like to know; so would a number of Boone parties who took out a policy in Charley's company. The tea party season is over. There hasn't been a party for a week or ten days. Charles is gone, and the parties but remind us of the happy days gone by when Cholly was the guest and when Cholly let the girls chew his fresh cud of tutti frutti. Boone misses him very much. So does the company selling insurance. Cholly was strictly onto his job just the same; he got away with over \$500 in good hard currency, and a number of business men have recently received inquiries as to the whereabouts of the agent who was making our city his temporary headquarters. So much for the Boone view of the young man. Morse has been representing the Pennsylvania Mutual Life, of which Mr. C. H. Rumsey of Des Moines is state agent. Mr. Rumsey was in the city a day or two ago investigating his agent's accounts. He says he straightened matters with the Boone patrons of the company, but finds nothing here that needs his attention, although Morse owes many bills, some of which are quite large. Mr. Rumsey says Morse has not earned his salary and he will therefore discharge him, after presenting him with a ticket to St. Louis, his home. He says Morse has not been guilty of any great wrongdoing, but has been indiscreet to live beyond his means. Among his Marshall creditors is the Pilgrim Hotel, which has a claim of \$80 for board, but has enough of Morse's personal belongings, including some furniture, to square the account. One of the banks and several of the personal friends of Morse are creditors for various sums." Morse v. Times Republican Printing Co. 124 Ia. 707, 100 N. W. 867.

In *Lovert v. Daily State Pub. Co.* 123 La. 594, 49 So. 206, 131 Am. St. Rep. 356, 23 L.R.A.(N.S.) 726, a sweeping charge of favoritism by the board of administrators of Tulane University was held to be a libel on each member of that board, although not referred to specifically by name, since it referred to the whole board and since the personnel of the board was well known to the public.

In *Perrett v. New Orleans Times Newspaper*, 25 La. Ann. 170, it appeared that five persons came to the office of the defendant newspaper in a state of excitement and, some of them at least, of intoxication, and demanded and secured the publication, as a paid and signed advertisement, of the following article: "We, the undersigned, most respectfully lay

before the public the following very astonishing facts that took place last night near the Carrollton depot: While we were on our way home from Carrollton to New Orleans, three police officers of the above place assailed us with revolvers pointed to us, to deliver every cent we had about us. All the money that we had was five dollars, and on delivering the same they left off. What sounds more horrible is that these so-called officers were accompanied by his honor Judge Perret, judge of Carrollton and Canal avenue. Signed, John Briant, D. L. Thompson, W. B. Savory, H. B. Delord, James B. Ribb, No. 413 Frenchman street." It further appeared that the signers of the foregoing article had been arrested and fined five dollars for disorderly conduct and that this proceeding had been the basis of their charge. It was held to be actionable on the part of the newspaper to publish the article.

The publication in a newspaper of the following words has been held to be actionable per se: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, for which Davis Tillson is without doubt responsible, as he was last year." *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50.

In *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322, it was held to be actionable, but only on proof of special damage, to publish in a newspaper, with reference to property belonging to the plaintiff, the following article: "The sale of the Cardiff Giant, so-called, at New Orleans, for the small price of eight dollars, recalls the palmy days of that ingenious humbug. We well remember the learned remarks made by connoisseurs in this city when it was exhibited in a vacant store quite near our office. While the vulgar herd only looked on in silence, seeking a colossal figure which excited their curiosity, but which they did not attempt to explain, the Harvard professors and other learned men traced its pedigree by their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition, and helped to advertise the show. But our professors and learned men were not the only victims of the sell. A distinguished professor of Yale discussed learnedly upon it in the *Galaxy Magazine*. He demonstrated beyond a doubt that the statue was authentic, that it was antique, and that it was a colossal monolith. He ciphered it down that it was a Phoenician image of the god Baal, and found no difficulty in proving to his own satisfaction that it was brought to America by a Phoenician party of adventurers, who sailed in one of the ships of Tarshish, and that it was buried by the idolaters to save it from desecration by the hordes of savages who overpowered and destroyed the Phoenicians. He

accounted for several marks and symbols upon the image, which were unmistakably Phoenician. Not long afterwards the man who brought the colossal monolith to light confessed that it was a fraud, and the learned gentlemen, who had indorsed its authenticity, were left as naked as the statue itself."

In *Curtis v. Mussey*, 6 Gray (Mass.) 261, a certain speech on slavery by Horace Mann, in which a severe criticism was made of the act of the plaintiff, a United States circuit court commissioner, in returning a negro to Georgia under the fugitive slave law, was held to be libelous.

It appearing that the plaintiff had never known a man named Lambert, that the charge of murder was false, and that she was not dead, by suicide or otherwise, the following publication has been held to be actionable per se: "The news of a double tragedy in which a former Marshall girl committed a double crime was received here Sunday. Mrs. Myrtle Clare, aged twenty-six and formerly Miss Myrtle Colby, of Marshall, shot and mortally wounded John L. Lambert, a street car conductor, then killed herself in a rooming house in Los Angeles, Cal., Thanksgiving Day. Lambert was taken to a hospital where he died. Miss Colby lived in Marshall about ten years ago. She came to that city from Springport, and was a rather attractive young woman. She worked for Chas. A. Kolbourne, who conducted a restaurant in a building now occupied by Jarius Raub, and resided in a West State street building. From there she went to Jackson. She was married to Ira Clare of Coldwater, Mich., and a few years ago and soon after the couple went West, where Mr. Clare secured a position with the Los Angeles Ice and Cold Storage Co. It is said that their married life was not as happy as it might have been and Mrs. Clare became acquainted with Lambert, a married man who had separated from his wife. Mrs. Clare applied for a divorce from Clare, intending to marry Lambert. Her sentiments were not reciprocated very cordially by the street car conductor, and it is believed the deed was inspired by desperation over the marital complications. It is said Lambert had a divorce, and that Mrs. Clare could not secure one, hence the crime." *Clair v. Battle Creek Journal* Co. 168 Mich. 467, 134 N. W. 443.

The publication of an article imputing the crime of sodomy or of assisting another in the commission of that crime is actionable per se. *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624.

It is actionable per se to publish in a newspaper a false charge of the criminal offense of attempting to bribe a legislator. *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8.

It has been held to be libel to publish a news item imputing the crime of burglary to

a policeman, the news item being headed as follows: "Policeman and burglar. The Detroit department said to have one of that sort. He pretends to be sick, and is suspected of having gone at once and robbed a store." *Long v. Tribune Printing Co.* 107 Mich. 207, 65 N. W. 108.

The publication in a newspaper of a resolution of a city council, which resolution had been made without the scope of the authority of the council, charging the plaintiff with being a "disreputable person," with having maliciously published a false report, with having acted with conduct which was execrable and odious, and with having caused the city irreparable damage, was held to be libelous per se in *Trebbly v. Transcript Pub. Co.* 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330.

The following publication has been held to be actionable, although copied or quoted from the words of another: "Then there was H. B. Johnson, who disgraced the office now filled by H. Clay Euing. He was once accused of stealing a stud horse in Lafayette county. He sued the party of accusers, and at the trial where four federal office holders made a part of the jury, a verdict was brought in for the defendant." *Johnson v. St. Louis Despatch Co.* 65 Mo. 539, 27 Am. Rep. 293.

In *Kelly v. Independent Pub. Co.* 45 Mont. 127, Ann. Cas. 1913D 1063, 122 Pac. 735, 38 L.R.A. (N.S.) 1160, the following publication was held to be libelous per se and actionable: "The mother, Mrs. Miller, is said to be a confirmed drunkard. It is alleged that on several occasions she had thrown a huge butcher knife at the children and has threatened to kill them if they were taken from her. The two girls were taken from school this afternoon by Mr. Schoenfeld, and they have been placed temporarily in the Paul Clark Home. The matter will be taken up before Judge Donlan to-morrow morning and the girls will probably be sent to the Orphans' Home in Helena. There is also a boy twelve years of age, and what disposition will be made of him has not yet been decided."

In *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605, it was held to be criminal libel, and hence "illegal conduct," for the plaintiff, a democratic newspaper publisher of New Hampshire, to publish an article exulting over the defeat of the Federal army at Bull Run and charging that army with brutal conduct toward citizens. The suit in that case was brought against the town of Concord for the damages caused the plaintiff by the destruction of his printing office by a mob, the action being predicated on a statute making towns liable for such damages caused by a mob, unless the damage was caused by the illegal conduct of the person damaged. The court held that the publication of the foregoing article, which had been the provocation of the mob's

act, was a criminal libel, and hence, an act of illegal conduct within the statute.

3. WORDS HELD NOT ACTIONABLE

In *Henwood v. Harrison*, L. R. 7 C. Pl. (Eng.) 606, 41 L. J. C. Pl. 206, 26 L. T. N. S. 938, 30 W. R. 1000, the alleged libel was contained in a report published as a comment on the proposal made by the plaintiff to the admiralty for the conversion of old wooden battle ships into iron-clad turret ships. This report contained a scientific criticism of the plaintiff's plan and concluded with the following passage, on which the charge of libel was founded: "These plans would have no weight whatever from the known antecedents of their author; but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy. Their Lordships may, therefore, see fit to send a copy of the correspondence confidentially to that gentleman, in order that he may have an opportunity of offering to their lordships any explanations which he may consider desirable with regard to it. To Mr. Henwood himself I think it is only necessary to say that their Lordships have had the whole question reconsidered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan: and I beg leave to submit that he be so informed." It was held that the reference to "antecedents" was not a personal aspersion on the plaintiff but only a reference to his lack of experience, and hence was not actionable as exceeding fair comment. The court said, per Willis, J.: "In substance, the defendant communicated to another member of the public a statement of the Lords of the Admiralty and the public officers under their control, accounting for their proceedings as to the reconstruction of the navy. This statement was made by public servants intrusted by the Crown, with the charge of the most important defense of the country, in which every subject of the Queen had an interest of the deepest character; and the statement would have been garbled and incomplete, unless it set forth the very discussion which the plaintiff's own suggestions naturally and necessarily challenged and provoked. It is vainly suggested that those proposals of the plaintiff were private and confidential. There was no stipulation that they should be so considered. They were, moreover, simultaneously published by the plaintiff, and exposed to honest criticism at home and abroad. The plaintiff's proposal was made upon a subject of public interest, to agents of the Crown, who were bound to consider and criticise what was put forward by the plaintiff, if they thought it of sufficient importance to be discussed, which, as against him, it must be taken to have been; and, in the course of that

criticism and discussion, the merits of his plans and the previous experience and judgment of the suggestor on the subject with which he dealt were relevant subjects of remark. The occasion, therefore, was one in which the alleged libeller and every member of society to whom he might issue the blue book had in common with the plaintiff an interest incomparably greater than that which in so many cases has been held to carry a privilege essential to freedom, and which, in the absence of malice, is an answer to the action."

The following publication has been held not to be actionable, since it made no reference to an individual, and since it would be privileged as fair comment even if such reference had been made. "The remainder of the evening was occupied in the discussion of 'an account drawn up by Mr. C. on the recent forgeries in lead.' These are figures reported to have been obtained from the Thames, and called 'pilgrims' signs' They are being offered not only in London, but throughout the country, and antiquaries should be on their guard in the purchase of them. Mr. C. had inspected 800 of them, but the aggregate is stated to be not less than 2,000. The whole are proved to be of recent fabrication. They appear to have been made in chalk moulds. They have been steeped in a strong acid and smeared over with Thames mud. It is to be lamented that there are no legal means of punishing a gross attempt at deception and extortion." *Eastwood v. Holmes*, 1 F. & F. (Eng.) 347.

In *Wiles v. Victoria Times Printing, etc. Co.* 11 British Columbia 143, the action was based on two published articles, the first of which was held to have no bearing on the case, and the second of which was as follows: "Two ladies have been canvassing the city for the past few days selling tickets for a 'recital by Mr. Wm. Lee Greenleaf, of Boston,' to be given under the auspices of the Willard Young Women's Christian Temperance Union Mission. Tickets are being sold in a manner similar to those for a recital by a gentleman of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon. Mayor McCandless' name is being used in connection with the concert without his knowledge or consent, and he wishes it understood that he is not favorably disposed towards the scheme. The Johnson Street Mission, it is reported, is to receive only \$50 from the proceeds, although the Y. M. C. A. hall is being given free of charge." Holding the article to be fair comment based on facts truly stated, the court said: "Now, what is enunciated in the second paragraph? It is applicable to those two ladies who have been canvassing the city for the sale of tickets. It

is said that it referred to the plaintiff, that she was obtaining money dishonestly by selling said tickets in a manner similar to the method employed on a former occasion by persons who sold tickets for an entertainment pretendedly but not really for the benefit of a local charity, and in such manner that said dishonest persons were obliged to abandon the continuance of their said conduct for fear of the law, and that the plaintiff was improperly in furtherance of her said dishonest design using the name of the Mayor of Victoria as a patron of the said entertainment. I should not have thought it was necessary for the plaintiff to have taken that up. This article was indefinite; it applied to two ladies who had been canvassing the town. If it does not apply to her there certainly could be no libel. If it did apply to her, what are the facts in the case? Mr. Hayward has told us what the method practiced in the Chase incident was, the selling of tickets and the giving of a concert in connection with which tickets were sold and subscriptions collected, the Home to receive but a small sum. And what is the system carried on in the present case? That the Home was to receive a small sum, they were selling tickets and collecting subscriptions in the same way. . . . I find that the first, the 'Siren Voices' article, had nothing whatever to do with the plaintiff; that it was bona fide, and was published without malice. I find as to the second article, that it was published without malice towards the plaintiff, that the facts as stated are true, other than that small statement as to the amount the association is to receive and that the hall is free; and it was fair comment, made in good faith, on facts which were matters of public interest."

In *Keller v. Loyless*, 205 Fed. 510, 123 C. C. A. 578, the following words were held not to be libelous per se: "Selling Goods to Bottlers. In its March issue, the National Bottlers' Gazette of New York perpetrated a characteristic editorial ghost dance under the above heading, running amuck with its crazy snickersnee whetted keen for the poor traveling man. In this remarkable aberration the bellicose crank, who slings muck for ink in his self-appointed and highly imaginary job of running the business of every manufacturer, supply dealer, bottler and bottling trade journal in the United States of America, coolly eliminates the knight of the grip from the equation of selling in the commercial carbonating world, reducing the business to that of a mere mail-order house. He gives the faithful, order-getting road man his walking papers, with a sneer at his efficiency and with a slander on his morals and manners, declaring: 'The old timers who held back their orders for the coming of some glib salesman—who got him and himself, too,

stone blind drunk and had "such fun" together—are fast passing away. A new era has set in. A bottler can't be "half seas" over and do business intelligently.' Ye Gods! Listen to that! It was not enough to kick the drummer downstairs, but he is branded as a drunkard and roysterer, employing bibulous conviviality as an art to land orders, a good deal as the confidence man works his oily wiles. The New York traducer of the bottling trade traveling man will probably be prompt with his little apology in his April issue, but his animus is plain enough, and the fraternity has seen him in his true light. Of course, slander aside, there is but one side to the question in so far as it involves advertising and traveling salesmen. The two are co-operative in every sense. Both are good and both are necessary. 'Acute Botts.' From Texas 'Grandoldtaxes' one of the best known traveling representatives in the line, writes that 'the editor of the National Bottlers' Gazette must be suffering from a case of acute botts. Don't think his advertising scheme will work, and he will find the number of traveling men increasing year by year just the same as in the past.'"

It is not actionable for a newspaper to publish an article warning the public against loss through a scheme for the formation of a fifty million dollar farmers' brotherhood organization which the court, from the evidence, deems only a swindling scheme. *Williams v. Chicago Herald Co.* 46 Ill. App. 655.

In *Morasca v. Item Co.* 126 La. 426, 52 So. 565, 30 L.R.A. (N.S.) 315, it was held not to be actionable for a newspaper to publish a report by the police that a child had died of tarter emetic poisoning, which it got from eating sugar bought from the grocery store of the plaintiff. The court said in that case: "Questions relating to life, health, and welfare may be commented upon, and if erroneous deductions be made, it does not give cause for damages unless special damage can be shown; that is, when persons taking part in the inquiry are not prompted by malice."

In *Hyatt v. Lindner*, 133 La. 614, 63 So. 241, 48 L.R.A. (N.S.) 256, the following anonymous letter, addressed to the mayor asking for a police investigation of a house, was held not to be actionable as a libel on the owner of the house: "An investigation of the house No. 909 Bourbon street by the police will be highly appreciated. This place is an old shack, rented to several different families. but the actions of many well-dressed and painted beauties and many well-dressed and some married men continually coming and going does not look well for a respectable neighborhood. Last week an auto backed up and several men got out and entered this place. Now I do not care to see these married men get into trouble, but there are many

respectable families in the neighborhood who sit out in the evening and have to face these unpleasant conditions. An early inspection of the place No. 909 Bourbon street will be highly appreciated by An Old Resident of the Neighborhood."

It appearing that the comment was fair, there being evidence to show the truth thereof, it was held in *Bearse v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446, that the following article published in a newspaper was not actionable: "We are informed by a former member of the city government who was a member of the committee having charge of matters connected with the new City Building, that he was not allowed to see all the bids which were made by Bangor contractors. He also says that, under the direction of the king boss, our Bangor contractors were requested to hand in their bids for a completed building and in making them to include separate bids for carpenter, mason, plumbing work, etc., and that several of these bids were open, but not shown to other members of the committee. Only a few minutes before the expiration of the time to receive bids, the gentleman imparting this information saw the architect, who was allowed to see all the bids of the Bangor contractors, write and seal what appeared to be a proposal, which he handed to the city clerk. He also says he made a few suggestions to the mayor relating to the manner in which the business was being done, and what the people were saying about it, to which the mayor replied, 'What in h—l have the people to do about it?' and that he wanted them to understand that he proposed to take charge of all the affairs connected with the new City Building. Mr. W. N. Sawyer says he put in a bid for the mason work, but his bid was not placed before the committee. All the Bangor contractors complain of the treatment they received. In the spring of 1893 many changes were made in the plans and specifications and to such an extent that such a reliable man as C. B. Brown says would reduce the cost of the building about \$15,000, and still the Bangor contractors were not allowed to put in new bids, but the out of town contractors were allowed to have the contract at their old figures. The mason work is of the poorest quality and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the wall. The doings of the old Tweed ring in New York were no worse than much that has been done in connection

with our City Building. It is in the hands of a wrecker and how long will the taxpayers of Bangor allow the present state of affairs to exist?"

It is not actionable in the absence of proof of malice for a voter and taxpayer, in a town meeting, to object to the granting of the application of town assessors for reimbursement for expenses incurred in defending a suit on the ground that the suit had been brought for perjury, and to say, in so opposing the application, that "they went to Barnstable and perjured themselves; I have it in back and white." *Smith v. Higgins*, 16 Gray (Mass.) 251.

In *Wieman v. Mabey*, 45 Mich. 484, 8 N. W. 71, 40 Am. Rep. 477, it was held not to be actionable to publish of a school teacher, in a petition to the superintendent to prevent the issuance of a license to him, that he was a man of bad moral character, where there was evidence in justification showing him to be a man addicted to profanity and sabbath breaking. The court said: "We do not think any superintendent would need vindication for being dissatisfied with the moral character of a teacher who has the faults complained of by these parties who opposed the licensing of plaintiff. A superintendent who should subject young children to such influences would be very censurable."

It has been held not to be actionable for members of a local school board to communicate in good faith to the county school commissioner the following complaint against a teacher: "We, the undersigned directors of school district No. 131, would most respectfully ask you to revoke the certificate to Mrs. Lou Finley who at present has charge of our school. From the most reliable and conclusive evidence in our possession, we must say that she is totally unfit to teach our school. She is very tyrannical and abusive and indecent, and our school is doing no good. We have trouble more or less all the time and have hoped after having called her in and talked over the matter with her that she would get along better, but things are getting worse. We could not enumerate all the charges that have been preferred, but she has kept some of the small boys in until one had to respond to nature in his pants and another had to make a run for it and afterwards to punishment for it. She has whipped unmercifully, pulled their ears and otherwise mistreated them until they do not respect her. She has called the children liars." *Finley v. Steele*, 159 Mo. 299, 80 S. W. 108, 52 L.R.A. 852, wherein the court said: "At the time of the publication of the alleged libel, defendants composed the school board of the school district in which plaintiff was teaching. They knew that she had had trouble with her pupils, and a peti-

tion signed by twelve patrons of the school complaining of her had been presented to them as a board, requesting them to ask her to resign. Complaints had also been made to the school commissioner, who in consequence thereof wrote to the board asking about the trouble between plaintiff and her pupils. On account of these facts the board called plaintiff before it and asked her to resign, but she declined to do so, and as a last resort, they prepared, in substantially the words of the statute, the charges against her which form the basis of this litigation, and sent them to the commissioner. They not only had an interest in regard to the way in which the school was being conducted, but in preferring the charges against the plaintiff were simply discharging their duty as members of the school board, and it makes no difference that the exact words of the statute were not used, the purpose and intent was the same. There was no actual malice proven, and the use of such word or words did not take away the privileged character of the communication. Intent makes the libel in such circumstances."

In *Com v. Featherston*, 9 Phila. (Pa.) 594, it was held that the publication of a notice to the public, stating that certain notes obtained by an attorney had been obtained by fraud, and warning the public not to receive them by assignment or otherwise, was privileged and was not actionable in the absence of proof of falsehood and express malice.

WILSON ET AL.

v.

SUN PUBLISHING COMPANY.

Washington Supreme Court—May 18, 1915

85 Wash. 503; 148 Pac. 774.

Appeal and Error — Harmless Error — Defect in Pleading.

Under Rem. & Bal. Code, § 1752, requiring the supreme court to decide the case on its merits, the refusal to grant a nonsuit, in an action for libel, on the ground that, when the motion was made, the complaint contained no allegation that the offending publication was untrue, is not error, where the complaint negated the truth of the published charges by the assertion of the opposite, and where the answer averred their truth.

Libel and Slander — Pleading — Allegation of Falsity.

Where the matter published is libelous per se, it is not incumbent upon the plaintiff to

allege its falsity; that being a matter of defense which, under Rem. & Bal. Code, § 293, must be alleged and proven as such.

Truth as Defense.

At common law, the truth of a libelous charge is usually a complete defense in a civil action for damages.

[See 17 Ann. Cas. 761.]

Trial — Amendment as Ground for Continuance.

In an action for libel, a trial amendment by a specific allegation that the publication was false presented no new issue, where the complaint averred the opposite of the published charges and the answer alleged their truth, so that the defendant's motion for a continuance is properly denied.

[See Ann. Cas. 1914A 1268.]

Libel and Slander — Privilege — Matter of Public Interest — Sanitary Condition of Restaurant.

Defendant's newspaper publication that plaintiffs' cafeteria was unclean, unsanitary, and not well ventilated does not fall within the rule of qualified privilege, so as not to be libelous per se, as the publication is not of matters relating to appeals for public patronage, which class relates to those who are in a sense public characters, such as seekers for office, artists, inventors, showmen, and such others as by appeal to the public by advertisement in the special sense directly challenge public criticism of their claims.

[See note at end of this case.]

Defamatory Words — Criticism of Condition of Restaurant.

Under Rem. & Bal. Code, § 2424, defining libel against a living person as every publication by writing, printing, etc., tending to expose him to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence, or to injure any person or association in his business or occupation, a newspaper publication charging that plaintiffs' cafeteria was unclean, unsanitary, and not well ventilated, that, if it were not for the big rotary fan in the kitchen, nothing could live, not even a microbe, that its tables, floors, etc., were damp and covered with food scraps, that its ice box and fish box were old, saturated wooden traps filled with a general mixture of eatables, tends to injure the plaintiffs in their partnership business by implying that their café was an unwholesome place and unfit for public patronage and is libelous per se.

Malice as Essential to Libel.

Malice is not an essential element of civil libel, as the civil action for libel is an action for damages in which compensatory damages only are recoverable, which would be the same, regardless of the motive of the publication.

[See 15 Am. St. Rep. 337.]

Same.

In a civil action for libel, malice is material only on the question of punitive or exemplary damages.

Damages — Punitive Damages — When Allowed.

Punitive or exemplary damages are not recoverable, except where specifically authorized by statute.

Libel on Business — Right of Action by Owner.

A libelous publication relating to plaintiffs' partnership business, designating the name under which it was carried on, did not state a cause of action in favor of the plaintiffs as individuals, but as partners, and the publisher cannot escape liability for libel because it did not mention the name of either plaintiff.

Right of Recovery — Nominal Damages Presumed.

Plaintiffs, in an action for the publication of words actionable per se, are at least entitled to nominal damages, unless the published charges were true.

Question for Jury — Truth of Libel — Conflicting Evidence.

In an action for a newspaper libel, where there was conflicting evidence as to the truth of the charges set up in justification, their truth is a question for the jury.

Appeal and Error — Review of Facts — Verdict on Conflicting Evidence.

A verdict in an action for libel, supported by substantial evidence that the published charges were untrue, concludes the question on appeal.

Libel and Slander — Evidence of Damage Insufficient.

In an action for a newspaper libel charging plaintiffs' partnership café was hot, dirty, unsanitary, and poorly ventilated, evidence considered and held not to show any actual damages to plaintiffs' business.

Libel on Business — Evidence as to Damages Inadmissible.

In such action, evidence that one of the plaintiffs had bought his half interest for \$6,500, and that the latter, when he sold, received "for the whole outfit" \$3,500, without indicating whether that represented one-half of the sale price on the whole sale price, is inadmissible, especially where it appeared that, prior to the publication, plaintiffs' business was already falling off at a rate not accelerated by the publication.

Libel on Partnership — Damage to Individual Members.

In an action for a newspaper libel relating to a cafeteria operated by plaintiffs as copartners, to recover damages for injury to their business, evidence as to the standing and reputation of one of the plaintiffs and of his family in the community is immaterial, since injury to the reputation and feelings of either partner, as an individual, is not an issue.

Same.

In an action for a libelous newspaper publication relating to a cafeteria conducted by plaintiffs as copartners, where there is little evidence of injury to the reputation of either partner, as an individual, and no evidence as to the injury of the separate business of

either, the only damages recoverable are such as resulted in injury to the partnership business itself and to the partners in their joint capacity.

Action by Partnership for Libel.

In an action for a newspaper libel relating to a cafeteria conducted by plaintiffs, a complaint in the name of the plaintiffs as copartners is not a misjoinder, and the defendant, without demurring for misjoinder, is entitled to construe it as an action for damages to the partnership business.

Appeal from Superior Court, King county: HUMPHRIES, Judge.

Action by Henry L. Wilson et al., plaintiffs, against Sun Publishing Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

John P. Hartman and Arthur E. Nafe for appellant.

Tucker & Hyland for respondents.

[505] ELLIS, J.—In August, 1913, the plaintiffs were, and since October, 1912, had been, copartners operating a cafeteria known as the Epler Cafe, on Second avenue, in the city of Seattle. They commenced this action on August 29, 1913, to recover damages for injuries to their business which it is claimed were caused by certain articles printed and published in *The Seattle Sun*, a newspaper then being published by the defendant. The first publication was on August 1, 1913, and reads as follows:

"Restaurant Kitchen an Awful Place in Summer Time Says Sun Reporter After a Visit to One.

"Tour Yesterday Reveals Many Changes for Better in Seattle, but He Lands in Cafeteria Where Rotary Fan is Only Thing That Makes Life Possible.

"(By the Author of 'The Confessions of a Dishwasher.')

"If it were not for the big rotary fan in the Epler Cafeteria kitchen, nothing could live there—not even a microbe. Certainly nothing could exist there without holding its nose.

"This is summertime in the kitchens. The hot sun which beats down upon the streets is not hotter than the roasting oven in the kitchen where foodstuffs spoil quickly and microbes grow fat.

"There has been a general cleaning up in most of the Seattle restaurant kitchens and dishwashing parlors since *The Sun* started its clean-up campaign. In some places it has been barely noticeable—the trickle of hot water sounding the [506] first call to cleanliness, or the swish of a scrubbing brush on saturated floors. In other places, the trans-

formation has been complete. Old saturated wooden tables, drainboards and ice boxes have been torn out, and new metal ones put in their places. Pervious floors have been ripped up to make room for clean white tile.

"Eat in More Comfort.

"I am a quick luncher and a haunter of restaurants. And I confess that I am beginning to eat my three meals a day with a greater degree of comfort.

"In my daily travels I have noticed peculiar things—such as new refuse cans with real lids on them, in the alley behind Rippe & Chapman's combination kitchen, and real steam rising from the dishwasher at the White Lunch.

"But yesterday it was hot—real hot for Seattle—and I had a real or imagined desire to find out how the living is in a hot kitchen in hot weather. A friend and I chose a kitchen at random—one to which I had not paid an extended visit before. It happened to be the Epler Cafeteria, 813 Second avenue.

"To repeat, nothing could survive there if it were not for a big rotary fan which appears to have been attached to a motor and placed in the window for the express purpose of forcing an exit for ill odors arising from food scraps which are on the first road towards disintegration.

"Ice-Box Hash.

"The floors of the kitchen were wet, slippery and littered with food scraps. Dishes covered with food from the last meal were left standing on the drainboard near the dishwashing machine. Filthy saturated wooden tables were absorbing the moisture from the latest left-overs.

"And the ice-boxes—saviors of food in the summer time, but flavor mixers and microbe harbors at the Epler Cafeteria. They were old, saturated, wooden affairs, capable of absorbing anything, even the roasting heat of the kitchen.

"We opened them one by one and looked inside. There, in each one, piled together was the greatest assortment of foods which I have ever seen accumulated in a single ice-box. It might have been appetizing—to one who is fond of hash.

"A Fish Box's Contents.

"There were things to eat, all the way from potatoes and hamburger steak to the latest salads and mayonnaise dressings, in a fish box.

[507] "But it was not quite so appetizing when we took a knife and scraped from the saturated wooden trays and walls of the ice box the remains of former meal preparations—generations upon generations of them, it appeared to me.

"And the refuse cans and the scraps which were spilled over make it fortunate there are not many flies in Seattle.

"Yesterday we paid a visit to other restaurants in Seattle, which is another story.

"And before long we shall visit other restaurants—other stories."

The second article was published on August 4, 1913, and reads as follows:

"Conditions in Local Restaurants.

"It is a matter of common knowledge that many restaurant kitchens, also many hotel kitchens, are carelessly conducted and in some cases are absolutely filthy.

"For years no effort was made by the city authorities of Seattle to properly supervise restaurant and hotel kitchens, and there seemed to be no escape from the uncleanly conditions for the thousands of people who patronize these places.

"It is true that there were restaurants and hotels where these bad conditions did not exist, and which were cleanly in every respect, but the good and the bad were so indiscriminately mixed together, that there seemed to be no possible way for the public to distinguish between them.

"The Seattle Sun undertook a public service in investigating these places, and to do so had men go to work in them as dishwashers, etc., for the purpose of securing information.

"As a result many facts were secured and published in The Sun and there followed a general cleaning up all along the line.

"Conditions today average much better than they did some months ago.

"The Sun has, however, determined to follow this matter up from time to time and see whether the reformation is progressive, rather than retrogressive.

"Last week this newspaper contained some strictures on certain cafeterias, including Epler's the kitchen of which was visited by two Sun representatives on a very hot day.

"Objections to the statements made by these men and printed in The Sun are made by Mr. Wilson, one of the proprietors, [508] and by others who are friends of the management.

"Mr. Wilson states that immediately following the appearance of The Sun with the strictures on his kitchen he invited fifteen or more of his regular patrons to walk out in his kitchen and investigate for themselves.

"This information The Sun gives as a matter of course, and it also publishes a letter from Edward C. Kilbourne, manager of the building, who states that the kitchen is clean and sanitary. There is not the slightest desire upon the part of The Sun to misrepresent the conditions in Epler's or in any other eating place.

"The men sent out by The Sun to investigate the restaurants do not in any way alter their report, however. They were absolutely unbiased and were acting under rigid instructions to render truthful accounts of everything they discovered.

"The dishwashing arrangements in Epler's were found to be modern and in every way sufficient. The criticisms made were all directed at specific kitchen shortcomings.

"The task of bringing all local restaurants up to a general high average of cleanliness is making The Sun some enemies among proprietors and managers, and there is a loud protest from several of them, who charge loss of business, etc.

"The sensible restaurant proprietor who has been criticised will devote all his energies to immediately putting his kitchen in a condition above reproach, and will waste no breath in idle denunciations.

"He should recollect that restaurants are in reality public service institutions and that the people have a right to demand the very best service from them."

The final article complained of was printed in The Seattle Sun on August 5, 1913, and reads as follows:

"Finds It Quite Possible to Keep Restaurant Kitchens Cool and Clean.

"Sun Reporter Visits Wing's Cafeteria, Gerald's Cafe and the Hofbrau—Ice Boxes May Be Clean and Dry Also.

"(By the Author of 'The Confessions of a Dishwasher'.)

"The same afternoon last week on which I visited the Epler Cafeteria I made a trip also through the kitchens of Gerald's Cafe, 824 First Avenue, Wing's Cafeteria, 1409 First avenue, [509] and the Hofbrau Cafe, First avenue and Madison street. These were all cleaner than the Epler kitchen.

"Soon after The Sun began to look into Seattle kitchens and dishwashing establishments, Wing's Cafeteria proceeded to rip out old floors and fixtures of its old kitchen and start in afresh with everything clean and white. All the old dishwashing things were destroyed. In place of old floors was laid white tile, while metal tables, trays and shelves took the places of old wooden ones.

"The arrangements for dishwashing in Wing's Cafeteria are entirely separated from the kitchen. The dishes have a large sunny room all to themselves—a room with plenty of air in it, with white walls and ceilings and a white tiled floor. Except for one board on which the dishes are placed after they are washed and dried, there is not an inch of wood in the place. Everything is solid, of stone or metal. Cracks and crevices and porous surfaces in which food might collect are unheard of.

"Diners May Witness.

"There are three dishwashing outfits in this white room, one for washing and rinsing plates and platters, another for washing and rinsing silver and glasses, and still a third for pans.

"Steaming hot water is running in all of them. The room enters directly into the big dining room, so that diners may have a full view of the process if they wish. It is high above the ground and through its spacious windows overlooks Elliott Bay.

"The kitchen where the food is prepared and cooked is downstairs below the dishwashing room, but not below the surface of the earth. It is clean and dry with hard, substantial walls and floors. Everything is fresh and clean-smelling.

"The combination kitchen and dishwashing establishment of Gerald's Cafe, 824 First avenue, was almost unbearably hot on that warm afternoon when I visited it. The kitchen appeared to be buried in the side of the first hill. It was dark and ventilated by only one small window at the top, which was at the surface of the earth.

"Hot at Gerald's.

"Gerald's kitchen was roasting hot, like its big brick oven, and it lacked circulation of fresh air. It was cleaner than the Epler kitchen, not as clean as Wing's and the Hofbrau.

[510] "There were old saturated wooden tables and shelves, which had the appearance, however, of being scrubbed occasionally. This, like the other kitchens which I visited that afternoon, was equipped with a hot water dishwashing outfit, capable of handling and really cleaning the dishes of its customers. The floor was wet in some places, and I noticed a few scraps of food scattered about. It was a substantial, level floor, however, and offered a solid footing. There was no fan in the kitchen. With its one tiny skylight window at the top, it resembled an old-fashioned bake oven itself.

"Hofbrau Cool and Clean.

"The kitchen of the Hofbrau Cafe was cool and clean. Its solid cement floor was especially clean, dry and free from dirt, grease and wet. There were wooden tables—but they were solid and made of hard wood. And they were white and clean, free from grease.

"Ice boxes and fish boxes in the Hofbrau were cool and appetizing as I opened them. They were not hash boxes. Each separate variety of food had a separate apartment all its own to keep fresh in. Fish were placed in one box, meats in another, vegetables in a third, while butter and dairy products were kept entirely separate. Each cut of meat

appeared as fresh as the day it was killed. The fish has its own icy room away from the butter. There was no evidence of stale food remainders on the inside linings. The interiors of the boxes were clean, cool and dry. It was possible to light a match on the inside wall. I did it."

The complaint alleges that the plaintiffs' restaurant had always been carried on in a first-class manner and had always been clean, sanitary and well ventilated; that prior to the publication complained of, the business, with the good will thereof, was of a reasonable value of \$30,000; that the libelous matter was published maliciously and without probable cause or any cause whatever; that the things set forth were false and untrue, and were known to be untrue by the officers and manager of the defendant when they were published; that by reason of the publication of the articles complained of the plaintiffs, both in their business and as citizens of Seattle, have been injured in their good name, fame and credit [511] and brought into public scandal, infamy and disgrace among all those people among whom they had been doing business; that the good will of their business has been destroyed, and that plaintiffs have been damaged in the sum of \$25,000. The allegation of falsity was inserted by amendment, over defendant's objection, at the close of the plaintiffs' evidence.

In its answer the defendant denied the allegation that plaintiffs' restaurant was clean, sanitary and well ventilated; denied that the business was worth \$30,000 at the time of the publication of the articles complained of; admitted the publication of the articles; denied that the publications were made maliciously; denied that the plaintiffs were damaged in the sum of \$25,000, or any amount; and, as an affirmative defense, averred that the facts published in the articles were true and were published with a full belief of their truth, without malice and for the protection of the citizens of and visitors to the city of Seattle. The reply traversed the affirmative matter in the answer.

The evidence is too voluminous to be set out in a connected statement. We shall discuss it so far as necessary in the consideration of the points presented. At appropriate times the defendant moved for a nonsuit and for a directed verdict. These motions were overruled. The jury returned a verdict in favor of the plaintiffs in the sum of \$7,500. The defendants moved for a verdict *non obstante* and for a new trial. These motions also were overruled. From the judgment entered upon the verdict, the defendant appeals.

While there are many assignments of alleged error, we shall consider only those which seem necessary to a proper disposition of the case.

As preliminary to the discussion on the merits, a question of pleading is presented. It is claimed that a nonsuit should have been granted because, when the motion was made, the complaint contained no allegation that the offending publications were untrue, hence did not state a cause of action. For many reasons there is no merit in this claim. In the first [512] place, the complaint negated in terms, by its direct allegations of cleanliness and sanitation, every charge made in the publications. In the second place, the answer averred the truth of the publications, thus supplying the supposed deficiencies now complained of and further emphasizing the issue to which the respondents' evidence was directed. In such a case we are admonished by the statute to proceed with the decision of the cause on its merits, disregarding technicalities. Rem. & Bal. Code, § 1752 (P. C. 81, § 1255); German American Bank v. Wright, 85 Wash. 460, 148 Pac. 709; Yeisley v. Smith, 82 Wash. 693, 144 Pac. 918; Kelly v. Lum, 75 Wash. 135, 134 Pac. 819, 49 L.R.A.(N.S.) 1151; Gaskill v. Northern Assur. Co. 73 Wash. 668, 132 Pac. 643; Bonne v. Security Sav. Soc. 35 Wash. 696, 78 Pac. 38.

In the third place, if the matter published was libelous *per se*, it was not incumbent upon the respondents to allege its untruth. That was a matter of defense which to be available must be alleged and proven as such. Rem. & Bal. Code, § 293 (P. C. 81, § 277). At common law, of which the statute is merely declaratory, the truth of a libelous charge, though no defense in a criminal prosecution for libel, was usually a complete defense in a civil action for damages. State v. Sefrit, 82 Wash. 520, 144 Pac. 725; Haynes v. Spokane Chronicle Pub. Co. 11 Wash. 503, 39 Pac. 969; Leghorn v. Review Pub. Co. 31 Wash. 627, 72 Pac. 485; 4 Blackstone, Commentaries, p. 150.

This disposes also of appellant's claim that the court erred in refusing a continuance when respondents were permitted to amend their complaint by inserting the specific allegation that the publications were false. This presented no new issue. The motion for a continuance was properly denied.

On the merits it is contended that a verdict for the appellant should have been directed at the close of all the evidence. Several reasons are assigned for this claim. We shall consider them in what seems to be their logical order.

[513] I. It is claimed, in substance, that the offending publications, being merely critical of matters of public interest, fall within the rule of qualified privilege and were therefore not libelous *per se*. Matters of such public interest as fall within the rule of qualified privilege are classified in Newell on Slander and Libel (2d ed.) p. 576, as follows:

"(1) Matters concerning the administration of the government. (2) Matters pertaining to the administration of public justice. (3) Matters relating to the management of public institutions and local authorities. (4) Matters relating to appeals for public patronage. (5) Matters concerning literary publications, books and pictures. (6) Matters concerning the character and quality of public entertainments. (7) Matters relating to religious bodies, churches and associations."

It is obvious that the publications here in question do not fall within any of these classes unless it be "matters relating to appeals for public patronage." That class, however, relates to those who are in a sense public characters, such as seekers for office, artists, inventors, showmen, patent medicine men, and such others as by appeals to the public by advertisement, in a special sense directly challenge public criticism of their claims. Newell, Slander and Libel (2d ed.) p. 583. There is nothing of that nature in the case presented here. The mere fact that a man's business, in a sense, touches the health and comfort of his customers or patrons does not invoke the rule of special privilege against him. Those who desire to criticize the manner in which his business is conducted are sufficiently protected against an action for damages by their absolute immunity in publishing the uncolored truth, and against a criminal prosecution in a proper case by negating malice, which, under our present criminal statute, is the gist of the criminal offense of libel. State v. Sefrit, supra. We have been cited to no authority, and have been able to find none, which would carry the rule of qualified privilege to the extent here asserted.

[514] II. Not being privileged, the next question is: Were the articles libelous *per se*? Our criminal statute defines libel against the living as follows:

"Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

"(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or . . .

"(3) To injure any person, corporation, or association of persons in his or their business or occupation, shall be a libel. . . . Rem. & Bal. Code, § 2424 (P. C. 135, § 343).

Eliminating the statutory element of malice, either actual or implied, an essential only of criminal libel, this definition meets the essentials of libel actionable *per se* as generally recognized in civil actions for damages. Newell, Slander and Libel (2d ed.) p. 43.

"Unfortunately, the law of libel has been obscured by a mass of technicalities and

subtle refinements. When language is used concerning a person or his affairs which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; that this is all that is meant by the term 'actionable *per se*.' Therefore the real practical test, by which to determine whether special damage must be alleged and proved in order to make out a cause of action for defamation, is whether the language is such as necessarily must or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken." Pratt v. Pioneer Press Co. 35 Minn. 251, 28 N. W. 708.

That the articles here in question had the clear tendency to injure the respondents in their partnership business is too plain for argument. They charged that this restaurant was hot, dirty, poorly ventilated, and insinuated the presence of "microbes." The natural meaning of the words used was [515] that the restaurant was an unwholesome place and unfit for public patronage. It has been held libelous *per se* to charge the sale of diseased and unwholesome meat. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157; Young v. Kuhn, 71 Tex. 645, 9 S. W. 860. It has also been held actionable *per se* to charge that a hotel keeper "kept no accommodations, and a person could not get a decent meal or decent bed if he tried." Trimmer v. Hiscock, 27 Hun (N. Y.) 364. The articles here in question were, from their natural tendency, actionable *per se*.

III. It is next claimed that there ~~was~~ a failure of proof because there was no evidence of malice. If this were a criminal prosecution, malice would be a material element and would be inferred from the necessary tendency of the articles. The criminal statute so declares. Rem. & Bal. Code, §§ 2424, 2425 (P. C. 135, §§ 343, 345). But in this state malice is not an essential element of civil libel. This results from the nature of the case. The civil action for libel is an action for damages, and, as in other actions sounding in tort, compensatory damages only can be recovered. It is obvious that these would be the same no matter what the motive which inspired the publication. Malice could only be material on the question of punitive or exemplary damage. But in this state punitive or exemplary damages cannot be recovered except where specifically authorized by statute. Spokane Truck, etc. Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L.R.A. 689; Willson v. Northern Pac. R. Co. 5 Wash. 621, 32 Pac.

468, 34 Pac. 146; Sloan v. Langert, 6 Wash. 26, 32 Pac. 1015; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; McGill v. Fuller, 45 Wash. 615, 88 Pac. 1038; Caldwell v. Northern Pac. R. Co. 56 Wash. 223, 105 Pac. 625; Baer v. Chambers, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D 559; Phillips v. Thomas, 70 Wash. 533, 127 Pac. 97, Ann. Cas. 1914B 800, 42 L.R.A.(N.S.) 582; Corcoran v. Postal Tel.-Cable Co. 80 Wash. 570, 142 Pac. 29, L.R.A.1915B 552. We have no statute allowing exemplary or punitive damages for libel. [516] In two cases this court has held that, in a civil action for libel, the element of malice is immaterial. Byrne v. Funk, 38 Wash. 506, 3 Ann. Cas. 647, 80 Pac. 772; Woodhouse v. Powles, 43 Wash. 617, 11 Ann. Cas. 54, 86 Pac. 1063, 117 Am. St. Rep. 1079, 8 L.R.A.(N.S.) 783.

In the Byrne case, this holding was apparently based on the fact that malice was not included as an essential element in the then existing statute defining criminal libel. Ballinger's Code, § 7087; Rem. & Bal. Code, § 2777. In the Woodhouse case, it was based definitely, and as we now conceive more logically and soundly, upon the ground that compensatory damages alone can be recovered in a civil action for libel. While our present statute defining criminal libel makes malice an essential element, that is because the action is punitive in its nature. The civil action being merely compensatory in its nature, and there being no statute authorizing punitive damages in such cases, it follows of necessity that malice or lack of malice is still immaterial in such cases, notwithstanding the change in the statutory definition of criminal libel.

IV. It is also urged that the articles were not libelous in that they did not mention the name of either of the respondents. We find no merit in this claim. The complaint, considered in its entirety, did not state a cause of action in favor of the respondents as individuals, but as partners. The libel was a libel touching their partnership business. The articles did mention the name of that business, which was known as the "Epler Cafe." By designating the name of their business, the article had just as damaging an effect upon the partnership business as if it had mentioned the names of the partners.

V. Finally, it is asserted that there was a total failure of proof of damages. Though the publication was not actuated by malice, it was actionable *per se*. The respondents were at least entitled to nominal damages, unless the things stated in the offending articles were true. The appellant attempted [517] to prove their truth in justification. There was much evidence so tending. There was also much evidence to the contrary. On

this conflict of evidence the question was clearly one for the jury. The verdict, being supported by substantial evidence that the charges were untrue, concludes the question. A review of this phase of the evidence would be useless.

But it was still incumbent on the respondents to prove actual damages to justify a recovery more than nominal. They attempted to prove specific damages by evidence of a falling off of the patronage of the restaurant, occasioned by the publication of the articles. Over appellant's objections, they sought to show, by the testimony of certain employees and a few customers, that there was a decided falling off in patronage immediately following the publication of the articles, especially after the appearance of the first article. This evidence was vague and unsatisfactory at best. They also introduced their books of account, but these showed that, beginning some six months prior to the publication of the first article, there had been a gradual falling off in attendance and a consequent reduction in the receipts of the business, and that this reduction continued at practically the same rate subsequent to the publication of the articles as prior thereto, until the restaurant was finally sold in December, 1913. They also introduced in evidence, over objection, a list of names of some nineteen persons who, it was stated by one of the respondents, stopped dining at the Epler Cafe immediately following the publication of the articles. He admitted, however, that as to most of these his information was based on hearsay. The other partner, who furnished the list, did not attempt to say that, by interviewing the persons named, or otherwise, he learned their reasons for the discontinuance. Four or five witnesses testified that they stopped dining at the restaurant after the publication of the articles. One of them had dined there but once. Another testified that he personally knew of the condition of the kitchen and only two or three of them testified that they failed to return to the [518] respondents' restaurant on account of the publications. Over objection, the respondents were permitted to testify as to what they paid for the business and what it was finally sold for on December 1, 1913. The respondent Wilson testified that he bought his half interest in October, 1911, for \$6,500, and the respondent Carle that he bought his half interest in October, 1912, for \$6,800. Carle testified that when he sold he received for "the whole outfit" \$3,500. It does not clearly appear whether this represented one-half of the sale price or the whole sale price. This last evidence was clearly inadmissible, especially in view of the fact that, prior to the publication of the articles, the respondents' own books showed

that their business was already falling off at a rate which continued but was not accelerated after the publication of the articles in question. It is obvious that many other elements might have, and probably did, enter into the purchase price and sale price of a business such as a restaurant. The evidence seems to us entirely too speculative and remote to have any probative value on the issue of damages and should have been excluded.

The appellant introduced evidence of the fact that, during the period of the decline of the respondents' business, several competing restaurants and cafes were started in adjoining blocks and in the immediate neighborhood of their place of business. It is the undisputed testimony of experienced restaurant men that this fact alone would have a necessary tendency to diminish the respondents' business. A careful consideration of all of the testimony touching special damages by diminution in patronage occasioned by the offending articles, forces the conviction that there was no such proof of any material falling off of patronage or any measurable or material injury to respondents' business caused by the publications as to take the question of special damages to the jury. In view of the showing made by respondents' own books which indicated a steady falling off beginning long prior to the publication of the articles, and in view of the [519] proof that the near location of several competing establishments would amply account for its steady continuance, we think that the vague testimony touching a few isolated instances of desertion of patrons because of the articles was wholly insufficient to constitute more than a scintilla of evidence of damage reasonably traceable to the publications. The only reasonable inference is that it was due to the adequate cause proven.

A case closely in point is presented in *Trimmer v. Hiscock*, *supra*. The defendant sued for damages for slanderous words injuring his business as a hotel keeper. He attempted to prove special damages by showing that, since about the time of the alleged slanderous words, there was a falling off in his business. This, however, was accounted for by the plaintiff's own witnesses, who testified that about that time a Good Templars organization was effected in the village and that many of his old customers and patrons joined the organization and ceased to frequent his house. Also, that at about that time numerous prosecutions were instituted against him for violations of the excise laws, and that it was due to this organization and these prosecutions that his business declined. A nonsuit was granted, but the supreme court held that while there was no proof of special damages, the words were actionable

Ann. Cas. 1917B.—29.

per se, and remanded the case for trial on that account.

VI. But one other question remains to be considered. The respondents, over the appellant's objection, were permitted to introduce the testimony of one of the partners as to his standing and reputation and the standing of his family in the community. It was objected that this testimony was immaterial in that the action was one for injury to the partnership business, and that injury to the reputations and feelings of either partner as an individual was not in issue. The objection was overruled, but the inquiry was not further pursued. Little evidence was offered showing an injury to the reputation of either of the partners, or humiliation or [520] mental suffering by either, on account of the publications. In any event we think such testimony was inadmissible. The rule which we conceive to be the correct one is thus stated in *Newell, Slander and Libel* (2d ed.) p. 371:

"Two or more partners may join in an action of slander for words spoken of them in the way of their trade, whereby they have sustained special damage. They may sue jointly for slander of them in respect of their trade without showing the proportion of their respective shares. But damages cannot be given in such an action for any injury to the private feelings of the plaintiffs, but only for such injury as they may have sustained in their joint trade or business."

The Supreme Judicial Court of Massachusetts, in *Gazynski v. Colburn*, 11 Cush. 10, states the rule as follows:

"It has always been held that when words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other. The case of husband and wife is not an exception to this rule. The exceptions to it are the case of words spoken of partners in the way of their trade, and the case of slander of the title of joint owners of land."

In *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397, the supreme court of Connecticut said:

"We will only add that it is well settled that in an action for libel by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business."

For a case closely analogous in principle, see also our recent decision in *Hall v. Gallo-way*, 76 Wash. 42, 135 Pac. 478. The court, touching this question, instructed the jury as follows:

"If, therefore, you should find from the evidence that the defendant published the article or articles charged in the complaint and that they were calculated to injure the plaintiffs either in their reputation or in

their business by either exposing them or either of them to ridicule or contempt or to [521] injuriously affect their reputation or the reputation of either of them in the community, or injuriously affect their business as restaurant proprietors, then, unless the defendant should prove it was justified in publishing the articles, you must find for the plaintiffs."

This instruction was repeated in substance several times in different parts of the charge. It is clearly erroneous for two reasons. In the first place, there was little evidence of injury to the reputation of either partner as an individual, and no evidence of injury to the separate business of either. The publications, though libelous *per se*, made no reference to either of the respondents personally except in one instance, and that in connection with the partnership property. They made no reference to the separate business of either. In the second place, the only damages recoverable in this action are, according to the foregoing authorities, such damages as resulted in injury to the partnership business itself, and to the partners in their joint capacity.

It is clear, therefore, that the judgment must be reversed. There was no evidence of special damages sufficient to take the case to the jury, and the element of damage to reputation or feelings, or the separate business of the respondents as individuals, could not be considered in this joint action. The respondents were only entitled to nominal damages under the evidence.

We find no merit in respondents' claim that there was a mere misjoinder of parties and that the objection thereto was waived by the failure of appellant to demur to the complaint. There was no misjoinder. The complaint itself was in the name of the plaintiffs as partners. The appellant had a right to construe it according to its legal effect as an action for damages to the partnership business. The objection to treating it otherwise was interposed as soon as evidence tending to prove individual damage was offered. A review of the authorities cited by respondents in this connection [522] would be idle. They are clearly distinguishable on the facts and in the nature of the cases.

The judgment is reversed, and the case is remanded with direction to enter a judgment for the respondents for nominal damages only.

Main, Mount, and Crow, JJ., concur.

NOTE.

The reported case holds that a publication relating to the sanitary condition of a restaurant is not privileged as a comment on

a matter of public interest, though it is made as part of a systematic newspaper investigation of the condition of the eating houses in a city. Comment on matters of public interest as libel or slander is discussed at length in the note to *Flanagan v. Nicholson Publishing Co.* reported ante, this volume, at page 402.

BISHOP ET AL.

v.

FISCHER.

Kansas Supreme Court—January 9, 1915.

94 Kan. 105; 145 Pac. 890.

Receivers — Jurisdiction in Receivership Proceeding — Orders to Third Persons.

The plaintiffs' lessee bored producing gas wells on the plaintiffs' land and on the lessee's land, and connected the wells by pipes converged in a building erected by the lessee on the plaintiffs' land, where a meter, a pressure gauge, and other gas appliances were installed. From this point the gas produced was conducted to a pipe line located in a highway alongside the plaintiffs' land. The pipe line belonged to a corporation for which a receiver was appointed by the district court. The receiver was authorized by the court to purchase gas from the plaintiffs' lessee, which the receiver distributed to consumers. The plaintiffs took possession of the building, pipes, and appliances on their own land and stopped the flow of gas into the pipe line under a claim of right predicated upon their contract with the lessee. Upon application made in the receivership suit, the receiver procured an order directing a person designated by the court to remove the obstructions preventing the flow of gas into the pipe line and enjoining the plaintiffs from maintaining such obstruction or interfering with the order. Neither the plaintiffs nor their lessee were parties to the receivership suit, and the order was procured without notice to them. The order having been executed, the plaintiffs moved to set it aside because it had been made without jurisdiction. The court modified the order but did not vacate it. Held, the court had no jurisdiction over the parties or over the property affected by the order, the order was void, and the court may be required by writ of mandamus issuing from this court to set aside the order.

Appearance — What Constitutes — Motion to Set Aside Order for Want of Jurisdiction.

The contents of the plaintiffs' motion to set aside the order considered and held not

to constitute a general appearance in the receivership suit.

[See note at end of this case.]

(Syllabus by court.)

Original action for mandamus. George J. Bishop et al., plaintiffs, and Edward L. Fischer, District Judge, defendant. The facts are stated in the opinion. DISMISSED.

James F. Getty for plaintiffs.

Ed. C. Little for defendant.

[106] BURCH, J.—The plaintiffs ask for a peremptory writ of mandamus commanding the defendant as judge of the district court to set aside an order of the court.

Briefly stated, the essential facts disclosed at the hearing are these. The plaintiffs own a tract of land which they leased for oil and gas purposes. The American Gas Company has gas rights in an adjoining tract. Two producing wells were bored on the plaintiffs' land and several producing wells were bored on the American Gas Company's land. Pipes were laid on the plaintiffs' land connecting all these wells, whereby gas produced was conducted to a common point on the plaintiffs' land. A building was erected there in which were installed a meter, a pressure gauge, and other gas appliances. From this point gas was conducted to a pipe line laid in the highway alongside the plaintiffs' land. The American Gas Company became the plaintiffs' lessee, and their claim is that the American Gas Company became such lessee upon the condition that if rentals and royalties were not paid they might terminate the lease and take possession of the pipes, building, and gas appliances on their land. Rentals and royalties were not paid. The American Gas Company became bankrupt, the plaintiffs undertook to forfeit the lease, and pursuant to their claimed contract rights they took possession of the pipes, buildings, and gas appliances on their own land. The appliances were chained and padlocked in such a way as to prevent the flow of gas into the pipe line in the highway. The pipe line in the highway belonged to the Mid-Continent Development Company. In August, 1911, in an action entitled *L. E. Inscho v. The Mid-Continent Development Company*, a receiver was appointed for the development company. Subsequently the court authorized the receiver to purchase all the gas furnished by [107] the American Gas Company, and gas obtained in this way was distributed to consumers. Neither the plaintiffs nor the American Gas Company were parties to the receivership suit and the receiver had no possession of the property involved in this suit, or authority over it. When the plaintiffs took possession of the means where-

by gas which the receiver was authorized to buy was delivered, the receiver made an *ex parte* application to the court for an order, which was granted without notice in the following terms:

"It is therefore considered, ordered and adjudged that George Holmes as employee of the American Gas Co. remove the obstructions preventing the flow of gas from the American Gas Company's pipe lines to the Mid-Continent Development Company's pipe line and that James F. Getty and George Bishop no longer maintain any obstruction to the said flow of gas and in no way interfere with this order, until the further orders of this court."

Holmes was in fact an employee of the receiver and proceeded to execute the order by breaking into the building on the plaintiffs' land and removing locks and chains which obstructed the flow of gas into the pipe line. The order was made on November 11, 1914. After its execution, and on November 14, the plaintiffs moved the court to set aside the order on the ground that it had been made without jurisdiction. After a hearing the court modified the order in such a way as to permit the plaintiffs to cut off the flow of gas from their own wells but allowed the order to stand as to gas flowing from the American Gas Company's wells. The court disclaimed jurisdiction over the plaintiffs, but believed that the public, to whom the receiver was distributing gas coming from the American Gas Company's wells, should not have its supply cut off by any summary or arbitrary act of the plaintiffs, and on that ground reserved further judgment until it could consider the proper course to be pursued. Thereupon the [108] plaintiffs brought the present action, which the receiver defends for the judge of the district court.

This court has jurisdiction to issue the writ prayed for. It is granted original jurisdiction in proceedings in mandamus by the constitution. (Art. 3, § 3.) This jurisdiction is plenary and may be exercised to control the action of inferior courts, over whom this court has superintending authority. (In re Petitt, 84 Kan. 637, 114 Pac. 1071.)

The action of mandamus cannot be used as a substitute for appeal, nor in any case where a plain and adequate remedy at law exists. In this case, however, there was no action pending against the plaintiffs in the district court. Without having jurisdiction of the plaintiffs and without having jurisdiction of the property, the district court, without notice, issued a mandatory injunction which in effect adjudicated the plaintiffs' rights and deprived them of the peaceable possession of property which no one

their business by either exposing them or either of them to ridicule or contempt or to [521] injuriously affect their reputation or the reputation of either of them in the community, or injuriously affect their business as restaurant proprietors, then, unless the defendant should prove it was justified in publishing the articles, you must find for the plaintiffs."

This instruction was repeated in substance several times in different parts of the charge. It is clearly erroneous for two reasons. In the first place, there was little evidence of injury to the reputation of either partner as an individual, and no evidence of injury to the separate business of either. The publications, though libelous *per se*, made no reference to either of the respondents personally except in one instance, and that in connection with the partnership property. They made no reference to the separate business of either. In the second place, the only damages recoverable in this action are, according to the foregoing authorities, such damages as resulted in injury to the partnership business itself, and to the partners in their joint capacity.

It is clear, therefore, that the judgment must be reversed. There was no evidence of special damages sufficient to take the case to the jury, and the element of damage to reputation or feelings, or the separate business of the respondents as individuals, could not be considered in this joint action. The respondents were only entitled to nominal damages under the evidence.

We find no merit in respondents' claim that there was a mere misjoinder of parties and that the objection thereto was waived by the failure of appellant to demur to the complaint. There was no misjoinder. The complaint itself was in the name of the plaintiffs as partners. The appellant had a right to construe it according to its legal effect as an action for damages to the partnership business. The objection to treating it otherwise was interposed as soon as evidence tending to prove individual damage was offered. A review of the authorities cited by respondents in this connection [522] would be idle. They are clearly distinguishable on the facts and in the nature of the cases.

The judgment is reversed, and the case is remanded with direction to enter a judgment for the respondents for nominal damages only.

Main, Mount, and Crow, JJ., concur.

NOTE.

The reported case holds that a publication relating to the sanitary condition of a restaurant is not privileged as a comment on

a matter of public interest, though it is made as part of a systematic newspaper investigation of the condition of the eating houses in a city. Comment on matters of public interest as libel or slander is discussed at length in the note to *Flanagan v. Nicholson Publishing Co.* reported ante, this volume, at page 402.

BISHOP ET AL.

v.

FISCHER.

Kansas Supreme Court—January 9, 1915.

94 Kan. 105; 145 Pac. 890.

Receivers — Jurisdiction in Receivership Proceeding — Orders to Third Persons.

The plaintiffs' lessee bored producing gas wells on the plaintiffs' land and on the lessee's land, and connected the wells by pipes converged in a building erected by the lessee on the plaintiffs' land, where a meter, a pressure gauge, and other gas appliances were installed. From this point the gas produced was conducted to a pipe line located in a highway alongside the plaintiffs' land. The pipe line belonged to a corporation for which a receiver was appointed by the district court. The receiver was authorized by the court to purchase gas from the plaintiffs' lessee, which the receiver distributed to consumers. The plaintiffs took possession of the building, pipes, and appliances on their own land and stopped the flow of gas into the pipe line under a claim of right predicated upon their contract with the lessee. Upon application made in the receivership suit, the receiver procured an order directing a person designated by the court to remove the obstructions preventing the flow of gas into the pipe line and enjoining the plaintiffs from maintaining such obstruction or interfering with the order. Neither the plaintiffs nor their lessee were parties to the receivership suit, and the order was procured without notice to them. The order having been executed, the plaintiffs moved to set it aside because it had been made without jurisdiction. The court modified the order but did not vacate it. Held, the court had no jurisdiction over the parties or over the property affected by the order, the order was void, and the court may be required by writ of mandamus issuing from this court to set aside the order.

Appearance — What Constitutes — Motion to Set Aside Order for Want of Jurisdiction.

The contents of the plaintiffs' motion to set aside the order considered and held not

to constitute a general appearance in the receivership suit.

[See note at end of this case.]

(Syllabus by court.)

Original action for mandamus. George J. Bishop et al., plaintiffs, and Edward L. Fischer, District Judge, defendant. The facts are stated in the opinion. DISMISSED.

James F. Getty for plaintiffs.

Ed. C. Little for defendant.

[106] BURCH, J.—The plaintiffs ask for a peremptory writ of mandamus commanding the defendant as judge of the district court to set aside an order of the court.

Briefly stated, the essential facts disclosed at the hearing are these. The plaintiffs own a tract of land which they leased for oil and gas purposes. The American Gas Company has gas rights in an adjoining tract. Two producing wells were bored on the plaintiffs' land and several producing wells were bored on the American Gas Company's land. Pipes were laid on the plaintiffs' land connecting all these wells, whereby gas produced was conducted to a common point on the plaintiffs' land. A building was erected there in which were installed a meter, a pressure gauge, and other gas appliances. From this point gas was conducted to a pipe line laid in the highway alongside the plaintiffs' land. The American Gas Company became the plaintiffs' lessee, and their claim is that the American Gas Company became such lessee upon the condition that if rentals and royalties were not paid they might terminate the lease and take possession of the pipes, building, and gas appliances on their land. Rentals and royalties were not paid. The American Gas Company became bankrupt, the plaintiffs undertook to forfeit the lease, and pursuant to their claimed contract rights they took possession of the pipes, buildings, and gas appliances on their own land. The appliances were chained and padlocked in such a way as to prevent the flow of gas into the pipe line in the highway. The pipe line in the highway belonged to the Mid-Continent Development Company. In August, 1911, in an action entitled *L. E. Inscho v. The Mid-Continent Development Company*, a receiver was appointed for the development company. Subsequently the court authorized the receiver to purchase all the gas furnished by [107] the American Gas Company, and gas obtained in this way was distributed to consumers. Neither the plaintiffs nor the American Gas Company were parties to the receivership suit and the receiver had no possession of the property involved in this suit, or authority over it. When the plaintiffs took possession of the means where-

by gas which the receiver was authorized to buy was delivered, the receiver made an *ex parte* application to the court for an order, which was granted without notice in the following terms:

"It is therefore considered, ordered and adjudged that George Holmes as employee of the American Gas Co. remove the obstructions preventing the flow of gas from the American Gas Company's pipe lines to the Mid-Continent Development Company's pipe line and that James F. Getty and George Bishop no longer maintain any obstruction to the said flow of gas and in no way interfere with this order, until the further orders of this court."

Holmes was in fact an employee of the receiver and proceeded to execute the order by breaking into the building on the plaintiffs' land and removing locks and chains which obstructed the flow of gas into the pipe line. The order was made on November 11, 1914. After its execution, and on November 14, the plaintiffs moved the court to set aside the order on the ground that it had been made without jurisdiction. After a hearing the court modified the order in such a way as to permit the plaintiffs to cut off the flow of gas from their own wells but allowed the order to stand as to gas flowing from the American Gas Company's wells. The court disclaimed jurisdiction over the plaintiffs, but believed that the public, to whom the receiver was distributing gas coming from the American Gas Company's wells, should not have its supply cut off by any summary or arbitrary act of the plaintiffs, and on that ground reserved further judgment until it could consider the proper course to be pursued. Thereupon the [108] plaintiffs brought the present action, which the receiver defends for the judge of the district court.

This court has jurisdiction to issue the writ prayed for. It is granted original jurisdiction in proceedings in mandamus by the constitution. (Art. 3, § 3.) This jurisdiction is plenary and may be exercised to control the action of inferior courts, over whom this court has superintending authority. (In *re* Petitt, 84 Kan. 637, 114 Pac. 1071.)

The action of mandamus cannot be used as a substitute for appeal, nor in any case where a plain and adequate remedy at law exists. In this case, however, there was no action pending against the plaintiffs in the district court. Without having jurisdiction of the plaintiffs and without having jurisdiction of the property, the district court, without notice, issued a mandatory injunction which in effect adjudicated the plaintiffs' rights and deprived them of the peaceable possession of property which no one

cause and person, this is a submission to the jurisdiction, and waives all defects in the service of process." (p. 580.)

In the early case of *Cohen v. Trowbridge*, 6 Kan. 385, which has been followed many times, the syllabus reads:

"A motion in a cause based wholly on an alleged want of jurisdiction is not an appearance generally, or a waiver of any irregularity in the proceedings by which a party is attempted to be brought into court; but a motion, grounded wholly or in part upon error in the judgment, or upon irregularities, aside from the question of jurisdiction, is such waiver as constitutes an appearance." (Syl. ¶ 3.)

The plaintiffs' motion may be read in such a way as to indicate a general submission to the jurisdiction of the court, but here, as elsewhere in procedure, substance [114] alone is to be regarded, and it is quite clear that the sole purpose was to challenge jurisdiction. The plaintiffs did not ask to be made parties, and the relief sought, the dissolution of the order, is entirely consistent with want of jurisdiction, and could be granted upon the hypothesis that the court had no jurisdiction. This relief was not asked because of error in granting the order or on the ground of irregularity aside from the question of jurisdiction. The plaintiffs desired no decree that they owned the property. Indeed, it would have been impossible for the court to adjudicate that fact as the case stood—on a simple motion and in the absence of the American Gas Company, which was not a party. The facts concerning the ownership and location of the property were stated to show the character of the right invaded, that the plaintiffs were claimants of absolute property interests which the court lacked power to divest summarily by an *ex parte* order. Likewise the plaintiffs did not desire a decree that they were free from relations with the receiver in the marketing of gas and use of the pipes. The facts concerning those matters were stated to show that the plaintiffs were not related to the business of the receivership in any way which would give the court jurisdiction over them or over the property in controversy. Read in this way the motion is consistent throughout with the idea of a special appearance to set aside the order for want of jurisdiction. While the plaintiffs ran some risk in thus attempting to exclude grounds of jurisdiction, the court is satisfied that such was their purpose, and such being their purpose, the court will not enlarge the appearance to make it general. This court is all the more ready to adopt this conclusion because it seems to have been the view of the district court. The proposition that the plaintiffs made a general appearance is presented for

the first time by the receiver in this court. The district court's view was indicated at the close of the hearing as follows:

"The Court: I have jurisdiction over the receiver [115] and the receiver and people under him have equities and they are in court and entitled to the protection of this court to the extent of preventing any one cutting off the supply of the gas without right. Now I am not sure just what the rights are in regard to that pipe going across this land; but I don't believe Mr. Bishop has any right to jump in there and tear up a main or close it off, that is, a general supply pipe, from customers of wells back behind his land so as to keep it away from whoever acquires the right to use it.

"Mr. Getty: They are using our land.

"The Court: This pipe runs across there and does not hurt your land as I get it. . . . I have no more jurisdiction over Mr. Bishop than anybody else, but he should not interfere with the supply of gas to these consumers."

The judge of the district court acted candidly and conscientiously. His solicitude for people who might be depending in part upon this supply of fuel and light in winter-time was commendable, and his reservation of final decision until he could satisfy himself fully as to the proper course to pursue was the result of this solicitude. Under these circumstances the present order will be that if the order of the district court be set aside within ten days from the filing of this opinion, this proceeding will be dismissed without costs, which are practically nominal, to either party.

NOTE.

Moving to Set Aside Order in Cause for Want of Jurisdiction as General or Special Appearance.

While there is little or no direct authority on the point, the holding of the reported case that a motion to set aside an order in a cause for want of jurisdiction does not constitute a general appearance seems to be supported by the following cases: *Lively v. Picton*, 218 Fed. 401, 134 C. C. A. 189; *Mitchell Min. Co. v. Emig*, 35 App. Cas. (D. C.) 527; *Kanne v. Minneapolis, etc. R. Co.* 33 Minn. 419, 23 N. W. 854; *Multnomah Lumber Co. v. Weston Basket Co.* 54 Ore. 22, 99 Pac. 1046, 102 Pac. 1; *Kilpatrick v. Horton*, 15 Wyo. 501, 89 Pac. 1035. Thus in *Multnomah Lumber Co. v. Weston Basket Co.* supra, it was said: "A special appearance is made by a party when he or his attorney in a suit or action seeks to obtain from the court an order vacating some proceeding which, it is insisted,

has been undertaken by the adverse party in an unauthorized manner." In *Mitchell Min. Co. v. Emig*, 35 App. Cas. (D. C.) 527, the court said: "It is well settled that one cannot avail himself of the right to vacate the process after a general appearance to the merits. . . . We do not consider the motion in this case as amounting to such an appearance. Its sole ground was the invalidity of the return because the corporation was not doing any business in the district, and had no office therefor at which process could be left, and the appearance was special for that purpose. It is true the motion was also to vacate the several orders made in the case, and dismiss the petition. Assuming that this was going farther and asking more than the appellant was entitled to, still the single ground upon which the vacation of the orders was prayed was the invalidity of the process." So in *Kanne v. Minneapolis, etc. R. Co.* 33 Minn. 419, 23 N. W. 854, in condemnation proceedings which the defendant had instituted against the plaintiff, the defendant made a motion to set aside the award. The court in holding that the defendant did not appear generally said: "Subsequently to the commencement of this action, plaintiff made a motion to set aside the award upon the grounds, among others, that no notice of the meeting of the commissioners was ever given him; that the commissioners were guilty of irregularities and misconduct; and also that the award had not been paid within six months. This motion the court denied, and at the same time denied a counter-motion by defendant for judgment on the award. From the order denying plaintiff's motion no appeal was taken. Defendant now contends that by thus uniting, as grounds of his motion, other matters with those that were jurisdictional, he appeared generally, and thereby waived all objections to jurisdiction, within the doctrine of *Curtis v. Jackson*, 23 Minn. 268. While there is no doubt of the correctness of the proposition laid down in the case cited, that if a party does not limit his appearance to jurisdictional questions, but also calls into action the powers of the court for other purposes, it is a general appearance, and he thereby submits to the jurisdiction of the court thereafter, yet it may admit of doubt whether the proposition was not misapplied in making such appearance relate back in point of time so as to validate a void judgment previously rendered. But the want of this notice of the meeting of the commissioners goes, not to the jurisdiction of the person of the landowner, but to the authority of the commissioners to act. This notice has respect to the compensation of the landowner, and the object of it is to give him an opportunity

to be heard on that question. Without it, the commissioners have no authority to make an assessment of his compensation or damages."

In *Kilpatrick v. Horton*, 15 Wyo. 501, 89 Pac. 1035, the rule appears to have been recognized although it was held that the institution of proceedings to vacate orders relating to the compensation of a receiver on both jurisdictional and nonjurisdictional grounds constituted a general appearance. The holding in *Lively v. Pictou*, 218 Fed. 401, 134 C. C. A. 189, does not appear to conflict with the rule laid down in the reported case. It was therein held that the action of a corporation in demurring to a petition for the appointment of a receiver, and in moving to set aside an entry for the appointment of a receiver without limiting its appearance to the sole purpose of objecting to the jurisdiction of the court over its person, constituted a general appearance.

Whether an appearance for the purpose of moving to set aside an attachment for lack of jurisdiction constitutes a general or a special appearance is considered in the note to *Davis v. Cleveland, etc. R. Co.* 18 Ann. Cas. 907. And for a discussion of the general principles governing the question whether an appearance is special or general, see the note to *Rogers v. Penobscot Min. Co.* Ann. Cas. 1914A 1184.

RAST ET AL.

v.

VAN DEMAN AND LEWIS COMPANY ET AL.

United States Supreme Court—March 6, 1916.

240 U. S. 342; 36 S. Ct. 370.

Injunctions — Against Enforcement of Penal Statute.

The threatened enforcement by state officers through civil or criminal proceedings, of a state statute which is attacked as repugnant to the Federal Constitution, may be enjoined by a federal court, where the statute, if exerted against complainants and their property, will produce irreparable injury.

[See 1 Ann. Cas. 121; 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

Trading Stamps — Imposition of License Tax — Validity.

There is such a difference between the selling of goods accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premi-

ums, and the selling of goods without such inducements to purchasers, that the imposition upon the former business of an additional license tax for each place in each and every county in which said business is conducted, as is done by Florida Laws 1913, chap. 6421, § 35, does not offend against the equal protection of the laws clause of the Federal Constitution.

[See note at end of this case.]

Same.

The delivery by a Florida merchant of coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, in connection with sales of merchandise at retail, is not interstate commerce so as to be protected against the imposition of a state license tax, although the coupons may have been inserted in the retail packages by the manufacturer or shipper outside the state, and are redeemable outside the state, either by such manufacturer or shipper, or by some other agency outside the state.

[See note at end of this case.]

Same.

The permission, if any, granted by the amendment of the Act of July 1, 1902 (32 Stat. at L. 715, chap. 1371, 3 Fed. St. Ann. 748), § 2, to U. S. Rev. Stat. § 3394, to inclose in packages of tobacco redeemable coupons, profit-sharing certificates, etc., does not extend to retail sales of such packages within a state so as to invalidate state restrictions upon such sales.

[See note at end of this case.]

Same.

Contract obligations are not unconstitutionally impaired by the imposition, under Florida Laws 1913, chap. 6421, § 35, of an additional license fee upon merchants offering with merchandise bargained or sold coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, since the statute must be deemed to be prospective in its operation, and not to affect sales completed before its enactment.

[See note at end of this case.]

Same.

Liberty to contract is not unconstitutionally infringed, contrary to the due process of law clause of U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), by Florida Laws 1913, chap. 6421, § 35, making merchants offering with merchandise bargained or sold any coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, liable to pay an additional license tax, which may be prohibitive, and, if the same are to be redeemed by someone else than the merchant offering them, liable to pay a similar license fee for the one who is to redeem.

[See note at end of this case.]

Fines and Penalties — Excessiveness — Preventing Test of Statute.

The penalties of \$1,000 fine, or six months' imprisonment, prescribed by Florida Laws 1913, chap. 6421, § 35, for violations of its

provisions against the sale without payment of the specified license fee, of merchandise accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness, or other liability redeemable in premiums, are not so severe as to intimidate against a contest of the validity of such statute, and thus deny the equal protection of the laws.

Appeal from United States District Court, Southern District of Florida.

Action by Van Deman and Lewis Company, et al., plaintiffs, against John W. Rast, et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the Opinion.

REVERSED.

[344] A statute of Florida approved June 5, 1913 (Vol. 1, p. 3), imposing licenses and other taxes, provides that merchants, druggists and storekeepers shall pay a license tax upon the cash value of the "stock of merchandise" of \$3 for the first \$1000 or fraction thereof, and \$1.50 for each additional \$1000 or fraction thereof. The tax upon wholesale dealers is \$1.50 upon each \$1000. The statute has this proviso: § 35, p. 35.

"Provided, further, That each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a State license tax of Five Hundred (\$500.00) dollars and a County license tax of two hundred and fifty (\$250.00) dollars in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate State and County license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license prescribed in this section shall be in addition to other licenses prescribed by this Act. Any [345] person violating any of the provisions of this section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand (\$1000) dollars or by imprisonment in the county jail not exceeding six months.

"Mercantile Agencies: Shall pay a license tax of one hundred (\$100.00) dollars in each county in which an office is established.

"Merchants using trading stamps, shall pay a license tax of two hundred and fifty (\$250.00) dollars for each place of business where they use such stamps.

"Merchant tailors shall pay a license tax of ten (\$10.00) dollars for each place of business."

This suit was instituted by appellees (Florida merchants) against appellant Rast as tax collector of Duval County, Florida, and the tax collectors of each county in the State, the different State's attorneys, county solicitors and prosecuting attorneys of the circuits and counties of Florida. The purpose of the suit was to restrain those officers from proceeding under the statute or enforcing it. A preliminary and perpetual injunction was prayed and that the act be declared unconstitutional, illegal and void.

The bill is very elaborate and we select from its repetitions and condense the following: It alleges the various businesses in which the complainants are engaged. The Van Deman & Lewis Company is a Florida corporation and a wholesale grocer, doing business as such and selling groceries in certain counties in the State; Harkisheimer Company is also a Florida corporation and is a retail grocer; J. S. Pinkusohn Cigar Company is a corporation organized under the laws of South Carolina and is a wholesale and retail merchant buying and selling cigars and other tobacco products in the cities of Jacksonville and Pensacola, Florida. With these complainants were joined others, corporations and individuals, doing business in Florida.

[346] It is alleged that complainants and each of them in the conduct of their business offer for sale and deal in various and numerous articles of merchandise manufactured and produced in other States than Florida by persons and corporations in those States and shipped into Florida to be sold therein, and who, for the purpose of advertising their businesses and increasing their sales, enclose in the packages in which the merchandise is put up for market and sale coupons, slips, certificates and other profit-sharing discount or premium tokens. The articles and the persons and companies producing them are enumerated.

The manner or method of disposing of and redeeming and taking up such coupons, etc., is alleged to be that the same are enclosed in packages or the wrappers thereof, or are a part of the wrappers, the packages are put into boxes, cases or other receptacles or enclosures and shipped by the manufacturer or producer from his place of business outside of Florida to the merchants in Florida, generally to a wholesale merchant or jobber, and are received by such in Florida and sold to the retail merchants in that State. The

retail merchant sells them to his customers. When the latter have accumulated a sufficient number of the coupons, etc., to entitle them to receive a premium or article or payment therefor according to some list, catalogue or rule promulgated by the manufacturer, producer or original shipper, they send such coupons, etc., to such manufacturer, producer or original shipper, or in some instances, to a company or agency in some State other than Florida, where they are redeemed or paid or the articles which the purchasers have selected are sent to them in consideration of such coupons, etc., or for the same and a postage stamp or stamps or a small sum of money in addition thereto. And this in accordance with the contract, agreement or sale made to the purchasers by the manufacturer, shipper or producer outside of the [347] State. And it is alleged that the transactions so detailed, the manufacturer without the State and shipment to wholesale merchants within the State, the sale by the latter to retail merchants and by the latter again to customers, constitute interstate commerce.

That the form of the coupons, etc., varies and when its identity is secured as prescribed it is evidence that each purchaser of a package has bought a definite part of some article, to be selected by him or her from a certain list, the list showing a number of valuable articles which can be paid for by a certain number of the tokens and a two-cent stamp.

In another case there is an accumulation of the tokens which are to be sent to the redemption or coupon agency or corporation and exchanged for a valuable article of merchandise to be selected by the purchaser from a list or catalogue furnished him.

Another form of coupons, etc., is where each of them is good for a certain value, for instance, one-half cent in presents or premiums, the coupons being sent from the State of Florida to another State. There are also other forms in which the coupons or tokens are to be redeemed, paid for or used in the purchase of other articles of merchandise or in the accumulation of premiums or the like. All of the articles are known and largely used as legitimate articles of commerce and the transactions detailed are interstate commerce.

That divers forms of coupons, etc., in connection with the sale of merchandise are used by the merchants of the State substantially in similar form mentioned above and the payment or redemption is made by the Florida merchant in Florida, sometimes by the delivery of some valuable article of merchandise; sometimes by the payment of cash or the allowance of credit on account of purchases in the nature of a discount or for or

on account of a certain amount having been purchased of the merchant by the [348] customer. The tokens are sometimes in the form of a cash register slip or memorandum.

That the methods detailed are a form of advertising and the use of such coupons, etc., induces purchasers to trade more largely with and to make more of their purchases from complainants on account of the additional inducement of such coupons, etc.; that they increase the businesses of complainants and their profits and enable them to carry and sell stocks of goods covering the various articles of merchandise, and are of great importance and value to complainants in their several businesses; and if they are prevented from using them their businesses will be decreased to the amount of many thousands of dollars.

That at the time of the passage of the statute complainants had on hand large amounts and quantities of goods and if they are prevented from selling them in the manner detailed they will be subjected to great loss and damage, will be embarrassed and injured in their businesses and the value of their property destroyed or greatly lessened.

That the transactions and methods give an additional value to purchasers and they are substantially benefited thereby. That there is no element of gambling or chance in the transactions and nothing in them or their methods prejudicial to the public health, safety, morals, or welfare.

That if there is a cessation of the transactions purchasers and customers who have received tokens but have not accumulated a sufficient number of them will be unable to have the same redeemed or paid or secure articles therewith. That about 500 merchants are similarly affected with complainants.

That certificates or tokens commonly called trading stamps and so designated in the statute are substantially like some of the tokens hereinbefore mentioned and [349] described and when delivered by retail merchants with the various articles sold to purchasers such purchasers are entitled to purchase or receive various valuable articles of merchandise, according to a list or catalogue, upon the presentation of the stamps to some person or company that has issued the trading stamps and that redeems them according to the provisions of such list or catalogue.

That under the statute every person, firm or corporation offering with merchandise any coupon, profit-sharing certificate or other evidence of indebtedness or liability redeemable in premiums is not only liable to pay the license tax for himself or itself but to pay such tax for every other person, firm or corporation who may redeem any such coupon, etc.

That such taxes are unreasonable, enormous and prohibitive on account of the number of articles sold, and by reason of the provision requiring complainants and each and every other person in like situation to pay the license tax to the State, and it is alleged with much circumstance that, from their number and the number of the articles that each sells, each and every person would be required to pay for license tax to the State and for one county or one place of business alone \$15,000 per year or one-half that amount for six months or less time.

That as a result of the statute, if the tax be paid for only 100 persons or persons, firms or corporations, it would amount to \$75,000 per annum; if for 1000 persons, firms or corporations in Florida for one place of business, it would amount to \$750,000, and so on as to any number to be paid by and for each and every of such manufacturer, producer or shipper.

That such coupons, etc., enclosed in packages of tobacco and so delivered are authorized and rendered lawful by section 3394 of the Revised Statutes of the United [350] States as amended by § 10 of the act of July 24, 1897, 30 Stat. 151, 206, c. 11, and by § 2 of the act of July 1, 1902, 32 Stat. 714, 715, c. 1371 (3 Fed. St. Ann. 748).

That the provision of § 35 (the provision quoted above) of the Florida statute and all provisions and enactments for its enforcement are in violation of the Constitution of the United States in that they violate (1) the commerce clause, (2) the due process clause of the Fourteenth Amendment, and (3) the equal protection clause of that amendment. There are many specifications of the particulars and it is alleged: (1) The statute discriminates between merchants in similar lines of business; (2) between merchants who advertise in a certain manner and those who advertise in another manner. (3) The taxes are not upon the business or occupation of complainants but upon the mere incidents of the business and are an unreasonable and illegal interference with the method and manner of conducting the business. (4) The taxes are unreasonable, arbitrary, oppressive, discriminatory and prohibitory for the reasons already detailed and are far in excess of the amounts of taxes or licenses fixed or imposed when other methods of advertising or inducing custom are used and will prevent complainants from carrying on their legitimate business. (5) They are not productive of revenue, are in excess of the profits of the businesses, and are in fact prohibitory. (6) That the methods employed by complainants in no wise affect the public health, morals or welfare, and the imposition of the taxes is in no way a legitimate or lawful exercise of the police

power of the State. (7) That the fines are so onerous, drastic, excessive and enormous as to deter complainants in going on and doing business as they have heretofore done and testing the validity of the statute in a court of law.

That by the statute and in § 59 thereof a violation of its provisions is made a misdemeanor and it is provided [351] in § 35 that for failure to pay any of the license taxes any person, whether acting for himself or as agent of another, may be imprisoned in the county jail, not exceeding six months.

It is further alleged that the statute impairs the obligations of the contracts entered into between complainants and their customers, in violation of clause 1, § 10, Article I, of the Constitution of the United States (8 Fed. St. Ann. 748).

That the officers of the State threaten to enforce the statute and that the State's attorneys, county solicitors and prosecuting attorneys of the several circuits and counties of the State are respectively empowered and authorized to prosecute in the several courts of the State and such officers are threatening to prosecute divers of the complainants, and it is alleged that a multitude of prosecutions will be instituted, with seizures, sales and injury of property if a temporary restraining order be not granted. There is a prayer for such order and for a perpetual injunction.

A restraining order was issued. The defendants appeared specially and filed motions to dismiss the suit and as grounds thereof denied the allegations and implications of the bill as to the various grounds of infringement of the Constitution of the United States charged against the statute, and set up that complainants had a complete and adequate remedy at law. That the bill sought a restraint of the enforcement of a criminal statute of the State and to enjoin an alleged threatened seizure of property in the enforcement of the alleged illegal tax and the enforcement of the collection of a tax imposed by a statute of the State of a general and public nature.

A motion was made for an interlocutory injunction, hearing upon which was referred to three judges. Upon the hearing the injunction was ordered (214 Fed. Rep. 827) to review which this appeal has been prosecuted.

Thomas F. West for appellants.
Charles M. Cooper for appellees.

[355] *McKENNA, J. (after stating the facts).*—It was determined that the bill set forth grounds of equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that

the statute, if exerted against complainants and their property, would produce irreparable injury, citing *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 47 U. S. (L. ed.) 778; *Davis, etc. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 S. Ct. 498, 49 U. S. (L. ed.) 169. We concur in this view.

Passing on the constitutional questions involved, the [356] court was of opinion that the statute violated the Fourteenth Amendment and considered it unnecessary to decide whether there was an interference with interstate commerce.

It is not entirely clear upon what clause of the Fourteenth Amendment the court rested its judgment. The equality clause was selected for special comment. After stating the limitation upon legislation and the power of classification, the court proceeds to say: "Is there a just basis for the classification attempted in this section [§ 35] of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And if goods are offered for sale with which coupons are given, redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods.

"We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a 'greater burden' than that imposed on others in the same calling and condition."

But the court went farther and declared that "the use of coupons, etc., was an entirely legitimate method of advertising" and that such had been the ruling in state cases which were cited. And excluding the application of cases adduced by defendants to sustain the statute as an exercise of the police power of the State, the court said: "As before pointed out, this coupon business is legitimate, in no way affecting the health or morals of the community."

Though it is not clear, as we have said, certainly not explicit in the opinion of the court, whether it decided the due process clause as well as the equal protection clause of the Fourteenth Amendment was violated by the statute, [357] we may assume that the violation of both was decided. It may be that the court thought that even though the use of coupons was a legitimate method of advertising and not affecting the health or morals of the community, it was nevertheless within the power of the State to license if the statute were free from dis-

crimination, or it may be that the court considered that the two grounds interlocked and were dependent upon the same reasoning. However, the two grounds may be, indeed must be, taken into consideration as they are submitted for decision.

The ground of discrimination, simply and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, Ann. Cas. 1912C 160, 31 S. Ct. 337, 55 U. S. (L. ed.) 369. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chicago, etc. R. Co. v. McGuire*, 219 U. S. 549, 31 S. Ct. 259, 55 U. S. (L. ed.) 328; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 413, 414, 34 S. Ct. 612, 58 U. S. (L. ed.) 1011, L.R.A. 1915C 1189; *Price v. Illinois*, 238 U. S. 446, 452, 35 S. Ct. 892, 59 U. S. (L. ed.) 1400.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank v. Richmond*, 226 U. S. 137, 142, Ann. Cas. 1914B 192, 33 S. Ct. 76, 57 U. S. (L. ed.) 156, 42 L.R.A.(N.S.) 1123; *Sligh v. Kirkwood*, 237 U. S. 52, 59, 35 S. Ct. 501, 59 U. S. (L. ed.) 835. And, we repeat, "it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." *Quong* [358] *Wing v. Kirkendall*, 223 U. S. 59, 62, and the cases cited above.

Of course, an element to be considered is the authority of the legislature over the subject-matter, and this will best be examined in considering the contentions of complainants under the due process clause. Preceding that, however, are the contentions based on the commerce clause and the sanction which the Constitution gives to the integrity of contracts.

First, as pertinent to our discussion, are the specific schemes at which, it is said, the statute is directed, and we adopt complainants' description of them. The first is "where the Florida merchant issues his own coupon, certificate or cash register receipt

and himself makes payment or redemption of the same, sometimes by the delivery of some valuable articles of merchandise, sometimes by the payment of cash or allowance of credit on account of purchases, being in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer." In a word, it is a case where the Florida merchant issues his own coupons and redeems them.

The second is "where the manufacturer or shipper outside of the State of Florida, in some other State of the Union, inserts such coupons or certificates in packages of his goods which he ships to Florida, and the ultimate purchaser or consumer takes such coupons or certificates from such packages and returns them to such manufacturer or shipper in such State outside of Florida, who gives a premium for them and sends such premium or proceeds of redemption to such ultimate purchaser or consumer in Florida who has forwarded to him such coupons or certificates." The merchandise so shipped into Florida is kept in stock by the merchants of the State and the coupons, etc., are delivered upon the sale of the merchandise to their customers, who have them redeemed in the [359] manner described. That is, the coupons are redeemed by the person who originally issues them; the coupons, however, to repeat, being delivered by the Florida merchant as a part of the transaction between him and the purchaser from him at retail.

The third is "where the manufacturer or shipper in a State other than Florida inserts in the packages of his goods which he ships to Florida such coupons or certificates which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some company or agency in some State of the United States outside of the State of Florida other than the manufacturer or shipper of the goods, to be redeemed or paid, and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupons or certificates." This differs from the other two cases in that a premium company or agency other than the manufacturer or shipper himself is used for the redemption or payment of the coupons or certificates. But here again the Florida merchant is a factor because it is in completion of the sale by him at retail that the coupons are delivered to the purchasers.

We are careful, by much repetition, to show the difference between the cases, to distinguish between the premium systems, and to show, as urged by counsel, that this case is not concerned with a license tax upon a trading stamp business pure and simple, a

license upon companies engaged in such business being provided by another section of the statute.¹

It is well here to observe, to avoid misunderstanding, that the redemption in the first scheme is "*sometimes by the payment of cash or allowance of credit on account of [360] purchases or for or on account of a certain amount having been purchased of the merchant by the customer.*" We are not concerned with a statute directed solely at such method of redemption or a business so confined. The Florida statute imposes its license tax on coupons, etc., "redeemable in premiums." And therefore, whether any other method of redemption—be it by giving a discount or an allowance of credit simply—would be amenable to objection we express no opinion. In all of the schemes other methods of redemption are used and are attempted to be justified.

With this comment we may say that all of the schemes have a common character—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase, something of value given other than it; and even as to the second and third schemes, the transactions are only executed through the purchase at retail. In other words, they are not designed for or executed through a sale of the original package of importation but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the State and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. All of the schemes have their influence and effect within the State. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the State.

The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce, they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the State nor their disposition in the packages of importation. Of course, there is shipment to Florida merchants but [361] for the disposition of the merchandise in retail trade. The schemes contemplate such disposition and are executed by it. Detach the importations from the retail sale, consider only the transportation to the State of merchandise in its original package, being sold therein in

such package, and there may, indeed, be interstate commerce; but so detached and so considered the importations are left without purpose, the schemes without execution. Indeed, complainants contend for the right not only of importations in the original package containing the coupons but the disposition of the goods and coupons through the retail merchant. This, we repeat, has no protection in the commerce clause.

Nor is the regulation of the statute prohibited by § 3394, Rev. Stat. as amended in 1897 (July 24, c. 11, § 10, 30 Stat. 151, 206) and 1902 (July 1, c. 1371, § 2, 32 Stat. 714, 715) [3 Fed. St. Ann. 748]. Section 3394 provides for a tax on cigars and cigarettes. By the amendment of 1897 it was forbidden to pack in, attach to or connect with any package of tobacco or cigarettes anything but the wrappers, and it was further provided that there should not be affixed to, or branded, stamped, marked, written or printed upon the packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward. This provision upset the practice of manufacturers and was attacked on the ground that it was beyond the power of Congress under the Constitution to enact, the prohibited practice being a method of advertising. The provision was sustained. *Felsenhead v. U. S.* 186 U. S. 126, 22 S. Ct. 740, 46 U. S. (L. ed.) 1085, *affirming* 103 Fed. 453. In 1902 the paragraph containing the provision was amended so as to forbid the enclosure or attachment to the packages of "any paper, certificate, or instrument purporting to be or representing a ticket, chance, share or interest in, or dependent upon the event of a lottery, [362] or any indecent or immoral picture; representation, print or words."

Let it be granted that this provision permitted the enclosure in the package of tobacco of tokens of the character with which this case is concerned. It goes no farther nor does it purport to go farther. It does not attempt to protect and enforce the permission to the retail sales of packages in the State. It might not legally have such effect if attempted; and such attempt will not lightly be inferred. *Savage v. Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 U. S. (L. ed.) 1197. The statute of Florida does not seek to control the interstate transportation of the packages, it controls only their sale in the State through the retail merchant, or, it may be, directly to the individual con-

¹"Sec. 55, p. 51. Trading Stamp Firms: Persons or firms or corporations known as trading stamp companies, shall pay a State

license tax of one thousand (\$1,000.00) dollars in each county where they transact any business."

sumer for the purpose described, and in both cases for the ultimate redemption of the tokens delivered with the sale.

McDermott v. Wisconsin, 228 U. S. 115, Ann. Cas. 1915A 39, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, 47 U. S. (L. ed.) 984, is not applicable. There Congress, for the effective execution of the Food and Drugs Act, defined what the "package" of commerce should be, and necessarily any law which conflicted with it was void. In the case at bar there is no such definition. There is only permission to insert in the package whatever the manufacturer of tobacco may choose, with a single exception. There is no compulsion of use, and omission to avail of the permission has no effect upon the purpose of Congress in the enactment of the revenue laws which provide for the packing of tobacco products.

The contract clause of the Constitution is also unavailable to complainants. The statute must be held to have perspective operation. Sales completed before its enactment are unaffected by it. We say "sales completed," and by this we mean those in which the right of redemption according to some of the schemes has accrued as distinguished from what is alleged in the bill as "the [363] understanding and expectation" arising from one or more sales that complainants would continue to sell to such purchasers other articles so that they might be able to accumulate tokens and use them. It cannot be said that there is an obligation to continue sales or an obligation to continue purchases. Besides, as the business is subject to regulation the contracts made in its conduct are subject to such regulation. *Louisville, etc. R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297, 34 L.R.A. (N.S.) 671, and *New York Cent. R. Co. v. Gray*, 239 U. S. 583, 36 S. Ct. 176, 60 U. S. (L. ed.) 451.

Having disposed of the other contentions of complainants, we are brought to a consideration of the question whether the statute of Florida offends the due process clause of the Fourteenth Amendment of the Constitution. In other words, does the statute interfere with the business liberty of complainants? Is it an illegal meddling with a lawful calling and a deprivation of freedom of contract? This is the contention, and it is attempted to be supported by the assertion that the schemes detailed in the bill are but a method of advertising and, as such, mere allurements to customers, not detrimental in any way to the public health and morals, nor obstructive of the public welfare; but are a means of enterprise, mere incidents of

the businesses of complainants and as beneficial to their customers as to them. And besides that they are but a method of giving discount, practically in some instances a rebate upon the price, and in others an equivalent gift of some article that may attract the choice of the purchaser, the choice being free and the article of definite utility and value.

These contentions have the support of a number of cases. They are opposed by others, not nearly so numerous as the supporting cases but marking a change of opinion. Both sets of cases indicate by the statutes passed upon a persistent legislative effort against the schemes under review or some form of them, beginning in 1880 and [364] repeated from time to time until the statute in controversy was passed in 1913.¹ In such differences between judicial and legislative opinion where should the choice be? That necessarily depends upon what reasoning judicial opinion was based. We appreciate the seriousness of the situation. Regarding the number of the cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion.

The foundation of all of them is that the schemes detailed are based on an inviolable right, that they are but the exercise of a personal liberty secured by the Constitution of the United States and distinguished from other lawful exercise of business contracts and activity by a method of advertising and lawful inducements to an increased custom and that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts but legislatures may be the best judges and, it may be, the conclusive judges.

This may be illustrated. A lottery of itself is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. All participants in it have an equal chance; there is no admonishing caveat of one against the other. And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from [365] circumstances, become the source of evil or may have evil

¹ It is said that 23 States have attempted either to prohibit or to license the selling or use of trading stamps and coupons. And

there has been like legislation for the District of Columbia and the Territory of Hawaii.

tendency. *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 56 U. S. (L. ed.) 1229.

But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success.

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a "lottery," may not be called "gaming;" it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chicago, etc. R. Co. v. McGuire* and *German Alliance Ins. Co. v. Kansas*, supra. And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them [366] or be convinced of the wisdom of the legislation. *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126, 127, 30 S. Ct. 496, 54 U. S. (L. ed.) 688. See also *Munn v. Illinois*, 94 U. S. 113, 132, 24 U. S. (L. ed.) 77.

But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.

Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*." *Otis v. Parker*, 187 U. S. 606, 608, 609, 23 S. Ct. 168, 47 U. S. (L. ed.) 323.

That case illustrated the reach of the power of government to protect or promote the general welfare. It sustained a provision of the constitution of the State of California which made void all contracts for the sale of the stock of corporations on margin or to be delivered at a future day. The practice had been common, its evil was disputed. It was attempted to be justified by argument very much like those advanced in the case at bar, but this court decided that the legislative judgment was controlling.

Even more pertinent in illustration of the power of the States as unaffected by the Fourteenth Amendment is *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66, 57 U. S. (L. ed.) 164. A statute of the State was sustained which provided that any one engaged in the manufacture, production or distribution [367] of any commodity in general use, who should intentionally, for the purpose of destroying the competition of any regular, established dealer, discriminate between different places by selling such commodity at a lower rate in one place than such person charged in another, after equalizing the distance from the point of production, should be guilty of a crime. Freedom of conduct was restricted by the statute which had its incentive in trade advantages. It was the judgment of the legislature that such practice was an impediment to the public welfare. The legislative judgment was sustained against the attack, among others, that the law was an infringement of freedom of conduct and contract.

In *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 34 S. Ct. 856, 58 U. S. (L. ed.) 1288, the company issued scrip payable in merchandise only from its store as an advance of monthly wages in payment of labor performed. A statute of the State (West Virginia) prohibited the issue of any order for the payment of labor unless it was redeemable in money. The statute was assailed on the ground that it interfered with the freedom of contract. It will be observed that there was a consideration for the order payable in merchandise; it was a payment in advance, and hence it was asserted that the statute was an injury to the employees

and employers. There were elements in the transactions of apparent advantage to both and it would seem to have been within the liberty of both to contract upon an estimate of the value of that advantage. It was deemed an evil by the legislature and this court sustained its judgment.

In *Erie R. Co. v. Williams*, 233 U. S. 685, 34 S. Ct. 761, 58 U. S. (L. ed.) 1155, 51 L.R.A.(N.S.) 1097, a law of the State of New York required railroad companies to pay their employees semi-monthly and prohibited them from making contracts which should vary the time of payment. The law was sustained mainly upon the ground that it was an amendment of the charter of the corporation, but the extent of the police power was adverted to and the competency [368] of the legislature exercising that power to enact the legislation. The incentive of the legislation was the benefit which accrued to the employees by the period of payment. The public welfare was deemed to be promoted by it.

Other cases might be cited and, it may be, of more pertinent application, which, from their number and instances, would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts and in the exercise of the power to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary.

Complainants allege that the license tax which the statute imposes is of prohibitory character and assert that they are exercising inviolable rights and privileges which the excess of the tax prevents in violation of the Fourteenth Amendment; they contend that hence the statute is invalid.

It is not certain from the allegations of the bill that the tax is of the asserted character, but granting it to be so we have shown that the business schemes described in the bill are not protected from regulation or prohibition by the Constitution of the United States. *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385; *Booth v. Illinois*, 184 U. S. 425, 22 S. Ct. 425, 46 U. S. (L. ed.) 623; *Otis v. Parker*, 187 U. S. 606, 23 S. Ct. 168, 47 U. S. (L. ed.) 323. See also *Dobbins v. Los Angeles*, 195 U. S. 223, 238, 25 S. Ct. 18, 49 U. S. (L. ed.) 169; *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 56 U. S. (L. ed.) 1220, 41 L.R.A. (N.S.) 153; *Postal Tel. Co. v. Charleston*, 153 U. S. 692, 699, 14 S. Ct. 1094, 38 U. S. (L. ed.) 871; *McCray v. U. S.* 195 U. S. 27, 1 Ann. Cas. 561, 24 S. Ct. 769, 49 U. S. (L. ed.) 78; *Kehrer v. Stewart*, 197 U. S. 60, 25 S. Ct. 403, 49 U. S. (L. ed.) 663; *Hammond Packing Co. v. Montana*, 233 U. S. 331, 34 S. Ct. 596, 58 U. S. (L. ed.) 985.

The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A.(N.S.) 932, is not justified.

Order reversed and case remanded with directions to dismiss the bill.

NOTE.

The reported case sustains a statute imposing a special license tax on merchants issuing trading stamps or profit-sharing coupons, and in so holding the court says that such a statute is within the police power of a state though the tax is prohibitory in its nature. The holding is specifically confined to stamps or coupons redeemable in premiums, the court saying: "Whether any other method of redemption—be it by giving a discount or an allowance of credit simply—would be amenable to objection we express no opinion." The decision of the reported case, which is authoritative so far as the application of the Federal Constitution is concerned, runs counter to a long line of state and lower federal court decisions which have held similar legislation to be invalid, the cases being collected in the notes to the following cases: *State v. Dodge*, 1 Ann. Cas. 47; *Denver v. Frueauff*, 12 Ann. Cas. 521; *Sperry, etc. Co. v. Owensboro*, Ann. Cas. 1915A 373; *State v. Pitney*, Ann. Cas. 1916A 209; and *Booth v. People*, 78 Am. St. Rep. 229. The reported case reverses *Van Deman, etc. Co. v. Rast*, 214 Fed. 827, which is cited in the note to *State v. Pitney*, supra.

The reported case was followed at the same term in two other cases sustaining a statute of another state. See *Tanner v. Little*, 240 U. S. 369, 36 S. Ct. 379, 60 U. S. (L. ed.) 691; and *Pitney v. Washington*, 240 U. S. 387, 36 S. Ct. 385, 60 U. S. (L. ed.) 703, the last cited case affirming *State v. Pitney*, supra.

STATE EX REL. DAWSON.

v.

CITY OF HARPER.

Kansas Supreme Court—March 6, 1915.

94 Kan. 478; 146 Pac. 1169.

Quo Warranto — Burden of Proof.

In a proceeding by the state in courts of general jurisdiction to inquire by what au-

thority a municipality exercises governmental functions the doctrine that the burden of proof is upon the defendant and that the state is not required to show anything rests upon the common-law theory as to the nature and character of information in quo warranto and has no application in this state.

[See note at end of this case.]

Same.

Section 679 of the code abolishes the writ of quo warranto and substitutes therefor a civil action governed by the same rules of procedure as other actions. Presumptions as rules of evidence may be invoked against the state in such an action as readily as against an individual in ordinary civil actions.

[See note at end of this case.]

Municipal Corporations — Extension of Corporate Limits.

The state brought proceedings in quo warranto to oust the city of Harper, a city of the second class, from exercising authority over certain territory. The answer alleged that in 1884, when the defendant was a city of the third class, the then owner of the land executed and filed for record a plat of the land as and for an addition to the city; that part of the land was platted and part unplatted, and that the land in controversy has ever since been treated by the owner and by the city in every respect as part of and within the corporate limits of the city; that in 1889, as part of the proceedings by which the defendant changed from a city of the third to a city of the second class, the mayor and council certified to the governor an accurate description by metes and bounds of all lands within the limits of the city as it then existed, which description included the territory now in controversy, and that thereupon the governor issued a proclamation declaring the defendant to be a city of the second class having the metes and bounds so certified. Held, that the answer stated a good defense, and that it was error to sustain a demurrer thereto.

(Syllabus by court.)

Appeal from District Court, Harper county: GILLET, Judge.

Quo warranto proceeding. John S. Dawson, relator, and City of Harper, defendant. Judgment for relator. Defendant appeals. The facts are stated in the opinion. REVERSED.

George E. McMahon and Donald Muir for appellant.

S. M. Brewster, T. A. Nofztger and Vernon I. Day for appellee.

[479] PORTER, J.—By this proceeding the state, on the relation of the attorney-general, inquires by what warrant the defendant exercises its jurisdiction as a city of the second class over certain territory. The city filed its answer setting out the facts upon

Ann. Cas. 1917B.—30.

which it relied, to which the plaintiff demurred. The district court sustained the demurrer, and the city, having elected to stand upon its demurrer, the court rendered judgment ousting the city from exercising or claiming any municipal control or supervision over the territory in controversy and the inhabitants thereof.

[480] The appeal presents the question whether the demurrer was rightly sustained, and this depends upon whether or not the land involved is a part of the city. The following facts appear from the answer: The city of Harper during the year 1884 was a city of the third class; during that year the then owner of the land described in plaintiff's petition duly made and executed a plat comprising the land in controversy, and filed the same in the office of the register of deeds of Harper county as and for an addition to the city of Harper; the lands comprised in the plat lay adjacent to the territory then comprising the city. Part of the land was platted, and part unplatted. The portion platted was divided into blocks to correspond in size to the blocks within the corporate limits of the city, and the streets and avenues described in the plat were made to correspond to the streets and avenues existing in the city, and were given upon the plat the same name as the streets and avenues of the city to which they corresponded. A copy of the plat was attached to the answer. The city continued to exist as a city of the third class until the year 1889, when proceedings were had to change the organization from that of the third to a city of the second class, as provided by law. As part of such proceedings, the mayor and council made out and transmitted to the governor an accurate description by metes and bounds of all lands within the limits of the city as it then existed, in which description was included the territory now in controversy. Thereafter the governor issued a proclamation declaring the defendant to be a city of the second class, having the metes and bounds so certified by the mayor and council. Since 1884 the land herein involved has been treated by the owners and by the city in every respect as part of and within the corporate limits of the city.

At the time the plat of this land was executed and filed for record the only statutory provision respecting the power of a city of the third class to extend its [481] limits was embraced in section 2 of chapter 37 of the Laws of 1883. So much of section 2 of the act as is applicable here, reads:

"The city council in their discretion may add to the territory adjacent to the city limits as defined and existing at the date of the approval of this act such additional territory as they may deem proper, and shall

in every case have power to increase or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city: Provided, That in no case shall any adjacent territory, except when divided into town lots, be added to the limits of a city without the consent in writing of the owner of the territory proposed to be added."

Substantially the same provision was in section 56 of chapter 26 of the Laws of 1869, which was the first act of the legislature authorizing the organization of cities of the third class. (*Atchison, etc. R. Co. v. Maquillin*, 12 Kan. 301.) The act provides for no special procedure for acquiring new territory, but leaves it to the discretion of the council to add additional territory as they may deem proper, and "in such manner" as in their judgment and discretion will redound to the benefit of the city. Except when divided into town lots, however, no adjacent land was to be added to the limits of the city without the consent, in writing, of the owner. The plat, a copy of which is attached to the answer, shows that only a portion of the land embraced in the plat was divided into town lots, and it is this portion of the tract over which the controversy in the present case arises. The act makes no provision as to where the consent shall be filed, and we think there can be no question that the filing of it in the office of the register of deeds was sufficient. The procedure for extending the boundaries of the cities of the third class at that time was very informal. It does not appear from the answer that the city ever enacted an ordinance declaring this territory to be within the city limits, but the petition shows that the city is exercising authority over [482] it, and the answer alleges that the city has continuously done so for more than twenty-nine years.

While ordinarily estoppel will not lie against the state, some importance must be attached to the fact that the city has exercised jurisdiction over the tract in question for this long period of time with the consent of the owners of the tract, and that the state by the proclamation of the governor in 1889 recognized this territory to be within the limits of the city as then certified and claimed by the city itself. It may be that at this late date the city is not able to show the formal adoption of an ordinance extending its limits to embrace the territory in question. It had, the undoubted right in 1884, under the laws as it then stood, so to extend its limits, because it had the written consent of the then owners of the land. It must, therefore, be presumed after this length of time that all the proper steps were taken by the city for the purpose of extending its boundaries so as to include this tract of land.

In a very recent case the state sought to inquire as to the right of a city of the first class to exercise authority over territory it claimed to have annexed, and we held that where the validity of an ordinance depended upon the existence of certain jurisdictional facts at the time the ordinance was enacted, the existence and not the nonexistence of such facts necessary to sustain the ordinance should be presumed in the absence of evidence to the contrary. (*State v. Atchison*, 92 Kan. 431, Ann. Cas. 1916B 500, 140 Pac. 873.) It was vigorously contended in that case by the state that where the sovereign inquires by quo warranto into the right of an individual to exercise the privileges of an office or the right of a municipal corporation to exercise authority, the burden of proof rests upon the person or municipality to show its right, and that no presumptions are to be indulged in such case as against the state in favor of the defendant. This contention was not upheld. It rests upon the common-law theory [483] as to the nature and character of the writ in quo warranto. One of the cases much relied upon by the state in the *Atchison* case is *McGahan v. People*, 191 Ill. 493, 61 N. E. 418. The Illinois case is in line with the authorities in that state running back as far as *Clark v. People*, 15 Ill. 213, 217, holding that the people, that is the state, are not bound to show anything in a proceeding by quo warranto. That was the doctrine of the common law, but our code (§ 679) abolishes the writ of quo warranto and substitutes in its stead a civil action. It is true, as we held in *State v. Anheuser-Busch Brewing Assoc.* 76 Kan. 184, 189, 90 Pac. 777, the language of the constitution conferring original jurisdiction upon this court in quo warranto is broad enough to authorize "all the relief which at common law could be given by a quo warranto proceeding of any kind." (p. 189.) But the action itself is to be tried with the same procedure and the same rules of evidence that apply to other civil actions. Presumptions, which are but rules of evidence, may be invoked against the state as readily as against an individual.

In the numerous quo warranto proceedings filed in this court in recent years wherein the state has sought to oust cities and city and county officials from the exercise of functions and privileges unauthorized by law, it has never been supposed that the burden of proof rested upon the defendants to show that they were not exercising privileges, offices or functions without authority. On the contrary, the usual practice has been to appoint a commissioner and have evidence taken, and the burden of proof has always been assumed by the state.

To follow the decision of the court in *State v. Atchison*, supra, would require us

to reverse the judgment here and remand the case for further proceedings, upon the well-settled theory that the exercise by the city during all these years of authority over this territory without dispute presupposes [484] the existence of all jurisdictional acts to make the conduct of the city legal, and that as against a demurrer, at least, this presumption must obtain until overcome by evidence, and therefore that the court should have overruled the demurrer to the answer. (*Knox County v. New York Ninth Nat. Bank*, 147 U. S. 91, 13 S. Ct. 267, 37 U. S. (L. ed.) 93, where it is said that it is "a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.") (p. 97.) See also *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 70, 6 U. S. (L. ed.) 552, and *Nofire v. U. S.* 164 U. S. 657, 17 S. Ct. 212, 41 U. S. (L. ed.) 588, where the rule was referred to as follows:

"This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact." (p. 660.)

It is quite apparent from the record that the city would never be able to establish proof that an ordinance was passed annexing the disputed territory, so that if the case was sent back for trial the state would be able to prove that there was no record of such an ordinance. However, we are impressed with the belief that this case should be ended, and that the city under the particular circumstances of the case and after the expiration of such a period of time should not be prejudiced in any way by its inability to show that an ordinance was passed annexing the territory. As observed, there was no express provision as to the manner in which cities of the third class should proceed in annexing territory. It was from the time of the filing of the plat treated by the city and the owner as a part of the city. In 1889 the state, through the governor, proclaimed it to be a city of the second class, having metes and bounds certified to it by the then council of the city which included this territory, and, in our opinion, this made it a city of the second class with the boundaries [485] thus declared. The answer, therefore, stated a good defense, and it was error to sustain the demurrer.

The judgment will be reversed, and the cause remanded with directions to overrule the demurrer and to render judgment for the defendant.

Dawson, J., not sitting.

NOTE.

Burden of Proof in Quo Warranto Proceeding or Action in Nature Thereof.

Majority Rule:

Rule Stated, 467.

Exceptions to Rule, 469.

Minority Rule, 470.

Majority Rule.

RULE STATED.

Quo warranto being at common law a high prerogative writ, its issuance on behalf of the sovereign was deemed to cast on the respondent the burden of establishing in himself the right or franchise concerning which it was the purpose of the writ to inquire. In a majority of jurisdictions the rule still obtains that in a quo warranto proceeding or an action in the nature thereof, the burden of proof is on the respondent.

England.—*Rex v. Leigh*, 4 Burr 2143.

Canada.—*Compare Gibb v. Poston*, 16 L. C. Rep. 257.

Alabama.—*Montgomery v. State*, 107 Ala. 384, 18 So. 157; *State v. Foster*, 130 Ala. 154, 30 So. 477; *State v. Dillard* (Ala.) 72 So. 56. See also *Jackson v. State*, 143 Ala. 145, 147, 42 So. 61; *State v. Waldrop*, 158 Ala. 86, 48 So. 394.

Arkansas.—*State v. Ashley*, 1 Ark. 513; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *State v. McDiarmid*, 27 Ark. 176.

Colorado.—*Lyons, etc. Road Co. v. People*, 29 Colo. 434, 68 Pac. 275; *People v. Owers*, 29 Colo. 535, 69 Pac. 515; *People v. Stratton*, 33 Colo. 464, 81 Pac. 245.

Connecticut.—*State v. Chatfield*, 71 Conn. 104, 40 Pac. 922; *State v. Lashar*, 71 Conn. 540, 42 Atl. 636, 44 L.R.A. 197; *State v. Hatch*, 82 Conn. 122, 72 Atl. 575; *State v. Clark*, 87 Conn. 537, 89 Atl. 172, 52 L.R.A. (N.S.) 912. *Compare Phelan v. Walsh*, 62 Conn. 287, 25 Atl. 1, 17 L.R.A. 364.

Delaware.—*State v. Kuhns*, 4 Boyce 416, 89 Atl. 1.

Illinois.—*Clark v. People*, 15 Ill. 213; *People v. Ridgley*, 21 Ill. 65; *Chicago City R. Co. v. People*, 73 Ill. 541; *Swarth v. People*, 109 Ill. 632; *Gunterman v. People*, 138 Ill. 522, 28 N. E. 1067; *Kamp v. People*, 141 Ill. 16, 30 N. E. 680, 33 Am. St. Rep. 270; *People v. Bruennemer*, 168 Ill. 482, 48 N. E. 43; *McGahan v. People*, 191 Ill. 496, 61 N. E. 418; *People v. McDonald*, 264 Ill. 514, Ann. Cas. 1915C 31, 106 N. E. 501; *People v. Baldrige*, 267 Ill. 196, 108 N. E. 49; *Latham v. People*, 95 Ill. App. 528; *Garms v. People*, 108 Ill. App. 631; *People v. Hen-*

nessey, 184 Ill. App. 71. See also *People v. Cooper*, 139 Ill. 461, 29 N. E. 872.

Indiana.—*Holman v. State*, 105 Ind. 569, 5 N. E. 702. See also *State v. Johnston*, 173 Ind. 14, 89 N. E. 393.

Kentucky.—*Tillman v. Otter*, 93 Ky. 600, 20 S. W. 1036, 29 L.R.A. 110; *Stack v. Com.* 118 Ky. 481, 81 S. W. 917.

Louisiana.—See *State v. Miltenberger*, 33 La. Ann. 263.

Michigan.—*People v. Mayworm*, 5 Mich. 146; *People v. Robertson*, 27 Mich. 116; *People v. Crawford*, 28 Mich. 88.

Minnesota.—*State v. Sharp*, 27 Minn. 38, 6 N. W. 408.

Missouri.—*State v. Powles*, 136 Mo. 376, 37 S. W. 1124. See also *State v. Giovanoni*, 59 Mo. App. 41. Compare *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *State v. McCann*, 13 Mo. App. 588, *affirmed* 88 Mo. 386.

Montana.—See *Territory v. Virginia Road Co.* 2 Mont. 109.

Nebraska.—*State v. Moores*, 52 Neb. 634, 72 N. W. 1056; *State v. Davis*, 64 Neb. 499, 90 N. W. 232.

New York.—*People v. Thornton*, 25 Hun 456; 60 How. Pr. 457; *People v. Pease*, 30 Barb. 588; *People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312, *dismissing appeal* 7 Lans. 274, 1 Thomp. & C. 158; *People v. Perley*, 80 N. Y. 624; *People v. Rafferty*, 77 Misc. 258, 136 N. Y. S. 4, *affirmed* 154 App. Div. 767, 139 N. Y. S. 572.

Rhode Island.—See *State v. Kearn*, 17 R. I. 391, 22 Atl. 322, 1018.

Tennessee.—*State v. Duncan*, 1 Tenn. Ch. App. 334; *State v. Allen* (Tenn.) 57 S. W. 182.

Utah.—*People v. Clayton*, 4 Utah 421, 11 Pac. 206; *People v. Jack*, 4 Utah 438, 11 Pac. 213; *State v. Beardsley*, 13 Utah 502, 45 Pac. 569.

Wisconsin.—*State v. Norton*, 46 Wis. 332, 1 N. W. 22. See also *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49.

Thus in *People v. Baldrige*, 267 Ill. 190, 108 N. E. 49, it was said: "In a long line of decisions this court has held that in proceedings by information in the nature of quo warranto the defendant, if he justifies, must set out his title specifically and must show on the face of the plea that he has a valid title to the office; that the people are not called upon to show anything; that the entire onus is on the defendant, and that he must not only show by his plea, but prove that he has a valid title to his office, and if this proof is not made the people will be entitled to judgment of ouster. . . . This is also the rule in other jurisdictions. The form of the issue in quo warranto between the state and the respondent is not like that in other civil proceedings, but the defendant

is called on to show title by his plea, which presents an issue of fact, and the burden of proof is upon him to establish it." And in *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312, the court said: "The people are here the ultimate source of the right to hold a public office; and now, as heretofore, when the right of a person exercising an office is challenged in a direct proceeding by the attorney general, the defendant must establish his title, or judgment will be rendered against him. It results from these considerations that the defendant, in order to have judgment in his favor, was required to prove that he was elected to the office of mayor at the election held in April, 1872. The possession of the office was not in this action evidence of his right. The burden was upon him to show by affirmative evidence that his possession was a legal and a rightful one." So in *People v. Mayworm*, 5 Mich. 146, it was said: "The rule is well settled that where the state calls upon an individual to show his title to an office, he must show the continued existence of every qualification necessary to the enjoyment of the office. The state is bound to make no showing and the defendant must make out an undoubted case. It is not sufficient to state the qualifications necessary to the appointment, and rely on the presumption of their continuance. The law makes no such presumption in his favor." And in *McGahan v. People*, 191 Ill. 496, 61 N. E. 418, the court in applying the rule said: "The real question tried and on which the case depended was, whether the territory organized as a village contained at the time three hundred inhabitants, and the burden was on the respondents to prove that it did. The people were not required, in the first instance, to prove anything. (*Kamp v. People*, 141 Ill. 9; *People v. Peoria*, 166 Ill. 517.)"

The rule has been applied in a number of instances in a quo warranto proceeding against a private corporation to test its right to exercise a corporate franchise. *People v. Volcano Canyon Toll-Road Co.* 100 Cal. 87, 34 Pac. 522; *People v. Peoria*, 166 Ill. 517, 46 N. E. 1075; *State v. Hogan*, 163 Mo. 43, 63 S. W. 378; *State v. Lincoln Traction Co.* 90 Neb. 535, 134 N. W. 278; *State v. Tillamook Port*, 62 Ore. 332, Ann. Cas. 1914C 483, 124 Pac. 637. Compare *State v. Steele*, 37 Minn. 428, 34 N. W. 903. Thus in *People v. Volcano Canyon Toll-Road Co.* supra, it was said: "This being an information in the nature of a quo warranto brought by the attorney general, and the fact that the defendant claimed and was exercising the disputed franchise being admitted, the burden was on the defendant to show by what warrant or authority it claimed and exercised the franchise." And in *State v.*

Tillamook Port, 62 Ore. 332, Ann. Cas. 1914C 483, 124 Pac. 637, the court said: "In an action, partaking of the nature of quo warranto, in the absence of any legislation or controlling consideration to the contrary, the rule that the onus probandi is upon the respondent applies, and the defendants must prove the existence of the corporate franchise which they are alleged to have usurped, and their title to the offices, with the wrongful claim or usurpation of which they are charged. *State v. Sharp*, 27 Minn. 38, 6 N. W. 408; 3 High, Ex. Legal Rem. § 629. We find that in ordinary civil actions the burden rests upon the plaintiff to allege and prove his title to the thing in controversy. In quo warranto proceedings we find the rule reversed, and it rests upon the respondent to show his title to the office or franchise in dispute. If he fails to show complete title, judgment is rendered against him. While in civil actions plaintiff recovers upon his own title in an action in the nature of a quo warranto, the respondent must show that he has a good title as against the government." So in *State v. Lincoln Traction Co.* 90 Neb. 535, 134 N. W. 278, it was said: "Where an information is quo warranto and presented by the law offices of the county or of the state charges the respondent with the unlawful exercise of corporate franchises, the answer should be either a disclaimer or a justification. . . . And if the information does not disclose that the state is demanding a forfeiture of franchises at one time legal, the burden is on the respondent."

EXCEPTIONS TO RULE.

There are a large number of cases which, while recognizing the rule that in a proceeding in the nature of quo warranto brought by the state against a public officer the burden of proof is on the respondent, hold that in an action brought on the relation of a claimant to the office, the burden of proof is on the relator, the proceeding being in substance one to try title to the office.

Colorado.—See *Dunton v. People*, 36 Colo. 128, 87 Pac. 540.

Dakota.—Territory v. *Hauxhurst*, 3 Dak. 208, 14 N. W. 432.

District of Columbia.—*Newman v. U. S.* 43 App. Cas. 53.

Illinois.—*Gorman v. People*, 78 Ill. App. 385.

Kentucky.—*Tillman v. Otter*, 93 Ky. 600, 20 S. W. 1036, 29 L.R.A. 110.

Louisiana.—*State v. Miltenberger*, 33 La. Ann. 263.

Michigan.—*Vrooman v. Michie*, 69 Mich. 42, 36 N. W. 749; *Atty.-Gen. v. May*, 99 Mich. 538, 58 N. W. 483, 25 L.R.A. 325.

Mississippi.—See *Andrews v. State*, 69 Miss. 740, 13 So. 853.

Missouri.—*State v. Heffernan*, 243 Mo. 442, 148 S. W. 90.

Nebraska.—*State v. Boyd*, 34 Neb. 435, 51 N. W. 964; *State v. Moores*, 52 Neb. 634, 72 N. W. 1056; *State v. Davis*, 64 Neb. 499, 90 N. W. 232.

New York.—*People v. Anthony*, 6 Hun 142; *People v. Perley*, 80 N. Y. 624; *People v. Keator*, 169 App. Div. 368, 154 N. Y. S. 1007.

North Carolina.—*State v. Ellington*, 117 N. C. 158, 23 S. E. 250, 53 Am. St. Rep. 580, 30 L.R.A. 532; *Smith v. Lee*, 171 N. C. 260, 88 S. E. 254.

Ohio.—See *State v. Hay*, *Wright* 96; *State v. Johnson*, 28 Ohio Cir. Ct. Rep. 793.

Tennessee.—See *State v. Evans*, 122 Tenn. 184, 122 S. W. 81.

Wisconsin.—See *Atty.-Gen. v. Barstow*, 4 Wis. 567; *State v. Norton*, 46 Wis. 332, 1 N. W. 22.

Thus in *People v. Keator*, 169 App. Div. 368, 154 N. Y. S. 1007, it was said: "In an action in the nature of quo warranto to try title to an office, as between the relator and the defendant, the burden is upon the former to make out a better title to the office than that of the defendant." And in *State v. Heffernan*, 243 Mo. 442, 148 S. W. 90, the court said: "The appellant contends that the burden was upon relator to show by evidence that his interest in the subject of the controversy was such as to authorize him to maintain the proceeding in that capacity. As there is no evidence tending to sustain this burden, it follows, if this position is well taken, that the judgment of ouster is erroneous. The prosecuting attorney filed in the circuit court his petition asking for leave, at the relation of Mr. Thompson, to file the information, and at the same time, without any further order of the court, filed it, and thereafter the defendant appeared and filed his answer. Upon these pleadings alone the case was tried. The information states that the relator is a resident of the road district, and the owner of lands situated therein, which is denied by the answer, and the issue so made calls for the determination (1) whether this is an issuable averment; and (2) if it is, whether the burden was upon the defendant to disprove it. . . . To the suggestion that the prosecuting attorney is the proper person to ascertain and determine whether or not the relator is qualified with respect to his interest to maintain the action, it is sufficient answer to say that the permission of the court is necessary to enable a prosecuting attorney to act, that the court can only speak by its records and that here the record is lacking, so that the 'exhibition' of the information which must

precede the retirement of the officer and the turning over of the prosecution to the relator is a nullity, but even if this was not so, the capacity of the relator is an important question materially affecting the defendant, and he is entitled to some tribunal in which he can try it. He has denied that capacity in his answer and the burden is upon him who alone has the facts in his possession, to meet the issue so raised, which is not susceptible of negative proof except by compelling the relator to disclose that he has not the deed in his pocket to qualify him for the position he has assumed. In this respect there is a failure of proof upon the vital question of the right of the relator to maintain his action." So in *Newman v. U. S.* 43 App. Cas. (D. C.) 53, it was said: "It is urged by counsel for respondent that the court erred in granting relator the right to open and close in the submission of the evidence, and the right to open and close the argument to the jury. The court properly instructed the jury that the burden of proof was upon relator. Mere possession of the office, accompanied by a commission from the proper appointing power, created a presumption that respondent possessed the legal qualifications to hold the office. The affirmative was, therefore, cast upon relator of overcoming this presumption, which, under our practice, required him to open and close the evidence and the argument. It is difficult, however, to understand just how respondent could be damaged by having the burden cast upon relator. The form of the writ would seem to indicate that the burden is upon respondent to show his lawful possession of the office. This was the early English practice, where the writ was prerogative, and issued in the name of the King. But that practice has not been followed in this country. Here the writ has fallen into disuse, and the proceeding is initiated by information in the nature of a civil proceeding to try the right to office. . . . It was not error to require relator to go forward in the trial."

It has also been held that in a proceeding in the nature of quo warranto instituted to oust officers of a private corporation and to induct the relators into the offices, the burden is on the relators to show their title to the offices. *State v. Oftedal*, 72 Minn. 498, 75 N. W. 692; *People v. Lacoste*, 37 N. Y. 192.

It seems that in an action in the nature of a quo warranto proceeding brought against a corporation for the purpose of forfeiting its franchise the burden of proof is on the state. *North, etc. Rolling Stock Co. v. Peo-*

ple, 147 Ill. 246, 35 N. E. 608, 24 L.R.A. 462; *State v. Talbot*, 123 Mo. 69, 27 S. W. 366; *State v. Grimm*, 220 Mo. 483, 119 S. W. 626. See also *State v. Lincoln Traction Co.* 90 Neb. 535, 134 N. W. 278. Thus in *State v. Talbot*, supra, it was said: "When the validity of an incorporation is questioned by the state, it is incumbent upon those assuming to act under it, to show, not only a valid incorporation, but also that the business transacted thereunder is lawful and is conducted in a lawful manner. We do not think the question suggested can be sustained. The certificate, if issued under authority of law, prima facie confers the right to conduct the business therein authorized, and in order for the state to attack the corporation for acts of its officers ultra vires, or contrary to the constitution or laws of the state, it devolves upon it to charge and prove the abuse or misuser of its franchisees relied upon as a ground of forfeiture."

Minority Rule.

In some jurisdictions the rule obtains that the burden of proof in a quo warranto proceeding or an action in the nature thereof is to be determined from the issues raised by the pleadings precisely as in other actions. *State v. Cobb*, 2 Kan. 48; *Campbell v. Braden*, 31 Kan. 754, 3 Pac. 542; *Tarbox v. Sughrue*, 36 Kan. 228, 12 Pac. 935; *Brown v. Jeffries*, 42 Kan. 605, 22 Pac. 578; *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854; *State v. Haskell*, 14 Nev. 209. And see the reported case. See also *State v. Hunton*, 28 Vt. 594; *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914C 661, 81 Atl. 536; *State v. Greene*, 87 Vt. 94, 88 Atl. 515, 517. Thus in *State v. Hunton*, supra, it was said: "The form of the issue, requiring the defendants to show cause, would seem to indicate, in form, that the defendants would be required to go forward in the case. But it seems to us that the form of the issue in the case does not correctly define the true position of the parties, in regard to the presumption of right. The defendants are in possession of the office in question, and should be presumed regularly elected and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." And in *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854, it was held in an action in the nature of quo warranto for the removal of a public officer for misconduct that the burden of proof was on the state as it would not be presumed that the officer was guilty of misconduct.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY.

v.

CHAMBERS.

Kentucky Court of Appeals—September 23,
1915.

165 Ky. 703; 178 S. W. 1041.

**Evidence — Weight — Testimony to
Fact Physically Impossible.**

Where one car and the trucks of another rolled off the end of a railroad switch and crashed into the fence in front of plaintiff's residence, wrecking it, but not injuring the house, except breaking a window by a flying picket, testimony by plaintiff that she was thrown over the foot of a bed, which was two feet higher than the mattress, onto a rocking chair, and thereby injured, when taken into connection with testimony by other occupants that they were not even awakened, is contrary to the physical facts, and no recovery can be had.

[See note at end of this case.]

**Witnesses — Credibility — Question for
Jury.**

The credibility of witnesses is for the jury.

**Trial — Direction of Verdict — Pre-
sumptions.**

On motion for directed verdict, the evidence of the adverse party must be taken as true, and every reasonable inference fairly deducible therefrom indulged.

**Testimony to Facts Physically Impos-
sible.**

While the scintilla rule prevails as to the quantity of evidence necessary to carry a case to the jury, a verdict of the jury based on evidence contrary to the physical facts will be reversed, for the evidence to support a verdict must be such as is fit to induce conviction.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Fourth Division.

Action by Mrs. Mahala Chambers, plaintiff, against Louisville and Nashville Railroad Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Helm & Helm and *Benjamin D. Warfield* for appellant.

S. L. Trusty for appellee.

[703] *HANNAH, J.*—Davies Street in Louisville extends east and west. It terminates at its eastern end in a "commons" adjoining the lumber yards of the C. C. Mengel Bros. Company. On the south side of this street

and at the corner where the street ends there is a six-room double frame dwelling with brick foundation and cellars under it.

[704] The eastern half of this double dwelling (the half nearer the commons) consisting of three rooms was on November 5th, 1912, occupied by W. E. Chambers and his wife, Mahala, and their son and daughter-in-law, Mr. & Mrs. R. C. Chambers.

From the Louisville & Nashville Railroad Company's tracks on Seventh Street there extends westward an industrial switch into the Mengel lumber yard, which switch terminates at a point in the commons about twenty feet east of the Chambers residence, and which runs approximately on a line with the southern line of Davies Street. The dwelling stands back nineteen feet from the fence on the southern line of the street, and four and a half feet from a fence on the west side of the property.

On the night of November 4th, 1912, Mr. and Mrs. R. C. Chambers slept in the front room of the eastern half of this double dwelling, and appellee and her husband occupied the adjoining or "middle" room. The bed occupied by the latter couple stood in the southwest corner of the room.

About 4 o'clock on the morning of the 5th a train of cars was backed on to the Mengel switch, and owing to a misunderstanding of signals among the train crew, one car and the trucks of another rolled off the end of the switch, crashed into the fence in front of the Chambers residence, and stopped with the front trucks in a cistern located on the front fence line and at a point just in front of the middle of the house.

Alleging that "said train and cars were caused to crash into and through the front fence and yard of said premises, violently plowing through the ground and crashing and demolishing things in its path and thereby jarring, shaking and moving said house, and causing plaintiff to come in contact with hard substances, permanently injuring her," Mrs. Mahala Chambers instituted this action against the railroad company to recover damages for her injuries. From a verdict and judgment in her favor in the sum of two thousand dollars the defendant appeals.

The bed upon which the plaintiff and her husband were sleeping was an iron one, the foot of which was two feet higher than the mattress. She testified upon the trial that she was thrown over the foot of the bed on to a rocking chair and thereby injured.

The car itself did not touch the house. It struck the corner of the fence, nineteen feet in front of the house, [705] although about six feet of the width of the car was inside the line of the front fence. It tore down the front fence, which was built of pickets, and also demolished the first three panels of the

side fence, and twisted some boards off of the fourth panel, the rear post of which was thirty-two feet from the front corner.

This side fence was constructed of posts placed eight feet apart, upon which were nailed horizontally pine boards sixteen feet long and one foot wide, the boards being arranged with "broken joints;" that is, the first and the third, and the second and fourth boards were so spaced as to end alternately on the posts to which they were attached. The fence was four boards (or four feet) high.

Aside from the breaking of a pane of glass in the front door (evidently caused by a flying picket from the front fence) nothing inside the house was disturbed except that the strings suspending a couple of pictures broke and a stovepipe became disconnected. Nor were there any marks of contact on the exterior of the dwelling.

Mr. & Mrs. R. C. Chambers, who were sleeping on a bed in the front room, were not thrown therefrom. A Mrs. Leonard, with her twenty-year old son and eighteen-year old daughter, occupied the western half of this double dwelling, and none of them were thrown from their beds or seriously disturbed. In fact the son testified that he was not awakened. And we are firmly convinced that Mrs. Mahala Chambers could not have been, as she testified, thrown from her position on the bed, over the foot thereof, two feet higher than the mattress, and on to a rocking chair near the foot thereof. Such an occurrence is inherently impossible; there was no force there present and operating upon her which could have produced such a result; and her testimony in that respect is impeached by all the physical facts, concerning which there is and can be no dispute.

Counsel for appellee undertake to explain this testimony by suggesting that it is quite possible that the noise made by the car in tearing down the fence and the noise of the breaking of the pane of glass in the front door, roused her from her sleep, and that while in a semi-conscious condition she jumped over the foot of the bed. This explanation is quite plausible, but we are not at liberty to accept the statements of counsel as to how she was injured. Appellee herself has undertaken to state how she [706] was injured, and some half dozen times declared in the course of her examination upon the trial that she was knocked over the foot of the bed—which is absolutely inconceivable and cannot be accepted as true.

1. It is undoubtedly well settled in this jurisdiction that the credibility of witnesses is for the jury; that upon a motion for a directed verdict, the evidence for the adverse party must be taken as true and every reasonable inference fairly deducible therefrom must be indulged; and that as to the quantity

of evidence necessary to convey a case to the jury, the "scintilla rule" prevails. But these rules, in sound judicial administration, do not become applicable unless the evidence of such adverse party be something of relevant consequence, possessed of the quality of proof, and having fitness to induce conviction. *Clark v. Young*, 146 Ky. 377, 142 S. W. 1032. Of necessity, these rules cannot apply where the only evidence upon which such adverse party rests his right to succeed, consists of a statement of alleged facts, inherently impossible and absolutely at variance with well established and universally recognized physical laws. In such case, that which purports to be evidence is insufficient to constitute a compliance with the requirements of the scintilla rule, for it is the essence of that rule that there must be some evidence (however slight) upon which the jury might rationally find a verdict for the party producing it.

In *Blumenthal v. Boston, etc. R. Co.* 97 Me. 255, 54 Atl. 747, the plaintiff had testified to alleged facts which were manifestly untrue; and the court said:

"It is undoubtedly true that where the determination of an issue of fact depends upon the credibility of witnesses, or where the jury would be justified in coming to a conclusion either way, as credence be given to the witnesses on the one side or the other, it is the duty of the court to submit such issue to the jury, however firmly convinced the presiding justice may be that there is no doubt as to where the truth lies; and, even where the surrounding circumstances merely make the story of the witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the tribunal created by the Constitution and laws for the determination of such questions. But, this cannot be so where the undisputed circumstances show that the story told by the witness upon a material issue cannot by any possibility be true, [707] or when the testimony of the witness is inherently impossible."

So, in *McKinley v. Metropolitan St. R. Co.* 86 N. Y. S. 461, 91 App. Div. 153, the court said: "This is not a case where the credibility of the witness is involved, which takes the case to the jury. His testimony is impeached by physical facts about which there is and can be no controversy." And, upon this ground, the court held the plaintiff not entitled to have his case submitted to the jury.

To the same effect, see also *Waters-Pierce Oil Co. v. Van Elderen*, 137 Fed. 557, 70 C. C. A. 255 (evidence for plaintiff contrary to the established laws of hydrostatics); and *Willis v. Browning*, 179 Mo. App. 233, 166 S. W. 1070.

In *Elliott on Railroads*, Section 1703 (Second Edition), it is said that "Well established laws of nature and similar well known sci-

tific and physical facts of which the courts will take judicial knowledge, may not only justify a trial court in directing a verdict or in setting aside a verdict and granting a new trial, but may also be sufficient to cause the appellate court to reverse the action of the trial court where it fails to give effect to such facts by directing a verdict or granting a new trial. Notwithstanding the general rule, which prevails in most jurisdictions, that the court on appeal will not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand although there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue and the verdict unjust and unsupported in law and in fact." See also *In re Harriot*, 145 N. Y. 540, 40 N. E. 246; *Johns v. Northwestern Mut. Relief Assoc.* 90 Wis. 332, 63 N. W. 276, 41 L.R.A. 587; *Hudson v. Rome*, etc. R. Co. 145 N. Y. 408, 40 N. E. 8; *Hunter v. New York*, etc. R. Co. 116 N. Y. 615, 23 N. E. 9, 6 L.R.A. 246; *Marshall v. Green Bay*, etc. R. Co. 125 Wis. 96, 103 N. W. 249; *Baumann v. Hamburg-American Packet Co.* 67 N. J. L. 250, 51 Atl. 461.

We are therefore of the opinion that the trial court should have sustained the motion of defendant for a directed verdict, a thorough and careful consideration of the question having convinced the court that the rule [708] herein announced is not only sound in principle but incontestably desirable and proper in the administration of procedural law, and one the discriminating application of which will more than justify its enunciation.

The judgment is reversed.

NOTE.

Withdrawal of Unreasonable Testimony from Consideration of Jury.

Introductory, 473.

Testimony Opposed to Common Sense or Common Experience, 473.

Testimony Contrary to Physical Facts in General, 475.

Testimony to Strange Phenomena of Electricity, 477.

Testimony to Looking or Listening for Approaching Train or Street Car, 477.

Testimony to Speed of Railroad Train or Street Car, 479.

Testimony to Result of Forces Acting onanimate Human Body, 479.

Testimony to Improbabilities Connected with Credibility of Witnesses, 480.

Introductory.

In *Wolf v. City*, etc. R. Co. 50 Ore. 64, 15 Ann. Cas. 1181, it was said that "if the testi-

mony of a witness transcends the laws of nature it is undoubtedly the duty of the court to withdraw such testimony from the consideration of the jury. Similar observations have been made in recent cases.

"The story of a witness on the stand, contradicted by any instrument or statement from the mouth of any other witness, may, in the light of physical situations and matters of common knowledge, convict him of being at least conclusively mistaken." *Falkenstern v. Greenfield*, 145 Wis. 232, 130 N. W. 61. "Neither court nor jury is bound by the mere declaration of a witness—no matter how improbable, incredible, or impossible that declaration may be." *Zibbell v. Southern Pac. Co.* 160 Cal. 237, 116 Pac. 513.

"Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability. The best that can be said in favor of the argument in support of the appeal is that there is a pronounced conflict in the testimony offered on behalf of the prosecution, but it is only a conflict; and whether it appear in the evidence offered on behalf of the people or in the evidence adduced upon the whole case, it will not constitute a ground in this court for a reversal of the judgment." *People v. Amadio*, 25 Cal. App. 729, 145 Pac. 151.

"It has been commonly said: verdicts must rest on probabilities, not on bare possibilities. There is not capacity in any number of the former to create the latter. So the person on whom the burden of proof rests to establish the right of a controversy must produce credible evidence from which men of unbiased minds can reasonably decide in his favor. He cannot leave the right of the matter to rest in mere conjecture and expect to succeed." *Samulski v. Menasha Paper Co.* 147 Wis. 285, 133 N. W. 142.

Testimony Opposed to Common Sense or Common Experience.

It seems that where evidence is so opposed to common sense or common experience that reasonable minds cannot entertain different opinions about it, it should be withdrawn from the consideration of the jury. *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147; *Zibbell v. Southern Pac. Co.* 160 Cal. 237, 116 Pac. 513; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Yeager v. Chicago*, etc. R. Co. 148 Ia. 231, 123 N. W. 974; *L'Houx v. Union Constr. Co.* 107 Me. 101, 77 Atl. 636, 30 L.R.A. (N.S.) 800; *Hughes v. Hughes*, 109 Me. 564, mem. 84 Atl. 647; *Davidson v. St. Louis*, etc. R. Co. 164 Mo. App. 701, 148 S. W. 406; *Falkenstern v. Greenfield*, 145 Wis. 232, 130 N. W. 61. See also *In re Baumhauer*, 179 Fed. 966, reversed on other grounds 186 Fed. 260, 108 C. C. A. 306; *Thurston v. McLellan*, 34 App. Cas. (D. C.)

294; *State v. Clifford*, 228 Mo. 194, 21 Ann. Cas. 1218, 128 S. W. 755, *followed* in *St. Louis v. Cool*, 228 Mo. 209, 128 S. W. 759; *Willis v. Browning* 179 Mo. App. 233, 166 S. W. 1070; *Reid v. Hennessy Mercantile Co.* 45 Mont. 383, 123 Pac. 397. "The testimony of a witness . . . contrary . . . to common knowledge, . . . is of no weight in favor of the side it is invoked to support, while it may be self-destructive, be successfully impeached by its demonstrated utter improbability or impossibility." *Samulski v. Menasha Paper Co.* 147 Wis. 285, 133 N. W. 142, "Where the testimony of a witness, though of a most positive character, is yet so improbable when tested by rules which govern men of ordinary capacity and intelligence in a given business transaction, a court may refuse to credit it." *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595. "Theory should not outweigh practice and experience and evidence which contests and contradicts the evidence of the senses must be received with caution." *State v. Clifford*, 228 Mo. 194, 21 Ann. Cas. 1218, 128 S. W. 755, wherein the court in discussing the value of evidence which showed that a wagon wheel, whether having a wide or narrow tire, does not normally travel on the full face of the tire, but rather on the outer edge thereof, also said: "This theory is combated by quite a respectable crowd of witnesses for the defense, including experienced wagon-makers and teamsters, all of whom maintain that wheel tires do not roll on their outer edges alone; that when new the tire usually bears more heavily on its outer edge, but that this edge soon wears down, so that the whole face of the tire comes in contact with and bears upon the ground over which it rolls. We must confess that the theory advanced by the relator is to us a novel one, and the literature of the law sheds no light on the subject. Although there be more witnesses in support of than opposed to the theory, that fact does not move us, for it cannot be claimed that a numerical preponderance of witnesses should be decisive of the controversy. Courts will not be presumed to be visionless; and we have never yet seen any kind of wagon tire, rolling on the surface of ground soft enough to receive the impression, which did not leave its full imprint on the narrow strip of earth over which it had rolled." In *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595, it appeared that a person who was claiming as a purchaser of a \$100,000 note in good faith and without notice testified that he got \$47,000 in currency from his wife to pay a part of the note, the sum being part of \$72,000 or \$73,000 in currency, which for a long time had been kept in their house in a hardwood cedar chest. The appellate court

in holding that his testimony was entitled to no credence said: "Aside from the unusual circumstances of a sensible business man keeping a small fortune in currency in a wooden chest in his house, there are other circumstances impairing the credibility of the story of Walls. . . . His story summarized, shows that he bought a note for one hundred thousand dollars made by a corporation of which he knew nothing; a note which drew no interest and which might not be paid. He could derive no benefit from the transaction unless he purchased the note at a discount which he testified he did not. After the purchase he paid no further attention to the matter, leaving it all to Manson. He did not even obtain possession of the original note and never did have it, and according to his own statement, in the interim between paying Manson the money and receiving the trusted note, Manson had the original note and his one hundred thousand dollars, and he had no receipt or any other writing to protect his interest should anything have happened. There were no witnesses to the transaction, no book entries by either of the parties, no receipts or memorandum, no bank account or other account of Walls showing that his funds had been decreased through payment of this one hundred thousand dollars. In fact, the transaction was so apart from the ordinary course of business as to warrant the court in concluding that the story of Walls was a fabrication and entitled to no credence, and that he was not a purchaser or indorsee of the original note of April 5, 1907, before maturity, or at all." In *Hughes v. Hughes*, 109 Me. 564 mem. 84 Atl. 647, it appeared that the plaintiff brought an action against his mother and brother for money had and received, it being alleged that the money, of the amount of \$1,800, was taken from the plaintiff's old coat hanging in the cellar in his mother's house. Exceptions to a compulsory nonsuit were overruled. So in *L'Houx v. Union Constr. Co.* 107 Me. 101, 77 Atl. 636, 30 L.R.A.(N.S.) 800, it appeared that the plaintiff was injured by a piece of steel breaking off from a chisel which he was using. The court in sustaining a motion to set aside a verdict for him in an action for damages against his employer said: "It appears from the plaintiff's own testimony that he was 37 years old; that he had worked for 17 years in the construction of water works, railroads, etc.; that he had used a striking hammer on a steel drill every year when there was blasting to do; that he knew steel drills used on stone hammered down on top and sometimes broke off at the point; that he had this chisel made from a piece of steel he took to the blacksmith. He saw clearly the kind of hammer and the kind of chisel proposed to be used. It would seem to be a matter of

common knowledge that when steel hammers are struck with great force upon steel chisels or drills held against iron surfaces, chips or particles of steel are liable to break off from the chisel, as well as from the hammer or the iron surface, and fly up and about. Especially would it seem that a man of the plaintiff's age, experience, opportunities for observation, and knowledge of the liability of the steel drills to break off at the point when held against stone, would know there was such danger when such a chisel was held against iron and struck so hard with a seven-pound hammer. If this were all that appeared in the evidence, there would be no question that the plaintiff assumed the risk of the consequences resulting from this heavy blow, under the familiar rule that a servant, if he does not stipulate otherwise, assumes such risks in his employment as are known to him, or would be known to him by the exercise of ordinary observation and forethought. *Golden v. Ellis*, 104 Me. 177, 71 Atl. 649. But the plaintiff further testified that he in fact did not know that in striking as hard as he did with that hammer upon that chisel held against the iron pipe there was any danger or liability of bits of steel breaking off from the chisel and flying about. His counsel argues that that testimony warranted the jury's finding that he did not assume the risk. Despite his assertion to the contrary, however, it is so clear that he must have known the danger or liability, had he been, as it was his duty to be, ordinarily observant and thoughtful, the jury's finding, resting as it does on that assertion alone, cannot be sustained. We must assume that he was ordinarily observant and caretaking, since such was his duty. Workmen are not excused from the exercise of their senses and reasoning faculties, and unless they stipulate otherwise they assume the risks that such exercise would reveal to them."

But in *Winkler v. Power, etc. Machinery Co.* 141 Wis. 244, 124 N. W. 273, the court in answering a suggestion that common sense was sufficient to show the incredibility or impossibility of certain testimony said: "What is thought to be common sense is frequently nothing more than a fixed belief based on no evidence and supported by no reasons, and it then ordinarily lacks the certainty requisite for the annihilation of positive evidence to the contrary."

Testimony Contrary to Physical Facts in General.

Where the evidence supporting a cause of action or defense is contrary to the physical facts or the laws of nature it may be withdrawn from the consideration of the jury, a verdict based on evidence of that kind being

unsustainable. *Baltimore, etc. R. Co. v. O'Neill*, 186 Fed. 14, 108 C. C. A. 116; *U. S. v. Sixty Barrels of Wine*, 225 Fed. 846; *McGlade v. Waterloo (Ia.)* 156 N. W. 680; *Louisville Water Co. v. Lally*, 168 Ky. 348, 182 S. W. 186, L.R.A. 1916D 300; *Sexton v. Metropolitan St. R. Co.* 245 Mo. 254, 149 S. W. 21; *Davidson v. St. Louis, etc. R. Co.* 164 Mo. App. 701, 148 S. W. 406; *Klass v. Metropolitan St. R. Co.* 169 Mo. App. 617, 155 S. W. 57; *Phillips v. Southwest Missouri R. Co.* 170 Mo. App. 416, 155 S. W. 470; *Daniels v. Kansas City El. R. Co.* 177 Mo. App. 280, 164 S. W. 154; *Warnke v. A. Leschen, etc. Rope Co.* 186 Mo. App. 30, 171 S. W. 643; *McLeod v. Miller (Nev.)* 153 Pac. 566; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. 396; *Henry v. Providence Gas Burner Co. (R. I.)* 90 Atl. 168; *Southern R. Co. v. Mason (Va.)* 89 S. E. 225; *Falkenstern v. Greenfield*, 145 Wis. 232, 130 N. W. 61; *Samulski v. Menasha Paper Co.* 147 Wis. 285, 133 N. W. 142. See also *Phillips v. Southwest Missouri R. Co.* 170 Mo. App. 416, 155 S. W. 470; *Weck v. Reno Traction Co.* 38 Nev. 285, 149 Pac. 65; *Carey v. Clark (Nev.)* 161 Pac. 713. "No judgment should stand on impossibility; for example, on the fact that one saw around a corner with a naked eye, or through a stone wall." *Dyrcz v. Missouri Pac. R. Co.* 238 Mo. 33, 141 S. W. 861. "No court should be bound by testimony demonstrated to be false by all the other facts in the case, and further demonstrated to be false under our own common knowledge of scientific facts." *Sexton v. Metropolitan St. R. Co.* 245 Mo. 254, 149 S. W. 21. "An uncontrovertible found, or conceded fact, or matter existing beyond all reasonable controversy, manifestly, can successfully challenge testimony to the contrary from the mouth of a witness, or number of them." *Samulski v. Menasha Paper Co.* 147 Wis. 285, 133 N. W. 142. In *McGlade v. Waterloo (Ia.)* 156 N. W. 680, it was said: "If the testimony offered by the party having the burden is in conflict with undisputed facts, and especially with physical facts which are a verity, or is such that under all the circumstances it cannot in the nature of things be true, or is such as that it is entirely and wholly inconsistent with any other theory than that the witnesses must have been mistaken, the trial court is justified and it is its duty to direct a verdict for the other party." In *Louisville Water Co. v. Lally*, 168 Ky. 348, 182 S. W. 186, L.R.A. 1916D 300, the plaintiff brought a suit against a water company to recover damages for negligently flooding his house, it being alleged that the water was suddenly turned on with such velocity as to force it through the faucet. The evidence showed that the faucet through which the water flowed was in perfect condition after the accident, as were all the water

piping and fixtures. The court in holding that a verdict should have been directed said: "Neither the pleadings nor the proof afford any reasonable explanation of how that faucet could have been turned on by the return of the water into the pipes when turned on by appellant, and we are unable to imagine how that could have done it. The only explanation, consistent with physical and mechanical laws with which we are familiar, that we are able to imagine, is that appellee, or some member of his family, left the faucet turned on, and that the waste pipe from the basin was obstructed in some way, which prevented the water from escaping through the waste pipe as fast as it came through the faucet, and that the overflow was caused in this way. We have been unable to discover the scintilla of evidence of negligence upon the part of appellant that would justify the court in overruling its motion for a peremptory instruction at the close of appellee's testimony. The evidence in this case can supply the necessary scintilla only by the indulgence in the theory that the force with which appellant turned the water into the pipes opened the faucet by unscrewing it at the washstand, and that would be to suppose a circumstance inherently impossible and absolutely at variance with well-established and universally recognized physical and mechanical laws. Water may be turned into pipes with sufficient force to burst them or tear off fixtures such as the faucet, but not so as to unscrew the faucet. . . . It results, therefore, that appellant's motion for a directed verdict should have been sustained, and the judgment herein is reversed and remanded for proceedings consistent herewith." So in *Henry v. Providence Gas Burner Co.* (R. I.) 90 Atl. 168, an action to recover damages for the loss of the services of the plaintiff's minor son injured by the alleged negligence of the defendant while in his employ, a directed verdict for the defendant was affirmed on the ground that the testimony of the son regarding the manner in which the accident occurred was inconsistent with the undisputed construction and operation of the machine causing the injury and was to be disregarded. Likewise in *Whited v. Cavin*, 55 Ore. 98, 105 Pac. 396, it was held that the testimony of a witness that it required as high as seventeen inches of water per acre for the proper irrigation of some lands would not be accepted as accurate although contradicted.

But it is only where the facts testified to are utterly at variance with well-established and universally recognized physical laws, and, therefore, inherently impossible, that courts may refuse to submit the case to the jury. *Schaffner v. C. F. Massey Co.* 189 Ill. App. 391, *affirmed* 270 Ill. 207, 110 N. E. 381;

Sheppard v. Wichita Ice, etc. Co. 82 Kan. 509, 108 Pac. 819, 28 L.R.A. (N.S.) 648; *Wasieto, etc. R. Co. v. Hall*, 167 Ky. 819, 181 S. W. 629; *Louisville v. Dahl*, 170 Ky. 281, 185 S. W. 1127; *Goode v. Central Coal, etc. Co.* 167 Mo. App. 169, 151 S. W. 508; *Phillips v. Southwest Missouri R. Co.* 170 Mo. App. 416, 155 S. W. 470; *Warnke v. A. Leschen, etc. Rope Co.* 186 Mo. App. 30, 171 S. W. 643; *Modrell v. Dunham (Mo.)* 187 S. W. 561; *Britt v. Omaha Concrete Stone Co.* 99 Neb. 300, 156 N. W. 497; *St. Martin v. Skamania Boom Co.* 79 Wash. 393, 140 Pac. 355. *Thompson v. Scott (N. D.)* 159 N. W. 21; *Campbell v. Baltimore, etc. R. Co.* 58 Pa. Super. Ct. 241; *Winkler v. Power, etc. Machinery Co.* 141 Wis. 244, 124 N. W. 273. See also *Reynolds v. Alton, etc. Traction Co.* 273 Ill. 207, 112 N. E. 668; *Yazoo, etc. R. Co. v. Huff (Miss.)* 71 So. 757. "It is only where the testimony of witnesses is opposed to the plain undisputed and indisputable facts of the occurrence in question that it will be rejected by the court as unworthy of belief." *Goode v. Central Coal, etc. Co.* 167 Mo. App. 169, 151 S. W. 508. In *St. Martin v. Skamania Boom Co.* 79 Wash. 393, 140 Pac. 355, it appeared that according to the evidence given a hot spring rose and fell with the rise and fall of a river, and that when the flow of the spring was increased the water was hotter. The court in holding that the evidence could not be rejected as unbelievable said: "It is argued that the latter statement is inherently unbelievable. This argument, however, proceeds upon an initial assumption that the access of the cold river water to the vein of the spring would, of necessity, cool the waters of the spring. An argument a priori such as this, to be of any value, must rest upon some admitted general principle or truth as a basis or cause. It is just here that the argument breaks down. To give it convincing force, it is necessary that we know and understand the operation of the hidden forces which control the flow of the water of the spring, and impart to it its temperature, but we neither know nor understand these forces in the present case. For example, it may be that the water in the spring flows more rapidly from the subterranean heating point when under the greater pressure supplied by the rise of the river, so that it may not have the same time for cooling before reaching the surface as when this pressure is not applied. This is offered not as a theory, but as showing that the assumption that access to the vein of the spring by the water of the river would necessarily cool the water is only an assumption and not an established principle or truth, which would only give validity to appellant's argument. Clearly, in such a case, all that the court can do is to take the evidence of the objective phenomena with-

out speculation as to their causes. There being no evidence to the contrary, we must accept these things as facts." In *Peterson v. Liddington*, 60 Ind. App. 41, 108 N. E. 977, it was held that a judgment would not be reversed on appeal because the record showed an impossible state of facts against natural law, in that a man sixty-seven years of age weighing 175 pounds threw a man sixty-four years of age and weighing 165 pounds seven feet. Similarly in *Winkler v. Power, etc. Machinery Co.* 141 Wis. 244, 124 N. W. 273, it was held that testimony as to the degree of lateral movement of a ladle used for carrying molten iron was not improperly submitted to the jury on the ground of its impossibility, it appearing there was an omission in the evidence of the surrounding circumstances making it impossible to demonstrate the incorrectness of the testimony. So in *Phillips v. Southwest Missouri R. Co.* 170 Mo. App. 416, 155 S. W. 470, it was held that the testimony of the plaintiff that his leg was broken several inches above the ankle by the fall of a street car fender was not so incredible as to require its withdrawal from the jury. Likewise in *Campbell v. Baltimore, etc. R. Co.* 58 Pa. Super. Ct. 241, it was held that the testimony of a witness that he saw red hot sparks of the size of a ten-cent piece or larger being emitted from a locomotive on the afternoon of a clear day, was not so contrary to well-known natural laws as to require its withdrawal from the consideration of that jury. And in *Yazoo, etc. R. Co. v. Huff (Miss.)* 71 So. 757, an action against a railroad company to recover damages for the wrongful killing of a child who had fallen asleep on the track, the court said: "It is hard to believe that a responsible engineer would gamble with the life of a child of tender years; and that he did not in this case is manifest from the undisputed testimony. The engineer is most positive in his testimony that he did not see the object at all until within 150 feet of it. He then did not at first know what the object was. He did the very natural thing of sounding the alarm, and there is no evidence that he took his eyes off the object, and that he failed to act promptly and effectively in applying the brakes and stopping the train. The whole tragedy was enacted within a few moments of time. That the train was brought to a quick stop is conclusively shown by all the testimony in the case. The plaintiff, by taking certain measurements after the accident, attempted to show that an engineer could have seen the small child a distance of at least 500 feet. We do not think, however, the actions of the engineer should be viewed in the light of a calm and deliberate test, made by witnesses standing on the track and looking intently at a small child, which they knew was being put upon the track for

the very purpose of making the test. The engineer of a fast-moving train has many duties to perform, and it is not unreasonable that he, as he says, did not, in fact, see the object at all until within 150 feet of the child, and when it was absolutely too late to prevent the injury."

Testimony to Strange Phenomena of Electricity.

In *Sexton v. Metropolitan St. R. Co.* 245 Mo. 254, 149 S. W. 21, the plaintiff sued his employer to recover damages for injuries sustained by reason of a "flash over" on an electrical rotary converter alleged to have been caused by tar dropping from a leaking roof. A physician testified that he found sixty or seventy particles of tar the size of a pea on the plaintiff's chest after the accident. The court said: "Under the evidence and under scientific principles it required the destruction of the tar in order to furnish the conductor or medium of the 'flashover.' Such is not consistent with sixty to seventy particles of tar the size of a pea or shot after a 'flashover' and all from a drop of tar from the roof, which drop could not be discovered by one who was looking for the trouble. . . . We omitted some further facts. Plaintiff says that the 'flashover' was as big as a half barrel. His language is: 'The electrical flame burst out through the air as big as a half barrel, and enveloped my head and arms inside this electrical flame.' This carbon brush was fastened to the holder by a small copper wire called a 'pig-tail.' After the accident the brush was picked up from the floor. The wire had been burned in the middle, or thereabout. No evidence as to tar was found upon this brush, or upon the commutator. Under these facts and circumstances, we say in this case on the question of tar as detailed by Dr. Baird, as we did in the Champagne case, 189 Mo. 726, 'such statements do not amount to any substantial evidence of the facts to which they relate.'"

Testimony to Looking or Listening for Approaching Train or Street Car.

It may be stated as a general rule that the testimony of a person struck by a train or car that he looked and listened for an approaching train or car, and did not see or hear it, will be withdrawn from the consideration of the jury where there was nothing to interfere with his sight or hearing. *Louisville, etc. R. Co. v. Moran*, 190 Ala. 108, 66 So. 799; *Zibbell v. Southern Pac. Co.* 160 Cal. 237, 116 Pac. 513; *Brown v. Chicago City R. Co.* 155 Ill. App. 434; *Maryland Electric R. Co. v. Beasley*, 117 Md. 270, 83 Atl. 157; *Dyrez v. Missouri, etc. R. Co.* 238 Mo. 33, 141 S. W. 861; *Waggoner v. Chicago, etc. R. Co.* 152 Mo. App. 173, 133 S. W. 68; *Landrum*

v. St. Louis, etc. R. Co. (Mo.) 178 S. W. 273; Paul v. Philadelphia, etc. R. Co. 231 Pa. St. 338, Ann. Cas. 1912B 1132, 80 Atl. 365; Labelle v. Central Vermont R. Co. 87 Vt. 87, 88 Atl. 517; Harrington v. Rutland R. Co. 89 Vt. 112, 94 Atl. 431; Norfolk, etc. R. Co. v. Strickler, 118 Va. 153, 86 S. E. 824; White v. Minneapolis, etc. R. Co. 147 Wis. 141, 133 N. W. 148. "This absolute duty of a person to look and listen before attempting to cross a railway track extends to vigilant attention in all directions from which a train, locomotive, or car may come, and includes obligation to see and hear such, if there be any, which such attention, in view of the danger, will enable him to. Therefore, for a person to declare he performed such duty and yet failed to perceive an approaching train or car, in case of their being such in plain sight or hearing, does not raise a question of fact for decision by a jury. Such person must be presumed to either not have performed such duty or to have done so and yet heedlessly submitted himself to the danger, and that is particularly so as regards a person traveling on foot, 'since the danger zone in such a case is so narrow and it may be avoided with so little effort.' . . . This rule of look and listen, in the circumstances stated, and to observe the dangers which are in plain sight or hearing to one in the vigilant performance of it, is, as before indicated, a rule of law, not a mere rule of evidence." White v. Minneapolis, etc. R. Co. 147 Wis. 141, 133 N. W. 148. In Norfolk, etc. R. Co. v. Strickler, 118 Va. 153, 86 S. E. 824, the rule was applied to the testimony of the plaintiff in an action to recover damages for a collision between a motor truck running on the defendant's tracks and the plaintiff's automobile. In Brown v. Chicago City R. Co. 155 Ill. App. 434, it appeared that the plaintiff after alighting from a south bound car at the south side of a street crossing passed around the rear of the car and while crossing the parallel track on the same street was struck by a train going north. The testimony showed that the north bound train had stopped just south of the street crossing. It was held that the testimony of the plaintiff that she looked and did not see the train before crossing the tracks should have been disregarded. In Paul v. Philadelphia, etc. R. Co. 231 Pa. St. 338, Ann. Cas. 1912B 1132, 80 Atl. 365, a directed verdict for the defendant was affirmed as against the testimony of the plaintiff that he stopped to listen although it was nighttime when the accident occurred and the engine instead of being in front of the train was pushing ten cars and pulling the rest of the train.

But the rule that the law will not credit the testimony of a person who says that he looked and listened for an approaching train or car

and did not see or hear it is confined in its application to a situation where in the nature of things he must have seen or heard if he had looked or listened. Baltimore, etc. R. Co. v. O'Neill, 186 Fed. 13, 108 C. C. A. 115; Zibbell v. Southern Pac. Co. 160 Cal. 237, 116 Pac. 513; Loftus v. Pacific Electric R. Co. 166 Cal. 464, 137 Pac. 34; Heinz v. Baltimore, etc. R. Co. 113 Md. 582, 77 Atl. 980; Davidson v. St. Louis, etc. R. Co. 164 Mo. App. 701, 148 S. W. 406. "The proposition that the plaintiff, although looking for the train, did not see it, is supported by the testimony of the witnesses we have referred to. There was testimony that the lamp was burning at the Olive street crossing, 250 feet east of the Clay street crossing, yet the three witnesses, two of whom were overtaken by the train, the other of whom met it, near the Olive street crossing, notwithstanding the greater light at that place, were unable, according to their testimony, to distinguish the train until within 20 or 30 feet from it. The witnesses who were upon the porch of the house near the track did not see the train until both engines had passed the house. We could not, without violating the record, hold that the plaintiff, whose opportunities for seeing the train were less than those of the three witnesses near the Olive street crossing, could have seen the train from the Clay street crossing. . . . The plaintiff's testimony that he did not hear the train, although he listened for it, is corroborated by all of the five witnesses mentioned. There was testimony that no steam was escaping from either engine, that the drifting train was slowing down as if for the purpose of stopping at a railroad crossing several hundred feet west of the Clay street crossing, and that it was not heard by the pedestrians upon the track, who especially had it in mind by reason of the danger they incurred in walking there, to say nothing of the fact that its approach was so comparatively quiet that the attention of the witnesses upon the nearby porch was first attracted to the presence of the train, not by the noise, but seeing before them the freight cars which followed the engines." Baltimore, etc. R. Co. v. O'Neill, 186 Fed. 13, 108 C. C. A. 115. In Davidson v. St. Louis, etc. R. Co. 164 Mo. App. 701, 148 S. W. 406, the rule was held not to apply where the plaintiff testified that weeds, grass and brush growing along the right of way obstructed his view. In Loftus v. Pacific Electric R. Co. 166 Cal. 464, 137 Pac. 34, it appeared that the defendant's electric car collided with the plaintiff's automobile at a crossing. The evidence showed that a person approaching the crossing could not see a car until it was within four or five hundred feet of the crossing and that the car when it struck the plaintiff was going at the rate

of forty miles an hour. It was held that the evidence of the plaintiff that he looked and listened was sufficient to take the question of his contributory negligence to the jury. So in *Zibbell v. Southern Pac. Co.* 160 Cal. 237, 116 Pac. 513, it appeared that the plaintiff was struck by some cars which with an engine attached to the rear were drifting along, no lights showing although it was nighttime. It was held that the evidence of the plaintiff that he looked and listened was sufficient to carry the issue of his contributory negligence to the jury.

Testimony to Speed of Railroad Train or Street Car.

In *Brown v. Chicago City R. Co.* 155 Ill. App. 434, it appeared that the plaintiff after alighting from a south bound car at the south side of a street crossing passed around the rear of the car, and while crossing the parallel tracks on the same street was struck by a train going north. The testimony showed that the north bound train had stopped just south of the street crossing. It was held that the testimony of a witness that the north bound train was going very fast when it struck the plaintiff was to be disregarded. And in *Giles v. Missouri Pac. R. Co.* 169 Mo. App. 24, 154 S. W. 852, it was held that the testimony of a witness that he successfully boarded a freight car running at the speed of an express train and that the train was brought to a dead stop in ten feet should be ignored.

Testimony to Result of Forces Acting on Animate Human Body.

In *Zeiler v. Metropolitan St. R. Co.* 153 Mo. App. 613, 134 S. W. 1067, the testimony of the plaintiff and two other witnesses showed that while the plaintiff was alighting from a car it started with sufficient force to throw the plaintiff to the ground, and then stopped within two to four feet. It was held that the evidence was substantial and not opposed to physical facts or laws. To the same effect see *Elliott v. Metropolitan St. R. Co.* 157 Mo. App. 517, 138 S. W. 663.

In *Daniels v. Kansas City El. R. Co.* 177 Mo. App. 280, 164 S. W. 154, it was held that the testimony of a plaintiff that after he had stepped onto the step of a street car but before he had taken hold of the hand-rail the car started and threw him forward out into the street should not be credited. Compare *Klass v. Metropolitan St. R. Co.* 169 Mo. App. 617, 155 S. W. 57, wherein the court in holding that the testimony that a person was thrown forward by the sudden starting of a car was not so improbable as to require its withdrawal from the jury, said: "Counsel for defendant assert that in

the position occupied by Mrs. Klass, as described by the witness, the certain effect of a sudden forward start of the car would have been to throw her westward against the rear end of the vestibule and not forward, but it must be borne in mind that several opposing and mutually modifying forces were brought into action, viz.: First, the jerk of the car which, if not interfered with, would have thrown the woman in the opposite direction; second, the force produced by the movement of Mrs. Klass in leaving the car which, at the time, was exerted in a direction at right angles to that of the motion of the car; third, the resistance to the suddenly introduced force offered by the handhold and, fourth, the involuntary effort a person will make to regain his equilibrium under such circumstances. Obviously the direction given the falling body of a person who has some means and opportunity for resistance to the major force would vary in different instances and would depend on the relative strength of the interacting forces. It would not do for us to indulge in a dogmatic conclusion and to pronounce that to be impossible which not only is possible but is well within the scope of the reasonable results of the forces brought into play. The question of whether or not the testimony of the witness is consistent with physical fact and law in this instance should be regarded as one of fact for the jury to determine."

In *St. Louis Southwestern R. Co. v. Britton*, 190 Fed. 316, 111 C. C. A. 216, the court in holding that a verdict should have been directed under the facts of the case said: "It is apparent, from a consideration of the physical facts, that plaintiff is mistaken. She was sitting in the seat, she testified, facing in the direction the train was going. She was not sitting next to the window, but near the aisle, and a sudden stopping of the train would have precipitated her forward, not thrown her sideways some distance to the window. Sitting where she was, had she been suddenly thrown sideways against the window sill, she would not have been struck in the side and back below the ribs, but much higher up, at or about the shoulder. . . . The requested instruction for a directed verdict in favor of the defendant, after the close of the trial, should have been given."

In *McClanahan v. St. Louis, etc. R. Co.* 147 Mo. App. 386, 126 S. W. 535, it appeared that the plaintiff sought to recover damages against a railroad for the fracture and breaking of the femur bone of her right leg by reason of falling in a hole in the platform at the defendant's station. Her testimony showed that after the accident she kept on her feet with little noticeable change in her walk until the next morning. It was held that the evidence required an instruction to

the effect "that if the jury believe the statements of plaintiff about what she did after she received the injury to her leg, yet if they found that such statements were contrary to physical facts as those facts are in evidence, the jury should disregard her statements."

In *Wabash R. Co. v. McDoniels*, 183 Ind. 104, 107 N. E. 291, the contention of the appellant and the facts pertinent thereto were stated in the opinion of the court as follows: "Appellant complains that the undisputed evidence is that decedent, just after the injury, said to one of its employees that he was standing on the track, when hit, and that the jury disregarded this testimony. By an examination of the evidence on this point we find that one man, a brakeman in the employ of appellant, testified that such a statement was made by decedent to him; that he was the first man to reach the decedent after the injury; another witness testified he was the first to reach decedent; both being witnesses for the appellant. Other witnesses testified that decedent was found some fifty feet or sixty feet northeast of the crossing; that pieces of flesh were found all along between the crossing and the place where decedent lay; and that when found he had a hole in the left side of the head so large that when parties attending were putting ice on his head a piece fell into it; the abdominal wall was torn so that the bowels protruded; the right leg was completely crushed off and entirely separated from the body, at a point within six or eight inches of the hip; the left leg crushed near the hip and that decedent died within five minutes after reaching the hospital." The appellate court in disposing of this contention said: "To believe that this man, injured as he was, could give an intelligent account of the accident would test human credulity to the limit. The jury has the right to disregard the testimony of a witness whose statement is contrary to the laws of nature."

In the reported case it appears that through the negligence of the defendant railroad company a car ran off a switch into the plaintiff's yard, demolishing a fence but not coming in contact with the house. The plaintiff testified that she was thrown from the bed in which she was sleeping over the foot, which was two feet higher than the rest of the bed, on a rocking chair and thereby injured. The court holds that her testimony was not sufficient to take the case to the jury.

Testimony to Improbabilities Connected with Credibility of Witnesses.

Unless the testimony of witnesses is so inherently weak and unreasonable that different minds could not entertain different opinions

about it, its credibility and weight are for the jury to determine. *Willis v. Browning*, 179 Mo. App. 233, 186 S. W. 1070. See also *Lucy v. Eulberg*, 164 Ill. App. 23.

STEELE

v.

DOWLING.

Ireland—King's Bench Division—November 17, 1913.

[1914] 2 I. R. 432.

Elections — Persons Entitled to Vote — Army Officer.

An army officer living with his wife in quarters assigned to them in military barracks is an occupant of a "dwelling house" and as such entitled to vote, though his use of the premises is subject to regulation by his military superiors and his quarters are subject to change by them.

[See note at end of this case.]

[432] Case stated by the revising barrister for South County Dublin Division.

The case set out as follows:—

"The name of John Steele appeared on the Long List for the Unit of Rathmines and Rathgar West, South County Dublin Division, as follows:—'Steele, Captain John. M. 1, Portobello. Inhabitant Occupier, Barracks. Rathmines West,' and was duly objected to by the respondent. The names of eighty-nine persons in the schedule hereto annexed also appeared as therein described, and were duly objected to.

"The facts established by the evidence were as follows, and related generally to the names of Captain Steele and of the other persons mentioned in the schedule, all of whom reside in the [433] Portobello Barracks, and are married officers or married noncommissioned officers:—

"The outside gate of the barracks is shut at 10 o'clock at night, and is in charge of the sergeant of the guard. In reference to married men and all non-commissioned officers, every one of them, subject to good conduct, holds a pass, enabling him to stay out if he wishes until 12 o'clock midnight only. However, if any of them wishes to stay out after 12 o'clock, he may procure from the company officer and from the commanding officer permission by an 'All-night pass' to stay out until reveille in the morning, at which time all persons must be in the barracks to answer their names. 'All-night

passes' are by custom issued by the commanding officer. If a man with a permanent 12 o'clock pass has not got an 'All-night pass,' and arrived later than 12 o'clock, he would be admitted; but the sergeant of the guard would report such case of lateness, and the man would be punished unless it were his first offense. If he was drunk and disorderly, he could be locked up in the guard-house. The regulation as to arriving not later than 12 o'clock does not, however, apply to commissioned officers.

"In all married quarters the principal and necessary portions of the furniture, such as tables, chairs, washstands, wardrobes, and the like are supplied by the army authorities, but married men may, and do, add extra articles, such as curtains, carpets, or an easy chair, of their own property. Married men are supplied also with coal, food, and gaslight. There is a strict rule against having lights in the rooms after a certain hour. The order is 'Lights out' at 10.15 p. m. for barracks; but it is not so strictly enforced in the married as in the unmarried quarters. The married men cook their food in their quarters; and each man has a key of his own quarters, and may go in and out of his apartments at any time during the day without hindrance.

"The poorest quarters have a sitting-room, bedroom, and scullery, and perhaps a joint w. c. With a bigger family a married man might have allotted to him, according to the size of his family, 'B' quarters, having two bedrooms, or 'C' quarters, having three bedrooms. When a married man goes off [434] on leave, he may retain the key of the quarters which had been allotted to him.

"A company officer is entitled to enter the apartments of the married man, not to interfere with the mode of living, but to inquire in regard to complaints. If the officer did not get admission, there would be at once a report to the orderly room, and the man would not refuse a second time. The door would not be broken open, but the soldier might be struck off the 'married roll,' or otherwise punished. He has no right to refuse admission to the company officer.

"Men in barracks cannot receive visitors after 10 o'clock p. m. Civilians are not admitted at all after 10 o'clock p. m. to the barracks, but if a civilian happened to be visiting a married man in his quarters, he might remain for a reasonable time after 10 o'clock p. m., when he must leave. The commanding officer has absolute power to shut up the barracks, and prevent any person from entering or leaving, but only in the event of riot or mutiny or the like would such a power be exercised. The residence of Colonel Hill, the officer commanding the troops, was, during the qualifying period, Roebuck House, Clonskeagh.

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"Unless ordered on duty, no person may leave the barracks after 9:30 o'clock p. m.

"The barracks are under perpetual military control, the officer in command being the senior commissioned officer for the time being present. A commanding officer can move any of the married men from one set of apartments to another at any time without notice; and the doctor could similarly remove a man and his family from one set of rooms to another, as, for instance, in the case of an increase of the family.

"There is a key for every door, and the married men are bound to be in their own quarters at night, and must sleep there; any absence from their allotted quarters is an absence without leave. Non-commissioned officers would be reported for arriving after 12 o'clock, just privates would be reported for breach of discipline by arriving after 10 o'clock p. m.

"The medical officer has the right to enter any quarters at any time, and inspect and report.

[435] "It was argued on behalf of the claimants [they were voters on the Long List or Register, not claimants,—(Rep.)], that the restrictions and discipline did not in any appreciable degree differ from that exercised in cities and towns in the case of private houses by public authorities, such as sanitary inspectors, or by public officers, such as police preventing access to a street; and that there was not such evidence of superior control as to prevent the several quarters from being separately occupied as dwelling-houses; and that, as none of the claimants messed together at a common mess, the cases were distinguishable from those dealt with in *McDaid v. Barton*, 4 *Lawson* (Eng.) 61, and that that decision did not apply:

"For the objector it was urged that the restrictions proved were inconsistent with the idea of dwelling-houses separately occupied, and that there was no contractual right to the occupation of the several rooms; that the claimants could have rooms allotted to them, or be changed from their rooms to others, without the men's assent and without notice; that lights should be quenched and visitors should leave at a definite hour; that no person could leave the barracks after 10 o'clock; and that the company officer and medical officer had at all times a right of entry into any part of the quarters; and that such drastic rules and prohibitions affecting the mode of life of the claimants in the several sets of rooms, showed such superior control as to prevent the claimants from claiming the franchise; and the cases of *Ladd v. Purcell*, 3 *Lawson* (Eng.) 190; *O'Brien v. McCarthy* (1912) 2 *Ir. R.* (Eng.) 17; and *Ladd v. O'Toole* [1904] 2 *Ir. R.* (Eng.) 389, were relied on.

"I was of opinion that the incidents were not consistent with the ordinary idea of a man's dwelling; that the constant superior control exercised throughout the barracks, carrying with it prohibitions and punishments in respect of the use of the rooms, and the restrictions upon personal freedom of ingress and egress when the claimants were not on duty, deprived the rooms of the characteristics of a true home. Accordingly, I found that Captain John Steele did not occupy 'M. 1' as a separate dwelling, and I expunged his name.

"In the several cases mentioned in the schedule (eighty-nine [436] in all) the facts were identical in all material respects, and the list of them was agreed upon by the solicitors for the appellant and respondent respectively. I allowed the objections in each case, and expunged the names of each of the persons on the same ground; and as the point of law, viz., 'Was there evidence to sustain my finding?' is the same in each, I hereby consolidate the appeals. If there was no evidence in support of my decision, having regard to the principles laid down in the above-mentioned cases, and also in the cases of *Bannon v. Hanrahan* [1900] 2 Ir. R. (Eng.) 455, and *M'Quade v. Charlton* [1904] 2 Ir. R. (Eng.) 383, then the names should be restored to the list, otherwise they will remain expunged."

Henry, K. C., and Russell for appellants.
Serjeant Sullivan, K. C., and Ronayne for respondent.

William V. Seddall, solicitor for appellants.

J. McDowell, solicitor for respondent.

[439] *PALES, C. B.*—The question on this appeal is whether the appellant, Captain Steele, is entitled to be registered as a voter as an inhabitant householder under the service franchise.

Captain Steele, who is married, resided with his family during the qualifying period in Portobello Barracks. His quarters consisted of a sitting-room, bedrooms, sanitary accommodation, and scullery. He and his family have their meals in the sitting-room. He has a key of his rooms, and can enter or leave them at any time of the day or night without hindrance.

The barracks are under perpetual military control, the officer in command being the senior commissioned officer for the time being present. The residence of Colonel Hill, the officer commanding the troops, was, during the qualifying period, not in the barracks but at Roebuck House, Clonskeagh.

I apprehend that were such dwelling-rooms situate in an ordinary house and not in bar-

racks, and separately occupied, as they were by Captain Steele, they would, under 41 & 42 Vict. c. 26, sect. 5, be held to be a dwelling-house, and that their habitation by Captain Steele by virtue of his commission in the army would entitle him to be registered as a voter. It is objected, however, that the military control over the barracks (the nature and particulars of which have been found by the case) prevents this result ensuing. Whether it has or has not this effect is the question for decision. The consideration of this [440] question has been so curiously mixed up with the decision of this Court in *Ladd v. O'Toole* [1904] 2 Ir. R. (Eng.) 389, which to my mind has no bearing upon it, that it will be convenient that I shall in the first instance remove this element from the discussion.

The decision in *Ladd v. O'Toole* [1904] 2 Ir. R. (Eng.) 389, was that this Court declined to follow as an authority the English decision of *Stribling v. Halse*, 16 Q. B. D. (Eng.) 246. *Stribling* was a shop-assistant, who by virtue of his employment occupied a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly occupied by other persons in the same employment, all of whom took their meals in common in another room provided by the employers. The decision there was that of Coleridge, C. J., Grove and Cave, JJ. Coleridge, C. J., in giving judgment, referred to a doubt expressed by Brett, L. J., in *Bradley v. Baylis*, 8 Q. B. D. (Eng.) 195, at p. 233, whether a person could be said to separately occupy a bedroom as a dwelling-house when he dwelt partly in the bedroom and partly in a sitting-room, and did not dwell in one exclusively. The Chief Justice states (p. 250) that, in a deference to the doubt so expressed, they allowed a case to go to appeal, and that the doubt was removed. In this last observation the reporter points out that the Chief Justice was in error, and that *Ancketill v. Baylis*, 10 Q. B. D. (Eng.) 577, which arose out of *Bradley v. Baylis*, 8 Q. B. D. (Eng.) 195, turned on a different point. Grove, J., makes his observations in almost similar terms, and, accordingly, the decision, which has been much cavilled at in England, was arrived at, and leave to appeal was refused.

In *Ladd v. O'Toole* [1904] 2 Ir. R. (Eng.) 389, this Court, as I have said, declined to follow *Stribling v. Halse*, 16 Q. B. D. (Eng.) 246. The real ground of the judgment is tersely put by the Lord Chief Justice on page 402 of his judgment. I would like to say why I think *Stribling v. Halse*, 16 Q. B. D. (Eng.) 246, is wrong. I think the judges proceeded on the view that once it was found there was separate occupation of a bedroom it followed that there was sepa-

rate occupation of a dwelling-house. This is the fundamental error. Separate occupation of a room in which [441] a person sleeps may be an element in determining whether it is a bedroom strictly so called or a dwelling; but it does not necessarily follow because a room is separately occupied as a sleeping apartment that the room so occupied is a separate dwelling."

The substantial ground of decision in *Ladd v. O'Toole* [1904] 2 Ir. R. (Eng.) 389, was that the applicants, although they slept in separate apartments, took their meals together in a common dining-room. It has no more to say to the present question than has the *Six Carpenters' Case*, and the same observation applies to *O'Brien v. M'Carthy* [1912] 2 Ir. R. (Eng.) 17. In it the common dining-room, and not the question of control, was the ratio decidendi. Indeed, Lord Justice Holmes, on page 37, expressly reserves his opinion in reference to soldiers. "The case of soldiers," he says, "for some reason has never been raised or discussed in this Court, and I do not wish to anticipate the result if it ever is."

McDaid v. Barton, 4 *Lawson* (Eng.) 61, was a case relating to non-commissioned officers and unmarried commissioned officers, all of whom were bound to dine at mess, and the case was treated as one virtually involved in *O'Brien v. M'Carthy* [1912] 2 Ir. R. (Eng.) 17, which did not rest on the question of control.

Now, as to the case of military control, it must be regarded, as Mr. Henry rightly pressed upon us, from a point subsequent to the qualifying period, not from one antecedent to it. It depends on the actual occupation during the qualifying period. Had there been an insurrection, Captain Steele might have been removed from his rooms altogether. But so might a weekly tenant be removed from his occupation, and lose his right to a franchise which he retained because he was not so removed. In the present case the extent of the control is not as much as, certainly not more, than that in *Atkinson v. Collard*, 16 Q. B. D. (Eng.) 254. It was there pressed by Mr. Asquith, and is answered in the considered judgment of the Court in these words: "A servant does not the less inhabit a dwelling-house, nor is it the less a dwelling-house, because the master makes and enforces regulations for the good [442] government of the servant and of the house, nor does the fact that the master retains himself or delegates to others the power of entering a servant's house for the purpose of maintaining order prevent the servant from having the sole and exclusive use of the house."

I entirely agree in this opinion, and hold that the decision of the revising barrister

should be reversed, and that Captain Steele should be placed on the register.

HOLMES, L. J.—The legislation that purports to prescribe the conditions entitling a man to the parliamentary franchise has given rise to more perplexing questions than any other statutory code that comes before our Courts, and of these questions, the most difficult are, in my opinion, those that relate to what is called the service franchise. As might be expected, it is hard to reconcile the decisions thereon with each other; and propositions accepted by one strong Court have been criticized or even rejected by another. A typical instance of such a decision is that in *Stribling v. Halse*, 16 Q. B. D. (Eng.) 246, which held that shop-assistants, each of whom occupied exclusively by reason of his employment a furnished bedroom in a dwelling-house belonging to his employers, were all entitled to be registered as voters, although the house also contained a sitting- or dining-room in which they took in common their meals provided by their employers, who also exercised general control, by means of resident caretakers, over the whole house.

This case was decided in 1885, and from that date, notwithstanding repeated disapproval by distinguished judges in both England and Ireland, it was always followed, generally with reluctance, until 1902, when this Court, *M'Quade v. Charlton* [1904] 2 Ir. R. 383, gave a decision absolutely inconsistent with it. In the following year, in *Ladd v. O'Toole* [1904] 2 Ir. R. 389, the matter was again reconsidered by all the members of this court; and although other considerations [443] arose therein, we agreed that *Stribling v. Halse*, 16 Q. B. D. 246, could not be regarded as an authority in this country. I now come to *O'Brien v. M'Carthy* [1912] 2 Ir. R. 17, which I think the revising barrister believed he was following in refusing a vote to Captain Steele. *O'Brien v. M'Carthy* [1912] 2 Ir. R. 17, dealt with the case of attendants in a lunatic asylum, each of whom had the exclusive use and occupation of a room in a building in the asylum known as the servants' quarters. The attendant slept in this room, and it was, therefore, at the least his bedroom. But it was contended that it was something more, and that having regard to the mode in which it was used, it was his dwelling-house. I said in my judgment in that case that in my opinion the principle acted on by the previous Irish authorities does not depend on small details. "The question," I go on to say, "is whether all the circumstances together are consistent with the ordinary idea of the room in which the claimant sleeps being a dwelling-house," and I suggest as a test what we are familiar with in family

life. In addition to their bedrooms there are in the asylum a recreation-room, which is used as a sitting-room by the male attendants, and at least one billiard-room. They are at liberty to use the day-rooms of the patients as recreation rooms when the patients are gone to bed; they have also a dining-room for their own exclusive use, and they take their meals therein. Giving dwelling-house any possible meaning, I cannot conceive how the room in which an attendant, having all these advantages in different parts of the building, sleeps, can be so described. Turning to the use of that room, I find nothing in its user that is not customary in a bedroom. It was found by the revising barrister that these rooms were used by the attendants for the purpose of reading, retirement, recreation, and privacy. I have lived in many houses, in all of which I have used my bedroom for the aforesaid purposes, except, perhaps, that of recreation; and if playing a game of patience can be so described, I have used it for that purpose too. In these circumstances, the majority of the Court held that the attendants were not entitled to a vote; and although Cherry, L. J., dissented, he based his decision on English and Scotch cases, which I am of opinion this Court [444] has distinctly declined to follow. Before leaving *O'Brien v. M'Carthy* [1912] 2 Ir. R. 17, I would add that I have not overlooked the element of control exercised by the Resident Medical Superintendent over the institution and its officers. This must necessarily be very great in a lunatic asylum; but I do not attach much importance to it in a claim for a vote based on the service franchise. In such cases there is always some control over the house and the servants; and yet such control may not be inconsistent with a servant occupying part of the house as his dwelling. The true test is, in my opinion, the mode of user. When *O'Brien v. M'Carthy* [1912] 2 Ir. R. 17, was before us, two years ago, I was aware that soldiers in barracks had been registered as voters without objection; and I anticipated that as a result of that decision we should be called on to hear appeals relating thereto. In the following year my anticipation was realized in *McDaid v. Barton*, 4 Lawson 61. In that case officers and non-commissioned officers who were unmarried occupied quarters in barracks, consisting of single rooms used as bedrooms, while they took their meals in a mess-room. It was admitted in that case that the position of the non-commissioned officers could not be distinguished from that of the assistants in the lunatic asylum; and all the members of the court held that, although they were under greater restrictions than the officers in the occupation of their rooms, the occupa-

tion of the latter was the same in its essential nature as that of the former, and, therefore, the objection to their claim to vote was allowed. I have referred to the details of these cases, as I think they illustrate the difference between them and the case we are now considering. Captain Steele is a married man, living in the married quarters. The poorest of such quarters have a sitting-room, bedroom, scullery, and, perhaps, a joint w. c. With a larger family, a married man might have allotted to him two or three bedrooms. The food used by the married man and his family is cooked in these rooms, and he has a key thereof which enables him to enter them at any time. I am of opinion on this evidence that each man's quarters is in their use as much his dwelling-house as a London flat is that of its occupant. It is true that there are some restrictions on the [445] enjoyment, but these restrictions are not burdensome; and, as I have already said, the service franchise always involves some kind of restraint. I am satisfied that Captain Steele and the others named in the schedule are entitled to the franchise.

CHERRY, L. J.:—The facts in this case differ materially from those proved in the case of *McDaid v. Barton*, 4 Lawson 61, decided by this Court last year. In that case the claimants, who were unmarried officers and noncommissioned officers living in barracks, occupied each only a single room, which was primarily used as a bedroom and only occasionally used as a sitting-room. The officers were all dining members of the mess, and partook of all their meals in the mess-room, except in the case of illness. The non-commissioned officers were similarly bound to take their meals at the sergeants' mess. We held that each of the rooms thus occupied was not "separately occupied as a dwelling" within the meaning of the 5th section of the Parliamentary Registration Act, 1878, and we accordingly disallowed the votes.

In the present case the facts are quite different. Captain Steele and the other persons mentioned in the schedule are married officers, or married non-commissioned officers, living with their wives and families in the rooms allotted to them respectively in the Portobello Barracks. They take all their meals in their quarters. Each has a key of his own quarters, and can go in and out of his apartments at any time during the day without hindrance. The poorest quarters have a sitting-room, bedroom, and scullery. In better quarters one or two extra bedrooms are added. The rules as to visiting and military control are apparently the same as in the case of the unmarried officers re-

ferred to in *McDaid v. Barton*, 4 Lawson 61.

Under these circumstances I have no hesitation in holding that each of these persons "inhabits" by virtue of his "office, service or employment" the rooms allotted to him within the meaning of sect. 3 of the Representation of the People Act, 1884.

Two arguments were pressed very forcibly upon us against [446] the right of voters to remain on the register, even on the supposition that we should hold that the suites of rooms occupied in each case constituted separate residences.

First, it was said that in every case of the service franchise there must be a contractual right to the premises occupied, and that here there was no such right, for the officers were liable to removal at any time. Secondly, it was urged that the amount of military control under the King's Regulations exercised by superior officers over the occupants was inconsistent with inhabitant occupancy under the Franchise Act.

The simplest and shortest answer to these arguments is that they were put forward and overruled by the English Court of Queen's Bench nearly thirty years ago, and officers and non-commissioned officers were held, in the group of cases reported under the heading of *Atkinson v. Collard*, 16 Q. B. D. (Eng.) 254, to be entitled to the franchise in circumstances precisely similar to those in the present case. Upon the questions how far contractual right to the premises is necessary in the case of the service franchise, and how far control of the occupant by persons in authority is inconsistent with it, there is happily no divergence between the English and Irish decisions, though on the question of what is necessary to constitute a separate residence there is some conflict between the decisions in the two countries. The case of *Atkinson v. Collard*, 16 Q. B. D. (Eng.) 254, is not, of course, binding on this Court, but it has been acted upon in England and Scotland for a great many years, and I think we ought to follow it on these two points, though we cannot regard it as an authority in Ireland upon the main questions as to what user constitutes "residence" within the meaning of the Franchise Acts.

For these reasons I am of opinion that the decision of the revising barrister should be reversed, and that the objections to the voters' names being upon the registry should be overruled.

NOTE.

Right to Vote of Soldier or Sailor in Actual Service.

In General.

In the absence of a constitutional or statutory provision to the contrary soldiers or sailors in the service of the United States are not disqualified as voters because of their membership in the armed forces. *People v. Riley*, 15 Cal. 48; *Hunt v. Richards*, 4 Kan. 549; *Taylor v. Reading*, 4 Brewst. (Pa.) 439. See also *Election Law*, 9 Phila. (Pa.) 497, 29 Leg. Int. 196; Opinion of Judges, 37 Vt. 665.

It is generally provided either by constitutional or statutory provisions that a residence for the purpose of voting is not deemed to be gained or lost by reason of employment in the service of the United States. Consequently a soldier or sailor does not gain a residence for the purpose of voting in a particular place by reason of his mere presence there while in the performance of his duty. *In re Green*, 5 Fed. 145; *People v. Riley*, 15 Cal. 48; *Devlin v. Anderson*, 38 Cal. 92; *Mead v. Carrol*, 6 D. C. 338; *Hunt v. Richards*, 4 Kan. 549; *Taylor v. Reading*, 4 Brewst. (Pa.) 439; *Election Law*, 9 Phila. (Pa.) 497, 29 Leg. Int. 196. See also *Matter of Cunningham*, 45 Misc. 206, 91 N. Y. S. 975; *Matter of Lewis*, 172 App. Div. 271, 158 N. Y. S. 1036; *In re Highlands*, 22 N. Y. S. 137. Thus in the case of *In re Green*, *supra*, it appeared that the petitioner had enlisted as a marine at the Brooklyn navy yard while a resident of New York city. According to the practice of the service persons so enlisting were stationed at that yard during the two years succeeding their enlistment, and it was contended that the expectation entertained by the petitioner at the time of his enlistment that he would be allowed to remain in Brooklyn for two years was a circumstance to be considered in determining his right to vote there. The court in answering this contention said: "But I am unable to see that the case is altered by this circumstance. The only intention the petitioner could have had in enlisting was to obey the orders of his commanding officer as to the place of his future abode. If he entered the service with the belief, hope, and expectation that he would be ordered to remain in Brooklyn, that does not affect the fact that by enlisting he made it impossible for him to have an intention of his own in regard to his residence at any particular place during the term of his enlistment." And in the case of *In re Highlands*, 22 N. Y. S. 137, it was held that persons residing on the West Point Military reservation

did not thereby gain a residence there for the purpose of voting.

The converse of the proposition heretofore stated is also true, namely, that a soldier or sailor does not lose his residence for the purpose of voting by reason of his absence therefrom on account of his employment. *Matter of Lewis*, 172 App. Div. 271, 158 N. Y. S. 1036. See also *Mead v. Carol*, 6 D. C. 338; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504. Thus in the case of *In re Lewis*, supra, it was held that an employee of a United States arsenal who also resided within the boundaries of the arsenal did not lose his right to vote as from his residence before he entered the service of the United States.

Although a soldier or sailor is deemed not to gain or lose a residence by reason of his presence or absence due to his employment, the rule that he may during his period of service change his residence where his intention so to do is sufficiently shown is supported by several cases. In *re Green*, 5 Fed. 145; *Matter of Cunningham*, 45 Misc. 206, 91 N. Y. S. 975. See also *Election Law*, 9 Phila. (Pa.) 497, 29 Leg. Int. 196. Thus in *Matter of Cunningham*, supra, the court in holding that a soldier was entitled to be registered as a voter as a resident at his place of service under the facts therein shown said: "The soldier may acquire a residence in the new locality. His calling the place his home, or believing it to be his home, does not legally make it such. It is not his view of the fact that governs; the facts themselves govern the question. Mere intention is not alone sufficient. It must exist, but must concur with and be manifested by resultant acts which are independent of the presence of the soldier in the new locality. It appears from the evidence produced on the part of the applicants that they have resided outside of the military reservation, within the state and ward No. 6 of the city of Plattsburg, during the year last past. This is in no way contradicted except by one (Tierney) who claims that the applicants admitted to him in a conversation that they had not resided outside of the military reservation for over a year. I think the proof sufficient to establish a residence in this ward for over a year last past, and, therefore, order that the board of inspectors convene and place the names of the applicants on the register list as provided by law, and that an order may be entered accordingly."

Under the Texas constitution (art. VI, § 1, sub-sec. 5) soldiers, marines and seamen employed in the service of the army or navy of the United States are denied the right to vote. Accordingly it was held in *Savage v. Umphries* (Tex.) 118 S. W. 893, that a member of the National Guard while employed

in the service of the army of the United States was not entitled to vote.

In Great Britain it is provided by statute (*Representation of the People Act of 1884*) that where a man inhabits a dwelling house in respect of which no person is rated by reason of such dwelling house belonging to or being occupied on behalf of the Crown, or by reason of any other ground of exemption, such person shall not be disentitled to be registered as a voter. It is also provided by another statute (s. 5 of the *Registration Act of 1878*) that the term dwelling house is to include any part of a house where that part is separately occupied as a dwelling, and that where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. Under that act the rule seems to be that the occupancy by a soldier or officer of separate quarters in a barracks is none the less an inhabitancy of a dwelling house because the occupants thereof are subject to military control by superior officers. *Atkinson v. Collard*, *Colt. Reg. Cas.* 375, 16 Q. B. D. (Eng.) 254, 55 L. J. Q. B. 18, 50 J. P. 23, 53 L. T. N. S. 670, 34 W. R. 75. And see the reported case. *Compare McDaid v. Barton*, 4 *Lawson* (Eng.) 61, discussed at length in the reported case.

Voting at Place without District.

During the Civil War a number of states passed statutes known as soldiers' voting acts which permitted volunteers while in the service of the United States to vote although they were stationed beyond the borders of their respective states. In several cases these acts were held to be valid. *Morrison v. Springer*, 15 Ia. 304; *Lehman v. McBride*, 15 Ohio St. 573; *State v. Main*, 10 Wis. 498. But in a number of jurisdictions they were held to be invalid on the ground that they violated constitutional provisions relating to the place at which votes were to be cast. *Bourland v. Hildreth*, 26 Cal. 161; *Day v. Jones*, 31 Cal. 261; *Opinion of Judges*, 30 Conn. 591; *People v. Blodgett*, 13 Mich. 127; *Opinion of Justices*, 44 N. H. 633; *Chase v. Miller*, 41 Pa. St. 403; *Thompson v. Ewing*, 1 Brewst. (Pa.) 67, 5 Phila. 102, 19 Leg. Int. 348; *Opinion of Judges*, 37 Vt. 665. However, under similar constitutional provisions acts permitting voters engaged in the military service of the country to vote at the places where they are stationed, for electors of the president and vice-president of the United States and for the representatives in Congress have been said to be valid on the ground that by the Federal Constitution, the whole subject relating to the election of

those officers is intrusted to the state legislatures subject to the control of Congress. Opinion of Justices, 45 N. H. 595, 596; Opinion of Judges, 37 Vt. 665. In *State v. Sadler*, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573, the court, in discussing the question whether a federal statute permitting electors of the territory of Nevada including those serving in the army of the United States both within and beyond the boundaries of the territory to vote at an election submitting a constitution for the territory, applied after Nevada became a state, said: "It was alleged by the complaint that Troop A, First Nevada Cavalry, in actual service in the United States army without the boundaries of the state, on the 8th day of November, 1898, on board ship on the high seas, between the coast of California and the Hawaiian Islands, who were citizens and electors of this state, held an election and cast their ballots in due form of law, and made due return thereof to the secretary of state; that the board of canvassers, consisting of the governor, chief justice of the state, and the United States district attorney, as provided in the election ordinances of the constitution of this state, and the present state board of canvassers, consisting of the chief justice and one or more of the associate justices, have each failed to open and canvass said soldiers' votes; that said votes, if opened and canvassed, will show 11 votes cast for the respondent and 24 votes cast for relator; and that said votes should be canvassed and counted by the court. Held, that said election ordinance applied only to the election held in pursuance of the mandate of Congress, found in the enabling act, requiring the constitutional convention to submit for ratification or rejection the constitution to the people of the Territory of Nevada, including those in the army of the United States, both within and beyond the boundaries of the territory; that the provisions of said ordinance do not, and were not intended to, apply to future elections held under the constitution and state government, but only to the election therein specifically provided for, and to any future election that Congress might for any reason order for resubmitting the constitution to the people of the territory, as Congress did with reference to a constitution framed by a convention for Kansas a few years before; that there is no statutory provision regulating the manner of voting or holding elections by persons who may be in the military or naval service of the United States, beyond the boundaries of the state, or for making returns of such election; and that without such provisions no such election could be legally held."

The New York constitution provides "that in time of war no elector in the actual military service of the state, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district." In 8 State Dep. Rept. the attorney general of New York in advising that a state of war within the meaning of the constitution existed when armed forces of the United States were sent into Mexico on a primitive expedition to capture or destroy insurrectionists who had invaded the territory of the United States, said: "As the constitution now stands, the elector may, in time of war, vote in the field provided he be outside of his election district in the actual military service either of the state or of the United States. . . . The plain purpose of the amendment is to provide for the taking of the soldier vote in the field whenever the elector's absence from his election district is compulsory by reason of his being in the actual military service of the state or of the United States; but the amendment can operate only in a 'time of war.' Any emergency, therefore, whether it be solemn war or imperfect war; whether it be invasion from without either actual or threatened; or insurrection or rebellion within our own borders; if the emergency is such that the state or nation finds it necessary to prosecute its right by force of arms, and to that end to mobilize the military forces of the state and call them into active military service, it is a 'time of war' within the meaning of the constitution, and article 15 of the Election Law immediately becomes operative. . . . That 'imperfect war' exists, . . . is clearly obvious. The territory of our country has been invaded by armed forces from Mexico who are in a state of insurrection against the Mexican Government. These armed forces have committed murder upon our citizens and destroyed their property. There is a constant menace and threat of similar invasion. Armed forces of the United States have been sent into Mexico on a punitive expedition to capture or destroy these lawless invaders of our country. General Trevino claiming to act by authority of the de facto government has assumed to oppose the movement of the United States troops now on Mexican territory in any direction, save towards the border of their own country. . . . In view of all these facts and conditions, a status of 'imperfect war' exists . . . , and this condition is equivalent to a 'time of war' for the purpose of bringing into operation the provision of our constitution and the statute enacted to carry its provisions into effect for the taking of the soldier vote in the field."

BEASTON ET AL.

v.

**PORTLAND TRUST AND SAVINGS
BANK ET AL.**

Washington Supreme Court—February 17,
1916.

89 Wash. 627; 155 Pac. 162.

**Witnesses — Testimony to Transaction
with Decedent — Deceased Agent of
Party.**

Rem. & Bal. Code, § 1211, providing that, in an action or proceeding where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, a party in interest shall not be permitted to testify in his own behalf as to any transaction had by him with the deceased, does not exclude the testimony of an officer and stockholder of one corporation from testifying as to a transaction had by him, as such officer, with an officer and stockholder, since deceased, of another corporation, from which the witness' corporation derives a right or title which it seeks to assert.

[See 9 Ann. Cas. 181.]

Depositions Taken before Death.

Such statute does not render inadmissible a deposition of the surviving party to a transaction taken before the death of the other party, though it is offered in evidence after such death.

[See note at end of this case.]

**Garnishment — Property Subject —
Deposit with Sheriff to Discharge
Liens.**

The proceeds of a cashier's check deposited by a bank with a sheriff and receiver to secure the discharge of loggers' liens in a foreclosure suit is not subject to garnishment at the suit of other creditors of the defendant in the foreclosure action, though the check was indorsed by the sheriff to the clerk of the court and was by him cashed, and though defendant prevailed as against the loggers' liens, where the check was not a loan by the bank to defendant, but was a special deposit to be returned to the bank in the event that it was not used for the purpose intended, and it was immaterial that a note for the amount of the check was given by defendant to the bank to evidence the transaction.

[See 12 R. C. L. tit. *Garnishment*, p. 808.]

Appeal from Superior Court, Clarke county: HOLCOMB, Judge.

Action by James Beaston et al., plaintiffs, against Payette Timber and Milling Company, Limited, defendant. From judgment rendered, intervener Portland Trust and Savings Bank appeals. The facts are stated in the opinion. **REVERSED.**

Huntington & Wilson for appellant.

McMaster, Hall & Drouley for respondents.

[628] FULLERTON, J.—In the early part of the year 1912, an action was brought by T. C. Stearns and others, as plaintiffs, against the Payette Timber & Milling Company, to foreclose loggers' liens filed by the plaintiffs upon certain logs and timber products owned by the milling company. At the commencement of the action, the court appointed the sheriff of the county wherein the liens were filed as receiver of the property, and possession of the property was duly taken by the sheriff pursuant to such appointment. After the seizure of the property by the sheriff, the milling company sought to secure its release prior to the determination of the question whether the liens of the plaintiffs were valid and subsisting liens thereon, a question on which it had taken issue in the foreclosure action. Pursuant to that purpose, it procured the Portland Trust & Savings Bank to issue its cashier's check, payable to the sheriff holding the property, in an amount equal to the claims sued upon, together with one hundred dollars additional to cover costs and interest. The statute (Rem. & Bal. Code, § 1173; P. C. 909, § 35) required that the deposit to secure the release of the property be made with the clerk of the court, and the sheriff, after indorsing the check, caused it to be so deposited, whereupon the property was released to the milling company. The clerk, however, did not hold the check, but caused it to be cashed and held the money in its stead. Later on, the issue between [629] the lien claimants and the milling company was tried out and resulted in a judgment in favor of the milling company, which was duly entered on June 17, 1912.

On January 24, 1912, the respondents in the present action recovered a judgment against the milling company for \$1,625. Subsequent to the deposit of the money with the clerk in the first action mentioned, but prior to the termination of that action, the respondents caused a writ of garnishment to be issued and served upon the clerk, garnishing all moneys in his possession belonging to the milling company. On September 16, 1912, after the final termination of the lien case and the time limited to appeal therefrom had expired, the judgment creditors caused an execution to issue on the judgment and a second writ of garnishment to be issued and served upon the clerk. In the meantime, the bank named had served a notice upon the clerk to the effect that the money deposited with him in the lien foreclosure proceedings was the money of the bank, and that the bank would look to him for the return of the money, if not applied to the purposes for which it was deposited. The clerk made an-

swer to the garnishment proceedings, setting up the adverse claim made to the money by the bank. The bank also obtained leave of court and filed a complaint of intervention in the proceedings, in which it set up its claim to the money. An answer was filed to the complaint, and on the issues thus framed, the rights of the parties to the money was tried. Judgment was entered against the bank and in favor of the garnishees, and from this judgment, the present appeal is prosecuted.

As a preliminary question, it is necessary to notice an objection made by the respondents to the admissibility of certain evidence offered by the appellant. In the negotiations leading up to the deposit of the money with the clerk of the court, the bank was represented by one Olmstead, its then vice president and manager, and the milling company by one Brainard, its president; each of these persons being at the [630] time a stockholder in the corporation which he represented. Prior to the trial of the garnishment proceedings, the deposition of Olmstead was taken for use at that trial, as to the understanding had between Brainard and himself concerning the deposit of the money. Between the date of the taking of the deposition and the date of the trial, Brainard died, and when the deposition was offered in evidence, it was objected to on the ground that the witness was incompetent to testify, because of the statute relating to the competency of witnesses when the adverse party sues or defends as the representative of, or as deriving right or title from or through, a deceased person. The trial court admitted the deposition, the respondents claim erroneously, and they urge in this court that it must be rejected here, since this court tries the action *de novo* and must try it upon the competent evidence in the record only. The statute relied upon to exclude the evidence is found at Rem. & Bal. Code, § 1211 (P. C. 81, § 1027). The portion thereof material to the question reads as follows:

"No person offered as a witness shall be excluded from giving evidence by reason of his interests in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any

such deceased or insane person, or by any such minor under the age of fourteen years."

The respondents do not, of course, claim that they are suing or defending as executor or administrator, or as the legal representative of any deceased person, but claim, as we understand them, that they defend as deriving right through [631] and from a corporation in which Brainard had an interest; the argument being that, since Brainard was, at the time of making the contract, a stockholder in and president of the milling company, he had a personal interest in the property of that company, and since the claim of the appellant bank to the money in the hands of the clerk affects that property, it affects such interest as Brainard had in the corporation, and to permit Olmstead to testify is to permit a party in interest to testify on his own behalf to a transaction had by him with a deceased person where the adverse party claims by or through such person. But we are constrained to the belief that the contention is not well founded. There are cases which maintain the rule that a stockholder has such an interest in a corporation as to disqualify him from testifying in behalf of the corporation in an action against the representatives of a deceased person, and cases, also, which maintain the converse of the rule, namely, that if the parties be living, one of them will not be permitted to testify to transactions with the other if the agent of that other, who conducted the transactions, be dead.

This latter rule may support the contention of the respondents, but we think the cases upon which it is founded, for the greater part at least, rest upon statutes which can be differentiated from our own, and that they are contrary to the general trend of the cases even upon like statutes. Our statute, it will be observed, applies, in its terms, only in the case of the death of a natural person who is a principal in the contract. It makes no reference to corporations, or to agents of corporations, or even to agents of deceased natural persons, and to read into it this further exception would be, we believe, an unwarranted extension of its terms. The cases cited from other jurisdictions, we shall not review. As we say, they are conflicting. Of the two cases cited from this court, the first is *Gilmore v. H. W. Baker Co.* 12 Wash. 468, 41 Pac. 124. But a careful reading of the case will show that the exclusion of the evidence there offered was rested [632] upon different principles from that contended for here; the court expressly saying, that it did "not feel called upon to pass on the question of whether an officer of a corporation can be permitted to testify to a transaction with a deceased person, in a suit between such corporation and the representative of such de-

ceased person." The other case is *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642. In this case the witness excluded stood in the relation of a mortgagee to the property in dispute, which would be affected by the result of the action. Plainly the case is not in point on the question here involved.

We think, further, that the deposition was admissible under the rule of the case of *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697. In that case we held that the death of a party to an action and the substitution of his legal representative, subsequent to the commencement of the action, did not render inadmissible in evidence the deposition of an adverse party in interest, when, at the time such deposition was taken, the witness was competent. This, on the principle that the witness testified when his deposition was taken, not when it was offered to be read in evidence. Such were the facts in the case before us. At the time the deposition of *Olmstead* was taken, all of the parties to the transaction were alive, and his evidence was then clearly competent, and the statute, to use the language of Judge Anders, "makes the time of testifying the test of competency, rather than the time of the hearing."

Treating the deposition of *Olmstead* as properly in the record, we think the trial court reached an erroneous conclusion on the facts. *Olmstead's* testimony makes it clear that the bank did not intend to make a loan of the money to the willing company, or otherwise vest it with title or ownership therein. While the witness realized that the money would be applied to the satisfaction of the claims of the plaintiffs in the lien foreclosure action, should they succeed in establishing their liens, he was led to infer from the statements [633] of *Brainard* that there were well grounded reasons for believing that they would not be so successful, and that the money would be returned to the bank within a short time. He also testified that it was understood between himself and *Brainard* that the check would not be cashed unless necessary for the payment of a judgment obtained by the lien claimants, but would, if not cashed for that purpose, be returned to the bank in its original form. His statements, it seems to us, are supported by the fact that the check was not made payable to *Brainard* nor the milling company, nor to any one for the milling company, but to the officer who had seized the property. It is true a note was taken from the milling company for the amount of the check, but this the witness explains was a convenient method of keeping an account of the transaction and to represent the obligation in case the proceeds of the check were applied on the liability it was given to indemnify. But, without pursuing the inquiry further, we think it clear

that the money was deposited for a special purpose, without intent on the part of the depositor to part with title unless necessary to be used for that special purpose. Were the contract, therefore, between the milling company and the bank, the milling company could not retain the money. The judgment debtors of the milling company by garnishing the money acquired no greater rights in the money than the milling company itself possessed, and, since the latter had no rights, the garnisheeing creditors acquired none. *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; *Merwin v. Fowler*, 20 Wash. 587, 56 Pac. 374; *McAlmond v. Bevington*, 23 Wash. 315, 63 Pac. 251, 53 L.R.A. 597. The judgment is reversed, and the cause remanded with instructions to enter a judgment for the appellant intervener.

Morris, C. J., Ellis and Chadwick, JJ., concur.

NOTE.

Statute against Admission of Evidence of Transaction with Decedent as Applicable to Deposition Taken before Death.

In *Boyd v. Gore*, 143 Wis. 531, 21 Ann. Cas. 1263, it was held, under a statute (St. Wis. 1898, § 4902) in force in that jurisdiction authorizing objections to be taken on the trial in case of evidence taken by deposition to the same extent as if the witnesses were personally present, that a deposition of a party taken before the death of the adverse party was inadmissible against the personal representatives of the deceased party as to transactions and communications had by the deponent personally with the deceased in his lifetime.

In the reported case, the court construes the Washington statute (Rem. & Bal. Code, § 1211) which provides as follows: "No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, . . . then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person." It is held that the statute is not broad enough to exclude the deposition of a party as to transactions with a person since deceased who was an officer of the ad-

verse party, a corporation. It is further held that the deposition in question was admissible under the ruling in *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697, inasmuch as at the time that it was taken all the parties to the transaction were alive and the evidence was clearly competent, the principle being that the witness testified when his deposition was taken, not when it was offered to be read in evidence, and the statute, in the language of the judge, making "the time of testifying the test of competency, rather than the time of the hearing."

No other recent case seems to have passed on the question.

INSURANCE COMPANY OF NORTH AMERICA.

v.

BAER.

Kansas Supreme Court—April 10, 1915.

94 Kan. 777; 147 Pac. 840.

Appeal — Questions Reviewed — Objection Not Made at Trial.

A wrong judgment, whereby a plaintiff corporation was defeated in the trial court, will not be upheld in this court on the sole ground that the corporate existence of the plaintiff was not proved, when that corporate existence was not treated as one of the issues on trial, and such failure of proof is presented and is called to the attention of the unsuccessful party for the first time in this court.

Insurance — Liability of Agent — Unauthorized Issuance of Policy.

An insurance agent who issues a policy of insurance in violation of the instructions of his company is liable to the company for the amount of insurance paid and expenses incurred by the company on account of a loss under the policy.

[See note at end of this case.]

Same.

An insurance agent cannot defeat his liability to his company for issuing a policy in violation of his instructions by showing that the company might have escaped liability on the policy by litigation.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Marshall county: KIMBLE, Judge.

Action by Insurance Company of North America, plaintiff, against Joseph Baer, de-

fendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Robert Stone and George T. McDermott for appellant.

W. J. Gregg and J. D. Gregg for appellee.

[777] MARSHALL, J.—This is an action brought by an insurance company against its agent, to recover damages sustained by reason of the agent's issuing an insurance policy in violation of instructions given by the company to the agent. Judgment was rendered in favor of the defendant. The plaintiff appeals.

[778] The plaintiff alleges that it is a corporation. The defendant for his answer files a general denial, alleges affirmative matter, and verifies the answer, as follows:

"State of Kansas, Marshall Co., ss.

"Joe Baer, being first duly sworn upon his oath, says that he has read and knows the contents of the foregoing answer, and that the statements, allegations and averments therein contained are true."

No evidence was introduced to show that the plaintiff was a corporation. The evidence shows that Joseph Baer, who was a banker, was the agent of the plaintiff, with power to issue policies of insurance; and that he wrote W. D. Perry, state agent for the company, on February 24, 1908, asking where he could insure stallions and jacks, and in what company. To this Perry replied, on March 2, as follows:

"This will acknowledge receipt of your esteemed favor of the 24th ultimo inquiring relative to insurance on fine horses and in reply beg to advise that while such risks are not regarded in high favor by any company, nevertheless in view of the fact that you have rendered us very satisfactory service during the past years you may feel at liberty to insure such risks in the North America. The rate on such stock in a private barn should not be less than 2.50 per hundred and of course if such stock is kept in a livery barn or other specifically rated risk the rate on such risk would govern in such cases.

"Your form should read so as to describe the particular animal by name, breed, and positively color, 'while and only while' in the premises described."

March 10, 1908, Perry again wrote Baer as follows:

"I have for acknowledgment your favor of the 3rd, relative to insurance on fine horses.

"Since writing you last I have received a letter from General Agent Downing with particular reference to this class of business

and he advised that he has been scrupulously declining to insure high priced horses particularly those used for breeding purposes. Inasmuch, however, as having been discussing the matter with you I am forwarding your correspondence to him [779] and have asked him to give you such final instructions as he may deem advisable under the circumstances. It seems that I was laboring under a false impression in view of what Mr. Downing had said and I prefer that he give you the final word in connection with this class of business."

The inquiries of Baer appear to have been turned over to W. N. Johnson, general agent of the company, who on March 13, 1908, wrote him as follows:

"We are just in receipt of a letter from State Agent Perry with which he enclosed your letter to him under date of March 3d relative to the writing of insurance upon fine horses, and in compliance with his request we advise you of our wishes in this matter, we beg to say that for a good many years we have declined to insure high priced horses used either for running, trotting or breeding purposes. So far as racing horses are concerned, there is altogether too much moral hazard connected with them to warrant us in insuring them, and as to horses used for breeding purposes, they are so often vicious and unmanageable as to become an extremely hazardous class of property to insure. In either case, the rate of insurance is inadequate, for the hazard is fully equal to that of a livery stable, and we would be unwilling to insure the class at less than 3% while located in the owner's own barn, or if they go from place to place and our insurance follows and covers them, we should want at least double that rate. For these reasons we would much prefer to be excused from insuring fine horses. We very much regret our inability to accommodate you but trust that we may be able to do so in other directions to our mutual advantage."

On March 22, 1910, Baer issued a policy of fire insurance on a stallion and jack for \$300 each, describing them as one horse and one mule, and making the policy effective anywhere. W. W. Potter, employee of the defendant, made out the daily report of the policy as follows:

"4. On contents of said stable, the sum of \$600.00 Dollars. Divided as follows, to wit:
300.00 on one Horse
\$. . . on Live Stock of all kinds."
300.00 on one Mule."

[780] The policy provided that "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage."

Sometime after the policy was issued, the owner of the stallion and jack gave a chattel mortgage on the animals, to a bank with which Baer was not connected. He learned of this chattel mortgage and had a conversation with the owner concerning the same. The animals insured were used for breeding purposes, and were burned in a livery barn not covered by the policy. The company compromised the claim, paid the owner \$500, expended the sum of \$48.84 in adjusting the policy, and sued Baer for the amounts thus paid. A demurrer to the evidence was interposed and was sustained by the court. Of this the plaintiff complains. It also complains that the court excluded evidence offered by the plaintiff. It does not appear that this evidence was produced on the motion for a new trial.

Under instructions given him, it was Baer's duty to notify the company on learning of any encumbrances on any of the property insured. He did not notify the company at any time of the chattel mortgage. The company learned of this chattel mortgage, and of all the misconduct of the agent, before the payment of the loss and expense.

1. The defendant contends that the demurrer was properly sustained, because the verified general denial put in issue the allegation of the plaintiff's incorporation. This seems not to have been specifically presented to the trial court. Technically, it was presented by the demurrer to the evidence. The case was tried as though this matter was not questioned. All parties seem to have assumed that it was not in issue. The demurrer to the evidence was sustained because, in the opinion of the trial court, the company had a defense to the policy for breach of the encumbrance clause [781] contained therein. We will not decide whether or not the verified general denial properly put in issue the incorporation of the plaintiff, because that question is for the first time presented in this court. We will treat this question, in this case, as it was treated by the trial court, and we will decide this case on the questions on which it was decided by that court. In *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244, this court said:

"Unless the record shows that the matter was specifically and unequivocally brought to the attention of the trial court while it had possession of the case and power to dispose of it as justice required, this court will regard the issue as abandoned. It would be gross abuse of procedure for a defendant to veil an oversight in making proof under a general demurrer to the evidence and a general motion for a new trial, and then appeal to this court for a new trial when the evidence is all the time lying in a public office barely outside the reach of judicial knowledge, and

when the new trial, if granted, would extend to that issue alone." (p. 372.)

2. Was Baer liable for the loss sustained by the company on account of this policy? In 31 Cyc. 1451, we find this language:

"It is the duty of an agent whose authority is limited by instructions to adhere faithfully thereto, regardless of his own opinion as to their propriety or expediency, and if he exceeds, violates, or neglects such instructions he will be liable to the principal for any loss or damage resulting therefrom."

In 22 Cyc. 1437, under the article "Insurance," we read:

"The agent must respond in damages for any breach of duty arising out of his relations as agent which has resulted in injury to the company. Thus if the agent violates instructions as to the class of risks which he is to insure and thereby renders the company liable for a loss on a risk which would not have been accepted had the instructions been observed, the agent will be liable to the company for the amount of loss which it has been compelled to pay on account of such risk."

[782] In *Continental Ins. Co. v. Clark*, 126 Ia. 274, 100 N. W. 524, it was said:

"In an action against an insurance agent for wrongfully writing a risk at a lower rate than authorized and failing to report the same, and the evidence tended to show that the company would have cancelled the risk had it known of it, the measure of damages is the total loss sustained thereby." (Syl. ¶ 7.)

In *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150, 39 N. W. 300, a fire insurance agent was held liable for issuing a fire insurance policy contrary to instructions. In 22 L.R.A. (N.S.) 509, is found a note to *Queen City F. Ins. Co. v. Hannaford First Nat. Bank*, 18 N. D. 603, 120 N. W. 545, on "Liability of insurance agent to company for failure to follow instructions," as follows:

"There is no doubt that an insurance agent will be liable to the company he represents for his negligent or wilful failure to obey instructions, thereby causing loss to his principal."

The evidence shows that Baer issued this insurance policy in violation of his instruction, and that in his daily report he did not properly describe the property, nor the place in which the animals were to be covered by the policy.

3. The defendant contends that the plaintiff had a valid defense against liability on this policy, and that payment on the policy was made with knowledge of those defenses. This does not excuse the defendant. Baer wrongfully issued the policy. On its face the company was liable. The agent of the company knew of that chattel mortgage. His knowledge, as against the policy holder, probably was the knowledge of the company. Having

such knowledge, and permitting the policy to stand, the company was probably liable on the policy. The company, in good faith, presumably, paid this policy to avoid litigation. The improper conduct [783] of Baer first created the liability of the company, and afterwards continued that liability. His estate cannot escape by asking the company to take chances in a lawsuit.

We think the demurrer to the evidence was improperly sustained, and that the evidence should have been submitted to the jury. The judgment of the district court is reversed, and a new trial is ordered.

NOTE.

Liability of Agent to Insurance Company for Issuing Policy in Violation of Instruction.

An insurance agent may, on principles of ostensible authority, bind the company to a risk which his instructions forbid him to assume. See 14 R. C. L. tit. *Insurance*, p. 871. But an agent who issues a policy in violation of his instructions and thereby subjects the company to a liability which he is forbidden to assume for it, is liable to the company for the damages sustained by it. *Phoenix Ins. Co. v. Seegers*, 192 Ala. 103, 68 So. 902; *State Ins. Co. v. Jamison*, 79 Ia. 245, 44 N. W. 371; *Continental Ins. Co. v. Clark*, 126 Ia. 274, 100 N. W. 524; *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150, 39 N. W. 300; *Sun F. Office v. Ermentrout*, 2 Pa. Dist. 77, 11 Pa. Co. Ct. 21; *Franklin F. Ins. v. Bradford*, 201 Pa. St. 32, 50 Atl. 286, 88 Am. St. Rep. 770, 55 L.R.A. 408; *St. Paul F. etc. Ins. Co. v. Laubenstein*, 162 Wis. 165, 155 N. W. 918. And see the reported case.

The rule that the agent is liable for the entire loss to the company was applied in the case of *Sun F. Office v. Ermentrout*, 2 Pa. Dist. 77, 11 Pa. Co. Ct. 21, wherein it was declared that the agent was liable for the full amount recovered against the company including the costs, but was not liable for counsel fees incurred in defending an action on the policy. The court said: "There is no reason apparent why the measure of plaintiff's damages in a case like this should be different from what it would be in a suit for the breach of a warranty by defendant to plaintiff, or in a suit by a surety against his principal for whose default the former has been made liable. Indeed, it is intimated in *Sedgwick on Dam.*, 6th ed., 407, that the test as to the agent's liability for costs is the same as that obtaining between principal and surety, i. e., the reasonableness of the litigation: *Ib.* 389-91; *Wynn v. Brooke*, 5 Rawle, 106. It is, however, also said, that

the effect of notice to defendant by plaintiff of the fact that he is being subjected to suit for a claim which the former ought to pay, will shift the burden of proof as to the reasonableness of the litigation; so that, whilst, where there is no such notice, plaintiff will be required to show the propriety of the litigation, in order to hold defendant for costs of the same; where there is such notice, the defendant, in order to avoid liability for costs, will himself have to prove its impropriety: *Sedgwick, Dam. 352*. Upon these principles, the liability of this defendant for the costs of the suit against the company upon the policy he negotiated cannot be disputed. . . .

The item of counsel fees ought not to have been included. And neither, I think, should the expenses of appeal. It was not only useless, as the result approved, but unnecessary in order to fix the liability of defendant to plaintiff. A defendant should not be punished for the erroneous advice of plaintiff's counsel, unless it be at least shown that he actively supported it and himself demanded or requested the removal of the cause to the last resort. There is no such showing here." In *State Ins. Co. v. Jamison*, 79 Ia. 245, 44 N. W. 371, wherein it appeared that an agent issued a fire insurance policy without reporting it to his company, contrary to his instruction, and that the risk was of such a character that it would not have been accepted by the company, the agent was held to be liable for the loss which the company was compelled to pay on the destruction of the property by fire. That case was followed in *Continental Ins. Co. v. Clark*, 126 Ia. 274, 100 N. W. 524, wherein the court said: "The close point in the case is the measure of damages. If merely nominal, then there should be no reversal; but if, on plaintiff's showing, compensatory damages might be allowed, then there should be a reversal, unless the damages to be awarded are simply the premium which defendants should have collected. Where the risk is not a prohibited one, the rule ordinarily is the difference between the rate received and the one that should have been collected, or, if the premium has not been paid, the full amount which should have been collected. But where the gist of the action is the failure of the agent to comply with his instructions to report the risk, and the evidence is sufficient to show that the principal would have canceled the policy, had it known thereof, then the true measure of recovery is the loss suffered by the principal. This is the holding in *State Ins. Co. v. Jamison*, supra; and with that we are content." In *Globe, etc. F. Ins. Co. v. Wetmore*, 49 Nova Scotia, 55, 23 Dominion L. Rep. 33, wherein it appeared that a fire insurance agent issued a policy on a risk at a lower rate than was authorized and

a loss followed, the company it was held could recover not merely the difference in premiums but the amount which the insurance company was obliged to pay on the policy.

But in *State Ins. Co. v. Richmond*, 71 Ia. 519, 32 N. W. 496, wherein it appeared that an insurance agent issued a fire insurance policy on an unoccupied hotel concealing the fact of unoccupancy from the company, contrary to instructions, but received a higher rate of premium than was usual for unoccupied hotel buildings, it was held that the insurance company, having been obliged to meet the policy, could not recover substantial damages. The court said: "The legal question presented is as to whether an insurance company can recover damages of its agents through whose fault, while acting in good faith, it is drawn into a contract of insurance somewhat different from what it supposed it to be, but not less valuable to it. In answer, we have to say that we do not think it entitled to recover substantial damages."

In *Winne v. Niagara F. Ins. Co.* 91 N. Y. 185, wherein it appeared that the directions to the agent were capable of two interpretations, it was held that the company could not recover from the agent for the loss sustained on a policy which under the most liberal interpretation of his instruction he was authorized to issue.

In *Security Ins. Co. v. Jaggars*, 120 Ark. 472, 179 S. W. 1008, wherein it appeared that a local agent executed to the general agent a bond which did not specifically mention that the local agent was liable for losses incurred by insuring prohibited risks, it was held that no such liability existed. The court said: "Under the terms and conditions of the bond Jaggars, as principal, was bound to keep a true and correct account of all moneys received by him for the insurance company and to pay same over, to make a report of the business transacted and in every way faithfully perform the duties as agent in compliance with the instructions of the general agent, through his proper representatives and at the end of the agency deliver up to the said general agent, or his representatives, all money, policies, books, and property due from him or in his possession, and it is further provided that if he should do so, and reimburse said general agent for all extra expense occasioned by any delinquency or failure to comply with the foregoing conditions, the obligations should be void. It does not appear to contemplate that the agent should be bound to the payment of losses occurring on policies issued on prohibited risks by him and does not in the opinion of the court bind him to any such payment."

STATE PUBLIC UTILITIES COMMISSION EX REL. MACON COUNTY TELEPHONE COMPANY.

v.

BETHANY MUTUAL TELEPHONE ASSOCIATION.

Illinois Supreme Court—October 27, 1915.

270 Ill. 183; 110 N. E. 334.

Public Service Commission — Jurisdiction — What Is Public Utility — Mutual Telephone Company.

Where a mutual telephone association has no authority under its charter to engage in public telephone service, or to devote its property to public use, but is organized for the private use of its members only, and not for profit, an order of the public utilities commission, requiring the association to cease operations for failure to obtain a certificate of convenience and necessity, as required by Laws 1913, p. 488, § 55, is void, since the jurisdiction of the commission is confined, by the terms of the act creating it, to the control and supervision of owners and operators of property devoted to a public use.

[See note at end of this case.]

Same.

The object of the act creating the public utilities commission is to bring under the public control for the common good property applied to a public use, in which the public has an interest, and the owner of such property must submit to such control to the extent of the public interest so long as the public use is maintained.

[See note at end of this case.]

Same.

While it is not essential to a public use that its benefits should be received by the whole public, or within a large part of it, they must not be confined to specified privileged persons, but must be extended to all persons in common upon the same terms, it being immaterial how few avail themselves of the rights so extended.

[See note at end of this case.]

Same.

The words "public use" mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use.

[See note at end of this case.]

Same.

"Public utility," aside from its statutory definition, implies a public use, carrying with it the duty to serve the public and treat all persons alike without discrimination, and it precludes the idea of service which is private in its nature, whether for the benefit and advantage of a few or of many.

[See note at end of this case.]

Same.

Whether a corporation is public or private is not to be decided from the number of per-

sons engaged in the enterprise for their mutual advantage, but from the terms of its charter and the general law under which it is organized.

[See note at end of this case.]

Same.

The fact that a mutual telephone association had obtained a license from the village to construct and maintain its telephone poles and wires in the streets, under which it is about to erect great quantities of poles and wires, does not fix its character as a corporation.

[See note at end of this case.]

Same.

The diversion of streets and alleys from their legitimate use by constructing a telephone system thereon would not give the public utilities commission jurisdiction over the association.

[See note at end of this case.]

Appeal from Circuit Court, Sangamon county: CREIGHTON, Judge.

Proceeding by State Public Utilities Commission on the relation of Macon County Telephone Company, plaintiff, against Bethany Mutual Telephone Association, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Whitley & Fitzgerald and J. L. McLaughlin for appellant.

Everett Jennings, Timothy F. Mullen, George M. Morgan, W. E. Redmon and Ben B. Boynton for appellee.

[184] CARTWRIGHT, J.—On the petition of the Macon County Telephone Company, a corporation operating a telephone system in the village of Bethany and vicinity, in Macon county, the State Public Utilities Commission ordered appellant, the Bethany Mutual Telephone Association, forthwith to cease from constructing or maintaining its telephone system in the same locality because it had not obtained from the commission a certificate of convenience and necessity provided for by section 55 of the act entitled "An act to provide for the regulation of public utilities." (Laws of 1913, p. 460.) The appellant feeling aggrieved by the order, took the record to the circuit court of Sangamon county by appeal, and the court entered a judgment finding that the commission had jurisdiction in the case and that the order was neither unlawful nor unreasonable, and affirming it. From the judgment of the court this appeal was prosecuted.

The appellant, by its answer to the petition, alleged that it was not a public telephone company and did not propose [185] to engage in the telephone business or construct its system for the public use, and it denied

the jurisdiction of the commission over it. The act creating the commission, defining its powers and giving it general supervision of public utilities, provides that the term "public utility" includes every corporation, company or association, joint stock company or association, firm, partnership or individual, that may own, control, operate or manage, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transmission of telephone messages between points within this State. The jurisdiction of the commission is by the terms of the act confined to control and supervision of owners and operators of property devoted to a public use. The purpose of the act is to bring under control by the public, for the common good, property applied to a public use in which the public has an interest. The owner of such property must submit to be controlled by the public to the extent of its interest as long as such public use is maintained. (*Munn v. People*, 94 U. S. 113, 24 U. S. (L. ed.) 77; *People v. Western Union Tel. Co.* 166 Ill. 15, 46 N. E. 731, 36 L.R.A. 637; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L.R.A. 568.) To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public or even a large part of it, but they must not be confined to specified, privileged persons. (*People v. Ricketts*, 248 Ill. 428, 94 N. E. 71.) The words "public use" mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use. (*State Public Utilities Commission v. Monarch Refrigerating Co.* 267 Ill. 528, Ann. Cas. 1916A 528, 108 N. E. 716.) The use must concern the public as distinguished from an individual or any particular number of individuals, but the use and enjoyment of the utility need not extend to the whole public or any political subdivision. It may be [186] confined to a particular district and still be public. (*State Public Utilities Commission v. Noble Mut. Telephone Co.* 268 Ill. 411, Ann. Cas. 1916D 897, 109 N. E. 298.) The appellant, under its charter, has no authority to engage in the public service or to devote its property to the public use. Aside from the statutory definition, the term "public utility" implies a public use, carrying with it the duty to serve the public and treat all persons alike, without discrimination, and it precludes the idea of service which is private in its nature, whether for the benefit and advantage of a few or of many. The

question of the nature of a corporation cannot depend upon the number of persons engaged in the enterprise for their mutual benefit, but the nature of a corporation and the purpose for which it is organized must be ascertained by reference to the terms of its charter, and in the case of a corporation organized under a general law such nature and purpose are defined by that law. There is nothing in the act providing for the organization of corporations which limits its privileges to those which propose to devote their property to a public use, and the commission has no authority over any others. (*Distilling, etc. Feeding Co. v. People*, 161 Ill. 101, 43 N. E. 779; *Evanston Electric Illuminating Co. v. Kochersperger*, 175 Ill. 26, 51 N. E. 719; *Bradley Mfg. Co. v. Chicago, etc. Traction Co.* 229 Ill. 170, 82 N. E. 210; *Buncombe Metallic Telephone Co. v. McGinnis*, 268 Ill. 504, 109 N. E. 257.) A corporation may be organized under the general Corporation act for any lawful purpose except those specified in the statute, and the act of 1883 (*Laws of 1883*, p. 183), declares it to be lawful to construct, operate and maintain private telephone lines from house to house, and grants the right, as against the public, to set the poles for such lines in the public streets, highways or alleys. The purpose for which appellant, the Bethany Mutual Telephone Association, was incorporated, as stated in its application for incorporation and in the certificate of incorporation issued by the Secretary of State, was "to be for the private use of the [187] members of said association only, for the purposes of telephonic communication between them, for their private and community interests and not for the pecuniary profit of any person or persons connected with said association, and not for the profit of any stockholder interested as owner of any interest in said corporation." By the charter the use of the telephone system is limited strictly and solely to the members of the corporation, and it has no authority, under its charter, to erect or maintain any telephone line for the service of the public. It can only exercise such powers as are within the scope of its charter, and none others. The telephone company was held in *State Public Utilities Commission v. Noble Mut. Telephone Co.* supra, to operate a public utility because its lines connected with country lines and other exchanges in Richland and surrounding counties, and it obtained and enjoyed a license conditioned that no person should be barred from membership and use of its lines. In *Buncombe Metallic Telephone Co. v. McGinnis*, 268 Ill. 504, 109 N. E. 257, the corporation had a control station connecting with various county lines and with the local village system and long

distance lines, and the object stated in the application for incorporation was for "telephone purposes to legally establish our right on public and private property with poles, wires and necessary equipment," which denoted an unlimited and public use.

It is argued that the appellant's property is used or to be used for a public use because the appellant has obtained a license from the village of Bethany to construct, maintain and operate telephone poles, wires and fixtures in the streets of the village and has purchased a great quantity of poles which it intends to erect on the public highways and to string wires on them. These matters neither concern the petitioner nor the State Public Utilities Commission and do not fix the character of the corporation. If poles or wires should be placed on streets and highways it would no more tend to prove that the use is public than the fact of [188] farmers driving upon the public highways with their own products would tend to prove they are common carriers. If constructing a telephone system in streets or highways for private use is a diversion of the streets or highways from their legitimate use, the commission would not thereby acquire jurisdiction over the appellant.

The commission had no jurisdiction to make any order concerning the appellant, and the judgment of the circuit court affirming the order of the commission is reversed. Judgment reversed.

Rehearing denied December 10, 1915.

NOTE.

The reported case holds that a mutual telephone company whose privileges are limited strictly to members of the company is not a "public utility" subject to regulation by a public service commission. In so holding the court distinguishes the case of *State Public Utilities Commission v. Noble Mut. Telephone Co.* 268 Ill. 411, wherein the opposite conclusion was reached as to a mutual telephone company connecting with other lines and whose service was open to the public generally. Whether a corporation not operated for profit is a public utility was considered in the note to *State Public Utilities Commission v. Mutual Telephone Co.* supra, as reported in *Ann. Cas.* 1916D 897.

GREAT SOUTHERN FIRE INSURANCE COMPANY.

v.

BURNS ET AL.

Arkansas Supreme Court—March 29, 1915.

118 Ark. 22; 175 S. W. 1161.

Insurance — Waiver of Conditions — Failure to Make Inquiry.

Where a fire policy is issued by an insurance company without written application, the company must be held to have waived the condition of the policy, providing that if the property be, or shall become, encumbered by a chattel mortgage, the policy shall be void, for while effect should be given to the contract, the insured has practically no voice in framing it, and to permit the company to obtain the premiums where the insured was in ignorance of the stipulation would work a fraud.

[See note at end of this case.]

Penalty for Failure to Pay Insurance — Right to Recover.

Insured and insurer agreed upon the amount of a fire loss. Thereafter the insurer denied liability on the ground that the property was encumbered at the time the policy was written. The original complaint prayed recovery for the amounts named in the face of the policies, but the insured shortly amended, praying recovery for the amounts agreed upon. It is held that, as the insurer contested all liability, the insured could recover the attorney's fees and penalties provided by Acts 1905, p. 307.

Appeal from Circuit Court, Craighead county: GAUTNEY, Judge.

Action by J. L. Burns et al., doing business as Burns & Billington, plaintiffs, against Great Southern Fire Insurance Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Allen Hughes and *W. W. Hughes* for appellant.

Hawthorne & Hawthorne, *N. F. Lamb* and *Archer Wheatley* for appellee.

[25] *HART, J.*—*J. L. Burns* and *M. F. Billington*, partners, as *Burns & Billington*, instituted this action against the *Great Southern Fire Insurance Company* to recover on two policies of fire insurance. The policies covered certain rice belonging to the insured, and no question is raised as to the amount recovered. At the time the contract of insurance was made, there was a chattel mortgage on the rice which was executed by *Billington*. *Doctor Burns* procured the policies of insur-

ance sued upon. An application was made to Freeze & Cole, insurance agents, who occupied offices in the same building adjoining those of the insured. The policies were issued upon the oral application of Doctor Burns, and no inquiry was made by the insurance agents as to the condition of the title of the property, or as to whether or not there was any mortgage upon it. The insurance agents selected the company in which the insurance was to be written, and kept the policies in their safe until after the fire occurred. The insured paid the premiums at the time the policies were issued, and it was only when they were making out the proof of loss that the insurance company ascertained that there was a chattel mortgage on the property insured, and upon that ground they refused payment. The policies were in the standard form and contained a provision that they were made and accepted subject to conditions and stipulations printed on the back thereof. Among the provisions printed on the back is the following:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void, . . . if the subject of insurance be personal property, and be or become encumbered by chattel mortgage."

It is admitted that Doctor Burns knew there was a chattel mortgage on the rice at the time he applied for the insurance, and that he did not make any disclosures concerning it because he was not asked about it, and did not know that it was material to the risk. He never read [26] the policies after they were issued, and neither he nor his partner knew that the policies contained the clause above quoted until after the loss had occurred.

Defendant requested the court to instruct the jury to return a verdict in its favor. This the court declined to do, and, over the objections of the defendants, instructed the jury to return a verdict in favor of the plaintiffs. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

Counsel for the defendant contends that the plaintiffs by accepting the policies of fire insurance containing the clause providing that they "shall be void if the property is or becomes encumbered by a chattel mortgage," are charged with notice of the condition, and are bound thereby; on the other hand it is contended by counsel for the plaintiffs that where a policy is issued by an insurance company without a written application, the company must be held to have waived the condition of the policy as to encumbrances by chattel mortgages.

The precise issue raised by the appeal has never been decided by this court. In the case of *Rhea v. Planters' Mut. Ins. Assoc.* 77 Ark.

57, 90 S. W. 850, and that of the *Home F. Ins. Co. v. Driver*, 87 Ark. 171, 112 S. W. 200, and other cases, this court has held that where there is a warranty against encumbrances, the insurer is protected by a condition against encumbrances inserted in the policy.

So, too, in the case of *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297, the court held that where a policy of fire insurance provides that it shall be void if the property insured afterward becomes encumbered by a mortgage, the giving of a mortgage on the property renders the policy void. In that case, however, the court said that there is a marked difference between a waiver of conditions made before and those made after the issuance of the policies.

In the case of *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959, the court held that a condition against encumbrances is waived by the acts of the agents of the insurer who, having authority to waive conditions, [27] and knowing that the property was encumbered, attached to the policy permits for additional concurrent insurance upon which additional policies were issued.

The decisions of the courts of last resort of the various States are in irreconcilable conflict upon the question of whether, under the circumstances detailed above, the policy was invalid from the beginning because of the anti-mortgage clause. It is insisted by counsel for the defendant that the policies sued on were the standard form now in common use, and that the insured was required to disclose the nature and extent of his interest in the property because this was a matter which would largely influence the insurance company in taking or rejecting the risk and estimating the premium; that the clause in question was inserted in the policies by the insurance company, and that the insured was bound by the terms of the policies when they accepted them; that under the facts disclosed by the record, there could be no waiver of the conditions of the policies; and that the conditions inserted in the policies were just as binding on the insured as would have been conditions inserted in any other contract.

A leading case sustaining their contention is that of *Parsons v. Lane*, 97 Minn. 98, 7 Ann. Cas. 1144, 106 N. W. 485, 4 L.R.A. (N.S.) 231. In that case the court cites and discusses many of the cases on both sides of the question.

Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L.R.A. (N.S.) 708, is a leading case sustaining the position assumed by the plaintiffs, that where the insurer issues a policy upon an oral application without making any inquiries as to the nature of the title of the property, it

will be presumed to have written the policy on its own knowledge, and, hence, to have waived the condition which would have invalidated the policy.

We have carefully examined several of the leading cases on both sides of the question, and, it being a new one in this State, we are at liberty to decide it in accordance with what we think to be the better rule, and that [28] which we deem to be the more reasonable and more in accord with a spirit of fairness and justice.

It is true, as contended, that the policies were in the standard form, but the condition upon which the policy is now sought to be invalidated was not in the body of the policy, but was printed upon the back thereof. It is also true that a contract of insurance, like any other contract, should be given force and effect according to its terms; but it is equally well settled that provisions in the printed forms inserted by the insurance company for its own benefit may be waived. Forms for insurance policies are usually prepared by the insurance companies for general use and without reference to particular cases. The insured has little voice in framing the terms of his insurance, and none whatever in preparing the form of the policy issued. He must accept the policy as it is prepared and tendered to him by the insurance company.

As a rule, the insured has no knowledge of the necessity of disclosures which long experience has taught insurance companies are necessary for their protection, or of what disclosures are important or material. In ordinary contracts of importance, the terms are agreed upon after careful consideration and discussion by the contracting parties and contracts are usually prepared in duplicate and carefully examined by the parties before they are signed.

As we have already seen, insurance contracts are prepared by the insurance company, and the terms used are the result of long experience on their part of things necessary to guard their interests. It is not the custom of fire insurance companies to place the policy to be issued by it before the person whose property is to be insured prior to its delivery to him. He has no opportunity to examine the many printed conditions and stipulations contained on the back of the policy until he has paid the premium for the insurance and the policy has been delivered to him. Under such circumstances, it ought not to be said that he was bound by the conditions and stipulations [29] in the policy declaring that the policy should be void if there was any encumbrance against the property where he had no knowledge of such condition, and was not aware that the giving of a mortgage on the property insured in any way affected the risk.

(1) In this case, the anti-mortgage clause was not in the body of the policy, but was in the printed conditions on the back of the policy along with numerous other conditions and stipulations concerning which no inquiry was made by the agents of the insurance company. The policies sued on were issued upon an oral application, and the agents of the insurance company made no inquiries of the plaintiffs concerning liens or encumbrances on the property. No stipulations or statements in reference thereto were made by the assured, and they had no knowledge that such information was material, or that the policies subsequently issued would contain any provision in reference thereto.

They were not aware that if the insurance company knew that any mortgage had been given on the property, it would decline the risk. They paid, and the agents of the insurance company received the premium, and the property was destroyed by fire during the life of the policies, and before the plaintiffs had any notice whatever of the anti-mortgage clause in the policy or that such condition would invalidate the policy if there was a mortgage on the property when the policy was issued. The agents who issued the policies had authority to waive conditions in the policy.

No question is raised, but that the loss was an honest one, and none but that the plaintiffs are entitled to recover the amount for which judgment was given if the defendant was liable. Under such circumstances, to urge the conclusion that the anti-mortgage clause avoided the policies would be to impute to the insurance company a fraud intended to deceive the assured by issuing policies not binding as contracts of insurance, although it received [30] and accepted therefor the premiums, knowing that the assured believed the contracts to be valid.

The defendant asked for a directed verdict, and no other instructions were asked by it. The effect of a directed verdict would have been to hold that the contract of insurance was void from the beginning, and that the policies never in fact had any force or validity because of the anti-mortgage provisions inserted therein by the insurance company without the knowledge of the insured. If that view should be adopted, the insurance company would not only have wrongfully received and accepted the premium from the assured, but would have also misled them into the belief that their property was insured when in fact it was not. So, we think the court was justified, under the circumstances, in finding that the insurance company had waived the anti-mortgage provision in the policies. *Allesina v. London, etc. Ins. Co.* 45 Ore. 441, 2 Ann. Cas. 284, 78 Pac. 392; *Farmers, etc. Ins. Co. v. Mickel*, 72 Neb. 123, 9

Ann. Cas. 993, 100 N. W. 130; *Humble v. German Alliance Ins. Co.* 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D 630; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Dooly v. Hanover F. Ins. Co.* 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Hanover F. Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. 183, 65 Am. St. Rep. 611; 3 Cooley, *Briefs on Insurance*, 2630, 2631.

The complaint in this case, as originally filed, asked for the amounts named in the face of the policies, \$2,000 on one, and \$2,500 on the other. After the fire, plaintiffs had a conference with the adjuster of the insurance company, and arrived at the amount of the losses which was agreed upon at \$1,517.04 upon one policy and \$1,896.30 on the other. After this had been agreed upon, the agents of the insurance company found out that a mortgage existed on the property at the time the policies were issued, and on this account refused payment. As soon as plaintiffs discovered the mistake in their original complaint, [31] they filed an amendment thereto in which they asked judgment for the amount which had been agreed upon between them and the agents of the insurance company. They recovered judgment for this amount.

(2) Under this state of facts, it is insisted by counsel for the insurance company that the plaintiffs are not entitled to the attorney's fees and penalty provided for under the Acts of 1905, but we do not agree with them in this contention. Soon after the original complaint was filed, it was amended and judgment was asked for the amount which had been agreed upon between the plaintiff and the adjuster of the insurance company as the amount of loss sustained by reason of the fire. Judgment was recovered against the insurance company for this amount. If the insurance company had desired to avoid the penalty and attorneys' fee provided for by the statute, it should have offered to confess judgment for the amount sued for in the amended complaint. It did not do so; on the other hand, it denied all liability under the policy. The plaintiffs having recovered the amount sued for in the amended complaint, the court properly allowed the attorney's fee and penalty provided for by the statute. *Queen of Arkansas Ins. Co. v. Milham*, 102 Ark. 675, 145 S. W. 540; *Queen of Arkansas Ins. Co. v. Bramlett*, 103 Ark. 1, 145 S. W. 541.

The judgment will be affirmed.

NOTE.

Waiver of Conditions in Insurance Policy by Insurer's Failure to Inquire into Existing Facts.

The reported case conforms to the rule laid down in *Farmers', etc. Ins. Co. v. Mickel*, 72

Neb. 123, 9 Ann. Cas. 992, that the failure of an insurance company to inquire as to the existence of facts, which by the terms of its policy avoid the insurance, estops the company to object after the issuance of the policy to the applicant's inability to comply with the condition or conditions of the policy in the particulars as to which no inquiry is made, and precludes the insurance company from an avoidance of the policy on the ground of a violation of the conditions thereof in that respect. To the same effect see the following recent cases: *Connecticut F. Ins. Co. v. Colorado Leasing, etc. Co.* 50 Colo. 424, Ann. Cas. 1912C 597, 116 Pac. 154; *Athens Mut. Ins. Co. v. O'Keefe*, 133 Ga. 792, 66 S. E. 1093; *Manufacturers' Mut. F. Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843; *Independent L. Ins. Co. v. Rider*, 150 Ky. 505, 150 S. W. 649, 42 L.R.A.(N.S.) 560; *Commonwealth L. Ins. Co. v. Rider*, 153 Ky. 130, 154 S. W. 906; *Hause v. Standard Acc. Ins. Co.* 172 Mich. 59, 137 N. W. 694; *Roloff v. Farmers' Home Mut. Ins. Co.* 130 Wis. 402, 110 N. W. 261. But compare *North British, etc. Ins. Co. v. Wright (Okla.)* 154 Pac. 654. Thus in *Commonwealth L. Ins. Co. v. Rider*, 153 Ky. 130, 154 S. W. 906, it appeared that an insurance company, issuing a policy of life insurance containing a clause barring applicants with consumption or kidney disease, accepted an applicant with both of those diseases without medical examination or without inquiry of the applicant with respect thereto, and accepted the premiums under the policy until the death of the insured. It was held that the insurance company could not avoid payment of the policy. The court said: "It is not alleged by appellant that it made any inquiry of insured as to the condition of his health, or that he made in respect thereto any statement or representation, false or otherwise, upon which it relied in issuing the policies. Therefore, the facts alleged in the answer do not show fraud on the part of the insured in procuring the policies. The effect of appellant's contention is that although it issued to the insured the policies without a medical examination or inquiry as to the condition of his health, and, as long as he lived, accepted of him the premiums as they fell due, the question of its liability upon the policies is by the provision in question, to be determined after the insured's death by then ascertaining whether the conditions, the provision declares shall relieve it of liability, existed when the policies were issued. In view of the fact that appellant had every means of ascertaining when the policies were issued whether the insured was then afflicted with the diseases mentioned in the provision referred to, such an interpretation of the contract will not be allowed, for to give it that meaning would be against public policy. In other words, as said in the opinion of the

circuit court: 'If the company can write on the back of its policy without inquiry a condition that it shall be void if the insured before its delivery has had consumption or disease of the kidneys, then it can write any and all of the multitude of diseases, family history, etc., ordinarily found in insurance applications, and this without inquiry at the time of the issue of the policy, or as a condition to its issue, and then after the death of the insured, enter upon an investigation which could be made while the insured is alive, and if it can find in that great catalog of diseases, one which would affect the risk, procure through the courts, relief from its obligation.' In *Humble v. German Alliance Ins. Co.* 85 Kan. 140, Ann. Cas. 1912D 630, 116 Pac. 472, wherein the facts were substantially the same as in the reported case, the court said: "That there was an existing incumbrance on the property when the policy in suit was issued was denied by appellee and appears to have been a disputed question of fact at the trial. In the absence of the evidence it may be assumed that the court ruled that the findings of the referee on this point were not sustained by the evidence. It was claimed that the contract between the insured and the coal company, in connection with which a mortgage was given, had been abrogated and that a mortgage under the new agreement had not been executed. Aside from that there is an allegation and contention by appellee that the application for the insurance in question was oral, that no questions were asked the insured as to incumbrances or additional insurance and that no representations as to these things were made by the insured or by anyone for him. If this be true, and there was no fraudulent concealment of the fact, the existence of a mortgage on the property would not necessarily invalidate the policy. It has been said: 'The issuing of a policy on an application which without fraud contains no answer to certain questions is a waiver of answer to those questions, even though in answer to another question the insured may have said there were "no other circumstances affecting the risk;" and to avoid the policy in such cases the insurers must prove untrue statements other than those inquired about.' (1 May, Ins. 4th ed. § 166.) Volume 1 of the second edition of Wood on Fire Insurance states the rule as follows: 'When no inquiries are made, the intention of the assured becomes material, and in order to avoid the policy, they must find, not only that the matter was material, but

also that it was intentionally fraudulently concealed.'"

Likewise the failure of an insurance company to insist on a responsive answer to an inquiry, and its willingness to accept an evasion of a question, has been held to bar it from claiming a right to avoid the policy because of the insured's inability to conform to a condition in the policy relating to the matter as to which no sufficient answer is required. *Fidelity Mut. L. Ins. Co. v. Beck*, 84 Ark. 57, 104 S. W. 533, *rehearing denied* 84 Ark. 59, 104 S. W. 1102; *Buffalo Forge Co. v. Mutual Security Co.* 83 Conn. 393, 76 Atl. 995; *Allen v. Phoenix Assur. Co.* 14 Idaho 728, 95 Pac. 829; *Peterson v. Manhattan L. Ins. Co.* 244 Ill. 329, 18 Ann. Cas. 96, 91 N. E. 466, *reversing* 115 Ill. App. 421; *Sterling L. Ins. Co. v. Rapps*, 130 Ill. App. 121; *Enright v. National Council*, etc. 161 Ill. App. 365; *Van Wormer v. Metropolitan L. Ins. Co.* 188 Ill. App. 166; *O'Connor v. Modern Woodmen of America*, 110 Minn. 18, 124 N. W. 454, 25 L.R.A.(N.S.) 1244; *L. Black Co. v. London Guarantee*, etc. Co. 159 App. Div. 186, 144 N. Y. S. 424; *French v. Fidelity*, etc. Co. 135 Wis. 259, 115 N. W. 869, 17 L.R.A.(N.S.) 1011. Thus in *Peterson v. Manhattan L. Ins. Co.* *supra*, the court said: "But the company did not elect to require an answer to the question. On the contrary, it issued the policy with that evasion appearing in the medical examination. If the answer was good enough when the company desired to collect premiums from the applicant, it ought to be good enough when the company is called upon to pay. By issuing the policy the company waived any answer to this question. *Hall v. People's Mut. F. Ins. Co.* 6 Gray (Mass.) 185." And in *L. Black Co. v. London Guarantee*, etc. Co. 159 App. Div. 186, 144 N. Y. S. 424, the court stated the rule as follows: "The law applicable to such a situation is well stated in *Richards on Insurance Law* (3d ed. § 113): 'Questions unanswered or partially answered. If a question in the application is not answered at all, or if the answer is not false in any respect, but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection; since, if not satisfied, the company should demand fuller information. So also to avoid forfeiture, equivocal answers are construed most strongly against the company, but notwithstanding this, the applicant must answer in good faith and not attempt to evade, conceal or mislead.'"

MASTELLAR ET AL.

v.

ATKINSON ET AL.

Kansas Supreme Court—February 6, 1915.

*94 Kan. 279; 146 Pac. 367.***Wills — Construction — "Desire."**

In the will of one who died and left surviving him a wife, one son and six daughters, he devised a life estate to his wife and added that after her death "I will and desire that the said property shall revert to my beloved son Artie Atkinson provided that in such event he shall pay to each of his sisters, Annie Hendrickson, Nancy Hooks, Ida Mastellar, Sarah Jackson, Lydia Wilson and Daisy Teach, the sum of two hundred dollars (\$200.00). Said two hundred dollars to be paid in yearly payments of sixty-six and two-thirds dollars (\$66 $\frac{2}{3}$) to each sister as above enumerated. The first payment to be made on the first day of September, following the first day of April after the death of my wife, Ellen Atkinson." In a proceeding to determine the ownership of the property and to partition the same it is held that the fee of the land vested in the son upon the death of the testator but that the enjoyment of possession is postponed until the life estate is terminated, and that the son takes the fee charged with the payment of the legacies given to the daughters of the testator, and that any one who succeeds to the estate and interest of the son prior to the completion of the payments takes the land subject to such charges.

[See note at end of this case.]

Same.

As used in a will expressing a will and desire to make certain disposition of property, the word "will" is mandatory, comprehensive, and dispositive in nature, and is broad enough to dispose of both real and personal property, and is as effective as the expression "devise and bequeath," and the word "desire," though frequently used as a precatory term, must be construed, in view of its use in connection with the word "will," as mandatory rather than as advisory, where it is evident that testator undertook to dispose of his entire estate.

[See note at end of this case.]

Construction of "Revert" in Will.

In a loose way the term "revert to" is sometimes used in a will as the equivalent of "go to," and, where the language of a will so indicates, it will be construed as used to designate the person to whom the testator wished the land to be given.

Appeal from District Court, Lincoln county: GROVER, Judge.

Action by Ida Mastellar et al., plaintiffs, against Sarah Atkinson et al., defendants. Judgment for defendants. Plaintiffs appeal.

The facts are stated in the opinion. **AFFIRMED.**

S. N. Hawkes and *W. W. McCanles* for appellants.

John J. McCurdy and *Z. C. Millikin* for appellees.

[280] *JOHNSTON, C. J.*—This action involves the interpretation of a will and the ownership and partition of a quarter section of land described in the will. George Atkinson, who owned the land, died in 1904, and left surviving him his widow, one son and six daughters. In the will which he made he devised a life estate to his widow, and further provided that after her death:

"I will and desire that the said property shall revert to my beloved son Artie Atkinson, provided that in such event he shall pay to each of his sisters, Annie Hendrickson, Nancy Hooks, Ida Mastellar, Sarah Jackson, Lydia Wilson and Daisy Teach, the sum of two hundred dollars (\$200.00). Said two hundred dollars to be paid in yearly payments of sixty-six and two thirds dollars (\$66 $\frac{2}{3}$) to each sister as above enumerated. The first payment to be made on the first day of September, following the first day of April after the death of my wife, Ellen Atkinson."

Artie Atkinson, the son of the testator, died in 1912, and left surviving him Sarah Atkinson, his wife, and [281] two children. This action was brought by the daughters of the testator against the heirs of Artie Atkinson to recover the land and partition the same among the plaintiffs. The defendants answered claiming to be the owners of the land subject to the life estate devised to the widow of the testator and to the payment of certain sums of money which the will directed should be paid to the plaintiffs. A reply to the answer was filed, which was subsequently withdrawn and a demurrer to the answer filed. The demurrer was overruled and, the plaintiffs failing to plead further, a trial was had which resulted in a finding in favor of the defendants and a judgment that the plaintiffs had no interest or title in the land.

The purpose of the testator is reasonably manifest. Evidently he undertook to make a complete disposition of his entire estate. A life estate in his land was given to his wife, and then he proceeded to make a disposition of the fee. While some unusual words were employed by the scrivener, who was evidently without legal training, it is reasonably clear that it was the intention of the testator to give the fee to his son, Artie, charged with the payment of the legacies given to the daughters of the testator. (*Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998.) Nothing in the will indicates a purpose to give the fee of the land to either the widow or the daughters, nor that the daughters should have

more than the sums of money which the son was directed to pay to them. All the inferences derivable from the language in the will proceed on the theory that the entire estate is given to the members of the testator's family, and under such circumstances the presumption is that he intended to dispose of his entire estate and not to die intestate as to any of his property. (*Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841; *Twist v. Twist*, 91 Kan. 803, 139 Pac. 377.) In giving the land to his son the testator used the expression, "I will and desire that the said property shall revert to [282] my beloved son," while in the earlier provision the words, "give, devise and bequeath," were employed. The word "will" is mandatory, comprehensive and dispositive in its nature, is broad enough to dispose of both real and personal property, and is as effective as the expression, "devise and bequeath." The word "desire," although frequently used as a precatory term, is sometimes used as a direction or command. (*Harrison v. Langfitt*, 158 Ia. 479, 139 N. W. 1076; *Brasher v. Marsh*, 15 Ohio St. 103; *Wood v. Camden Safe Deposit, etc. Co.* 44 N. J. Eq. 460, 14 Atl. 885; *Philadelphia's Appeal*, 112 Pa. St. 470, 4 Atl. 4; *Oyster v. Knull*, 137 Pa. St. 448, 20 Atl. 624, 21 Am. St. Rep. 890; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056.) Used here in connection with the word "will," and where it is evident that the testator had undertaken to dispose of his entire estate, the word must be taken as mandatory rather than as advisory.

The word "revert" was evidently not used in its technical sense. It was not employed to express the idea that the property should be turned back to the son, as it had never been owned or held by him. In a loose way the term "revert to" is sometimes used as the equivalent of "go to," and the language of the will, taken together, indicates that the term was used to designate the person to whom the testator wished the land to be given. It has been so interpreted in a number of cases by other courts. (*Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76; *In re Bennett*, 134 Cal. 320, 66 Pac. 370; *Bates v. Dewson*, 128 Mass. 334.)

It is contended that the use of the phrase "provided that in such event" indicates that the testator was not making a mandatory provision. The proviso does not imply a doubt that the son might not accept the land with the condition attached, nor that the testator had in mind a contingency that the fee would not vest at his death. The term as used in the will means [283] no more than that, having given the land to the son, he had required the payment of specific sums to his daughters and charged the estate devised with such payments. If it be necessary to show an acceptance of the devise by the son

it is supplied by an averment in the answer to the effect that the son took and received a vested remainder in fee in the land, and is now the owner thereof, and on the trial the court found these averments in the answer to be true. The title to the land vested in the son at the death of the testator, and the rights of the daughters to the legacies also vested at the same time, to be paid by the son in accordance with the directions in the will. The son was not entitled to the possession of the land until the widow died and the life estate had ended, and no part of the legacies were to be paid until the first day of September following the first day of April after the death of the widow. These provisions, however, did not postpone the vesting of the title in the son, and as the will does not provide a limitation over in case of nonpayment, the legacies required to be paid by the son became fixed charges upon the land devised to him. Any one who succeeds to the interest of the son prior to the making of the payments takes the land, of course, subject to these charges.

There is complaint of the ruling of the court which refused leave to plaintiff to file an amended reply. The application was not made until some time after the case had been submitted and the judgment had been rendered. No sufficient grounds for opening the case at that time were stated, and in any case it must have been held that the refusal was not an abuse of discretion.

The judgment is affirmed.

NOTE.

Meaning of "Desire" as Used in Will.

When Addressed to Devisee or Legatee:

Construed as Advisory Term:

"Desire" Used Alone, 503.

"Desire" Used with Similar Words, 506.

"Desire" Used with Words Evincing Advisory Intent, 507.

Construed as Mandatory Term:

"Desire" Used Alone, 508.

"Desire" Used with Similar Words, 510.

When Not Addressed to Devisee or Legatee:

Construed as Dispositive Term, 511.

Construed as Command to Executor, 514.

Construed as Appointing or Controlling Trustee, 515.

When Addressed to Devisee or Legatee.

CONSTRUED AS ADVISORY TERM.

"Desire" Used Alone.

The courts are frequently called on to place a construction on the word "desire" as used

in a will whereby a testator makes a devise or bequest of his property and then expresses his "desire" to the immediate devisee or legatee that the property shall be subsequently used or applied in a specified way. Under such circumstances the question arises whether by the word "desire" as used by the testator the conduct of the person to whom it is addressed is meant to be governed absolutely, in which case the word "desire" is a mandatory term, or whether it is merely an indication to the person of the testator's wish but allowing an exercise of discretion, under which circumstances the word "desire" is an advisory term. It being the cardinal rule in the construction of wills that the testator's intention must control and this being largely dependent on the surrounding circumstances of each particular case no rule can be stated as to when the word "desire" is a mandatory term and when it is an advisory term. But it may be said that in arriving at the testator's intention from the word itself the tendency seems to be to look on it as an advisory term, this view being taken on the ground that the testator would have used a stronger and more emphatic expression if he had intended it to be an indication of his absolute will.

In each of the following cases the word "desire" was held to be an advisory term.

In *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, the following provisions of a will were before the court: "I also give and bequeath and devise to my said husband all that portion of my real property in Ventura county, California, lying on the east side of the Saviers road, and north of the row of gum trees and more particularly described as follows, to wit: . . . containing 99.58 acres, as shown upon map of my real property made by George C. Power in June, 1895. It is my desire and I hereby request my said husband to convey in such manner and at such times as he may deem best, under contract or otherwise, the said above-described 99.58 acres of land to Ventura Lodge, No. 214, A. F. & A. M., of the town of San Buena Ventura, California, or to trustees for its use and benefit in such manner as to impose upon said lodge or the trustees thereof the obligation to properly care for, protect, and maintain in good order the cemetery lot in said Springfield Cemetery in which I may be buried." It was held that the testator expressed only a wish that her burial lot should be left in repair and it was not her purpose to bind her husband to that object in such a way that the trust and confidence she reposed in him could be enforced in a court of equity.

In the case of *In re Marti*, 132 Cal. 666, 61 Pac. 984, 64 Pac. 1071, the court was called on to construe the following provisions of a will: "Secondly. I give and bequeath to

my wife, Elizabeth Jenny Marti, all the other property, real and personal, and wherever situated, of which I may die possessed [giving a description thereof]. I appoint my wife as executrix of this my last will and testament, to serve without bonds; with full power of disposition, and to manage the business, to sell, to lease, and manage the property without order of the court or interference whatever. Upon the death of my wife, I desire that one half of the property bequeathed to her shall be devised by her to my relatives." In holding that no command was expressed and that the wife took an absolute title free from any trust, the court said: "The precatory words in the present will are: 'Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives.' These words stand in the will in a paragraph separate from that by which the property is given to the wife, and there is nothing in the context, or in any other part of the will, which throws any light upon the intention with which the words were used. The words themselves fall far short of a command or a direction, and are rather in the nature of an expression of the testator's feelings, and a suggestion or recommendation to be considered by her in making a testamentary disposition of her estate, or as a reason to influence her therein. While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms."

In *Van Gorder v. Smith*, 99 Ind. 404, it was held that the word "desire" was used in a precatory and not mandatory sense in a will by which a testator bequeathed all his personal property to his wife to be held, used and controlled by her as long as she might live, and to be disposed of by her at her death by will or otherwise, and which also contained the following provision: "It is my desire that my wife, with . . . the interest she shall receive on the moneys invested in registered government bonds, will provide and keep a good comfortable home for my two sons and herself, and that she will use every endeavor to give them a good education, . . . and she may, from time to time as she may deem proper and just, divide and apportion the property herein bequeathed to her among my children, after first becoming satisfied that such property, when so given to them, will not be uselessly squandered and wasted." The provision was construed as rather enlarging than restraining the power of disposition. The court said: "These subsequent provisions of the will expressed by way of . . . 'desire' we construe as rather en-

larging than restraining the power of disposition. While it was the manifestation of unbounded confidence in the prudence, discretion and maternal affection of his wife, it was, in no sense the creation of a trust, nor a limitation upon her power to dispose of the property 'by will or otherwise' at her pleasure."

In *Bills v. Bills*, 80 Ia. 269, 45 N. W. 748, 20 Am. St. Rep. 418, 8 L.R.A. 696, it appeared that a testator by the first clause of his will provided thus: "First, I give and bequeath to my wife, Irene Bills, all of my real and personal property situated in Jones county, Iowa, except as hereinafter specified." Then after making certain devises and bequests, in the fifth clause he said: "Fifth, all the real and personal property herein bequeathed to my wife, Irene Bills, remaining at her decease, I desire to be divided into five equal shares, to [certain beneficiaries]." It was held that an absolute title vested in the wife and that "desire" was not an imperative term, the court saying: "When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire or direction for its disposition, after the death of the devisee or legatee, will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest."

In *Jewell v. Barnes*, 110 Ky. 329, 61 S. W. 360, 53 L.R.A. 377, it appeared that a will by which a testator left his interest in a business to his wife and brother, making them equal partners, contained the following clause: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitles him to." It was held that no trust was established in favor of Robert M. Jewell since the language imported no command on the testator's part but only an expression of his desire, and was no doubt put in tacit shape so as not to embarrass the devisees in the management of their affairs.

It appeared in *Jacob v. Macon*, 20 La. Ann. 182, that a bequest was made in the following terms: "I give and bequeath to my wife the further sum of ten thousand dollars, which I desire her to use for the benefit of her brothers and sisters, Eugene, Louise, Mathilde, and Louis H. Malarcher, according to her best judgment and discretion, which is to be paid after the discharge of the debts." The court held that there was an absolute disposal of the money in favor of the wife and whether the other persons named in the will

were to receive any benefit therefrom was addressed entirely to the conscience and discretion of the wife as devisee. It was said: "He [the testator] desires her to use the money for the benefit of her brothers and sisters, but she has the absolute disposal of it and may spend the money donated. . . . The desire or request of the testator, Charles D. Yancey, is simply addressed to the conscience of the devisee. . . . We do not consider the bequest a trust."

In *Dufour v. Deresheid*, 110 La. 344, 34 So. 469, it appeared that the will of a testator read thus: "I declare I have brought in marriage the sum of six thousand five hundred dollars. I institute as my universal legatee my wife, Katharina Deresheid, to whom I give and bequeath the totality of the property which I shall leave on the day of my decease. At the death of my wife, I desire that, after deduction made of the above sum of six thousand five hundred dollars which shall be paid to my natural heirs, the balance of what she will leave on the day of her decease shall be divided equally between my natural heirs and her own." It was held that neither the testator's heirs nor his wife's heirs took anything under the will; that the testator's heirs would receive none of the estate unless the wife saw fit so to provide in her will; and that the wife's heirs would share in the estate only in case she died either leaving a will so providing, or intestate, under which circumstances they would take under the law of inheritance.

In the case of *Ogden's Petition*, 25 R. I. 373, 55 Atl. 933, the court was called on to answer the question whether there was a limitation on the location by the town within its limits of a monument provided for in the following bequest: "To the town of North Providence five thousand (\$5,000) dollars to erect a monument to the memory of the soldiers and sailors who fell or died in the late war, enlisting from this part of the town existing A. D. 1885; and my desire is that the monument be erected at the junction of Olney and Fruit Hill avenues in said town, on a triangular piece of land thereat located." The court held there was no limitation, saying: "The testator expresses a desire for a certain location, but he does not require it. The expression is precatory, not imperative. It was evidently intended only as a personal recommendation of a site. As such it is not binding on the town."

The court held in *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. 902, that no trust was created in favor of the children by the testator's expression of desire as to advances to be made by the wife in the following clause of a will: "I direct that all my just debts and funeral expenses be paid out of my personal estate; then all the balance of my estate, real and

personal, I direct be and remain in the possession of my wife and children for their support and the education of my children; and as my children shall arrive of age or marry, I desire that my wife shall advance to such child or children such an amount, either in property or money, as she deems prudent, but not exceeding a distributive share of my estate, as it is my intention for my said wife to keep as much of my estate as will make her comfortable during her widowhood, but should she marry again, then she is to have no part of my estate." That it was intended to be left a discretionary matter the court held was clearly evidenced by the vagueness of the amount to be paid, the language being "such an amount . . . as she deems prudent," as well as by the distinction made in the use of the words "direct" and "desire" in the various provisions of the clause.

It appeared in the case of *In re Diggles*, 39 Ch. D. (Eng.) 253, 59 L. T. N. S. 884, that a testatrix, after bequeathing and devising all her property both real and personal to her daughter in her will, said: "It is my desire that she allows to my relative and companion, Anne Gregory, an annuity of £25 during her life." It was held that the testatrix did not intend to bind her daughter to pay the annuity but only to express a wish that she should do so.

In the case of *In re Oldfield* [1904] 1 Ch. (Eng.) 549, 90 L. T. N. S. 392, it appeared that a testatrix having devised and bequeathed all her real and personal property equally among her two daughters as tenants in common for their own absolute use and benefit, used the following words: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will." The word "desire" was held not to have been used in a mandatory sense, the court saying: "This is a desire expressed with regard to the income of the share which each daughter was to take absolutely under the first clause of the will. Under these circumstances, one has to ask oneself this: Would anyone desiring to create a trust have created it by the use of such language as is used by this testatrix? Is it not more probable that, if she had intended to create such a trust, she would have left her property to the daughters, charging one-third of the income of the property with a trust in favor of the son, and then have given the residue of the income or of the property, subject to the life interest to the son, to the daughters? In my judgment there is nothing in this expression of desire sufficient to cut down the absolute gift for the use and benefit of the daughters which is comprised in the first part of the will."

In *Re Soulliere*, 24 Ont. W. Rep. 400, 4 Ont. W. N. 1092, 9 Dominion L. Rep. 879, it appeared that a testator after willing all his property to his wife, added the following clause: "I also desire that at her death she will divide the estate that I now give to her among our children in the most just manner possible." It was held that no trust was created. The court said: "It is said that this constitutes a precatory trust and that it operates to cut down the gift to a life estate with the power of appointment among the children. At one time this would probably have been so; but the tendency of the more recent legislation is all the other way. I think that in this will the gift to the wife is absolute, and that the clause quoted recognizes this and falls far short of what is now regarded as necessary to cut down the absolute estate given."

"Desire" Used with Similar Words.

Where the word "desire" coupled with other words of similar meaning has been addressed to a devisee or legatee it has in certain cases been construed by the courts as being used in an advisory sense. For instance, the term has been so construed where the testator expressed his "wish and desire." Thus, in *Toms v. Owen*, 52 Fed. 417, where a testator expressed his "wish and desire" that his wife should make free use of all property conveyed to her by a deed of earlier date and devised to her by the will, for her own use or for charitable purposes, stating that he knew that in case any of his immediate relatives or her sister should by misfortune or otherwise need any aid or assistance, she would cheerfully and generously share with them, it was held that there was no trust created. The wife's power to carry out the wish expressed was left to her own sense of generosity, which implied the discretion to act or not to act in the event the objects named needed assistance. In *Holmes v. Dalley*, 192 Mass. 451, 78 N. E. 513, it appeared that in the fourth clause of a will in which by previous provisions a trust for the benefit of the testator's wife and daughter was created it was provided as follows: "Fourth—After the decease of my said wife, one half of the principal of said trust estate is to be paid over and conveyed to such person or persons, and in such proportions as my said wife shall by will appoint, but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share of said trust estate to my daughter and her children, in such way and manner, and in such proportions, as to her may seem best—but in case my said wife shall die without making any appointment of her share of said trust estate, then the same shall be added to the share held in trust for

my daughter and her children and be held upon the same trusts." On the wife's decease in her will she devised and bequeathed the property constituting one-half of the trust estate to others than her daughter. It was held that the words "wish and desire" did not constitute a trust but were merely an expression of hope on the part of the testator. In *Post v. Moore*, 181 N. Y. 15, 2 Ann. Cas. 591, 73 N. E. 482, 106 Am. St. Rep. 495, it appeared that a testator having devised and bequeathed all his property to his wife, her heirs and assigns forever, by a subsequent item declared: "It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law Miss Nellie Post." It was held to be discretionary with the wife whether she would pay such sum, no trust being created by the precatory words. The view was taken that no man would use indefinite and optional forms of expression toward those whom he expected to assume a binding duty and obligation in regard to the corpus or income of a bequest. In *Montreal Bank v. Bower*, 18 Ont. 226, 17 Ont. 548, it appeared that a testator by his will had made an absolute gift of the residue of his estate to his wife, and then inserted a clause in his will reading: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects thereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable." It was held that the wife took an absolute title to the property, no trust being created.

The term has also been construed as advisory in nature where a testator expressed his "desire and request." Thus, in *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274, *affirming* 91 Hun 398, 36 N. Y. S. 317, it appeared that a testator gave a house and lot to his wife and "to her heirs and assigns forever," and then after making certain legacies to other parties and providing that the same should not be charges on the house and lot given the wife, gave all the residue of his estate to his wife and to her heirs and assigns forever. But to this was added the following provision: "And it is my desire and request that my said wife do sustain, provide for and educate Lucretia M. Wood, the daughter of my said adopted daughter Josephine M. Wood. And it is my further desire and request that my wife do make the said Lucretia M. Wood, Josephine M. Wood and my nephews and nieces, the children of my brothers Caleb S. Clay and George Clay, joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." It was held that the precatory words in the will were not of such force as to deprive the wife as donee of the absolute

right of disposal, but were only morally binding upon her and therefore no trust or power in trust was created thereby in favor of the persons named. In the case of *In re Forscht's Estate*, 2 Pa. Dist. 294, in holding that no trust was created by the words "desire and request," it was said: "It is well settled that merely precatory words, following an absolute bequest or devise—words not importing imperative direction, but of desire and request merely, will not create a trust or serve to reduce the estate or interest previously given. Such are the words used in this will: 'It is my desire and request.' They follow an absolute gift of one-third of testator's estate to Israel; they are dependent on a contingency that may never happen, 'in case my said son Israel has no children to inherit his estate;' they apply not to the corpus or thing bequeathed to Israel, but to 'so much of his estate as he receives from me under this will.' They are insufficient to create a trust of this fund for the children of Mrs. Miller, or to reduce the gift to Israel to a life estate."

Likewise, the word has been construed as advisory in nature where a testator stated that he "expected and desired" the devisee or legatee to use the property in a particular way. Thus, in the case of *In re Gardner*, 140 N. Y. 122, 35 N. E. 439, it appeared that by the residuary clause of his will a testator gave the residue of his estate to his wife to have and to hold the same and every part and parcel thereof to her and her assigns forever, provided, however, that if any part of it should remain unexpended or undisposed of at her death what should so remain he gave to his son and his heirs and assigns, adding this clause: "And I expect and desire that my said wife will not dispose of any of said estate by will in such a way that the whole that might remain at her death shall go out of my own family and blood relation." It was held that the gift to the wife, subject to the condition that any part not disposed of at her death should pass to the son, was in no way limited or qualified by the clause expressing desire and expectation above quoted, and that the wife at her death could dispose of the property in any way she desired.

"Desire" Used with Words Evincing Advisory Intent.

The word "desire" has been held to be used as an advisory term where the testator's intention to use it in a mandatory sense is expressly negated by the provisions of another clause of his will.

Thus, in *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357, *affirming* 132 Fed. 485, wherein it appeared that a testator bequeathed all of his property to his two brothers "to

be held and disposed of by them absolutely as their own property," added it was his "desire" that they should so adopt his children that they would share equally with their own in their advancements and estate, and then concluded with the provision that "nothing in this will, and no request, direction or bequest made herein, shall be so construed as to create a charge or incumbrance upon any of the property bequeathed," it was held that no trust was created in favor of the children.

In *Lumpkin v. Rodgers*, 155 Ind. 285, 58 N. E. 72, it appeared that a testator had devised and bequeathed all his property to his wife and then by his will provided as follows: "(2) 'It is my desire that the business be so conducted that all of our children, or their heirs, shall finally share equally in the distribution of our property.' (3) 'I would advise that the said Nancy Adamson shall at some suitable time call to her counsel two or three good discreet men to assist her in making a proper and equitable division of the real estate, as well as other property that she may think proper, among all the children aforesaid, retaining, however, if she choose so to do, the title and possession of said property to herself until after her death.' (4) 'Nothing in the above shall be construed to effect a perfect and indefeasible title to her, the said Nancy Adamson, which this will conveys to her, to all the said property, both real and personal, with the right to control, sell, and convey the same at her pleasure.'" It was held that the said second clause should be construed as advisory only.

In *Enders v. Tasco*, 89 Ky. 17, 11 S. W. 818, it appeared that the second clause of a will read thus: "All the rest and residue of my estate, real, personal and mixed, after the payment of my just debts and funeral expenses, I will, devise and bequeath to my dear wife, Candace J. Enders, to have, control, use and enjoy as her own absolute property, if she should survive me long enough to enjoy or take possession or control of the same; and, in the event of her surviving me, it is my desire that it may suit her pleasure, and if so, I request, but without intending to create any trust therefor, that she allow and pay Ann Tasco, a mulatto, who has been for some time in our service, the sum of fifteen dollars per month, at the end of each month, so long as said Ann may live, to be used and applied toward her maintenance and support." In holding that "desire" was not used as an imperative term, the court said: "The testator's wish is, that it may suit the pleasure of his wife to make this allowance out of her absolute estate, which is equivalent to saying that, if it does not suit the pleasure of his wife to make the allowance, then he does not desire her to make it; that her pleasure, upon the subject of allowance, is to

be the law unto him; if she is in favor of making the allowance, it will accord with his wish; if not, then her will be done, not his, for his is to be subordinate to hers, in proof of which . . . he says his wish or request is not to create a trust in favor of the appellee. If this clause establishes a precatory trust in favor of the appellee, it would be a difficult task for a testator to so express himself as not to create one, in expressing a mere wish to the object of his bounty, but leaving it entirely optional with the object of the bounty as to carrying out the wish."

CONSTRUED AS MANDATORY TERM.

"Desire" Used Alone.

The courts have construed the word "desire" in the cases hereinafter set out as a mandatory term, thus making the direction which the testator expressed as his desire binding on the devisee or legatee to whom the testator addressed the same.

In the case of *In re Buhrmeister*, 1 Cal. App. 80, 81 Pac. 752, it appeared that a testator by one article of his will devised all his property to his six children "in equal shares, share and share alike," and by a subsequent article declared that it was his "desire" that his son Walter should have the use and occupation of a certain fruit ranch for a period of five years immediately following his death and directed the other children to execute a lease for that period. It was held that more than a mere wish or request was intended and that there was an absolute direction.

In *Major v. Herndon*, 78 Ky. 123, it appeared that the fourth and fifth clauses of a will before the court for construction read as follows: "Fourth. I give and bequeath to my beloved wife, Elizabeth Jane Herndon, the farm upon which I now reside, together with the remainder of my property, after taking out the legacies above named, during her life time or while she remains my widow, which I desire she shall manage and control for the benefit of herself, and mine and her children; and at her death, or the termination of her widowhood, it is my desire that said property may be equally divided among my children, after charging my three eldest sons with the sum of eleven hundred dollars each, as aforesaid. Fifth. It is my desire that the property of which I may die possessed, after the payment of the legacy of eleven hundred dollars to my son, John Chapman, shall be kept together, my younger children receive an education equal with what my three eldest sons have received, and made equal with them in a horse, saddle, and bridle, and everything else I have given them after which I desire

an equal division." "Desire" as therein used was held to be a mandatory term clearly indicating the testator's intention that the children should share in the testator's estate. A precatory trust was therefore held to have been created. The court said: "The first part of the fourth item of the will is sufficient to vest in the widow an absolute estate for life or during her widowhood, and there are no words following the gift which expressly limit it; but both in this and in the succeeding item the 'desire' of the testator that she shall manage and control the property, not for her own benefit alone, but for the benefit of his and her children as well, is three times distinctly and unequivocally expressed, and after reading these two items, no doubt can remain that he intended that his wife and his and her children should enjoy his bounty in common."

In *Maught v. Getzendanner*, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 352, it appeared that a testator provided in his will as follows: "I give and bequeath and devise unto the Reverend H. G. Bowers, of Jefferson, Maryland, all the rest and residue of my estate, and desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner as will, in his judgment, best promote the cause of Christ." The word "desire" it was held was therein used in an imperative sense and a trust would have been created thereby had it not been for the vagueness and uncertainty in the expression of its objects and purposes.

In *Erickson v. Willard*, 1 N. H. 217, it appeared that a testatrix gave property by the following provision: "I give and bequeath unto him the said Joseph Willard aforesaid, clerk and rector of St. John's Church, his heirs and assigns forever all my real and personal estate at the time of my decease after my just debts and funeral charges are paid." The will contained also this clause: "And I desire that the said Joseph Willard should at his discretion appropriate a part of the income of my estate aforesaid not exceeding fifty dollars a year to the support of the widow Margaret Erickson my sister's daughter during her natural life, and it is my express direction that my executor place the aforesaid Margaret in some pious and Christian family in the country at a distance from this town where she may be removed from temptation." In an action to compel the fulfillment of the provisions of the clause last quoted it was held that "desire" as therein used was an imperative term and created a trust in favor of the plaintiff. But in that case it should be noted that Joseph Willard was also named executor of the testator's estate and the court laid considerable stress upon this fact in holding as stated above.

In *Vandyck v. Van Beuren*, 1 Caines (N. Y.) 84, it appeared that a testator provided as follows: "I desire (b) my three sons Cornelius, Jacobus, and Ephraim, that in case any of my daughters above mentioned should be inclined to purchase of them the land in the Bruyn's patent (here above bequeathed to them) for a living for herself and family, that then they let such of my daughters have it at the same price they had it for." It was held that an election was given to any of the daughters to purchase the premises and a trust was raised by the will for that purpose.

In *Riker v. Leo*, 115 N. Y. 93, 21 N. E. 719, the evidence showed that a testator left a fund in trust to his executors to apply the income thereof to the support of a nephew and on his death were directed to pay the same "to any responsible corporation in this city, existing at the time of the death of my said nephew, whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, and I desire such corporation annually to transmit the interest received on said fifty thousand dollars to Jerusalem, Palestine, to ameliorate the condition of the Jews living there, by promoting among them education, arts and sciences, and by learning them mechanical and agricultural vocations." It was held that the word "desire" as therein used to express the object of the gift was equivalent to a command to the donee. The court said: "The 'desire,' which he expresses, has here the force of a command, because it expresses the object the testator had in view when making the bequest. It is very clear that where the donee of property is 'desired' or 'requested' by the testator to dispose of that property in favor of others, those words are imperative and their use will create a trust."

In the case of *In re Dewey*, 45 Utah 98, 143 Pac. 124, a testatrix, it appeared, had inserted the following provision in her will: "All the rest, residue and remainder of my property of every kind and nature whatsoever, if any, which remain after paying and discharging all the debts, bequests, legacies, and obligations hereinbefore mentioned and provided for, I hereby give, devise, and bequeath to the said Hubbard Tuttle, Sr. It is my desire that he shall distribute the same, or the proceeds thereof, among my nephews and nieces, and to such of them, and in such proportions, as he shall deem just and proper, and his decision upon such matters shall be final, conclusive and binding upon all parties." The court held that from the provisions of the will generally and from the language of the clause quoted the intention of the testator was to create a trust on the property devised and bequeathed to the said Hubbard Tuttle, Sr. In other words the

court said that the language used was equivalent to a command.

In *Harding v. Glyn*, 1 Atk. (Eng.) 469, 470, it appeared that the will under consideration gave "to Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did desire her at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations, as she should think most deserving and approve of." It was held that at his wife's death the testator's next of kin then living were entitled to have the property divided among them, a trust having been created.

"Desire" Used with Similar Words.

Where the word "desire" has been used in connection with other words of similar meaning in addressing a devisee or legatee, it has in some cases been considered to be a mandatory term placing the duty on the devisee or legatee to act in accordance with the direction so expressed.

It has been so held where a testator expressed his "wish and desire" to his devisee or legatee as to their conduct with the property. Thus in *Murphy v. Carlin*, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699, it appeared that a will devising the residue of the estate to the testator's wife after the payment of certain legacies provided by its sixth clause as follows: "It is my wish and desire that my wife continue to provide for the care, comfort and education of Thomas Joseph Murphy, now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her and shows himself worthy of such consideration." It was held that the words being a positive and unequivocal expression of the will of the testator established a precatory trust and placed an absolute duty on the wife to carry out the same. The court said: "That it was his intention that she should be imperatively charged with that duty, is apparent from the circumstances surrounding the transaction as well as upon the face of the will. Here was a helpless infant, an affectionate boy, reared in his family without means and without friends to assist him in the battle of life, taught to regard the testator as his father and to look to him for protection, and for whom he seems to have had a father's affection; a woman young enough to contract future marital relations that might seriously interfere with

the protection which he knew she was then disposed to give him. Is it not more reasonable that he should have intended to make the provision for him obligatory upon his wife rather than to leave his fate to the whim and caprice of herself or some future husband? If this boy had been the testator's natural born son, who would have a doubt of it? And yet he seems to have entertained the same sort of affection for this boy 'who had been raised as a member of his family since his infancy.' Why then make a distinction in interpreting his will? That his wife was to be charged with the obligation 'to continue to provide for the care, comfort and education' of the child, and 'in case of her death, make a suitable provision for him,' seems manifest from the fact that he placed in the will itself the condition upon which she was to be released from that obligation, i. e., 'should he show himself unworthy of such consideration.' There was no necessity for this provision, if his wife was to have unlimited discretion to provide for the plaintiff or not, as she might choose. He named the condition and (*expressio unius exclusio alterius*), the only condition upon which her failure to execute his wishes in that behalf should be excused. Hence, the condition being performed, the duty became imperative."

In *Deacon v. Cobson*, 83 N. J. Eq. 122, 89 Atl. 1029, a trust was held to be created by the following provisions: "Third. All the rest, residue and remainder of my estate, real, personal and mixed . . . I give, devise and bequeath to my daughter, Theodosia Borden, her heirs and assigns forever, but it is my wish and desire, and I hereby request my said daughter, Theodosia Borden, to keep intact so far as may be possible and practicable the body of my estate which she is to receive by virtue of this third item of my will, using only the rents, issues, profits and income therefrom for her own separate use and maintenance. And I further desire and hereby request my said daughter, Theodosia Borden, to make a will wherein and whereby she shall devise and bequeath all the corpus of my estate which she is to receive by the third item of this will, or so much as may be intact and remaining at the time of her death, as follows." [Directions for bequests and devises then following.] The court said: "The question for determination is whether the words 'wish,' 'desire' and 'request,' as used in that will and codicil, are operative to create a trust in favor of the persons named by testatrix. A rule of construction early adopted by the English court of chancery was to the effect that when, by will, property is given absolutely to a person, and the same person is by the testator 'recommended,' 'entreated,' 'requested' or 'wished' to dispose of that property in favor

of another, the recommendation, request or wish will be held to be imperative and to create a trust, if the subject and objects of the trust are certain. That rule of construction was adopted by our court of last resort more than half a century ago, and has since been uniformly recognized by the courts of this state; it cannot be now questioned in this court. . . . It necessarily follows that the requests of testatrix in the will and codicil here in question must be given the same force as though the language adopted by testatrix had been, wherever the word 'request' occurs, it is my will and I do hereby order and direct. With this rule of construction uniformly recognized by our courts for so long a period of time, testators and scrivener's may be said to have been privileged to rely upon its existence and future recognition."

In *Foster v. Willson*, 68 N. H. 241, 38 Atl. 1003, 73 Am. St. Rep. 581, it was held that a command was expressed and a trust established by the words "wish and desire" as used in the following provisions of a will: "2. As to all the rest, residue, and remainder of my estate, I give, bequeath, and devise the same to my said husband, Fred H. Willson, to have and to hold the same to him and his heirs and assigns forever; but it is my wish and desire that he shall furnish a home, maintenance, and care to and for my said father during life, should he need and require it."

In the case of *Re Walton*, 20 Manitoba 686, a precatory trust was held to be created by the words "wish and desire" as used by a testator in the following clause: "I bequeath to each of my sons [names following] one-third of my stock or shares in the Canadian Pacific Railway Company, the share of each to be transferred in the books of the company to each of such legatees. My wish and desire, however, is that, though each of my said three sons shall have had such shares so transferred to them as aforesaid, they shall not dispose of them but only the income derived therefrom shall be expended by them respectively, and that upon the death of each of them his share shall be disposed of and the proceeds thereof divided equally amongst all my grand children."

The word "desire" has been construed as mandatory where a testator expressed his "will and desire" to his devisee or legatee as to their conduct with the property. Thus, in *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412, it appeared that the third and fourth clauses of a will were as follows: "3rd. It is my will and desire that my beloved husband shall have all my property, both real, personal and mixed, whatever the interest may be, whether separate or community interest. And that he shall have full power and control over same to use and dispose of as he may desire. 4th. It is my will and desire that at his

death, should he have any of said property still remaining in his possession not disposed of or used by him, that the same shall be given by him to my nieces, Jessie McMurry and Flora Brown, daughters of Vina and Taylor Brown." The words "will" and "desire" having been interpreted to have been used in an imperative sense in the third clause it was held that they should be given a like meaning in the fourth clause, thereby reducing the estate in fee to the husband to a fee in trust except as it was subject to be disposed of by the husband during his lifetime. In *Girdler v. Girdler* (Ky.) 113 S. W. 835, it appeared that a testator expressed it as his "will and desire" that none of the real estate given and devised to his sons under previous provisions of his will should be sold or alienated for a certain period. It was held that while there might be some question as to whether the expression "it is my desire" amounted to a positive restriction, there could be no question that the phrase "it is my will" amounted to a restriction and was equivalent to the expression "direct."

When Not Addressed to Devisee or Legatee.

CONSTRUED AS DISPOSITIVE TERM.

The word "desire" when not addressed to a devisee or legatee but used to indicate the wish of the testator as to the disposition of his property has in certain cases hereinafter set out been construed as a dispositive term by which a testator evinces his will to make a devise or bequest as positively by the use of that term as if he had made the direction in the mandatory language customarily employed for that purpose.

Thus, in the case of *In re Tooley* reported in full, post, this volume, at page 516, the will before the court for construction read as follows: "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother." It appeared that Logan Mattie Tooley survived the testatrix but was unmarried at the time of her death and had no children. The court in sustaining the claim that the property belonged to the sisters and brother said that the word "desire" was a dispositive expression showing the absolute will of the testatrix to make a gift of the property. The court further held that there was no question in that case whether a trust was established for that would only arise where the request was made to a devisee or legatee, or construed to have been so made.

In *Keplinger v. Keplinger* (Ind.) 113 N. E. 292, it appeared that the will under consid-

eration provided as follows: "First. It is my desire that after all my just debts including funeral expenses and doctor's bills are paid, that the rest and residue of said estate both real and personal I hereby give and bequeath unto my wife, Mary A. Keplinger, she to have the full control for and during her natural life. Second. At the date of the death of my wife, it is my desire that after a suitable monument is erected at my grave the same to cost not less than five hundred dollars, the rest and residue of what is left shall be devised as follows, to wit: To Glen Keplinger the sum of five hundred dollars. . . . And after the above distributions are distributed it is my desire that the rest and residue of said estate be devised equally between John A. Keplinger and Lizzie Middaugh. Third. I hereby appoint my wife, Mary A. Keplinger, executrix of this will during her life and at her death, I hereby appoint said John A. Keplinger and Lizzie Middaugh to execute it according to the above bequests." The court said: "The question of the character of the words or terms used, whether precatory or imperative, is not material in considering a primary gift. A devise of a simple remainder by the use of the word 'desire' is as effective as one by the use of the technical word 'devisee.' . . . It is only where there is a primary gift to one, followed by an apparent attempt to impress on the estate given a use for the benefit of another, that the character of the words used in such attempt, whether mandatory or advisory, becomes important. Consequently, if the first item . . . devised a life estate only [and it was so held] leaving the remainder in fee for further disposition, it is unnecessary to consider the proper definition of 'desire' as found in the second item, whether as signifying command or entreaty."

In *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203, the word "desire" was held to be equivalent to a command in a polite form, working a good charitable bequest as used in the following residuary clause: "If, after all the aforesaid legacies and annuities are fully provided for, any surplus should remain in the hands of trustees, I desire the same to be then distributed among and applied to such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof; and I give the trustees for the time being of such remaining property and estate full power and discretion and authority to appropriate and expend such remaining property in such manner as in their judgment may best promote the objects and purposes above mentioned."

In *Moseley v. Bolster*, 201 Mass. 135, 87 N. E. 606, it appeared that a will contained

the following clause: "All the rest and residue of my estate in whatsoever it may consist and wheresoever situated, I give bequeath and devise to my son Oliver H. Perry and my daughters Martha Ann Perry and Mary Augusta Moseley wife of John G. Moseley of said Boston as follows to my son Oliver H. one undivided half part and I desire that my real estate in Needham County of Norfolk & Commonwealth of Massachusetts shall be held by my son Oliver in the division of my estate, together with the farm stock utensils and other personal property on said estate in Needham, to my said daughter Martha Ann one undivided quarter part and to my daughter Mary Augusta one undivided quarter part." It was held that the word "desire" expressed the absolute will of the testator that his son Oliver should have the real estate described. The court said: "The expression of the testator's 'desire' that this property should be held by his son was not the mere expression of a hope that the beneficiaries of his will would use his bounty in a certain manner; it was an operative disposition of his property. . . . Full effect can be given to the intent of the testator by treating this disposition of a part of the residue in favor of the son as a partial division made by the testator of the undivided estate which he gave to all his children."

In the case of *Matter of Copeland*, 38 Misc. 402, 77 N. Y. S. 931, the court, disregarding the fact that the word "desired" was addressed to a devisee or legatee, held that the testator clearly showed an intention to make a gift when he used it as in the following clause of his will: "First: After all my lawful debts are paid and discharged, I give and bequeath to my ever beloved son Edward Copeland, all of my estate, both real and personal, of whatever kind or nature of which I may die seized and possessed, but out of this inheritance he is desired by his mother to pay as soon after as possible that it comes into his ownership five hundred dollars (\$500) to her grandniece, the daughter of William P. Clark, of Newburgh, Orange County, State of New York, now known as Ellie Clark, recognizing in this form the kindness bestowed upon your mother in her youth by her brother, the grandfather of said Ellie Clark." Therein the court said: "While the words 'give, devise and bequeath,' are the usual words used in wills, yet they are not essential to the validity of a gift, and if it appears that it was the intention of the testator to have the property go to the person named as legatee, even if the words 'wish or desire' are used, then the intention of the testator will be followed out. . . . I think that the plain intention in this case, although there was only the word 'desired' used shows an intention to make this a gift. The testator had given everything that she had, after

the payment of her debts, to her son, and stated, however, that she desired that as soon as possible that five hundred dollars should be paid to the person named, Ellie Clark, and stated that she did this for the purpose of 'recognizing in this form the kindness bestowed upon your mother in her youth.' There is no doubt therefore but that the testator firmly believed when she made this will that she was making an effectual provision, by which the person toward whom she was kindly disposed would receive the contemplated gift."

In the case of *Matter of Compton*, 72 Misc. 289, 131 N. Y. S. 183, where it appeared that part of the second clause of a will read thus: "I desire that the sum of \$1,800 (eighteen hundred dollars) invested in the Lord's work in care of Miss S. A. Lindenger (of which I receive the income during my lifetime), shall not be withdrawn from said work at my decease, but shall wholly remain in that work," the words "I desire" were held to be equivalent to "I direct," and it was said that the said provision of the will would have amounted to a gift in trust valid and enforceable had the trust been valid in other particulars. The court therein said: "The words 'I desire' are equivalent in meaning to the words 'I direct,' and should be so interpreted. The language used amounts to a declaration that the testatrix had previously invested in the 'Lord's work,' in care of Miss S. A. Lindenger, the sum of eighteen hundred dollars, and to a direction that the fund should not be withdrawn upon her death, but should forever remain in that work."

The court in *Cook v. Ellington*, 59 N. C. 371, held that the words "I desire" were equivalent to the words "I give" when used as in the following clause of a codicil: "I desire that my wife, . . . shall have all the crop of cotton that I may have on hand at the time of my death."

In *Oyster v. Knull*, 137 Pa. St. 448, 20 Atl. 624, 21 Am. St. Rep. 890, it appeared that a testator provided as follows in his will: "I give and bequeath to my son Napoleon Kiever Oyster my Mount Airy farm . . . for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children." The word "desire" was held to be mandatory and to work a gift of the property. The court said: "The words, 'I desire,' etc., as employed by the testator, are equivalent to the words 'I will and direct.' The clause in question may then be read thus, 'I will that the above estate shall go to the use of his children.'"

In the case of *In re Dickinson*, 209 Pa. St. 59, 58 Atl. 120, it appeared that a testatrix disposed of her estate in the following language: "All the rest, residue and remainder of

my estate, real, personal and mixed, and wherever situated, I give, devise and bequeath unto my beloved husband, Henry B. Dickinson, his heirs and assigns. . . . And should my husband not expend the whole of my estate, then it is my desire at his death to give so much of it as remains to my sister, Annie Ulrich, and my two brothers, Algernon J. Martin and John J. Martin." It was held that the word "desire" as used by the testatrix expressed her will and intention and was a mandatory term passing whatever property remained undisposed of at the husband's death to the persons designated. The court said: "The concluding sentence expresses the desire of the testatrix to give the whole of her estate, not expended by her husband, to her sister and brothers. It is her wish to thus give her estate. It is not her desire or wish or recommendation that her husband shall give the unexpended estate to them. The estate is not committed to him with expressions of desire as to how he disposed of it. The testatrix makes the disposition herself. She gives him the estate. This carries with it the power to convert, sell, convey, assign and transfer. He could have expended the whole of it, for there is no limitation, restraint or condition attached to the bequest. But if he did not consume or expend it, then what remained at his death she gave to others. This is the reasonable interpretation of the will. He did not consume the whole; what remains, therefore, is her estate, and passes by her will to the legatees. . . . Where the words 'wish' and 'desire' are used in expressing a desire for an act to be done by some person named by the testator, they are generally precatory merely, but no such presumption necessarily arises when the words are used to express the intention and will of the testator. In such cases they are held to be mandatory."

In *McCreary v. Burns*, 17 S. C. 45, by a clause of a will reading: "I desire that the land and other property remaining shall continue in the possession of my beloved wife, Leah Burns, during her life," a gift of a life estate was held to pass, the court saying: "The first part of the second paragraph of the will undoubtedly gives a simple life estate to Leah. There is no direct gift in terms, but being in a will the word 'desire' means that."

But, in *Hunt v. Hunt*, 18 Wash. 14, 50 Pac. 578, the court construed a clause in a codicil reading as follows: "I desire fifteen thousand dollars (\$15,000) to be given to our foster son, Edward Woods Hunt, at any time convenient to my executrix." It was held that the codicil constituted neither a bequest nor a trust, it appearing that the wife, who was appointed executrix and was by the terms of the will given all the

testator's property for life, after being directed by the codicil to pay a bequest of five thousand dollars, was authorized if the revenues from the estate were not sufficient for her support "to use such part of the principal as she may require," and that the payment of the five thousand dollars bequest and the fifteen thousand dollars claimed for the son would more than exceed the amount of the property coming into the wife's hands.

A bequest or devise in a will has been held to be revoked by a testator expressing his "desire" to do so in a clause of a codicil. In *Harrison v. Langfitt*, 158 Ia. 479, 139 N. W. 1076, wherein it appeared that a clause in a codicil was as follows: "I desire to change the will in regard to J. W. Langfitt, he having received his share in land under value," it was held that such heir was thereby precluded from sharing in the estate. The court said: "It is also urged by the appellant that the codicil did not in fact change the will, but only expressed a 'desire' to do so. It is well settled that mere precatory words in a will are not binding as a disposition of property. But this usually has reference to the expression of a wish or request as to the future conduct or action of other parties. But the expression of a wish or desire is by no means fatal to the form of a bequest or devise. Indeed, bequests frequently appear in just such form, and are sustained as sufficient."

The word "desire" when used in connection with words of similar import has been construed as a positive direction of the testator to make a disposition of his property to the persons named. Thus, in the reported case it appears that a testator expressed it as his "will and desire" that certain property in which he had devised a life estate in his wife should revert to his son, provided he paid certain specified legacies. In earlier provisions of the will it appears that the testator had used the words "give, devise and bequeath." The court holds that while "desire" is sometimes used as a precatory term still in this case where it is used with the word "will" which is mandatory in its nature and where the testator's intention to dispose of his entire estate clearly appears it must be taken as a mandatory term. And in *Young v. McKinnie*, 5 Fla. 542, a clause of a will reading: "It is my will and desire that my property . . . be equally divided," etc., was held to operate a present gift. In *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. S. 57, where a testatrix declared in her will that in the event of her death her "wishes, desires and intentions" were that all her real estate be disposed of to persons and in a manner thereafter enumerated, it was held that the testatrix being at liberty to do what she chose with her property, expressed her intention by the use of the above

words which were there used in an imperative sense and had the same force as though the word "direct" had been used. In *Brasher v. Marsh*, 15 Ohio St. 103, mandatory effect was given to the words "wish and desire" as used in a clause of a will, reading thus: "I also wish and desire that all my real estate be equally divided between my children, namely," etc. In *Taylor v. Martin* (Pa.) 8 Atl. 920, the court was called on to construe the following provisions of a will: "I do hereby will, devise, and bequeath unto my beloved and faithful wife, Mary Raybold, all my estate, real, and mixed, whatsoever and wheresoever the same may be at the time of my decease, to her sole and separate use, behoof, and control forever. Item 5. It is also my desire and wish, after my wife's death, that my house and lot, number 2,007 Fitzwater street, shall go to my daughter Mary C. Martin, wife of Thomas J. Martin, for her sole and separate use during her natural life; and after her death the above said house and lot of ground, number 2,007 Fitzwater street, shall revert and go to my son Joshua C. A. Raybold, to him, his heirs and assigns, forever." It was held that the words "desire and wish" were used to show the absolute intention of the testator and thereby a life estate was given to the daughter, Mary C. Martin, in the property mentioned with remainder over to the son, the gift to his wife being limited to a life estate. In *Cockrill v. Armstrong*, 31 Ark. 580, it appeared that a testator inserted in his will the following clause: "It is my wish and desire that my grandson, William Armstrong Cocke, be brought up and educated at the cost and expense of my estate." It was held that the terms "wish" and "desire" must be construed as creating a change on the testator's estate.

CONSTRUED AS COMMAND TO EXECUTOR.

In cases where a testator has expressed it as his "desire" that his executor should act in some particular manner with regard to the estate, the word has been held to express a command from the testator with which the executor must comply.

Thus, in the case of *In re Pforr*, 144 Cal. 121, 77 Pac. 825, it appeared that a provision of a will read as follows: "A. Third. I desire that my executrix and executor, at the expiration of two years from the date of my demise, shall have the property sold at public auction or otherwise, and after paying all indebtedness standing against it, to divide the net proceeds of such sale into six equal parts or divisions, and to distribute the same, share and share alike, to my heirs and devisees as hereinafter set forth." The court said: "The provision for the sale of the property and the distribution of its proceeds among the six bene-

ficiaries operated as an equitable conversion of the real estate into personalty. . . . This result is not overcome by reason of the testator having used the word 'desire' instead of 'direct' in authorizing the sale. The words 'I desire' that my real estate shall be sold are the equivalent of the words 'I will' that it be sold. . . . While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor."

In *Bohon v. Barrett*, 79 Ky. 378, mandatory effect was given to the word "desire," as used in the following clause of a will: "I desire that my executor shall, at such time, on such terms, and in such quantities as he may think best, sell all my real estate, of every kind, and wherever situated, and convey the same to the purchaser or purchasers by deed or deeds duly executed."

In *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633, the word "desire" was held to be used in an obligatory sense and to be equivalent to a positive direction as used in the following provisions of a will: "Fourth. I desire the sum of twenty-five thousand dollars (\$25,000) set apart and invested by my executors, the revenue from which I give to my said wife for life for her support and the maintenance of the household. . . . Seventh. All the rest and remainder of my estate, of every nature and kind, I desire invested and added to my residuary estate, the income from which shall be shared equally by my two sons and paid to them after deducting the taxes paid on the same."

In *Philadelphia's Appeal*, 112 Pa. St. 470, 4 Atl. 4, there was involved a clause in a will reading thus: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages." The court said: "We regard this as a direction to sell. The words 'I desire' are the equivalent of the words 'I will' that my real estate shall be sold, etc., while the added words, 'as soon after my decease as practicable,' left no discretion to his executors excepting as to the matter of time."

In *Turrill v. Davenport*, 173 App. Div. 543, 159 N. Y. S. 814, it was held that such clearly appearing to be the intention of the testatrix the words "I desire" must be construed to have been employed in a mandatory sense and equivalent to "I will" when used as in the following clause of a will: "Realizing that the present income from the investments and securities is extremely small and that even this must be constantly diminished by taxes on real estate, I desire that in order to augment said income the landed property be sold as soon as profitable sales can be

negotiated and the proceeds reinvested in safe interest bearing bonds and mortgages. . . . Sales and reinvestments in the discretion of Mrs. Turrill; after her demise, of the other executors."

But in *Hazlewood v. Webster*, 7 Ky. L. Rep. (Abstract) 164, construing a will wherein the testator declared his "greatest desire" to be that his executor see that his two brothers were well taken care of during their lives that they might lack for nothing that would render them comfortable, and then bequeathing a saddle horse and saddle and some private papers to his executor and devising and bequeathing the rest of his estate, which was considerable, to his relatives, it was held that by such language no trust was created which a court would enforce either on the specific devises or the estate generally.

In a case where a testator expressed it as his "desire" that an executor should place a certain fund in trust, it was held to be equivalent to a direction or a command. *Wood v. Camden Safe Deposit, etc. Co.* 44 N. J. Eq. 460, 14 Atl. 885. In that case it appeared that a testatrix by will directed that the residue of her estate should be divided into three equal parts and then gave and devised one-third to each of her three daughters. Subsequently, she executed a codicil thereto in these words: "I desire that one-half of the share of the property inherited from me by my daughter, Lydia C. Wood, shall be placed in trust, The Camden Trust Co. acting as trustee." It was held that the word "desire" was not in the application made by the testatrix the expression of a request, recommendation or entreaty addressed to the legatee or devisee; but it was an order, direction or command to the executors of the will clearly placing on them the duty to place in trust one-half of the one-third originally left to Lydia C. Wood.

CONSTRUED AS APPOINTING OR CONTROLLING TRUSTEE.

Where a testator has addressed a trustee with the word "desire" the provision has been held to be mandatory and controlling on the trustee. *Central Trust Co. v. Egleston*, 47 Misc. 693, 98 N. Y. S. 1055, wherein the court construed the following clause of a will: "For the first year and one-half after my death (if any child is under age) I desire that the Central Trust Company advance to my wife in the ratio of my previous expenditure from five thousand dollars to about nine thousand dollars, so as to give time to adjust family affairs—this to be for the benefit of my wife and sons, not one, but all—but if all of the children are of age (twenty-one) then for one year, not one year and one-half (\$5,000 to \$9,000)." It was held that the testator

intended to control and direct the disposition and not to leave it as a discretionary matter.

Where the word "desire" was addressed to the court in respect to the appointment of an executor named in a will as trustee, it was held in *Wolbert v. Beard*, 128 Wis. 391, 107 N. W. 663, that the request for the appointment must be considered as equivalent to an appointment by the will.

MATTER OF ESTATE OF TOOLEY.

California Supreme Court—May 12, 1915.

170 Cal. 164; 149 Pac. 574.

Wills — Construction — Words Constructed in Ordinary Sense.

The words of a will are to be taken in the ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected.

Construction of "Desire."

Civ. Code, § 1322, provides that a distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear, or by inference from other parts of the will, or by an inaccurate recital of, or reference to, its contents in another part of the will. A will provided: "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother." It is held that the word "desire" indicated 'he wish of testatrix regarding the disposition of the property, and was a dispositive and testamentary provision, binding upon the court in the distribution of the estate, so that, where the daughter survived the testatrix and died unmarried, the property was to be distributed to the brother and sisters of the testatrix.

[See note at end of this case.]

Same.

Such provision is a command sufficient to effect a testamentary disposition of the property, and not an expression of a wish or preference directed to the daughter, so that there is no precatory trust reposed in her.

[See note at end of this case.]

Appeal from Superior Court, Glenn county: FINCH, Judge.

Distribution of estate of Martha L. Tooley. From a decree rendered, brother and sisters of decedent appeal. The facts are stated in the opinion. **REVERSED.**

Frank Freeman for appellants.

Glenn West, Ben F. Geis and Duard F. Geis for respondents.

[165] SHAW, J.—The transcript presents an appeal by the brother and sisters of the decedent from a decree of the superior court making distribution of her estate. The sole question presented is the construction of the last will of the decedent.

The will reads as follows:

"I give all my property at my death to my daughter Logan Mattie Tooley.

"If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother.

"**MARTHA L. TOOLEY.**"

The daughter, Logan Mattie Tooley, survived her mother, the testatrix, but died before the petition for distribution was filed. She also left a will by which she gave all her property to Leonard Lenus Klemmer subject to a small annuity. She was unmarried at the time of her death and had no children. Letters of administration with the will annexed were granted upon her estate. In the petition for distribution of the mother's estate the executor asked that distribution thereof [166] be made to the brother and sisters of Martha L. Tooley. The administratrix of the daughter's estate filed an opposition to this petition and asked that distribution be made to said administratrix for the benefit of the estate of said Logan Mattie Tooley. The court denied the petition for distribution and sustained the opposition thereto. Distribution was made accordingly to the administratrix of the estate of the daughter for the benefit of said estate.

The contention of the respondents is that the first paragraph of the will vests the estate in the property of the mother absolutely in the daughter, Logan Mattie Tooley, and that the second paragraph is ineffectual to change this disposition. They rely upon the rule set forth in section 1322 of the Civil Code. It is as follows:

"A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

The argument is that the words of the second paragraph of the will are not as clear and distinct as those of the first paragraph, and, consequently, that they cannot affect the clear and distinct devise and bequest contained in the first paragraph. The basis of

this argument is that the word "desire" in the second paragraph is not to be taken as a positive disposition of the property but only as an expression of a wish or preference directed to the devisee Logan Mattie Tooley. We are of the opinion that this position is untenable. The words of a will are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected. The second clause of the will, if taken alone, would constitute a clear disposition of the remainder at the death of the testatrix to her brother and sisters. The rule is practically universal that words in a will indicating the wish of the testator regarding the disposition to be made of her property by the law at her death are to be taken as a dispositive provision. The correct rule is clearly stated in *Presbyterian Board, etc. v. Culp*, 151 Pa. St. 467, 470, 25 Atl. 118, as follows:

"Where, however, words of recommendation, request and the like are used in direct reference to the estate, they are *prima facie* testamentary and imperative, and not precatory. [167] Should the testator say merely 'I desire A. B. to have one thousand dollars,' it would be as effectual a legacy as if he were expressly to direct or will it, or were to add 'out of my estate,' or that it should be paid by his executor. The reason is obvious. A will, in its nature, is the disposition which the testator desires to have made of his estate after his death. All the expressions indicative of his wish or will are commands. It is different when, having made a disposition, he expresses a desire that the legatee or devisee should make a certain use of his bounty." In the case of *In re Marti*, 132 Cal. 671, 61 Pac. 965, 64 Pac. 1071, the court, upon this subject, said: "While the desire of the testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given in absolute terms." In the Tooley will the words of the second clause are, in the sense here referred to, "addressed to the executor," and are mandatory.

The respondents here deny that there is either a precatory trust or disposition of the remainder. The *Marti* case establishes beyond question that there is here no trust. The result would be that the second clause would be wholly ineffectual, which is contrary to the rule of section 1325 (Civ. Code) that a will is to be so interpreted as to give some effect to every clause, rather than so as to render any expression inoperative.

The proposition that words expressing desire or wish, when directed to the estate, and not to some devisee with respect to the prop-

erty received by such devisee, are to be deemed as dispositive expressions evincing the will of the testator with respect to the property, is thoroughly well established. In the case of *In re Wood*, 36 Cal. 80, the will began as follows: "I wish five thousand dollars to go to John C. Cole, in the event of my dying intestate." Notwithstanding the use of the word "intestate," the court held that this constituted a will, saying: "It clearly fills the definition of a will given by approved writers on that branch of the law, viz.: 'The declaration of a man's mind as to the manner in which he would have his property or estate disposed of after death.'" To hold otherwise, the court remarked, would be to assert that he went through the solemn form of executing such an instrument for no purpose whatever. The following cases declare that the word "desire," or other similar expression, when used to [168] declare the disposition to be made of property at the death of the testator and not as a request or prayer directed to a devisee or legatee concerning such devise or legacy, is a dispositive command, testamentary in character and not precatory, but a positive direction binding upon the court in the distribution of the estate: *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282; *McMurry v. Stanley*, 69 Tex. 231, 6 S. W. 412; *Stewart v. Stewart*, 61 N. J. Eq. 28, 47 Atl. 633; *Weber v. Bryant*, 161 Mass. 403, 37 N. E. 203; *Philadelphia's Appeal*, 112 Pa. St. 474, 4 Atl. 4; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. S. 58; *Taylor v. Martin* (Pa.) 8 Atl. 922; *Oyster v. Knull*, 137 Pa. St. 448, 21 Am. St. Rep. 890, 20 Atl. 624; *Brasher v. Marsh*, 15 Ohio St. 111; *Wood v. Camden Safe Deposit, etc. Co.* 44 N. J. Eq. 460, 14 Atl. 885; *Phillips v. Phillips*, 112 N. Y. 205, 8 Am. St. Rep. 737, 19 N. E. 411.

In view of these authorities it cannot be said that the words of the second paragraph of the will are not equally clear and distinct as those of the first paragraph. We think no case can be found, in which a will indicating a disposition of property by the word "desire" or "wish" has been held not to be sufficient to constitute a will. The meaning of the word, when used in such connection in a will, is as clear as that of any other word in the language.

The decisions upon the question whether or not words of recommendation, entreaty, or desire directed to a devisee or legatee asking or enjoining a disposition of the thing devised or bequeathed, are precatory words sufficient to establish a trust, or are mere expressions leaving the matter to the discretion of the devisee or legatee, have no bearing upon this case. Such questions arise only when the request is made, or from the context is construed to be made, to the devi-

see or legatee. Where the words are used to describe a disposition of property, that is where they are directed to the executor or to the law and not to a devisee or legatee, the authorities are uniform that the word is sufficient to declare a disposition of the property. The second paragraph of the will is not directed to Logan Mattie Tooley at all, but is a clear statement that, upon her death without husband or children, whatever of her mother's estate then remains is to be divided equally among the sisters and brother of Martha L. Tooley. For these reasons [169] we are of the opinion that the court below erred in making the decree complained of.

The decree of distribution is reversed.

Sloss and Lawlor, JJ., concurred.

Hearing in Bank denied.

ANGELLOTTI, C. J. (*dissenting*).—I dissent from the order denying a rehearing.

To my mind it is correctly stated in the petition for rehearing that the theory of the department opinion apparently is that words which may properly be held sufficient to show a primary or direct devise of property, will necessarily be sufficient to qualify or cut down an absolute estate in the same property given in unequivocal language by a preceding provision of the will. Such a theory, I think, finds no support in the authorities. The question is, not whether such words as are used in the second paragraph of the will here involved would be taken as a positive disposition by the testatrix of the property referred to, if they were the only words in the will relative to such property, but whether, *considered in connection with the words of the first paragraph* referring to the same property and clearly and distinctly devising an absolute estate therein, they show an intent on the part of the testatrix to limit the effect of the disposition made by such paragraph. In the determination of this question, section 1322 of the Civil Code is applicable. I am of the opinion that the judge of the lower court was correct in his conclusion that the words used in the second paragraph with relation to this property are "not equally clear and distinct" as those used in the first paragraph, that, considered in connection with the first paragraph, they fail to show any intention on the part of the testatrix that her daughter should take less than an absolute estate, and that they should be considered as nothing more than the expression of a wish or desire on the part of the testatrix, addressed to her daughter.

NOTE.

The reported case places a construction on the word "desire," as used in the clause of

a will, by the first sentence of which a testatrix gave all her property to her daughter, and in the following sentence provided that if at the death of that daughter she had neither husband nor children the testatrix desired any property that might be left should be divided equally among her sisters and brother. It appeared that the daughter survived the testatrix and died without husband or children. The court, saying that the question whether a trust was created under the clause did not enter into the case since that could arise only where the desire was addressed to a devisee or legatee, holds that the word "desire" was a dispositive term passing to the testatrix's sisters and brother title to the remaining property.

For a general discussion of the meaning of the word "desire" as used in a will, see the note to *Mastellar v. Atkinson*, reported ante, this volume, at page 502.

JUDD AND DETWEILER, INCORPORATED.

v.

GITTINGS ET AL.

District of Columbia Court of Appeals—
March 1, 1915.

48 App. Cas. (D. C.) 304.

Attorneys — Personal Liability for Incidental Expenses — Printing Briefs.

An attorney at law is personally liable for the cost of printing briefs where it appears that in previous similar dealings with the same printers he has habitually paid for the printing on bills rendered to him personally.

[See note at end of this case.]

Appeal from Supreme Court of District of Columbia.

Action by Judd and Detweiler Incorporated, plaintiff, against Gittings et al., defendants. Judgment for defendants. Plaintiff appeals. REVERSED.

[305] Appellant, Judd & Detweiler, a corporation engaged in the printing business in the city of Washington, brought suit in the supreme court of the District of Columbia against appellees Gittings & Chamberlin, a law firm in this city, for the recovery of a bill for printing briefs in two cases in which defendants were counsel.

The case was submitted to the court below upon an agreed statement of facts, in which it appeared that about the 8th day of No-

ember, 1911, defendants ordered from plaintiff fifty briefs for use in a case then pending in the Supreme Court of the United States; that on or about the 27th day of January, 1911, they ordered the same number of briefs printed for use in a case then pending in the supreme court of the state of South Carolina, and that the briefs so ordered were printed and delivered to defendants, with an accompanying bill. The material part of the agreed statement of facts is as follows: "Plaintiffs had done similar printing for defendants for a number of years, and bills were delivered with above mentioned work, made out in the name of Gittings & Chamberlin, as had been the custom. Bills for previous work of a similar nature had always been paid to plaintiff by defendants, plaintiff having no knowledge whether or not there had been previous payments to defendants by any or all of their clients; on the other hand, defendants never paid any of said bills without first receiving payment from the client, of which prior payment by defendants' clients plaintiff had no knowledge. On receipt of manuscript, plaintiff knew that defendants were attorneys for their respective clients, and that the work was ordered by them in no wise different from the manner in which other orders had been given by them to plaintiff, to wit, a telephone order by defendants to call for copy for their brief, and when the brief was printed, delivery of the same to defendants by plaintiff with a bill made out in defendants' name. The account was kept in the name of defendants on plaintiff's books, of which fact the defendants, however, had no knowledge. Defendants [306] did not dispute the bills or liability therefor until suit brought, namely, on the 24th day of June, 1912." On submission of the case to the court below, judgment was entered for defendants, from which this appeal was taken.

John B. Daish and J. Raymond Hoover for appellant.

John C. Gittings and J. Morrill Chamberlin for appellees.

[309] VAN ORSDDEL, J. (after stating the facts).—The court below in its opinion attached no importance to the fact that these parties for a long period of time had been conducting transactions similar to the one sued upon, and that it had in all instances been the custom for plaintiff to send its bill to defendants, made out in their name, and for which in each instance it received in payment thereof defendants' check. We think the question of defendants' liability turns largely upon this conceded fact. One set of the briefs was for use in the supreme

court of South Carolina. It is inconceivable that plaintiff would have printed and delivered the briefs, if dependent upon the client for payment, without either the money in advance or an assurance that the attorneys would pay the bill. While it is stipulated that no such guaranty was expressly given by defendants, we think there was an implied assurance to that effect arising out of the custom which had been established between the parties in past transactions. In *Wires v. Briggs*, 5 Vt. 101, 28 Am. Dec. 284, a case in which it was held that an attorney was not liable for the costs of the service of a writ, the rule of implied liability was stated as follows: "It is true that in some cases the law may imply a promise on the part of a lawyer to pay fees for the services of client's writs; as where the officer had been in the constant practice of charging his fees for such services to the lawyer, who from time to time had settled such charges without questioning their legality; from such practice the law may imply a promise to pay for subsequent services."

Unquestionably, it is a settled rule of the common law that [310] where one contracts with the agent of another, and the contracting party is apprised of the agency, the principal, and not the agent, is responsible. In other words, an agent is not generally liable when transacting business for a disclosed principal. It must be conceded in this case that plaintiff had notice on the face of the briefs printed of defendants' agency and the names of their principals. While it is true that an attorney is the agent of his client, the relation between them, we think, is such that it calls for some modification of the general rule which the law recognizes as existing between principal and agent. In ordinary transactions, the agent is subordinate to the principal, the principal standing out as the real actor, and the agent merely as a subordinate representative. But the relation between attorney and client is different. The attorney has complete charge of the litigation, is so recognized by the court, and, as such, dominates in all matters pertaining to the conduct of the litigation. "While in one sense the client is the principal and the attorney the agent, and while the attorney is professionally and constantly acting for clients, whose names from the records of the courts and other means of publicity are almost always known or may be so, yet there are peculiarities in his case which make it necessary to apply to it with some qualification the general principles of agency. In most cases of agency the principal is what the name imports,—the leading person in the transaction. The agent is, as the term implies, a mere subordinate, important only as the representative of the

principal; often representing only one principal. An attorney at law, on the other hand, occupies a position of recognized importance in itself, not infrequently of great prominence before the public, in which he often has a large number of clients, his relations to whom are full of detail, and who are little noticed by the public." *Heath v. Bates*, 49 Conn. 342, 44 Am. Rep. 234. The attorney usually determines what steps are to be taken in his client's interest, and the acts of the attorney in the conduct of litigation are binding upon the client. We therefore deem the just and equitable rule of law thus established to be that, in the absence [311] of express notice to the contrary, court officials and persons connected, either directly or indirectly, with the progress of the litigation, may safely regard themselves as dealing with the attorney, instead of with the client. This applies not only to obligations incurred by the attorney for actual costs attending the litigation, but to the necessary expenses of attorneys, including the printing of briefs, which are not chargeable as costs in the case.

The court below attached great importance to the rules of court as imparting legal notice to plaintiff as to the filing and distribution of briefs in pending cases. Rules of court have the force of statutes to the extent of their operation. They are for the control of officers of the court, including attorneys and litigants, "and are binding upon the court, and upon the suitors and those who represent suitors." *District of Columbia v. Roth*, 18 App. Cas. (D. C.) 547. It would be extreme, indeed, to hold the rules of the supreme court of South Carolina legal notice to plaintiff of the disposition to be made of the briefs it was printing for the use of defendants. Besides the rules of the court in South Carolina, as in every other jurisdiction, impose the duties relative to the disposition of briefs equally upon the attorney and the litigant. The rules of court, therefore, have little, if any, bearing upon this case.

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

NOTE.

Personal Liability of Attorney for Incidental Expenses of Action.

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II. Liability on Express Contract, 520.

III. Liability on Implied Contract:

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2. Sheriff's, Constable's, Bailiff's, Marshal's or Clerk's Fees:
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I. Introductory.

In the note to *Simmons v. Liberal Opinion Limited*, 21 Ann. Cas. 876, the personal liability of an attorney for costs is discussed. The present note discusses the personal liability of an attorney for the incidental expenses of an action, not by virtue of such expenses being taxed or being taxable costs, but on the ground that the attorney has rendered himself personally liable by a contract express or implied, in procuring the performance of the services on behalf of his client.

II. Liability on Express Contract.

An attorney in a cause is the agent of his client and like any other agent he may undertake to be liable personally on contracts which he enters into in the furtherance of his client's business. Hence, there is no doubt that an attorney is personally liable for the incidental expenses of an action where he has expressly contracted that he will be personally liable. *Evans v. Phillpotts*, 9 C. & P. 270, 38 E. C. L. 115; *Maddox v. Cranch*, 4 Har. & McH. (Md.) 343; *Cameron Sun v. McAnaw*, 72 Mo. App. 196; *Dinkel v. Wehle*, 63 How. Pr. (N. Y.) 298; *Crosby v. Kropf*, 33 App. Div. 446, 54 N. Y. S. 76; *Daniels v. Hand*, 161 N. Y. S. 213; *Pessano v. Eyre*, 13 Pa. Super. Ct. 157. The foregoing rule has been applied to contracts for the printing of briefs, *Cameron Sun v. McAnaw*, 72 Mo. App. 196; stenographer's charges, *Daniels v. Hand*, 161 N. Y. S. 213; the fees of an ordinary witness, *Evans v. Phillpotts*, 9 C. & P. 270, 38 E. C. L. 115; the fees of an expert witness, *Pessano v. Eyre*, 13 Pa. Super. Ct. 157; the fees of a sheriff, *Maddon v. Cranch*, 4 Har. & McH. (Md.) 343; and the

fees of a referee in a cause, *Dinkle v. Wehle*, 63 How. Pr. (N. Y.) 298.

The fact that an attorney has rendered services gratuitously for a charitable institution does not affect his personal liability to those whom he has personally promised to compensate for assisting him. *Crosby v. Kropf*, 33 App. Div. 446, 54 N. Y. S. 76.

III. Liability on Implied Contract.

1. IN GENERAL.

In the reported case it is said obiter: "In the absence of express notice to the contrary, court officials and persons connected, either directly or indirectly, with the progress of the litigation, may safely regard themselves as dealing with the attorney, instead of with the client. This applies not only to obligations incurred by the attorney for actual costs attending the litigation, but to the necessary expenses of attorneys, including the printing of briefs." An examination of the specific illustrations enumerated, *infra*, will show that, in so far as the fees of public officers are concerned, there is a conflict of authority as to the personal liability of an attorney on implied contract. However, with regard to persons other than public officers, it would seem that the weight of authority is opposed to the dictum in the reported case, and sustains the rule that an attorney is not personally liable on an implied contract for their fees and charges, where the attorney has disclosed his client, has acted within the scope of his authority, express or implied, and is not a party in interest.

2. SHERIFF'S, CONSTABLE'S, BAILIFF'S, MARSHAL'S OR CLERK'S FEES.

a. View that Attorney Is Personally Liable.

It has been held that, in the absence of special circumstances indicating a contrary intention, there is an implied contract that an attorney will be personally responsible for the fees of a sheriff, constable, bailiff, marshal or clerk, on a writ delivered to such an officer, for execution or entry.

United States.—Anonymous, 2 Gall. 101, 1 Fed. Cas. No. 445.

Connecticut.—*Heath v. Bates*, 49 Conn. 342, 44 Am. Rep. 234.

Maine.—*Tilton v. Wright*, 74 Me. 214, 43 Am. Rep. 578.

Massachusetts.—*Tarbell v. Dickinson*, 3 Cush. 345.

New York.—*Reilly v. Tullis*, 10 Daly 283; *Birkbeck v. Stafford*, 23 How. Pr. 236, 14 Abb. Pr. 285; *Adams v. Hopkins*, 5 Johns. 252; *Campbell v. Cothran*, 1 Thomp. & C. 70; *Campbell v. Cothran*, 56 N. Y. 279 (*affirm-*

ing 65 Barb. 534, 1 Thomp. & C. 70); *Gadski-Tauscher v. Graff*, 44 Misc. 418, 89 N. Y. S. 1019; 34 Civ. Pro. 25. See also *Bowe v. Campbell*, 63 How. Pr. 167, 2 Civ. Pro. 232; *Ousterhout v. Day*, 9 Johns. 114; *Jackson v. Anderson*, 4 Wend. 474; *Judson v. Gray*, 11 N. Y. 408.

Canada.—*Jarvis v. Washburn, Draper* (U. C.) 163; *Boston v. Taylor*, 1 L. C. Jur. 60; *Devlin v. Bibeau*, 30 L. C. Jur. 101; *Kavanagh v. Phelon*, 3 N. Bruns. 472; *Palmer v. Harding*, 19 N. Bruns. 281; *Panneton v. Guillet*, 7 Quebec 250. See also *Theroux v. Pecand*, 6 Quebec 14. Compare *Caldwell v. Badger*, 7 N. Bruns. 516; *Corbet v. McKenzie*, 6 U. C. Q. B. 605.

The reason for the foregoing rule was stated in *Tilton v. Wright*, 74 Me. 214, as follows: "Writs are usually handed to the sheriff for service and to the clerk of courts for entry, by the attorney by whom they were made. The attorney has a lien on the judgment recovered, for his fees and disbursements included in the taxable bill of costs, which embraces both the service of the writ and the entry of the action. The attorney having such lien hands the writ for service to the sheriff or to the clerk for entry. Neither the one nor the other is obliged to perform the services required, without a prepayment of their respective fees. The sheriff serving, and the clerk entering the action without prepayment, a promise on the part of the attorney to pay each their respective dues, may be reasonably inferred, unless notice to the contrary be seasonably given. Accordingly, it has been repeatedly held that the attorney is responsible to the sheriff and the clerk for the fees of writs handed by him to the one for service, and to the other for entry."

In *Tarbell v. Dickinson*, 3 Cush. (Mass.) 345, it was held that while an attorney is personally liable for the fees of a sheriff, his liability is similar to that of a guarantor, and as such he should be informed as to the extent of his liability. The court said: "Though the attorney makes himself originally liable for expenses, yet his liability is not on his own account, or for his own benefit, but in behalf and on account of his client. He stands somewhat in the situation of a guarantor, and should know the extent of his liability, in order that he may look to his principal for indemnity. The officer being requested to make return of his doings, the attorney may reasonably expect to be informed of what the officer has done, and for which he has claims, without going to him personally and particularly to inquire. Where there are constantly increasing expenses, it is most reasonable and important, that the attorney should have notice of them, in order that he may determine whether or

not he will continue to be liable; and that he may have opportunity to obtain indemnity from his client."

In *New York* the leading case of *Adams v. Hopkins*, 5 Johns. 252 (decided in 1810) held that an attorney was by implied contract personally liable to a sheriff for his fees. However, the doctrine of *Adams v. Hopkins*, has been limited strictly to the fees of public officers. *Tyrrel v. Hammerstein*, 33 Misc. 505, 67 N. Y. S. 717. And the courts have refused to extend it to analogous cases. *Judson v. Gray*, 11 N. Y. 412. In that case, the court said: "It is clear, therefore, that the decisions in this state, in which attorneys and solicitors have been held liable for the fees of the officers of the court, upon a promise implied from their acts done as attorneys merely, are in conflict with principle, and with the whole current of authorities elsewhere on the subject. In all such cases, it is a sound and salutary rule, that while the court, for the mere sake of restoring the harmony and symmetry of the law, will not interfere to overthrow a doctrine which has, through a series of decisions, come to be universally regarded as fixed and settled, they will, nevertheless, circumscribe the anomaly within as narrow limits as possible. It is never admissible to extend such a rule, by a resort to analogy; for the obvious reason, that every new case, to which the erroneous rule is applied, affords the basis of a still wider departure from principle."

b. View that Attorney Is Not Personally Liable.

In some jurisdictions it has been held that, in the absence of special circumstances indicating a contrary intention, there is no implied contract that an attorney will be personally responsible for the fees of a sheriff, constable, bailiff, marshal, or clerk on a writ delivered to such an officer of execution or entry. *Royle v. Busby*, 6 Q. B. D. (Eng.) 171, 50 L. J. Q. B. 196, 43 L. T. N. S. 717, 29 W. R. 315; *Mayberry v. Mansfield*, 9 Q. B. 754, 58 E. C. L. 754; *Preston v. Preston*, 1 Doug. (Mich.) 292; *Moore v. Porter*, 13 Serg. & R. (Pa.) 100. Compare *Foster v. Blakelock*, 5 B. & C. 328, 11 E. C. L. 246, 108 Eng. Rep. (Reprint) 122; *Walbank v. Quarterman*, 3 C. B. 94, 54 E. C. L. 94, 136 Eng. Rep. (Reprint) 38; *Brever v. Jones*, 10 Exch. (Eng.) 655, 1 Jur. N. S. 240.

In *Preston v. Preston*, *supra*, the court said: "In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. The rule of law is well settled that an agent does not become personally liable, unless his principal is unknown, or there is no responsible principal, or the agent exceeds his powers, or becomes

liable by an undertaking in his own name. From the very nature of the business done by the clerk of the court in the progress of a suit, he has before him a knowledge of the principal for whom the attorney acts, and that the latter acts only in his capacity of attorney. The statute fixes the amount to be paid to the clerk for the services required of him. He may refuse to perform any of those services until he receives his pay, or a personal promise by the attorney to pay him. If, however, the clerk performs the services without requiring immediate payment, or a personal undertaking by the attorney to pay him, the credit must be understood to be given to the client, and not to the attorney." See also *Royle v. Busby*, 6 Q. B. D. (Eng.) 171, 50 L. J. Q. B. 196, 43 L. T. N. S. 717, 29 W. R. 315, wherein the court said: "This appeal raises the question whether a sheriff's officer can maintain an action for his fees and possession money against the solicitor of an execution creditor, where the solicitor has done nothing more than deliver a writ of fieri facias to the sheriff for execution? It is not contended that the law, apart from contract (express or implied), casts any such liability upon the solicitor. The sheriff is an officer of the law, with subordinate officers of his own appointment, for whose acts and defaults he is responsible. He and his officers are, by statute, entitled to certain fees, but the statute does not say that the solicitor of the execution creditor is to pay them: and, whatever the remedy for them may be, when the proceeds of an execution are insufficient, there is no reasonable ground on which it can be implied that the solicitor, who, in the proper and ordinary course of his duty to his client, simply delivers a writ to the sheriff for execution, thereby enters into a personal contract to pay such fees. It was held, in several cases which preceded *Brewer v. Jones*, 10 Exch. 655, that a request by the solicitor that a particular bailiff might be employed to execute the writ was evidence of a contract by him to pay that bailiff's fees and possession money; and in one of those cases, *Foster v. Blakelock*, 5 B. & C. 328 [11 E. C. L. 246], the distinction was expressly pointed out by Mr. Justice Bayley between such a state of circumstances and that which exists where the solicitor merely delivers the writ for execution to the sheriff. *Mayberry v. Mansfield*, 9 Q. B. 754 [58 E. C. L. 754] and *Seal v. Hudson*, 4 D. & L. 760 (Eng.), were cases in which there was in fact nothing more than the delivery of the writ to the sheriff, and in both those cases it was held that there was no evidence of any contract, and that the solicitor was not liable. In *Brewer v. Jones*, 10 Exch. 655, the Court of Exchequer arrived

at an opposite conclusion, upon the authority (as it considered) of *Walbank v. Quarterman*, 3 C. B. 94 [54 E. C. L. 94], and it is remarkable that the judges who pronounced that decision themselves regarded it as at variance with sound principle, and only justified it by that (supposed) precedent. *Walbank v. Quarterman*, 3 C. B. 94 [54 E. C. L. 94], however, was decided upon the authority of *Foster v. Blakelock*, 5 B. & C. 328 [11 E. C. L. 246], in which the distinction already noticed was pointed out, and it was determined upon a state of facts similar to that which existed in *Foster v. Blakelock*, 5 B. & C. 328 [11 E. C. L. 246]. It is therefore no precedent at all for *Brewer v. Jones*, 10 Exch. 655, which thus stands self-condemned as against sound principle, and is opposed to the judgment of a court of co-ordinate jurisdiction, and of equal authority, in *Maybery v. Mansfield*, 9 Q. B. 754 [58 E. C. L. 754]. We have no hesitation in following *Maybery v. Mansfield*, 9 Q. B. 754 [58 E. C. L. 754], in preference to *Brewer v. Jones*, 10 Exch. 655."

A statute of *New Hampshire* (Laws 1899, ch. 20, § 1; Pub. Stat. 1901, p. 686) expressly provides that "no attorney shall hereafter be personally liable to any sheriff or other officer authorized to serve process for his fees or expenses incurred in the service of any writ or other process placed in his hands for service, except upon an express contract to pay the fees and expenses thereon." Prior to the enactment of that statute, the rule in *New Hampshire* was that an attorney was personally liable to a sheriff to whom he delivered a writ for service. *Eastman v. Coos Bank*, 1 N. H. 23; *Towle v. Hatch*, 43 N. H. 270; *Joyce v. Morgan*, 66 N. H. 487, 23 Atl. 78.

a. Where Attorney Has Collected Fees.

It has been held that an attorney is personally liable to a sheriff for his fee where he has collected the sheriff's fee after it has been taxed in favor of the attorney's client. *Knott v. Kirby*, 10 S. D. 30, 71 N. W. 138.

d. Effect of Custom.

In *Iowa* and *Vermont*, while it is said that no liability on the part of an attorney for the fees of court officers arises from the relation itself, it has been held that the personal liability of an attorney for the incidental expenses of an action may be fixed by custom. *Doughty v. Paige*, 48 Ia. 483. See also *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284; *Russell v. Ferguson*, 77 Vt. 433, 60 Atl. 802. Thus in the case last cited, the court said: "Whatever the rule may be in other jurisdictions, it has long been the settled law of this state that an attorney

is not, by virtue of that relation alone, liable for fees accruing in suits brought by him.

. . . But attorneys may by custom become responsible for fees of this kind, if the custom is of the requisite character, for it is simply the case of an agent becoming personally liable on contracts made for his principal." The foregoing rule has been held to be applicable to court fees, *Russell v. Ferguson*, supra; and sheriffs' fees, *Doughty v. Paige*, supra. In passing on the requisites necessary, in order that a custom may fix a personal liability on attorneys for sheriffs' fees, the court in *Doughty v. Paige*, supra, said: "Plaintiff claims that, aside from the custom on the part of the Pottawattamie county attorneys to agree to become responsible for sheriffs' fees, there was a custom of paying sheriffs independent of an express agreement, and that the evidence so shows. It is urged, therefore, that the defendant's acts in employing him, interpreted in the light of such custom, raised an implied contract to pay him. Before we could hold that the defendant's acts had that effect, it should be made to appear to us, at least, that the attorneys were accustomed to pay, not only in the absence of an express agreement, but regardless of the responsibility of their clients, and whether they had money in their hands or not, belonging to their clients, and that such practice was uniform and of long standing."

In the reported case a personal liability on the part of an attorney for the cost of printing briefs is held to arise by virtue of a custom, it being, however, intimated in that case that irrespective of custom such a liability exists.

3. WITNESSES' FEES AND EXPENSES.

An attorney is not personally liable for the fees and expenses of witnesses summoned in behalf of his client, in the absence of facts showing an express undertaking to be so bound. *Robins v. Bridge*, 3 M. & W. (Eng.) 114, 6 Dowl. 140, M. & H. 357; *Sargeant v. Pettibone*, 1 Aikens (Vt.) 355. Thus in the case last cited, the court said: "An attorney is not, of course, liable to pay witnesses in his client's suits. They may refuse to attend till their fees are paid, or some person whom they will trust becomes personally holden. And, if the attorney thus undertakes, he will be holden." And see *Robins v. Bridge*, supra, wherein the court said: "The question in this case is, whether an attorney, who has caused a witness to be subpoenaed, without any express contract, and without any circumstances from which a special contract can be inferred, is liable to be sued by the witness for his expenses at the trial. The importance of the question

induced the court to take some time for consideration, as no instance has yet occurred of any decision in banc, as far as we are informed, though there was a case of a somewhat similar complexion to this tried before my Brother Parke, who nonsuited the plaintiff, at Guildhall, but it was never brought before the court. . . . This is the first case in which the question has arisen, whether there is an implied contract to pay the expenses of a witness, by the attorney or agent by whom he has been subpoenaed. It is sufficient for the decision in this case to say that there is no implied contract by the attorney to pay the witness. The attorney is known merely as the agent—the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words."

As in the case of ordinary witnesses, an attorney is not personally liable for the fees of expert witnesses summoned on behalf of his client unless the attorney expressly assumes personal liability. *Lee v. Everest*, 2 H. & N. (Eng.) 285. See also *Pessano v. Eyre*, 13 Pa. Super. Ct. 157. In *Ross v. Niles*, 84 N. Y. S. 142, an attorney was held personally liable for the fees of an expert witness on the ground that the attorney had not disclosed his client and, in addition, the facts indicated that the attorney was a party in interest. And see *Pessano v. Eyre*, supra.

It has been held that an attorney in a cause, who attends at a coffee house with witnesses summoned on behalf of his client, is personally liable for refreshments furnished them. *Fendall v. Noakes*, 3 Jur. (Eng.) 726, 7 Scott 647.

4. REFEREE'S FEES.

It has been held that, in the absence of an express contract, an attorney is not personally liable for the fees of a referee appointed by the court. *Howell v. Kinney*, 1 How. Pr. (N. Y.) 105; *Judson v. Gray*, 11 N. Y. 408.

5. COMMISSIONER'S FEES.

It would seem that a solicitor is not personally liable for commissioner's fees. *Lamoreux v. Morris*, 4 How. Pr. (N. Y.) 244, wherein the court said: "This court has held that the attorney is liable for sheriff's fees, upon the ground that the sheriff is obliged to serve process. (1 Caines 192; 5 Johns. 255, 368; 4 Wend. 474.) A different rule prevails in Vermont (1 Vt. 101), but I believe in this state it has never been decided that the attorney was liable for witnesses', referee's or commissioner's fees. In

Howell v. Kinney, 1 How. Pr. 105, it was decided that the attorney was not liable for referee's fees. I think the petitioner could not have recovered if he had brought an action against the solicitor."

6. EXAMINER'S FEES.

In *Watertown v. Cowen*, 5 Paige (N. Y.) 510, it was held that a solicitor was personally liable for the fees of an examiner for taking the testimony of witnesses on behalf of the solicitor's client. The court said: "It appears to have been the uniform practice in this state for the sheriffs, clerks, masters, registers and other officers of the several courts of record, to charge their fees to the attorney or solicitor of the party for whose benefit the services are performed; and there are no good reasons for distinguishing the case of an examiner from that of any other officer of the court, in this respect. From the uniform practice on this subject, there is an implied assumpsit by the attorney or solicitor, to pay for the services done for his client in the cause, by his express or implied request. And where the solicitor for a party notices the taking of the testimony of witnesses before an examiner, or attends or procures the cross-examination of the witnesses of the adverse party, there is an implied assumpsit on the part of the solicitor to pay the fees of the examiner for taking such testimony on behalf of the client."

7. ASSOCIATE COUNSEL'S FEE.

It has been held that an attorney could not recover from his client the fee of an associate counsel whom the attorney employed without authority from his client. *Meany v. Rosenberg*, 32 Misc. 96, 65 N. Y. S. 497, wherein the court said: "An attorney's employment is undoubtedly one of personal trust and confidence requiring his personal services, and he has no implied authority to retain associate counsel or to employ a substitute to act in his place, unless such conduct has been assented to by his client, with full knowledge of the facts. . . . Under the record before us, plaintiff was, therefore, not entitled to recover for the services performed by the witness Brown."

8. NOTARIAL FEES.

Where an attorney employed another to prepare a notarial certificate, without disclosing that the work was being done for a client, it was held that the attorney was personally liable on the contract. *Dulon v. Camp*, 28 Misc. 548, 59 N. Y. S. 508.

9. STENOGRAPHER'S FEES.

It has been held that an attorney is not personally liable for the services of a court stenographer in the absence of facts showing a special agreement. *Bonynge v. Waterbury*, 12 Hun (N. Y.) 534; *Sheridan v. Genet*, 12 Hun (N. Y.) 660; *Bonynge v. Field*, 81 N. Y. 159. Thus in *Sheridan v. Genet*, supra, the court said: "The defendant was sued to recover compensation for a copy of the testimony given in the case of *Hazewell v. Cousin*, on the trial of which the defendant acted as the counsel of *Hazewell*. The stenographer knew that he so acted, having been present at the trial. The defendant, however, ordered the copy to be made and it was done at his request. The stenographer then knew that the defendant was the counsel for *Hazewell*. He had been advised of that on the trial. It was not to be supposed that he had any personal interest in the copy in the absence of proof to the contrary. What was said, therefore, in the case of *Bonynge v. Waterbury*, 12 Hun (N. Y.) 534, recently decided by this court, is applicable, namely: 'The defendant was an agent for a known principal, and ordinarily would not incur a personal liability, simply by requesting a performance of such a service for his client. Of course he could bind himself personally, and that would be the result when it followed from the nature of the agreement made, and the intention of the parties. But without something more than the mere performance of his duties as counsel for his client, such a liability would not be created unless it might be for the fees of clerk, sheriff and other similar officers,' and the same rule should be applied in this case which was declared in that case, namely, that the counsel ordering such services will not be responsible, unless he intended to become personally bound to pay, a fact to be determined by the jury upon the trial."

However, in *Bloomfield v. Nevett*, 24 Colo. App. 91, 131 Pac. 801, it was held that an attorney was personally liable to a court stenographer where the stenographer had been employed by the attorney without authority from his client.

10. EXPERT ACCOUNTANT'S FEES.

It has been held that attorneys are not personally liable for the services of an experienced bookkeeper whom they employ to examine books of a partnership, where the bookkeeper knows he is being employed for the attorneys' client. *Covell v. Hart*, 14 Hun (N. Y.) 252. On the other hand, an attorney has been held to be personally liable to an expert accountant whom he employed without disclosing his client. *Good v. Rumsey*, 50 App. Div. 280, 63 N. Y. S. 981

11. EXPENSE OF ADVERTISING.

In *Gray v. Journal of Finance Pub. Co.* 2 Misc. 260, 21 N. Y. S. 967, wherein it appeared that an attorney personally entered into a contract for the publication of a legal citation in connection with the probate of a will, paid the cost of publication and took a receipt in his own name, and the publishers knew no one in the transaction except the attorney, it was held that the attorney was acting as a principal or at least the agent of an undisclosed principal and hence might sue in his own name for breach of the contract.

12. EXPENSE OF PRINTING BRIEFS, ARGUMENT, ETC.

In the reported case it is held that the attorneys in a cause are personally liable for the cost of printing briefs ordered by them, when it has been the custom of the attorneys for a long time personally to pay the printer for similar services. And in *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291, it was held that attorneys are personally liable for the cost of printing briefs unless they expressly contract to the contrary. In that case the court said: "It may be remarked, in the beginning, that the action involves the liability of an attorney, who procures a printer to print briefs and arguments in causes of his respective clients, to answer himself for the debt thereby contracted. In other words, does the printer, in such a case, look for payment to the attorney or to the attorney's clients, for whom the printing is done? All this, it seems to us, must depend upon the contract. If Thomson, as an attorney at law, contracted with Trimmier to print his clients' briefs and arguments, unless in such contract he stipulated that he was having such work done as the agent of his clients as his principals, he will be liable to pay for such work. It is true, an attorney at law is the agent of his client, but only in the sphere of his agency in the transaction of his clients' law business. Such an attorney has no power, as such attorney, to bind his principal except within the sphere of his special agency. If he acts beyond such sphere, he must have special authority, and to make his acts, as such special agent, binding on third parties, they must have notice of such special power. When Mr. Thomson, as an attorney, contracted with Mr. Trimmier for this printing he was bound in law, either to have contracted for himself or for another. The legal result is, that such a contract is his, until he makes the contrary appear. To hold otherwise would require that courts should hold clients responsible for any contracts made by their attorneys, whether such clients authorized

such contracts, or not. These wholesome truths had better be observed in the conduct of lawyers with their clients, and by third parties as well."

However, there is authority to the effect that it is within the scope of the implied authority of an attorney to have abstracts and briefs printed at the cost of his client. *George Hornstein Co. v. Crandall*, 156 Ill. App. 520; *Sanders v. Riddick*, 127 Tenn. 701, 156 S. W. 464. And it has also been held that the fact that the printing is charged to the attorney is by no means conclusive on the question whether the credit is given to the attorney or to his client. *George Hornstein Co. v. Crandall*, *supra*. The manuscript has been held to be sufficient notice that the attorney is acting as agent for his client. *Livingston Middleditch Co. v. New York College of Dentistry*, 31 Misc. 259, 64 N. Y. S. 140; *Argus Co. v. Hotchkiss*, 121 App. Div. 378, 107 N. Y. S. 138. And in New York and Tennessee, it has been directly held that in the absence of circumstances showing a contrary intention, an attorney is not personally liable for the cost of printing briefs, arguments, etc. *Livingston Middleditch Co. v. New York College of Dentistry*, 31 Misc. 259, 64 N. Y. S. 140; *Tyrnel v. Hammerstein*, 33 Misc. 505, 67 N. Y. S. 717, 8 N. Y. Ann. Cas. 432; *Sanders v. Riddick*, 27 Tenn. 701, 156 S. W. 464. Thus in the case last cited, the court said: "The next ground of complaint by Sanders is that the expense of printing the briefs of his attorneys should have been borne by them, and not by himself. We concur with the chancellor in his view that the expenses of a lawsuit are the expenses of the client, and that, where the service of a third person is needed to the better conduct of the cause, such as a stenographer or a printer, that service, when called into requisition, is *prima facie* at the expense of the client. Referring to such services, it was said in *Bonyng v. Field*, 81 N. Y. 159, that 'attorneys cannot be held personally responsible for services of this kind rendered in a suit, unless there is a special obligation to that effect.' No such special undertaking is claimed to have existed in the case under review. Attorneys have implied power to cause briefs to be printed at the cost of their client." And in *Argus Co. v. Hotchkiss*, 121 App. Div. 378, 107 N. Y. S. 138, it was said: "It was recognized upon the trial of the action and it is undoubted law that an attorney's negotiation for work to be done in a law suit is the act of an agent for a known principal and for the expense of that service the agent does not become personally responsible. . . . Whether or not at the time of the making of the contract for the printing of the case defendant Hotchkiss revealed to Mr.

Speer the nature of the case and the nature of his interest therein, when the case was sent to the printer it was a fair notice that the action was one for divorce, a purely personal action in which the defendants could only be interested as attorneys or counsel. It was not a case involving property rights in which the defendants might have a property interest which would make probable their entering into a personal obligation for the payment of these fees. Mr. Speer must have known as all lawyers know that in this class of cases usually the husband provides for the expenses of the litigation on behalf of the wife. In case of failure by the husband to pay the same neither the attorney nor the counsel of the wife incurs any personal liability for the expenses of a law suit unless by special contract. The question is not only what in fact Mr. Speer understood from the conversation with Mr. Hotchkiss, but what inferences he had the natural right to draw therefrom, considering the fact as it appeared to him when the copy was furnished him that the action in which the papers were to be printed was purely a personal action between third parties for divorce. The mere procurement of the printing of a case by counsel certainly does not create personal liability. Nor can the statement by Hotchkiss of a personal interest that the work be done cheaply be construed to be a special promise to pay a debt for which he would not otherwise be liable."

13. EXPENSE OF TAKING PHOTOGRAPHS.

It has been held that *prima facie* the client and not the solicitor is liable for the price of photographs taken at the direction of the solicitor for use in the trial of his client for manslaughter. *Wakefield v. Duckworth* [1915] 1 K. B. (Eng.) 218, 84 L. J. K. B. 335, 112 L. T. N. S. 130, 59 S. J. 91, 31 Times L. Rep. 40, wherein the court said: "I am of opinion that the decision of the county court judge was right. The plaintiff is a photographer, and a member of the defendants' firm went to him and asked him to supply some photographs for the purposes of a trial in which the defendants were acting on behalf of a client. There is no question that the plaintiff knew that the defendants were solicitors acting on behalf of a client, and that being so, apart from any other considerations, they were agents acting on behalf of a principal. *Prima facie* in such a contract the plaintiff would have to have recourse to the principal and not the agent."

In the foregoing case it was, however, intimated that had the solicitor acted without authority he would have been liable personally.

WHITE ET AL.

v.

STATE EX REL. HUFF ET AL.

Indiana Supreme Court—October 29, 1915.

183 Ind. 649; 109 N. E. 905.

Intoxicating Liquors — Liquor Dealer's Bond — Transfer of License — Liability of Surety on Transferor's Bond.

Under Burns' Ann. St. 1914, § 83230 (Laws 1911, c. 119, § 12), providing that if, upon hearing of a petition for transfer of a liquor license, the commissioners approve the application for a license, it shall grant the holder permission to sell and the applicant permission to purchase, and upon filing of a bond by such purchaser, with the approval of the county auditor, the board shall issue to the purchaser of the license a certified copy of the order of transfer, where, on transfer of a license, the transferee files no bond, but, the surety on his transferor's bond having assented to the substitution, such surety's assent to the change is filed with the approval of the commissioners, the old bond meets the requirements of the statute and binds the surety.

Same.

In such case both transferee and surety are bound to discharge the statutory conditions of the bond, under Burns' Ann. St. 1914, § 1278, providing that no bond shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged, but shall be bound to the full extent contemplated by the law requiring the same.

Civil Damage Act — Complaint Sufficient.

Where, in an action against a liquor dealer for a death caused by intoxication, the complaint alleged that the intoxication incapacitated the decedent to manage his horses properly, that because of such incapacity they became unmanageable, and that, while decedent was intoxicated and the team in such state, he leaned out over the dashboard, and one of the horses, irritated by his acts, kicked him on the head and face, inflicting injuries from which he died, such complaint sufficiently avers connection between decedent's intoxication and his injury.

Appeal and Error — Questions Reviewed — Refusal to Direct Verdict — Necessity of Motion for New Trial.

The refusal of the trial court to direct verdict by peremptory instruction cannot be made the basis for an independent assignment of error on appeal; such action must be presented to the trial court as cause for new trial, and the court's refusal to grant it assigned as error.

Briefs — Failure to Argue Question as Waiver.

Where the part of appellant's brief devoted to propositions and authorities made

no specific reference to any instruction given or refused or to any testimony admitted, such causes for new trial are waived under Rule 22, cl. 5 (55 N. E. vi), providing that the brief of appellant shall fully present every error and exception relied on.

Civil Damage Act — Liability for Death from Intoxication.

In an action against a liquor dealer for a death caused by intoxication, evidence considered and held to warrant finding that defendant sold liquors to decedent while the latter was intoxicated.

[See note at end of this case.]

Same.

In an action against a liquor dealer for a death caused by intoxication, evidence considered and held to justify finding that decedent's intoxication was the cause of his physical disability and death.

[See note at end of this case.]

Appeal from Circuit Court, Posey county: CLEMENTS, Judge.

Action by State, on the relation of Ida Huff et al., plaintiffs, against James White et al., defendants. Judgment for plaintiffs. Defendants appeal. Transferred from Appellate Court. The facts are stated in the opinion. **AFFIRMED.**

William Espenschied, George Wm. Curtis and George C. Taylor for appellants.

G. V. Menzies for appellees.

[651] Cox, J.—This appeal is from a judgment recovered by appellees, the widow and children of Lewis E. Huff, deceased, in an action on a retail liquor dealer's bond to recover statutory damages for loss of support through his death. § 8355 Burns 1908, § 5323 R. S. 1881; § 8323 Burns 1914, Acts 1911, p. 363, § 8. The first error assigned by appellants is that the trial court erred in overruling their demurrers to the complaint. The complaint was in one paragraph and alleged: "That relators are the widow and only surviving children of one Lewis E. Huff, deceased; that said relators were entirely dependent for their support and maintenance upon said Lewis E. Huff, who died on March 13, 1912, as a result of the grievance herein-after alleged; that on April 3, 1911, one Alfred Spillman made application for, and was granted, a license by the board of commissioners of Posey County, Indiana, to sell intoxicating liquors at the town of New Harmony, Indiana, and executed his bond in the penal sum of \$3,500 with the defendant, The Bankers Surety Company of Cuyahoga County, Ohio, as surety thereon, conditioned that said Spillman, among other things would pay all civil damages growing out of unlawful sales of intoxicating liquors, or other unlawful conduct on the part of said Spillman,

which bond was filed with the auditor of Posey County, Indiana, and a copy thereof is attached to the complaint [652] and marked exhibit A; that, on October 2, 1911, Spillman made application and request to the board of county commissioners of Posey County, Indiana, and was granted the right by said board to transfer said license to the defendant James White, and that White accepted said sale and transfer and entered into business as a saloon keeper upon the same terms and conditions mentioned in said license to Spillman, in the same premises in New Harmony, Indiana; that on the sale and transfer of said license the defendant, The Bankers Surety Company of Cuyahoga County, Ohio, filed its written consent with said board of commissioners to said sale and transfer and its covenants with said board to be bound thereon, as obligor to said White, in all things the same as it had theretofore been bound for said Spillman, and that said covenant is filed with said complaint and marked exhibit B; that this covenant was approved by the auditor of Posey County, which approval is filed with the complaint and marked exhibit C; and that thereupon White commenced to sell intoxicating liquors and keep a saloon under and by virtue of said license. That Huff, on March 13, 1912, was a farmer about 42 years old living on a public highway four miles south of New Harmony and was a strong, healthy and industrious man who earned a good support and maintenance for the relatives who were at that time entirely dependent upon the decedent for their support and maintenance; that Huff, on the afternoon of March 13, 1912, while sober drove a road wagon, with a gentle team of horses attached thereto, from his home over the highway to New Harmony, that he arrived at New Harmony and visited the saloon of defendant, White; that on the said thirteenth day of March, 1912, the defendant White or his barkeeper and agent, unlawfully sold or gave decedent intoxicating liquor when decedent was in a state of intoxication, which was known to White, his barkeeper or agent; that by reason of and as a result of the intoxication of decedent, caused as aforesaid by the unlawful selling or giving [653] to decedent, intoxicating liquors by White or his agent, the defendant became incapacitated for managing and driving his team of horses, and, as a result of said intoxication, when driving his team of horses decedent was liable to receive fatal injuries, that the decedent when intoxicated started, after dark, on March 13, 1912, to drive said team of horses, attached to said wagon, from New Harmony over said public highway to his home. That as a result of and caused by said intoxication, the decedent was incapacitated from properly managing, controlling or

driving said team of horses; that said team of horses, on account of and caused by decedent's incapacity to properly drive and control them became irritable, fractious and unmanageable by decedent; that the decedent when intoxicated leaned over the dashboard of said wagon and as he leaned over said dashboard, said team, or one horse thereof, was irritated and made fractious and unmanageable by the acts of decedent, when so intoxicated, to such an extent that the horse kicked decedent on the head and face, causing him fatal injuries and as a result of his injuries decedent died and was found dead the next morning in said wagon near his home. That the death of decedent was caused by the unlawful selling or giving to him by defendant, White, or his agent, of intoxicating liquors as aforesaid. That by reason of the premises relatives have been injured in their means of support in the sum of \$3,500 for which sum they demand judgment."

Exhibit "A" was the usual form of bond provided by law for liquor dealers and originally executed by Alfred Spillman and The Bankers Surety Company as surety. Exhibit "B" shows by endorsement on the original Spillman bond that on October 2, 1911, the interest of Spillman was assigned to appellant White, subject to the consent of The Bankers Surety Company, and this was signed by Alfred Spillman and thereafter there appears endorsed on said bond the consent of The Bankers Surety Company that the bond be assigned to White, subject to all its terms and conditions. [654] This was signed by The Bankers Surety Company by Edwin Wade, its attorney in fact. Exhibit "C" was the approval of the auditor of Posey County to such assignment and consent and the order of the board of commissioners thereon.

In behalf of appellant surety company it is claimed that the complaint fails to state a cause of action against it for the reason that the law which permits the transfer of a retail liquor dealer's license, by its terms, requires that the transferee, before he can secure approval of the transfer and rights thereunder shall give a new bond. § 8323c Burns 1914, Acts 1911, p. 254, § 12. And it is contended that the bond counted upon by complaint is not such a bond and hence does not impose any liability upon appellant surety company. The statute in case a license is transferred requires the "filing of a bond by such purchaser . . . with the same penalties and upon the same conditions as is required of applicants for licenses." There is no doubt that the bond in question meets all of the requirements of the statute as fully as if an entirely new instrument had been executed by appellants. Even if a new bond were intended by the statute the assignment of the old bond, as made, amounts to a new agreement on the

part of appellant surety company to become the guarantor of White in his undertaking legally to conduct a licensed saloon, such agreement being in an instrument with the "same penalties and upon the same conditions" as the bond of the transferer of the license. It was in no respect the same undertaking as that which was the guaranty of the conduct of Spillman, the original licensee. In any event, § 1278 Burns 1914, § 1221 R. S. 1881 would require us to hold appellants bound to discharge the statutory conditions of the bond in the circumstances averred, for it has often been held that the force and effect of this section is to cure defects and supply omissions in such bonds, whether the defects and omissions be of form or substance, and to hold the obligors, both principals [655] and sureties to the full extent of the law requiring the bond. *U. S. Fidelity, etc. Co. v. Poetker* (1913) 180 Ind. 255, 102 N. E. 372, and cases there cited.

There is further contention by both appellants that the complaint fails to allege that the death of Huff was the result of his intoxication and for that reason that the demurrers of both should have been sustained. The averments of the complaint charge in sufficient terms that the intoxication incapacitated decedent to manage his horses properly; that because of his incapacity to control and direct them the horses became irritable, fractious and unmanageable; that while decedent was so intoxicated and while the team was in this state, he leaned out over the dashboard and as he did so one of the horses irritated and made fractious by his acts kicked him on the head and face, inflicting injuries from which he died. The connection between Huff's intoxication and his injury is sufficiently averred. *Homire v. Halfman* (1901) 156 Ind. 470, 60 N. E. 154.

Refusal of the trial court to direct a verdict for appellants by peremptory instruction is assigned as error. This cannot be made the basis for an independent assignment of error on appeal. Such action must be presented to the trial court as a cause for a new trial and the court's refusal to grant such new trial assigned for error to be available. *Bane v. Keefer* (1899) 152 Ind. 544, 53 N. E. 834; *U. S. Health, etc. Ins. Co. v. Batt* (1912) 49 Ind. App. 277, 97 N. E. 195; *Deeter v. Burk* (1915) 59 Ind. App. 449, 107 N. E. 304.

A joint motion for a new trial filed by appellants was overruled and this ruling is assigned as error. The motion was based on the alleged insufficiency of the evidence in fact and law to sustain the verdict, on the giving of certain instructions and the refusal to give others and on the admission of certain testimony alleged to have been incompetent. No specific reference is made in that [656]

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part of appellant's brief devoted to propositions or points and authorities to any instruction either given or refused nor to any testimony admitted. These causes for a new trial are, therefore, under the rules waived. Clause 5, Rule 22; *Kaufman v. Alexander* (1913) 180 Ind. 670, 103 N. E. 481; *Chicago, etc. R. Co. v. Dinius* (1913) 180 Ind. 596, 103 N. E. 652; *Mutual L. Ins. Co. v. Finkelstein* (1915) 58 Ind. App. 27, 107 N. E. 557.

This leaves for consideration only the question whether there was error in overruling the motion for a new trial on the ground that the evidence is insufficient to sustain the verdict. We understand that appellants claim that the evidence fails in two particulars. The first is that there was no evidence to show that appellant White or his agent or servant "unlawfully sold or gave intoxicating liquor" to Huff at the time when he was intoxicated; and the second that there was none to prove that Huff was intoxicated at the time of his death or that his death was the result of his intoxication. A review of the evidence shows the following as to these contentions: Huff was sober when he came to town on the afternoon of his death; he was a quiet, inoffensive man when sober; he was in and about appellant White's place from before 5 p. m. to about 9 p. m.; he drank some in White's saloon during the afternoon; while there he got into a very boisterous and threatening argument which was so serious as to cause his expulsion from the saloon; he bought liquor at other saloons during the afternoon; he was boisterous and noisy on the streets and in front of White's saloon during the afternoon and evening; two witnesses testify that he was drunk at or near 5 p. m. at which time he was in and about White's place; one witness, on cross-examination, admitted that he was "kinda drunk" when he saw him at 5 p. m. near White's; another witness testified Huff drank a glass of beer in White's saloon sometime between 4 and 5 o'clock in the afternoon. In the face of this evidence it cannot be said that there was no evidence [657] from which the jury might reasonably find that appellant White sold intoxicating liquors to decedent while decedent was intoxicated. It was warranted in finding it from his conduct within and without the saloon, and from the direct testimony of competent witnesses. 23 Cyc. 325, § d, and cases there cited.

On the questions of his continuing drunkenness and the cause of his death the following appears: Huff was found the following morning lying on his back in his wagon, his feet bent back underneath him and his knees up against the dashboard, as if he had been sitting on his knees. His face was mashed, his teeth knocked in, and his nose broken. No other wounds were seen. He was cold and

stiff. Underneath him was an open, half-emptied flask of whiskey. There was some horse hair on the right hand side of the dashboard the same shade as that on the right hand horse's leg, where some had been freshly knocked off just above the hoof. Huff's cap was found in the ditch some distance from where his body was found. The horses had not kept the road all the way; in some places the track waved about. Where the cap lay there were tracks which impressed the witness as having been made by a sudden forward motion of the right hand horse; as if he had "perted up and stepped further than the other." A witness testified, "and the tracks seemed like something had hit him and scared him;" this of the right hand horse. Huff had been a successful and careful farmer. From these facts it cannot be said that there was no evidence to sustain the verdict and judgment. Huff was a good farmer with years of experience in managing horses. The circumstances including the character of his driving on the night of his death were ample evidence of his physical incapacity to handle the team in his accustomed manner. Having found that he was drunk shortly before he left town and that he carried with him a flask of whiskey which had been partly emptied the jury might well [658] conclude that the cause of his physical disability and the cause of his death was his intoxication.

No harmful error is shown and the judgment is affirmed.

NOTE.

Damages for Death by Intoxication.

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I. Introductory.

The purpose of this note is to review the more recent cases concerned with the question of damages for death by intoxication. Earlier cases are reviewed and collated in the notes to *Stafford v. Levinger*, 1 Ann. Cas. 132, and *Mastad v. Swedish Brethren*, 85 Am. St. Rep. 446. The present note excludes, however, consideration of cases involving the lia-

bility for death by the criminal act of an intoxicated person, those cases having been fully treated in the note to *Waller v. Collinsworth*, Ann. Cas. 1913A 510.

II. In Absence of Civil Damage Act.

In the absence of a statute imposing liability for death caused by intoxication, a liquor dealer can be held liable for the death by intoxication of one to whom he furnishes liquor only where he is guilty of actionable negligence in selling the liquor, and that negligence is the proximate cause of the death. *Bolen v. Still*, 123 Ark. 308, 185 S. W. 811.

It has been held that, in the absence of a statutory right of recovery for death by intoxication, a statute making it a misdemeanor to sell liquor to an habitual drunkard after notice from his wife forbidding sales to him makes a sale in violation of that statute negligence per se and gives the wife a right of recovery for the death of her husband caused by such negligence on general principles of tort liability. *Riden v. Grimm*, 97 Tenn. 220, 38 S. W. 1097, 35 L.R.A. 587, wherein the court said: "The principal question presented under the demurrer is, that for the acts complained of there is no common-law liability, and that the statute simply makes them a misdemeanor, and prescribes a penalty, which the state alone can enforce, but confers no right of action for damages upon the wife. The principle involved in this case is the same as that involved in *Queen v. Dayton Coal, etc. Co.* 95 Tenn. 458. In that case a minor had been employed to work in a mine, contrary to the prohibition of the statute, which made such employment a misdemeanor. The minor brought civil suit for personal damages sustained while so employed, and this court held that the employment of the infant in the mine, in violation of the statute forbidding such employment and declaring it a misdemeanor, made it, per se, such negligence as rendered the employer liable for all injury sustained by the infant in the course of the employment. 'The breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment.' It is also actionable negligence whenever it is shown that the breach of the statute inflicts or results in the damage or injury complained of. In *Bishop on Non-contract Law*, sec. 71, it is said: 'A civil wrong and a criminal wrong are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, one individual suffering from it only as others do, can maintain no action against the wrongdoer, even should it in a degree casually press more heavily upon him

than upon others. But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable."

But it has been held that a statute requiring that an applicant for a license to sell liquor shall enter into a penal bond, conditioned that the applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business, creates no statutory liability for the death of a purchaser occasioned by reason of liquor sold at the place of business of a retail liquor dealer, in the absence of a civil damage act giving an action for injuries caused by intoxication. *Bolen v. Still*, 123 Ark. 308, 185 S. W. 811.

It is not actionable negligence for a licensed saloon keeper to sell two quarts of whisky to a man of reasonable intelligence, fifty-six years of age, and sober at the time, with nothing indicating that the purchaser was an excessive drinker, and such a sale will not entitle the administrator of the purchaser to recover damages for the death of the decedent caused by his falling off his horse while returning home intoxicated. *Bolen v. Still*, 123 Ark. 308, 185 S. W. 811.

III. Under Civil Damage Act.

1. IN GENERAL.

Under the so-called civil damage statutes giving an action for injuries caused by or resulting from intoxication, the recent cases are practically unanimous in holding that recovery for death caused by intoxication, or by the act of an intoxicated person, may be had against the person selling, giving, or furnishing the liquors contributing to the intoxication, or against the owner of the premises wherein the liquors are sold, given or furnished.

Illinois.—*Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216; *Smith v. People*, 141 Ill. 447, 31 N. E. 425; *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068; *Deel v. Heiligenstein*, 244 Ill. 239, 91 N. E. 429, *affirming* 147 Ill. App. 307; *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536; *People v. Brumback*, 24 Ill. App. 501; *Marschall v. Laughran*, 47 Ill. App. 29; *Brown v. Butler*, 66 Ill. App. 86; *Johnson v. Gram*, 72 Ill. App. 676; *Wanack v. Alexander*, 78 Ill. App. 356; *Triggs v. McIntyre*, 115 Ill. App. 257, *affirmed* 215 Ill. 369, 74 N. E. 400; *Lahey v. Crist*, 130 Ill. App. 152; *Johnson v. Bush*, 154 Ill. App. 494; *Whiteside v. O'Connors*, 162 Ill. App. 108; *Dunnigan v. Ellis*, 162 Ill. App. 185; *Parsons v. Smith*, 164 Ill. App. 509; *Hammers v. Knight*, 168 Ill. App. 203; *Poole v. Lansden*, 183 Ill. App. 609; *Jopp v. Fairburn*, 186 Ill. App. 280; *Indiana*.—*McCarty v. State*, 162 Ind. 218,

70 N. E. 131; *Wall v. State*, 10 Ind. App. 530, 38 N. E. 190; *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544, 70 N. E. 190; *Greener v. Niehaus*, 44 Ind. App. 674, 89 N. E. 377; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, *rehearing denied* 46 Ind. App. 130, 91 N. E. 624; *Lawlor v. State*, 53 Ind. App. 24, 99 N. E. 487. And see the reported case.

Iowa.—*Jarozewski v. Allen*, 117 Ia. 632, 91 N. W. 941.

Maine.—*Gardner v. Day*, 95 Me. 558, 50 Atl. 892.

Michigan.—*Hilliker v. Farr*, 149 Mich. 444, 112 N. W. 1116, 14 Detroit Leg. N. 498; *Dice v. Sherberneau*, 152 Mich. 601, 116 N. W. 416, 16 L.R.A. (N.S.) 765, 15 Detroit Leg. N. 255; *Sisson v. Lampert*, 159 Mich. 509, 124 N. W. 513, 16 Detroit Leg. N. 1032; *In re Bennett*, 160 Mich. 309, 125 N. W. 2, 17 Detroit Leg. N. 50; *Merrill v. Tinkler*, 160 Mich. 575, 125 N. W. 717; *Weatherbee v. Byam*, 160 Mich. 600, 125 N. W. 686.

Nebraska.—*McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213; *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547; *Fitzgerald v. Donohoe*, 48 Neb. 852, 67 N. W. 880; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; *Young v. Beveridge*, 81 Neb. 180, 116 N. W. 766; *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864; *Roach v. Wolff*, 96 Neb. 43, 146 N. W. 1019; *Whipple v. Rosenstock*, 99 Neb. 153, 155 N. W. 898; *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637; *Moran v. Slatery*, 99 Neb. 360, 156 N. W. 663; *Juckett v. Brenna-man*, 99 Neb. 755, 157 N. W. 925; *Hauth v. Sambo*, 158 N. W. 1036.

New Hampshire.—*Squires v. Young*, 58 N. H. 192.

New York.—*Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

Ohio.—*Compare Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598.

Pennsylvania.—*Fink v. Garman*, 40 Pa. St. 95; *Bower v. Fredericks*, 46 Pa. Super. Ct. 540; *Bier v. Myers*, 61 Pa. Super. Ct. 158.

South Dakota.—*Garrigan v. Kennedy*, 19 S. D. 11, 8 Ann. Cas. 1125, 101 N. W. 1081, 117 Am. St. Rep. 927; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150; *Dickmann v. Thomas*, 36 S. D. 283, 154 N. W. 811.

Washington.—*Woodring v. Jacobino*, 54 Wash. 504, 103 Pac. 809.

Canada.—*DeStruve v. McGuire*, 25 Ont. L. Rep. 491, 21 Ont. W. Rep. 138, 25 Ont. L. Rep. 87, 20 Ont. W. Rep. 374.

In *Gardner v. Day*, 95 Me. 558, 50 Atl. 892, the court said: "It is evident that the statute not only gives a remedy when one is injured in his person, or property, by an intoxicated person, but also when a person is

injured in his or her means of support 'by reason of the intoxication of any person.' The most obvious and common injury of this latter character is where a wife or child is dependent upon the husband or father for support, and by reason of the intoxication of the husband or father he is rendered wholly or partially incapable to furnish such support. It is unquestioned that in such case an action will lie if the total or partial incapacity to provide support is only temporary, or even if it is lasting, caused by some permanent disability sustained while in a state of intoxication, so long as the husband continues to live; but it is claimed that this injury to the wife's means of support does not continue after the death of the husband. In other words, the contention is, and it is supported by a number of decisions of courts of high authority, under substantially similar statutes, that while a wife's means of support may be injured within the meaning of the statute by reason of the temporary or permanent disability of the husband, by reason of his intoxication and consequent incapacity, or diminished capacity to provide support, she cannot be injured in this respect by his death following and resulting from his intoxication. We cannot agree to this proposition. We are unable to perceive any legal distinction, except in degree, between the temporary injury to a wife's means of support through the husband's inability to provide support by reason of some accident sustained while intoxicated, and the permanent injury suffered by her of the same nature by reason of the husband's death resulting from his intoxication. In either case, the injury is to her means of support by reason of his intoxication. 'Otherwise, minor and temporary injuries to the plaintiff's means of support would be within the protection of the statutes, while the greatest and most permanent injury of all would be without remedy.' 6 Am. & Eng. Enc. of Law (2d ed.) 54 and cases cited. A wife cannot of course recover under this statute for the death of her husband, nor for her mental suffering caused thereby, nor for any of the consequences of his death, except for the injury to her means of support by reason of his intoxication; but if his death is the proximate result of such intoxication, she is none the less injured in her means of support thereby, within the meaning of the statute as we construe it."

Recovery for death by intoxication has been had where the deceased met his death in the following ways:

—*Killed by train or locomotive while intoxicated.* Buck v. Maddock, 167 Ill. 219, 47 N. E. 208; Deel v. Heiligenstein, 244 Ill. 239, 91 N. E. 429, *affirming* 147 Ill. App. 307; Greenacre v. Filby, 276 Ill. 294, 114 N. E. 536; People v. Brumback, 24 Ill. App. 501; Johnson v. Gram, 72 Ill. App. 676;

Lahey v. Crist, 130 Ill. App. 152; Johnson v. Bush, 154 Ill. App. 494; Lawlor v. State, 53 Ind. App. 24, 99 N. E. 487; In re Bennett, 160 Mich. 309, 125 N. W. 2, 17 Detroit Leg. N. 50; Merrill v. Tinkler, 160 Mich. 575, 125 N. W. 717; Sellars v. Foster, 27 Neb. 118, 42 N. W. 907; Pilkins v. Hans, 87 Neb. 7, 126 N. W. 864; Roach v. Wolff, 96 Neb. 43, 146 N. W. 1019; Hauth v. Sambo (Neb.) 158 N. W. 1036; Bier v. Myers, 61 Pa. Super. Ct. 158.

—*Killed by reason of mismanaging horses while intoxicated.* Smith v. People, 141 Ill. 447, 31 N. E. 425; Brown v. Butler, 66 Ill. App. 86; Johnson v. Gram, 72 Ill. App. 676; Wanack v. Alexander, 78 Ill. App. 356; Poole v. Lansden, 183 Ill. App. 609; Wall v. State, 10 Ind. App. 530, 38 N. E. 190; Jarozewski v. Allen, 117 Ia. 632, 91 N. W. 941; Moran v. Slattey, 99 Neb. 360, 156 N. W. 663; Fink v. Garman, 40 Pa. St. 95. And see the reported case.

—*Suicide as result of intoxication.* White-side v. O'Connors, 162 Ill. App. 108; Hammers v. Knight, 168 Ill. App. 203; Dice v. Sherberneau, 152 Mich. 601, 116 N. W. 416, 16 L.R.A. (N.S.) 765, 15 Detroit Leg. N. 255; Neu v. McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Garrigan v. Kennedy, 19 S. D. 11, 8 Ann. Cas. 1125, 101 N. W. 1081; Dickmann v. Thomas, 36 S. D. 283, 154 N. W. 811.

—*Death by freezing or exposure due to intoxication.* McCarty v. State, 162 Ind. 218, 70 N. E. 131; American Surety Co. v. State, 46 Ind. App. 126, 90 N. E. 99; Curran v. Percival, 21 Neb. 434, 32 N. W. 213; Scott v. Chope, 33 Neb. 41, 49 N. W. 940; Juckett v. Brennaman, 99 Neb. 755, 157 N. W. 925; De-Struve v. McGuire, 25 Ont. L. Rep. 491, 21 Ont. W. Rep. 138.

—*Killed in fight while intoxicated.* Parsons v. Smith, 164 Ill. App. 509; Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116; McClay v. Worrall, 18 Neb. 44, 24 N. W. 429; Woodring v. Jacobino, 54 Wash. 504, 103 Pac. 809.

—*Death from falling down stairs while drunk.* Marshall v. Langhran, 47 Ill. App. 29; Greener v. Niehaus, 44 Ind. App. 674, 89 N. E. 377.

—*Death resulting from excessive drinking.* Gardner v. Day, 95 Me. 558, 50 Atl. 892; Young v. Beveridge, 81 Neb. 180, 115 N. W. 766.

—*Death by drowning while intoxicated.* Weatherbee v. Byam, 100 Mich. 600, 125 N. W. 686; Chmelir v. Sawyer, 42 Neb. 362, 60 N. W. 547.

—*Death by suffocation in drunken stupor.* Triggs v. McIntyre, 115 Ill. App. 257, judgment affirmed 215 Ill. 369, 74 N. E. 400.

—*Death from injuries to arm, complicated by delirium tremens.* Whipple v. Rosenstock, 99 Neb. 153, 155 N. W. 898.

—*Death from being kicked by drunken husband, whereby miscarriage resulted.* Phair v. Dumond, 99 Neb. 310, 156 N. W. 637.

—*Death as result of intoxication of deceased, particular manner not appearing.* Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068; Dunnigan v. Ellis, 162 Ill. App. 185; Jopp v. Fairburn, 186 Ill. App. 280; Terre Haute Brewing Co. v. Newland, 33 Ind. App. 544, 70 N. E. 190; Sisson v. Lampert, 159 Mich. 509, 124 N. W. 513; Fitzgerald v. Donohoe, 48 Neb. 852, 67 N. W. 880; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; Squires v. Young, 58 N. H. 192; Bower v. Fredericks, 46 Pa. Super. Ct. 540; Palmer v. Schurz, 22 S. D. 283, 117 N. W. 150.

It has been said that the civil damage statutes are penal in character and must be strictly construed. Walker v. Dailey, 101 Ill. App. 575. But it has also been said that a civil damage statute must be given such a construction as, without doing violence to its terms, will carry out its spirit, and accomplish the purpose for which it was enacted. Johnson v. Gram, 72 Ill. App. 676. And while such a statute which gives a remedy unknown to the common law should not be enlarged, it should be so construed, when the language is clear and explicit, as to give it its true meaning, having in view the purpose of the statute. Gardner v. Day, 95 Me. 558, 50 Atl. 892.

To entitle the plaintiff to recover for death under the civil damage statutes, it is necessary to prove three things: the sale or gift of liquor, the consequent intoxication, and that such intoxication caused the death. Baker v. Summers, 201 Ill. 52, 66 N. E. 302; Greener v. Niehaus, 44 Ind. App. 674, 89 N. E. 377. The proof of those three things is sufficient to constitute a cause of action, although there are other allegations not proved. Hammers v. Knight, 168 Ill. App. 203; American Surety Co. v. State, 46 Ind. App. 126, 90 N. E. 99, *rehearing denied* 46 Ind. App. 130, 91 N. E. 624.

Liability for death by intoxication may be predicated on a sale by an agent or servant of the defendant as well as on a sale by the defendant personally. Deal v. Heiligenstein, 244 Ill. 239, 91 N. E. 429, *affirming judgment* 147 Ill. App. 307; Pennington v. Gillaspie, 66 W. Va. 643, 66 S. E. 1009.

Under a statute making a general provision for recovery for injury to means of support caused by any intoxicated person, or in consequence of the intoxication of any person, recovery may be had for death caused by the intoxication of one who had been treated to liquors by a third person, and to whom the defendant did not sell or give drinks, but did serve such drinks as were ordered on the account of the person treating. Johnson v. Gram, 72 Ill. App. 676, wherein the court

said: "What possible difference can it make to the defendants in error whether Johnson paid for the liquor he drank or it was paid for by others? The liquor was set out upon their bar for him to drink, and he drank it in their presence, they knowing the probable consequence would be that he would become intoxicated, as he did, which according to common observation is not an unusual result when a number of men in a saloon indulge in the practice of treating each other to intoxicating drinks. We are of the opinion that the sad results shown in the case at bar were within the purview of the legislature in the adoption of the dram shop law, and among the evils sought to be remedied by that act. Any other construction than that we place upon it would not accomplish the purpose which the framers of the law evidently intended."

The fact that the defendant never received any pay for the liquors alleged to have caused the death is no defense to an action under the civil damage act. Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116.

Under a civil damage statute recovery may be had for death by intoxication against one who furnished liquor, not as a liquor dealer, but as a host to his guests. Peterson v. Brackey, 143 Ia. 75, 119 N. W. 967, wherein it appeared that the plaintiff and her deceased husband had made a social visit to the defendants, their neighbors, that in the course of the evening they were served at four different times, at least, with a mixture of alcohol and water, and of alcohol, water, and coffee; that the wife of the deceased, the plaintiff, felt "dizzy and funny" after the fourth round of drinks and went to sleep on a bed, the deceased lying down on the floor by the bed; and that the next morning the plaintiff found her husband dead on the floor. Verdict and judgment against the defendants were sustained.

Where a person is injured and dies because of intoxication, all persons who sold to him liquor materially contributing to that intoxication are jointly liable, under civil damage acts, for the death. Parsons v. Smith, 164 Ill. App. 509.

One causing intoxication in whole or in part cannot escape liability for damages to the means of support caused by such intoxication simply because he may not have foreseen the consequences of intoxication produced by the sales. Parsons v. Smith, 164 Ill. App. 509. And it is immaterial, in an action under a civil damage statute, whether the defendant knew that the deceased was in the habit of becoming intoxicated or not. In re Bennett, 160 Mich. 309, 125 N. W. 2.

All persons made liable by a civil damage act for death by intoxication, including sureties on the bond of the license, are jointly

and severally liable and may all be joined as defendants in the same action. *Hauth v. Sanubo* (Neb.) 158 N. W. 1036.

Under the civil damage statute which gives the right of recovery only against a licensed dealer, the plaintiff must plead and prove that the defendant was a licensed dealer. *Paulson v. Langness*, 16 S. D. 471, 93 N. W. 655.

Recovery cannot be had under a civil damage statute for death caused by the drinking of a bottle of lemon extract sold by the defendant, a grocer, to the deceased, unless it be shown that the defendant, or his clerk, who sold the bottle knew it was bought for use as an intoxicant, or unless the defendant was engaged in an evasion of the dram-shop act. *Walker v. Dailey*, 101 Ill. App. 575, wherein the court said, obiter, however, that if such knowledge or such intention to evade the law were proved, recovery could be had.

The fact that the deceased came to his death by drowning while fishing unlawfully does not deprive the widow of her statutory right to recover against one whose sale of liquor caused the intoxicated condition in which the deceased was when he drowned. *Weatherbee v. Byam*, 160 Mich. 600, 125 N. W. 686, 17 Detroit Leg. N. 223.

2. STATUTORY VARIATIONS.

The provisions of the various civil damage acts of the different jurisdictions show some diversity, the principal difference being that some of the statutes make a general provision for liability while others limit the liability to cases of intoxication resulting from certain classes of sales or gifts or to sales or gifts under certain circumstances. For the purposes of this note it will be sufficient to point out a few of these distinctions.

The broader type of statute is represented by that of Illinois (Rev. St. 1889, § 9), on which many of the other statutes are based, and which provides as follows: "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons. And any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for any other purpose, shall knowingly permit the sale therein of any intoxicating liquors that have caused in whole or in part

the intoxication of any person, shall be liable, severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages."

Some of the statutes confine the liability to cases of intoxication produced by or as a result of an unlawful sale or gift. Such is the statute of Indiana (Burns 1901, § 7279; R. S. 1881, § 5315); that of Iowa (Code 1897, § 2418); and that of Pennsylvania (Bright. *Purd. Dig.* p. 1082, § 47).

Others create liability only where sales or gifts of intoxicating liquors are made after the giving of notice not to serve them to the person in question. Such is the statute of Dakota (Polit. Code, 1885, c. 35, § 4); that of Massachusetts (St. 1885, c. 282); and that of New Hampshire (Gen. Laws, 1878, c. 109, § 28). The statute of Kentucky (Gen. St. 1888, p. 1235) gives an action for damages resulting from furnishing intoxicating liquors to a known inebriate.

For other statutory peculiarities, see the statutes of the various jurisdictions.

Under the Iowa statute, sales of liquor are presumptively unlawful, and the defendants must plead and prove that they were lawful in order to secure exemption on that ground. *Jarozewski v. Allen*, 117 Ia. 632, 91 N. W. 941.

3. CAUSATION IN GENERAL.

In order to fix liability on the defendant in an action for death under the civil damage acts, it is necessary to trace a chain of causation leading from the act of the defendant, in the selling or giving of liquor, up to the injury for which recovery is sought. Accordingly, an instruction to the jury basing liability wholly on the sale or gift of liquor by the defendants, without any requirement of proof that the sale or gift should have produced the intoxication, or that the intoxication should have been the cause of the death, is erroneous. *Baker v. Summers*, 201 Ill. 52, 66 N. E. 302.

In the consideration of the question of causation and proximate cause, the chain of causation divides naturally and logically into two links: first the causal relationship between the sale or gift of the liquor by the defendant and the intoxication; and second, the causal relationship between the intoxication and the injury to the means of support.

4. CAUSATION OF INTOXICATION.

To entitle a person to recovery for death caused by intoxication it is necessary, after having proved the sale or gift of liquor by the defendant, or on his premises with his consent, to prove that the gift or sale was the cause of the intoxication. *Baker v. Sum-*

mers, 201 Ill. 52, 66 N. E. 302; *Dunnigan v. Ellis*, 162 Ill. App. 185.

It need not be proved that the drinks furnished by the defendant were the sole, or even the most material, cause of the intoxication. It is sufficient if they contributed, with drinks obtained elsewhere, to produce the intoxication. *Brown v. Butler*, 66 Ill. App. 86; *Kelley v. Malhoit*, 115 Ill. App. 23; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, *rehearing denied* 46 Ind. App. 130, 91 N. E. 624; *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637. In *Brown v. Butler*, supra, the court said: "It does not appear whether deceased had been drinking in any other saloon or not, nor is it material. If, by reason of his intoxication, deceased lost his life, then, if such intoxication was caused in whole or in part by intoxicating liquor sold or given to him by plaintiff in error, the liability exists, no matter how much may have been furnished by others. Parties engaging in the saloon business know that they incur just such risks as this, and that the sale of one single glass of intoxicating liquor may bring upon them a liability for the wrongful or careless acts of others, over whom they have no control; but it is one of the dangers of the traffic, and they must take the consequences if they follow the business." In *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637, it appeared that the defendant had furnished the deceased two glasses of whisky, and that deceased then, after the defendant had gone out, stole the whisky bottle, the contents of which combined with the effect of the two glasses to produce the intoxication. The court said: "It is strongly urged that, since the intoxication of Phair resulted from the drinking of whisky in the stolen bottle, the defendant is not liable. The evidence shows that Dumond furnished two glasses of whisky to Phair before the bottle was stolen. The whisky sold and given contributed to the resulting intoxication. This is sufficient under the statute."

However it has been held in one recent case that in order to create a liability on the part of a liquor dealer, his act must be shown to have been the proximate cause of the intoxication. *West v. Leiphart*, 169 Mich. 354, 135 N. W. 246.

Whether the intoxication was caused by the liquor sold, given, or dispensed to the deceased by the defendant is a question of fact for the jury. *Brown v. Butler*, 66 Ill. App. 86.

A chain of causation cannot be traced, however, from the sale by the defendant to the intoxication through intermediate sales by third persons. Therefore recovery cannot be had against a saloon keeper for the death of A by intoxication caused by liquor sold to A by B, B having bought it from the defend-

ant saloon keeper. *West v. Leiphart*, 169 Mich. 354, 135 N. W. 246; *Sullivan v. Conrad*, 79 Neb. 303, 112 N. W. 660. In *West v. Leiphart*, supra, the court said: "In the case under consideration, the injuries complained of are not the natural and proximate consequence of the sales of liquor made by defendant Leiphart to Johnson and Stuebeck. Though the injury may be traced up to the unlawful act of one man, if it would not have happened but for the subsequent, independent, unlawful act of another, the latter alone is liable."

5. CAUSATION OF DEATH.

The plaintiff in an action under the civil damage acts must as a general rule in order to recover for death from intoxication further prove that the death of the deceased was caused by the intoxication by the sale or gift of liquor by the defendant, or on his premises. *Baker v. Summers*, 201 Ill. 52, 66 N. E. 302; *Dunnigan v. Ellis*, 162 Ill. App. 185; *Dudley v. State*, 40 Ind. App. 74, 81 N. E. 89.

The intoxication need not, however, be proved to be the sole cause of the death, *Dunnigan v. Ellis*, 162 Ill. App. 185; *Hammers v. Knight*, 168 Ill. App. 203; *Moran v. Slaterry*, 99 Neb. 360, 156 N. W. 663; or even the principal cause, *Moran v. Slaterry*, 99 Neb. 360, 156 N. W. 663; nor need it be proved that no cause other than the intoxication intervened. It is sufficient to prove that the intoxication superinduced or assisted in bringing on the condition which caused the death. *Dunnigan v. Ellis*, 162 Ill. App. 185.

Proof that the death was not caused by the intoxication entitles the defendants to a verdict in their favor. *Hart v. Duddleson*, 20 Ill. App. 618.

Where recovery is sought for death by suicide the plaintiff need not even prove that the suicide was committed while the deceased was intoxicated, provided it was the result of a previous intoxication. *Garrigan v. Kennedy*, 19 S. D. 11, 8 Ann. Cas. 1125, 101 N. W. 1081, 117 Am. St. Rep. 927; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150.

But it has been held that a liquor dealer is not liable for the death of one to whom he has sold intoxicating liquors if the death was not the natural or proximate result of the intoxication. *Roach v. Kelly*, 194 Pa. St. 24, 44 Atl. 1090, 75 Am. St. Rep. 685, wherein the court said: "There are many cases where the question of remote or proximate cause is for the jury, but this is not one of them. The facts are undisputed; deceased had an old grudge against Atkinson; when heated by liquor he revived the old quarrel; in gratification of his ill will he also picked a quarrel with Pratt, the father-in-law of the man he hated; they proceeded some distance

to private property and fought; Roach defeated Pratt, then attacked Atkinson; while engaged in this second flagrant breach of the peace the cry of police is raised, and all, both drunk and sober, fled; Roach, by the concurring circumstances of the slip on the bank and the fall into the open sewer, was killed. Admit that his resentment on account of the old grudge and his quarrelsomeness were prompted by the liquor and resulted in the fight; he received no injury in that consequence of defendant's act; the direct effect of the liquor ended with the fight; in a subsequent attempt, however, to escape arrest for a violation of law he met his death; this was an intermediate cause, disconnected from the primary one, for which, under no view of the facts, was defendant responsible. If Roach in his flight had been arrested by the officers, and in a scuffle to escape from them had met his death, it might as well have been argued the proximate cause of his death was the unlawful sale of liquor, yet it is too plain for argument that the resistance to the officers was the proximate and effective intervening cause, while at most the sale of liquor was the very remote cause."

And in *Hart v. Duddleson*, 20 Ill. App. 618, it was held that it is proper to instruct the jury that the intoxication must be proved to have been the proximate cause of the death.

It has been held, however, that the *Indiana* statute (Burns 1901, § 1337a) was intended to afford a remedy for an injury to the means of support, whether directly or remotely caused by the intoxication. *McCarty v. State*, 162 Ind. 218, 70 N. E. 131; *Greener v. Niehaus*, 44 Ind. App. 674, 89 N. E. 377; *Hughes v. State*, 50 Ind. App. 617, 98 N. E. 839. In the case last cited the court said: "The statute provides for a recovery by action for injuries to person or property or means of support, without any restriction whatever, and . . . both direct and consequential injuries were included; . . . it is evident that the legislature intended to go, in such a case, far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in the producing or who caused such intoxication. . . . The question was not whether the death of the deceased was the natural, reasonable or probable consequence of the defendant's act; but it was enough if intoxication, caused in whole or in part by liquor sold by the defendant, was the cause of the death of the plaintiff's husband, if by reason thereof the plaintiff's means of support were injuriously affected."

In *Michigan* it has been held that, where the injury to the means of support for which recovery is sought results from the suicide of the plaintiff's husband while intoxicated, the

plaintiff need not prove that the suicide was caused by the intoxication, it being sufficient to show that the self-destruction occurred when the deceased was intoxicated. *Dice v. Sherberneau*, 152 Mich. 601, 116 N. W. 416, 16 L.R.A. (N.S.) 765, wherein the courts said: "The difficulty in proving that the deceased would not have committed suicide without the intoxication is apparent. It would substantially result in denying to a wife or children the benefit of this statute in cases of suicide. Even where a wife sought damages because her husband had committed the crime of burglary, while in a state of intoxication, the court instructed the jury that the defendant was liable if the husband formed the intent to commit the burglary by reason of the intoxication, or was so intoxicated that he was incapable of forming the intent. *Dennison v. Van Wormer*, 107 Mich. 461. In that case stress was laid upon the felonious intent essential to establish the crime. In such cases it is incumbent upon the wife or child to show facts and circumstances from which a jury may legitimately infer that the crime was the result of the intoxication, and not of a previously formed intent. Intoxication seldom leads to burglary and other crimes where the act implies a previously formed and intelligent criminal intent. In such cases mere proof of intoxication is not sufficient to sustain a right of action by the wife or child for damages resulting from loss of support. It is, however, a matter of common knowledge that persons long addicted to the excessive use of intoxicants—that was the case here—do, when under the influence of liquor, attack their families and often attempt their own destruction. In such cases the fact that the act was committed while in a state of intoxication is all that the statute requires."

By the terms of the *Nebraska* civil damage act (Ann. St. 1907, § 7168) a statutory presumption is raised that the intoxication caused the death and where intoxication is proved immediately preceding, or at the time of the death, the causal relation between the intoxication and the death need not be proved. *Davis v. Borland*, 83 Neb. 281, 119 N. W. 454, wherein the court said: "That there may be no misunderstanding, we quote from the defendants brief upon this point: 'The mere fact that a man kills another while intoxicated fixes no liability on the saloon keeper. Liability attaches only when the jury are satisfied that intoxication caused or contributed to cause the homicide. If Davis killed himself while intoxicated, there is no liability, unless the jury conclude that the drinking of intoxicating liquors caused or contributed to cause the suicide.' There can be no doubt that as a legal proposition the above quotation from the brief of the defendants is a correct statement of the general rule of law,

and that in ordinary cases it is well settled that a petition, in order to state a cause of action, should set forth every essential fact which the plaintiff must prove in order to entitle him to recover. Our legislature, however, has created an exception in this respect in cases brought against the vendor of intoxicating liquors for damages sustained in consequence of intoxication arising from the sale thereof. Section 7168, Ann. St. 1907, is in the following language: 'On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification. This section of itself supplies allegations and proof in respect to matters that are essential in the ordinary action. When damage has been suffered at the hands of an intoxicated person, the statute, in an action brought against the vendor to recover for such damages, raises a presumption in favor of the plaintiff that the sale which caused the intoxication, or which contributed thereto, was the cause of the injury.'

The causal relation between the intoxication and the death is a question of fact for the jury. *Triggs v. McIntyre*, 215 Ill. 369, 74 N. E. 400, affirming judgment 115 Ill. App. 257; *Lahey v. Crist*, 130 Ill. App. 152; *Dunnigan v. Ellis*, 162 Ill. App. 185; *Parsons v. Smith*, 164 Ill. App. 509; *Jarozewski v. Allen*, 117 Ia. 632, 91 N. W. 941; *Bower v. Fredericks*, 46 Pa. Super. Ct. 540; *Garrigan v. Kennedy*, 19 S. D. 11, 8 Ann. Cas. 1125, 101 N. W. 1081.

Under a civil damage act giving a right of recovery to one injured in means of support by any intoxicated person, or in consequence of the intoxication of any person, a distinction is made in the application of the rules or proximate cause between actions brought under the first and those brought under the second of the alternative clauses of the statute. In an action for an injury by any intoxicated person, i. e. by the affirmative act of one intoxicated, the rules of proximate cause have been held not to apply, and the plaintiff need only show that the intoxication was the cause of the injury, either proximate or remote. *Whiteside v. O'Connors*, 162 Ill.

App. 108; *Bristline v. Ney*, 134 Ia. 172, 111 N. W. 422, 13 Ann. Cas. 196, 13 L.R.A. (N.S.) 1158; *Lee v. Hederman*, 158 Ia. 719, 138 N. W. 893. In *Whiteside v. O'Connors*, supra, recovery was sought by the widow of the deceased because so crazed by intoxication caused by the sale of liquor to him by the defendant that he committed suicide. Holding this to be an action for an injury to means of support by the affirmative act of an intoxicated person, not simply in consequence of the intoxication of any person; and that hence the rules of proximate cause had no application, the court said: "We conclude that if the husband of plaintiff in error committed suicide while in a state of intoxication and the defendants in error contributed in whole or in part to produce such intoxication the rule announced in *Jack v. Globe*, . . . is applicable, and that it was only incumbent upon plaintiff in error to show that the intoxication of her husband was the cause of his suicide, either proximate or remote. . . . When the action is for an injury resulting from the direct, affirmative act of an intoxicated person the doctrine of proximate cause has no application, and a liability accrues upon proof of that fact, but where the action is for an injury resulting 'in consequence of intoxication habitual or otherwise,' it is incumbent upon the plaintiff to show that such intoxication was the proximate cause of the injury." In *Bristline v. Ney*, supra, it was said: "As already noted, there are . . . opinions which profess to apply the rule of proximate cause; but in each instance the term 'proximate' is used in the sense of an originating cause, from which the injurious effect is logically traced through an intervening series of acts or events. This rule is, of course, properly applicable where the right of recovery is based upon the second clause of the civil damage statute which makes the liquor dealer liable for injury sustained 'in consequence' of the intoxication of any person. But where recovery is sought under the first clause for injury done 'by an intoxicated person,' the adjudicated cases are practically unanimous that when the plaintiff has proved the unlawful sale to a person on whom she is dependent for support, and the intoxication of such person thereby produced and an injury done by him while in that condition to her means of support, she has made the case for which the statute provides. In other words, the statute indulges in the reasonable presumption that an act done to the injury of his family by a person whose faculties are abnormally excited, or confused by drink, especially where the act is of a character not ordinarily to be expected from a sane and sober person, is the result of his intoxication. If when these have been shown the defendant claims that notwithstanding the drunkenness

so wrongfully occasioned, the injurious act is wholly chargeable to some other cause or influence, it is open to him to establish that fact in defense. It is certainly not required of the plaintiff, that, after proving the wrongful sale of the liquor by defendants to her husband, his resultant intoxication, and his suicide while in that condition (and upon each of these points there was evidence on which the jury could properly find in her favor), she must then proceed to prove by a preponderance of the evidence that the deceased would not have committed suicide had the defendants not sold him the liquor."

But when recovery is sought under the second clause of such a statute, i. e. for an injury to the means of support in consequence of the intoxication of any person, it seems that the plaintiff must show that the intoxication was the proximate cause of the injury. *Whiteside v. O'Connors*, 162 Ill. App. 108; *Bristline v. Ney*, 134 Ia. 172, 111 N. W. 422, 13 Ann. Cas. 196, 13 L.R.A.(N.S.) 1158. The rules of proximate cause applicable to cases of injury to means of support in consequence of the intoxication of any person, under the civil damage statutes, were elaborated in the case of *Whiteside v. O'Connors*, supra, wherein the court said, adopting the language of the court in *Seith v. Commonwealth Electric Co.* 241 Ill. 252, 89 N. E. 425, 132 Am. St. Rep. 204, 24 L.R.A.(N.S.) 978: "The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause. The question is not determined by the existence or nonexistence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of the negligent act or omission might have foreseen the precise form of the injury but when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set

in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer." Within the rules thus stated the doctrine of proximate cause is properly applicable in an action for 'injury occasioned in consequence of' intoxication."

In a case wherein it appeared that the deceased, in a drunken stupor, got his neck and mouth in such a position as prevented the passage of air into his lungs, and, being unable to make any voluntary effort to help himself in his unconsciousness, died thus from suffocation, his intoxication was held to be the cause of his death within the meaning of the law. *Triggs v. McIntyre*, 115 Ill. App. 257, affirmed 215 Ill. 369, 74 N. E. 400.

In a case where it appeared that the deceased had been left drunk, sitting on the porch of the saloon when it was closed, on a freezing night, and that when found his body was in the vault of an out house behind the saloon, into which he could easily have fallen accidentally, the body when found being covered with the water in the vault, and showing no signs of external violence, it has been held that the jury were warranted in finding that the intoxication caused the death. *McCarty v. State*, 162 Ind. 218, 70 N. E. 131.

Evidence that the deceased was last seen staggering from the saloon toward the railroad, and that his dead body was found on the rear footboard of the engine, is sufficient to justify the jury in finding that the death resulted from the intoxication. *Lawlor v. State*, 53 Ind. App. 24, 99 N. E. 487.

A finding that the deceased died as the result of lessened physical and vital ability caused by excessive drink, the immediate cause of his death being exposure, of such a character as would not be calculated to cause death if the vital powers were not impaired, is sufficient basis for a finding that intoxication caused the death. *Juckett v. Brennaman*, 99 Neb. 755, 157 N. W. 925.

Under the Canadian civil damage act (27-28 Vic. c. 18, s. 40), which only creates liability "whenever in any inn, tavern, etc., any person has drunk to excess of intoxicating liquor of any kind, therein furnished to him, and while in a state of intoxication from such drinking has come to his death by suicide, or drowning, or perishing from cold or other accident caused by such intoxication," no recovery can be had for a death by apoplexy caused by excessive drinking, such mode of death not being by any "other accident caused by such intoxication," within the terms of the statute, but being death by natural causes induced by intoxication. Bo-

bier v. Clay, 27 U. C. Q. B. 438, wherein the court said: "Had our statute declared that if any person shall die from excessive drinking, the person furnishing the liquor so drank shall be responsible in this action, the case would be wholly different. We must be careful not to extend the words used, creating as they do certain new liabilities, beyond their natural sense. If the deceased, having previously been drinking to excess, took in this tavern a tumbler of brandy, and drank it off at a draught, and thereby produced an immediate apoplectic seizure or asphyxia, and fell back insensible, and died at once or in a few hours, could we hold that to be death from accident caused by intoxication? We think not—that it would be death from natural causes produced by the intoxicating liquor, just as sunstroke might strike him down, as in the case cited. Then if no accident had occurred to cause death, we think no absence or presence of skillful or judicious treatment can affect the case."

6. WHO MAY RECOVER.

It has been held that a personal representative, given a general right of action for the wrongful death of his decedent, has no right of action under the civil damage statutes for a death caused by intoxication, the latter remedy being limited to the person entitled to damages by reason of injury to means of support. *Couchman v. Prather*, 162 Ind. 250, 70 N. E. 240; *Murphy v. Willow Springs Brewing Co.* 81 Neb. 223, 115 N. W. 761. In the case first cited, the court said: "An examination of the authorities relative to the construction of statutes giving special rights of action for death shows that this court has always endeavored to construe such statutes in such a way as to prevent their overlapping."

And it has been held that an administrator suing for the death of his intestate, alleging it to have been caused by unlawful sale of liquor to the deceased whereby he contracted the drink habit, became diseased, and died, is barred of his action by the maxim *volenti non fit injuria*, in the absence of allegation and proof that the sales were made to the deceased at a time or times when he was so drunk, or in such a state as to be incapable of giving consent. *Bissell v. Starzinger*, 112 Ia. 266, 83 N. W. 1065.

According to recent cases under the civil damage acts, recovery may be had by the widow for the death of her husband by intoxication.

Illinois.—*Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216; *Smith v. People*, 141 Ill. 447, 31 N. E. 425; *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068; *Reisch v. People*, 229 Ill. 574, 82 N. E. 321; *Deel v. Heiligenstein*, 244 Ill.

239, 91 N. E. 429, *affirming* 147 Ill. App. 307; *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536; *People v. Brumback*, 24 Ill. App. 501; *Marschall v. Laughran*, 47 Ill. App. 29; *Wanack v. Alexander*, 78 Ill. App. 356; *Lahey v. Crist*, 130 Ill. App. 152; *Whitesides v. O'Connors*, 162 Ill. App. 108; *Parsons v. Smith*, 164 Ill. App. 509; *Poole v. Lansden*, 183 Ill. App. 609; *Jopp v. Fairburn*, 186 Ill. App. 280.

Indiana.—*Greener v. Niehaus*, 44 Ind. App. 674, 89 N. E. 377; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, *rehearing denied* 46 Ind. App. 130, 91 N. E. 624.

Michigan.—*Dice v. Sherberneau*, 162 Mich. 601, 116 N. W. 416, 16 L.R.A.(N.S.) 765, 15 Detroit Leg. N. 255; *Sisson v. Lampert*, 159 Mich. 509, 124 N. W. 513; *Merrill v. Tinkler*, 160 Mich. 575, 125 N. W. 717; *Weatherbee v. Byam*, 160 Mich. 600, 125 N. W. 686.

Nebraska.—*Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Juckett v. Brennaman*, 99 Neb. 755, 157 N. W. 925.

New Hampshire.—*Squires v. Young*, 58 N. H. 192.

Pennsylvania.—*Fink v. Garman*, 40 Pa. St. 95; *Bower v. Fredericks*, 46 Pa. Super. Ct. 540.

Recovery may also be had by minor children for the death of their father by intoxication, *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; *Hammers v. Knight*, 168 Ill. App. 203; *Hughes v. State*, 50 Ind. App. 617, 98 N. E. 839; and by minor children for the death of their mother, who supported them, the father being worthless, *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637; *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

It seems that an illegitimate child may recover for the loss of means of support by the death by intoxication of its father under a civil damage statute, and a child born after the death of the father may recover. *Goulding v. Phillips*, 124 Ia. 496, 100 N. W. 516; *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637.

Recovery may be had by the widow and minor child or children jointly for the death of the husband and father. *Triggs v. McIntyre*, 115 Ill. App. 257, *affirmed* 215 Ill. 369, 74 N. E. 400; *Lawlor v. State*, 53 Ind. App. 24, 99 N. E. 487; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213; *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864; *Roach v. Wolff*, 96 Neb. 43, 146 N. W. 1019; *Moran v. Slaterry*, 99 Neb. 360, 156 N. W. 663; *Hauth v. Sambo* (Neb.) 158 N. W. 1036; *Garrigan v. Kennedy*, 19 S. D. 11, 8 Ann. Cas. 1125, 101 N. W. 1081; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150.

Parents may recover for the death of their minor son. *Beckerle v. Brandon*, 229 Ill. 323, 82 N. E. 266. And recovery may be had by a dependent mother for the death of a son contributing to her support, *Hilliker v. Farr*, 149 Mich. 444, 112 N. W. 1116; *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429; *Fitzgerald v. Donohoe*, 48 Neb. 852, 67 N. W. 880; or by a mother for the death of her minor son. *Johnson v. Bush*, 154 Ill. App. 494.

But where a mother is suing for the death by intoxication of her minor child, she cannot declare for herself and her other minor children jointly. *West v. Leiphart*, 169 Mich. 354, 135 N. W. 246, wherein the court said: "The deceased had neither wife nor minor children. He died a minor himself and unmarried. No authority is cited which holds that the interests of the brothers, sisters, and mother of a deceased person can be combined in one action in a suit brought in the name of the mother to recover a gross sum for all."

Recovery may also be had by a father for the death of his son who was contributing to his support, *Jarozewski v. Allen*, 117 Ia. 632, 91 N. W. 941; or by a sister for the death by intoxication of her twin brothers with whom she had a contract whereby they were to support her during her life in return for house work she should do for them. *In re Bennett*, 160 Mich. 309, 125 N. W. 2.

7. LIABILITY OF OWNER OF PREMISES.

The statute of Illinois (Hurd's Rev. Stats. 1905, c. 43, § 9) provides that the owner of the building, in specified contingencies, "shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages." Under that statute exemplary damages may be assessed against the owner of the property, when justified by the facts. *Beckerle v. Brandon*, 229 Ill. 323, 82 N. E. 266, wherein the court said: "The court gave plaintiffs' instruction No. 8, which advised the jury that if they found for the plaintiffs and found certain alleged facts to be true, they might then return a verdict including exemplary damages. This is said to have been wrong so far as Willis, the owner of the property, is concerned, as the evidence did not show any intentional wrongdoing, or any reckless, malicious, wanton or oppressive conduct on his part. Section 9 of chapter 43, Hurd's Revised Statutes of 1905, gives a right of action against the liquor seller under certain circumstances, and provides that the owner of the building in specified contingencies 'shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages.' The language just quoted received

the consideration of this court in *Hackett v. Smelsley*, 77 Ill. 109, and the reasoning of that opinion warranted the circuit court in giving the instruction above referred to."

Under the foregoing statute a verdict and judgment against a brewing company, the owner of the building in which a saloon was located, has been sustained by evidence showing that the brewing company had knowledge that liquors were sold there. *Jopp v. Fairburn*, 186 Ill. App. 280.

All the owners of the premises wherein the liquor is sold, if they knowingly consent to such use of the premises, are jointly liable under the Illinois statute with the persons who sell the liquor, for the death of one to whom the liquor is sold. *Johnson v. Bush*, 154 Ill. App. 494; *Parsons v. Smith*, 164 Ill. App. 509.

8. DAMAGES RECOVERABLE.

Recovery under the civil damage acts is on an entirely different footing from individual actions to recover damages in tort. The action for death by intoxication is purely statutory. It is not an action for damages, but is predicated solely on an injury to means of support. *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216; *Poole v. Lansden*, 183 Ill. App. 609; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, *rehearing denied*, 46 Ind. App. 130, 91 N. E. 624; *Sharpley v. Brown*, 43 Hun 374, 4 N. Y. St. Rep. 784. Therefore in determining liability in such an action no consideration may be given to other injuries, such as mental suffering, loss of companionship, loss of probable increase of estate, etc. *Hapenny v. Huffman*, 184 Ill. App. 351.

But it has been held in Nebraska that the right of recovery under the civil damage act of that state (Comp. St. 1895, c. 50) is not confined to damages specifically to means of support, but is coextensive with the right of recovery in actions under statutes similar to Lord Campbell's act, and that recovery may be had for all damages resulting from the unlawful sale. *Murphy v. Willow Springs Brewing Co.* 81 Neb. 219, 115 N. W. 763; *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864. In the case first cited it was said: "There is no room for distinction in the character or extent of damages recoverable under Lord Campbell's act and under the Slocumb liquor law. At least there is no ground for restricting the recovery in actions brought under the latter act within narrower limits than those which depend upon the former." And in *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864, referring to the foregoing language of the court in the case of *Murphy v. Willow Springs Brewing Co.* the court said: "This is undoubtedly the true rule of the measure of

damages in such cases. The person licensed must pay all damages that a person sustains in consequence of such traffic, and the special provisions found in the statute subsequent to this general provision are intended to extend and enlarge the measure of damages rather than restrict it."

Where a widow is given a statutory action against a liquor dealer for injury to her means of support caused by the death of her husband occasioned by intoxication, the fact that she may have means or income of her own will not affect her right to recover damages, since she still is entitled to recover for the loss of the support she was entitled to receive from her husband. *Deel v. Heiligenstein*, 244 Ill. 239, 91 N. E. 429 (*affirming* 147 Ill. App. 307), wherein the court said: "The instruction given on behalf of the appellee which is particularly complained of stated that this was a suit brought by plaintiff for damages to her means of support, and that the fact that she had received money upon a policy of insurance on her husband's life was not to be considered, but if the jury found she had been deprived of her means of support she might recover, without reference to what money or property she had of her own—whether derived from insurance policies or from any other source. This instruction contained a correct statement of the law. It was proven that the deceased earned from \$80 to \$100 per month as a railway switchman and that he gave his earnings each month to his wife; that he supported her and kept her in comfortable circumstances. He was under a legal obligation to support his wife, and this obligation was not limited to supplying the bare necessities of life, but included supplying such comforts as were suitable to his condition in life. The fact that a wife may have means of her own or an income from a source other than her husband will not affect her right to recover damages under the dram-shop act for an injury to her means of support on account of the death of her husband. She still has the right to recover for the loss of support she was entitled to receive from her husband. . . . Though the deceased, at the time of his death, had in force a policy of insurance on his life payable to his wife, that fact would in no wise affect her right to recover for the injury to her means of support occasioned by reason of his death."

Especially is this so if her other income is not a sufficient means of support for her. *Poole v. Lansden*, 183 Ill. App. 609.

And the fact that the deceased husband was so worthless and addicted to drink that he did not support his wife, is no defense to an action by her for his death by intoxication. *Knott v. Peterson*, 125 Ia. 404, 101 N. W.

173, wherein the court said: "Defendant contends that, as plaintiff's husband failed to furnish his wife support prior to any sales made by Peterson, she lost nothing through his death, but really is better off in consequence thereof. This argument is answered, we think, by what is said in *League v. Ehmke*, 120 Iowa 484, wherein it is held, in effect, that, although the husband may have been a hard drinker before he purchased liquor of the defendant, it did not follow that he would continue to be, or that he would have met his death notwithstanding defendant's sales. And we may remark parenthetically that the doctrine contended for by appellant is not sound either in morals or in law. One is not justified in causing loss of human life because that life may not apparently be of much consequence either to his friends or to his family. But for defendant's sales, the husband might have reformed, and returned to his old manner of living. Of course, reformations from the drink habit, after it becomes fixed, are infrequent; but this the jury was authorized to consider in making up its verdict as to damages. Plaintiff was entitled in law to the support of her husband, and, no matter how worthless that husband may seem to be, neither a saloon keeper nor anyone else is justified in taking his life, and then saying that it was of no consequence anyway."

If a minor son contributed to the support of his parents, his death by intoxication is such an injury to their means of support as will sustain recovery by them against the person causing the intoxication. *Beckerle v. Brandon*, 229 Ill. 323, 82 N. E. 266. A mother may be injured in her means of support by the death of her minor son, if he contributed to her support, in spite of the fact that she is living with her husband. *Johnson v. Bush*, 154 Ill. App. 494, wherein the court said: "Appellants' main contention is, that the loss of wages resulting from the death of appellee's son, who was about eighteen years of age, was not an injury to appellee's means of support within the meaning of the statute, as she was living with her husband and he was entitled to the wages of the minor son, and he was the proper plaintiff; and that such instructions as authorized the jury to take into consideration the likelihood that the deceased would have contributed to the support of appellee in the future, were improper. The proof shows that the husband, who was also a coal miner, was in the habit of getting drunk from three to four times a week, and that for two years he had not furnished appellee any money for her support; that she had received some of his wages and some of the wages of the deceased in the form of orders from the store of the company, for which they both worked; and that deceased contributed to the support of the ap-

pellee and her family by giving her from eight to ten dollars every two weeks when he worked. As the wages appellee received from deceased constituted a part of her means of support, she, by his death, suffered an injury thereto, and as means of support relate to the future as well as the present, she was therein injured, not only at the time of his death but in time to come, as one of the sources of her future support was thereby cut off and her means of future support were thereby diminished."

The measure of damages to which a widow is entitled for injury to means of support, is the present value of the husband's support during their joint expectancy of life. Minor children can recover only for loss of support during their minority. *Young v. Beveridge*, 81 Neb. 180, 115 N. W. 766. Humiliation, grief, and like injuries cannot be considered in determining the question of liability, but when a foundation for actual damages has been laid by proof of loss of means of support, such injuries as humiliation and grief may be considered in awarding exemplary damages. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009. It seems that in Michigan exemplary damages for shame, mortification, etc., caused by the intoxication may be recovered where proved. But they cannot be recovered unless the shame and mortification be proved. *Spray v. Ayotte*, 161 Mich. 593, 126 N. W. 630, 17 Detroit Leg. N. 388.

Under the West Virginia civil damage act (Code 1891, c. 32, § 20, p. 236) illegality in a sale of intoxicating liquors makes the sale wilful and wanton as a matter of law and justifies an award of exemplary damages. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009, wherein the court said: "Cases arising under our civil damage law are sui generis. If sales be made illegally, in violation of the express command of the statute, whether made by principal or agent, in the eye of the law, as heretofore construed, they are deemed to have been made wilfully and wantonly. The illegality thereof, the violation of the law by principal or agent, supplies all the elements necessary in other cases to show fraud, malice, oppression, or wanton, wilful or reckless conduct or criminal indifference to civil obligation on the part of defendant, and justifies the jury in imposing on the wrongdoer, for his infraction of the law, exemplary damages."

Where exemplary damages are awarded they should bear some reasonable proportion to the actual damage done, else they are unreasonable and excessive, evincing partiality and prejudice on the part of the jury, so as to justify the court in setting the verdict aside. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009.

A verdict of \$275 is entirely inadequate as a recovery for the injury to the means of

support of the plaintiff by the death by intoxication of her husband, it being shown that he earned from \$1.50 to \$3 a day, supported his family comfortably, and was paying for his home through a homestead loan association. *Johnson v. Gram*, 72 Ill. App. 676, wherein the court reversed and remanded the judgment of the lower court on the grounds of the inadequacy of the awarded damages.

A verdict of \$1,000 for the death by intoxication of the plaintiff's husband, a farmer forty-two years of age, who had supported his wife during his life, is not excessive. *Brown v. Butler*, 66 Ill. App. 86.

In a case wherein it appeared that the deceased, the husband of the plaintiff, was employed as a buggy-washer in a livery stable, and later made a living as a vendor of pop corn, pop, horse-radish, etc., it was held that a verdict for \$10,000 was an excessive award, and a remittitur of half the amount was required. *Whipple v. Rosenstock*, 99 Neb. 153, 155 N. W. 898.

9. EVIDENCE.

Although an action under a civil damage statute is somewhat penal in its nature, it is not strictly so, but is an action for damages. Therefore to be sufficient foundation for a verdict for the plaintiff, the facts in such an action need not be proved beyond a reasonable doubt. A preponderance is enough. *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068; *Brown v. Butler*, 66 Ill. App. 86; *Dickmann v. Thomas*, 36 S. D. 283, 154 N. W. 811. In the case first cited the court said: "It is contended that the court erred in instructing the jury that a preponderance of the evidence was sufficient upon which to base a verdict in favor of the plaintiff. We do not view that question as an open one in this court. In the case of *Hall v. Barnes*, 82 Ill. 228, which was an action by the wife under the dram-shop act, the court, on page 229 said: 'Upon the remaining point we regard the evidence sufficient as to the loss of means of support in consequence of drunkenness caused by appellants. While it is true the action is penal and the material allegations in the declaration must be fully proved, yet it is not necessary the evidence should exclude all reasonable doubt. It is sufficient if there is a preponderance of evidence, and this may result from circumstantial as well as direct evidence.' This is an action to recover damages, and not to recover a fine or a penalty. . . . and this court, in that class of cases, has uniformly approved instructions which have informed the jury the plaintiff need only establish his case by a preponderance of the evidence."

Where the action for damages for death by intoxication is predicated on an injury to the

means of support, what the plaintiff's means of support were is a proper subject of inquiry, and it is admissible to prove that the plaintiff had no other support than that furnished by the deceased. *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216.

Declarations of the deceased connected with the act resulting in his death, which have a tendency to show whether he had an intention to commit suicide, are admissible as a part of the *res gestae* and as bearing on the question whether the death was suicidal or was the result of intoxication. *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536, wherein a liquor dealer was held to be liable for the death of a purchaser of liquor caused by his being run over by a train. It appeared that the deceased had gone home from the saloon in an intoxicated condition, had left his home later and was seen by the engineer of the limited train lying across the track, but too late to prevent the killing. It was held that evidence that when the deceased was going home he declared his intention to go home, kiss his wife and babies, and go to bed was competent and admissible as showing his last declared intention in connection with his act.

Unless so connected with the event as to be a part of the *res gestae*, declarations of the deceased, tending to show an intention to commit suicide, are inadmissible to show that the death was caused by suicidal intent rather than by intoxication. *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536, wherein the court said: "If in every case where one since deceased considered at any time the question to be or not to be, with an inclination or decision toward the negative, his declarations neither connected with any act nor preliminary to or preparatory for any act could be proved, it would open a limitless field of inquiry as to the circumstances under which the declarations were made and whether in normal conditions or at times of exceptional misfortune, discouragement and despondency. It would raise all sorts of psychological questions of mental states and intentions at different times and changes of intention from external conditions."

Statements of the deceased as to where he got the whisky, made at a time so remote from the transaction causing the death as not to be part of the *res gestae*, are inadmissible. *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460. In an action for death by intoxication evidence of conversations with the deceased, not a part of the *res gestae*, are inadmissible. *Knott v. Peterson*, 125 Ia. 404, 101 N. W. 173. And statements of an attending physician, made so long after the death as not to be a part of the *res gestae* are likewise inadmissible. *Goulding v. Phillips*, 124 Ia. 496, 100 N. W. 516.

But where it is admitted that the deceased committed suicide, the question being whether

he did so as the result of intoxication, a writing left by him is inadmissible to show that the suicide was not caused by intoxication. *Hammers v. Knight*, 168 Ill. App. 203, wherein the defendants offered and secured the admission in evidence, under objection, of the following paper: "good Buy this is the last report Ed Hammers can give My wife is a hore sind [signed] by Ed Hammers." The court on appeal held that the paper should not have been admitted as tending to show that jealousy and not intoxication caused the suicide since the paper might just as well show that the intoxication caused the jealousy. The court said: "The only purpose for which this paper could be admissible would be for its supposed tendency to show the state of mind in which Hammers was when he wrote it at some period of time before he fired the fatal shot. There was no proof that it was written at the time of the shooting. If Hammers was wild or crazy because of intoxication, the charge in this paper may have been made by him because of his intoxicated condition. Hammers could not prepare and leave a paper which would be evidence of the truth of what he wrote, either against appellant or appellees. The natural tendency of this paper as evidence was to lead the jury to believe that he killed himself because he considered his wife unfaithful, whereas it might with equal propriety be concluded that he wrote the paper and harbored in his mind the charge therein contained because he was intoxicated and frenzied with drink. The impropriety of admitting the paper may be illustrated by supposing that it had said that he was intoxicated; that this intoxication had been produced by intoxicating liquors sold to him that day by appellees; and that he was about to kill himself because of that intoxication. Such a paper would be just as illustrative of his state of mind as the one put in evidence, but it is obvious that it would not be competent evidence against appellees. We conclude that it should not have been admitted."

Where there is evidence fairly tending to prove that the liquor procured from the plaintiff appreciably contributed to the condition of intoxication which resulted in the death, whether it did so contribute is a question properly left to the jury, and a peremptory instruction for the defendant is not proper. *Deel v. Heiligenstein*, 244 Ill. 239, 91 N. E. 429, affirming 147 Ill. App. 307, wherein it was said: "It is claimed by appellant that the proof shows that Deel was not intoxicated at the time of his death and that the verdict was not sustained by the evidence, and he assigns as error the refusal of the court to give a peremptory instruction to the jury, at the close of plaintiff's case and again at the close of the whole case, directing them to find for the defendant. The evidence strongly

tends to show that the deceased was intoxicated at the time of his death and that the intoxication was caused wholly by the liquors he drank that day at Shumway, but it is not so conclusively shown that he procured from appellant sufficient intoxicating liquor to appreciably contribute to his condition. There was evidence fairly tending to prove this phase of appellee's case, however, and the trial court properly refused to give the peremptory instructions asked."

Where parents are suing for exemplary or vindictive damages for the death by intoxication of an infant son, evidence that the father and son had on previous occasions visited other saloons and drank together is competent to be considered in fixing the amount of the damages. *Beckerle v. Brandon*, 229 Ill. 323, 82 N. E. 266, wherein it was held, however, that although such evidence was competent its exclusion was not ground for reversal where evidence actually went to the jury that the father had previously consented to the son's drinking at the saloon in question. The court said: "It is then urged that the court erred in not permitting the defendants to show that the father and son visited and drank together at other saloons at other times. Inasmuch as the plaintiffs were claiming vindictive damages this evidence was competent. . . . The fact that the wife sued jointly with the husband did not warrant its exclusion. If the father had on other occasions consented to the sale of intoxicating liquor to his minor son, the jury had a right to take that fact into consideration in determining whether vindictive damages should be awarded and in fixing the amount thereof in case they awarded damages of that kind, no matter who sued. We think, however, that this error does not warrant a reversal. It was shown by the testimony of the father and others that on earlier occasions at Beckerle's bar the son had bought intoxicants, the father consenting, and that the son had there, in the presence of the father, partaken of the same without objection from the latter. Under these circumstances the exclusion of the evidence in question was not harmful."

In *Kelley v. Malhoit*, 115 Ill. App. 23, the court said: "In view of the statement made by counsel for plaintiff in open court that plaintiff made no claim to exemplary damages, the inquiry made of the plaintiff when on the witness stand as to whether she had drunk with her husband ought [not] to have been allowed, but no harm came to plaintiff thereby. She denied that she ever drank with him and there was no proof that she ever did."

Evidence of statements made by the defendant to his barkeepers with reference to selling liquor to or permitting liquor to be ob-

tained by the deceased, while admissible in mitigation of exemplary or punitive damages, is inadmissible for the purpose of defeating the recovery of actual damages. *Dunnigan v. Ellis*, 162 Ill. App. 185. Likewise evidence of statements by the deceased to the effect that the defendant would not allow his barkeepers to sell or give the deceased any liquor is admissible only on the question of punitive or vindictive damages and not for the purpose of showing that no sales were made to the deceased. *Dunnigan v. Ellis*, 162 Ill. App. 185.

Proof that one became intoxicated while drinking certain liquors is conclusive proof that those liquors were intoxicating and no other affirmative proof thereof need be given. *Lahey v. Crist*, 130 Ill. App. 152.

It is competent to prove that the deceased was in the habit of becoming intoxicated. *Merrill v. Tinkler*, 160 Mich. 575, 125 N. W. 717.

Where the civil damage statute gives a remedy only when the sale or gift by the defendant is unlawful, and where the sale or gift to an intoxicated person is unlawful, it is material to prove that, when the sale or gift on which the action is based was made, the deceased was intoxicated, and evidence of that fact is, of course, competent. Under those circumstances, evidence of the habits of the deceased in the matter of getting intoxicated is competent, as tending to show the illegality of the sale. *Sisson v. Lampert*, 159 Mich. 509, 124 N. W. 513, 16 Detroit Leg. N. 1032.

Evidence of the habits of the deceased as to the drinking of liquor and its effect on him is admissible as bearing on the question of the quantum of damages, *Kelley v. Malhoit*, 115 Ill. App. 23; and on the question of exemplary damages, *Sisson v. Lampert*, 159 Mich. 509, 124 N. W. 513. And, in like manner, evidence of the character of the business or occupation of the deceased, his habits of industry and thrift, age, and physical condition, is admissible on the question of damages. *Marschall v. Laughran*, 47 Ill. App. 29; *Peterson v. Brackey*, 143 Ia. 75, 119 N. W. 967; *Lee v. Hederman*, 158 Ia. 719, 138 N. W. 893.

But where a witness has testified to the facts showing the habits of the deceased for industry, it is proper to exclude opinion evidence on his part as to whether the deceased was industrious. *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864.

Spontaneous declarations as to the state of his health, made by the deceased when there was no thought of any litigation or controversy and where circumstances negative any motive or design, are admissible. *Juckett v. Brennaman*, 99 Neb. 755, 157 N. W. 925. And life tables are admissible in evidence, as bear-

ing on the question of the life expectancy of the deceased, and, hence, on the injury to means of support. *Knott v. Peterson*, 125 Ia. 404, 101 N. W. 173; *Peterson v. Brackey*, 143 Ia. 75, 119 N. W. 967; *Sellars v. Foster*, 27 Neb. 118, 42 N. W. 907; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460. But, although admissible, the tables of life expectancy are not the controlling guide as to the probable duration of the life of the deceased. *Davis v. Borland*, 83 Neb. 281, 119 N. W. 454.

Anybody with a sense of smell is competent to testify that the deceased, immediately after his death, vomited blood and whisky, and that one could smell whisky all over the house. The expert testimony of a chemical analyst is not needed, for whether the liquor was distilled from molasses or corn is immaterial, and any person with a sense of smell is competent to discover and testify to the presence of spirituous liquor on such an occasion. *Marshall v. Laughran*, 47 Ill. App. 29.

Where a sister predicates her right of recovery on the death by intoxication of her brothers with whom she had a contract whereby they should support her, it is competent to introduce in evidence an account book showing the expenditures of the plaintiff for two years alleged to have been made with money furnished by the brothers, this evidence being material and admissible on the question what it had cost to support the plaintiff. *In re Bennett*, 160 Mich. 309, 125 N. W. 2.

In an action by a widow for the loss of means of support by the alleged death of her husband by intoxication, it is competent to leave to the jury the question of the situation and condition of the defendant and her dependence on her husband for support. *Martin v. Fisher*, 143 Mich. 462, 107 N. W. 86, 13 Detroit Leg. N. 8.

Evidence that the defendants had sold liquor to the deceased on occasions previous to that immediately preceding his death is admissible. *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864.

Where the bartender who made the sale has testified that he fooled the deceased and sold him ginger ale instead of liquor just before his death, it is competent to show that intoxicating liquor and not ginger ale was served to the deceased by introducing testimony of a conversation had at the time of the sale, between a bystander and the bartender, in which the bystander complained that enough liquor was served the deceased to kill him, and the bartender replied that he had given him (at some previous time) a "bolacek" of alcohol, that the deceased had

lived through that all right, that if he could stand that he could stand all he drank then, and that he didn't care if the deceased died before morning. *Young v. Beveridge*, 81 Neb. 180, 115 N. W. 766.

Where the testimony is conflicting as to whether the defendant made sales to the deceased, it is competent to introduce evidence that the deceased had brought home a whisky flask bearing a label reciting that it had been sold by the defendant. *Sullivan v. Conrad*, 79 Neb. 303, 112 N. W. 660.

Evidence offered by the defendant that the deceased had bought drinks elsewhere than at the saloon of the defendant on the date of the death of the deceased is wholly immaterial and is inadmissible. *Dickmann v. Thomas*, 36 S. D. 283, 154 N. W. 811.

It is competent for a witness to testify directly to the fact that the deceased was intoxicated at a time shortly before his death. *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150.

In an action by a widow under a civil damage statute for injury to her means of support by the death by intoxication of her husband, evidence as to the number and ages of the plaintiff's children is inadmissible. *Rogers v. Bailey*, 68 W. Va. 186, 69 S. E. 698, wherein the court said: "The plaintiff was permitted to prove that she had been married but nine years and was the mother of three children. Thus the dependent age of the children was shown. The admission of this evidence was prejudicial error. A clear statement from a standard authority is in point here: 'In an action by a wife to recover damages by the sale of liquor to her husband, evidence as to the number, age, and sex of her children is not admissible; for since the plaintiff can recover only for her own proper loss or damage, and the statute gives a separate right of action to each of the children, such testimony could have no relevancy and might improperly enhance the damages awarded.' *Black on Intoxicating Liquors*, section 327. In a more recent work it is said: 'The question as to whether evidence is admissible as to the age, sex and number of the children of the plaintiff who has brought suit under the statute for injury to her means of support has been frequently passed upon. The prevailing rule seems to be that such evidence is wholly immaterial and its admission reversible error, for the reason that the statute gives each child a right of action and the wife's right to recover is based on the loss of means for her support, and not for the support of her children.' *Woollen and Thornton on Intoxicating Liquors*, section 1063. The decisions generally are in accord with these texts."

INSOHO ET AL.

v.

**MID-CONTINENT DEVELOPMENT
COMPANY.**

Kansas Supreme Court—March 6, 1915.

*94 Kan. 370; 146 Pac. 1014.***Corporations — Appointment of Receiver — Grounds — Mismanagement.**

The majority of the stockholders of a corporation have the right to control the corporation, and the majority of the board of directors have the right to determine its policies and manage and direct its affairs so long as they act in good faith and within the limitations of the law. The appointment of a receiver for a solvent, going concern is a last resort remedy, and should not be employed to correct improper conduct when other adequate remedy is available. Bad judgment and ill success in previous ventures, completed or not being actively prosecuted, current transactions merely unwise and not so reckless or extravagant as to amount to breach of trust, irregularities and misconduct which are not so culpable as to jeopardize the interests of the corporation and the rights of stockholders, and dissensions among directors, so long as a majority of them control, do not warrant the appointment of a receiver. In no case should a court take the property and business of a solvent, going corporation out of the hands of the board of directors and into its own hands by the appointment of a receiver at the suit of a minority stockholder unless the right of the plaintiff be free from reasonable doubt and the danger of loss or injury be clearly proved.

[See 17 Ann. Cas. 916; Ann. Cas. 1915B 581.]

Discharge of Receiver — Grounds — Change in Management.

This suit was commenced by a preferred stockholder for a dividend, for the appropriation of the property of the corporation to the payment of such dividend, for the redemption of her stock, and for the appointment of a receiver to accomplish the purposes of the suit. A receiver was appointed at the commencement of the suit on the allegations of the verified petition, which contained numerous specifications of misconduct on the part of the board of directors, and charged imminence of insolvency. A referee was appointed to hear the cause, who returned findings of fact and conclusions of law which the court adopted, except a recommendation that the receiver be discharged. Before the reference was made a new and enlarged board of directors was chosen at a regular stockholders' meeting, which new board the referee found to be harmonious, and against which no objection of any kind was lodged. The charge of threatened insolvency was not sustained. Held, the reten-

tion of the receiver after the election of the new board of directors constituted an abuse of judicial discretion. Held, further, the findings of fact disclose that the original appointment of the receiver was not justified.

Preferred Shareholder — Status as Stockholder or Creditor.

The capital stock of the corporation consisted of \$100,000 common stock and \$50,000 preferred stock. The plaintiff purchased 500 shares of the preferred stock and received a certificate of stock which provided there should be paid on it from net earnings a fixed yearly dividend from date of issuance at the rate of seven per cent per annum, to be earned before dividends on common stock were declared; that the stock should not be entitled to further dividends and should have no voting power; that it should be preferred as to assets on winding up the affairs of the company; and that it should be redeemable at the option of the company after one year from date of issue, at par with accrued dividends. Held, the certificate was a certificate of stock and not a certificate of indebtedness, and the plaintiff was a stockholder of the corporation and not a creditor.

[See note at end of this case.]

Same.

The board of directors adopted a resolution to redeem the preferred stock, and at the same time adopted a resolution to set aside seventy-five per cent of the gross earnings from that time on for that purpose, to be known as a preferred stock fund, to be apportioned as often as twenty-five per cent of the amount of the preferred stock was accumulated. The resolutions were adopted only eight days before the receiver was appointed, and the board of directors had no opportunity to carry them out. Held, the resolutions must be construed together, and so considered they merely pledged the transfer of seventy-five per cent of future gross earnings to the preferred stock fund, to be apportioned as stated; the entire issue of preferred stock did not immediately become an absolute liability of the company; the preferred stockholders continued to be stockholders and not creditors until an apportionment of the preferred stock fund was made; and the preferred stockholders then became creditors only with respect to such apportionment.

[See note at end of this case.]

Dividends — From What Funds Payable — Net Earnings.

The defendant engaged in the business of prospecting for and producing gas and oil. It developed a valuable gas field near Muncie, left it for other fields, and then returned to it after the proceeds of the sale of its stock had been spent. It then borrowed \$11,000, which it used to build a pipe line to supply gas to consumers with whom it had contracts. By bringing in new wells and connecting them with the pipe line it brought its income up to an average of \$2,800 per month, and received for the sale of gas for the thirty days next preceding the appointment of the receiver the sum of \$3,000. It

expended all earnings received after the pipe line was built in repaying the money borrowed to build the pipe line, in drilling new wells and connecting them with the pipe line, and for general expenses. When the suit was commenced it still owed about \$2,500 of indebtedness incurred for these purposes, which was due and payable. Held, there were no net earnings out of which to pay dividends on the preferred stock.

Same.

At the time the resolutions referred to were adopted the board of directors adopted a resolution authorizing the secretary and treasurer to proceed with the payment of preferred dividends. At that time there were about \$2,900 in the treasury which were forthwith applied to the satisfaction of the claims of creditors. Held, the money was not net earnings, and the duty to pay creditors was superior to the duty to pay preferred stockholders.

(Syllabus by court.)

Appeal from District Court, Wyandotte county: FISCHER, Judge.

Action by Lydia E. Inscho et al., plaintiffs, against Mid-continent Development Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

C. Angevine, J. K. Cubbison, and William G. Holt, for appellant.

T. F. Railsback for appellees.

[372] BURCH, J.—On August 15, 1911, the plaintiff, Lydia E. Inscho, the owner of five hundred shares of preferred stock issued by the defendant, sued the defendant to recover the sum of \$35 as a seven per cent dividend on her stock for the preceding year. On the same [373] day the judge of the district court on presentation to him of the verified petition, appointed a receiver for the defendant. On the same day the receiver qualified and took possession of all the defendant's property. On the same day an intervening stockholder filed a pleading praying judgment for a \$7 dividend. Later two other stockholders intervened, asking for dividends in sums of \$35 and \$70, respectively. Issues were made up, and in March, 1912, a referee was appointed to hear the case. In October, 1912, the referee reported findings of fact and conclusions of law and recommended the discharge of the receiver. Various motions relating to the referee's report were filed, including a motion by the defendant to discharge the receiver and a motion for judgment in favor of the defendant on the referee's findings of fact. On November 29, 1912, the cause was finally submitted to the district court. The cause was held under advisement until June 7, 1913, when the referee's

report was adopted, except the recommendation to discharge the receiver, the referee's findings were stated as findings of the court, and judgment was rendered in favor of the plaintiff, the interveners, and all other holders of preferred stock, for dividends, for the redemption of their stock, and for other relief. The defendant appeals.

The defendant was organized under the laws of the state of Arizona with a capital stock of \$100,000 common stock and \$50,000 preferred stock. It engaged in the business of prospecting for and producing gas and oil. It first drilled for gas and oil in Chase and Morris counties, and spent a large sum of money in such work without return. It then developed a good gas field near Muncie, in Wyandotte county. It then explored a field in Marshall county, Oklahoma, and purchased a majority of the stock of an Oklahoma corporation known as the Mal-Millan Company, organized for the production of gas and oil and occupying the Marshall county field. Large sums of money were spent in these ventures [374] without success. It then returned to the Muncie field and was operating there when the action was commenced.

The petition disclosed that the plaintiff purchased her stock on July 5, 1910. It was alleged that the net earnings of the defendant, from which 7 per cent annual dividends on preferred stock were payable, were and had been for some months about \$3000 per month; that such earnings were sufficient to enable the defendant to pay one annual dividend to the plaintiff in the sum of \$35, but that such dividend had not been paid, and the plaintiff desired to subject the property of the defendant to payment of her claim. The petition further alleged that at a recent meeting of the board of directors a reserved privilege to redeem the preferred stock at par with accumulated dividends had been exercised, a resolution had been adopted to create a sinking fund for the redemption of the preferred stock, and the preferred stockholders had been notified of the action taken. A copy of the plaintiff's certificate of stock was attached to the petition, the material portions of which read as follows:

"This certifies that Mrs. Lydia E. Inscho is the owner of 500 Shares of the Preferred Capital Stock of the Mid-continent Development Company, full paid and nonassessable, on which there shall be paid by said Company from its net earnings a fixed yearly dividend from date of issuance, at the rate of seven per cent per annum, payable semi-annually, which shall be earned before dividends are declared from time to time on the Common Stock. This Stock is also Preferred as to the assets of the Corporation in case of winding up its affairs, and shall not be

entitled to any further dividends nor have any voting power. The stock is redeemable at the option of the Company after one year from date of issuance by paying par value thereof, with accrued dividends."

The remainder of the petition was quite prolix and redundant, but may be summarized as containing the following charges against the defendant. Nothing had [375] been paid for the common stock. Subscriptions to the entire amount of the preferred stock had been paid into the company's treasury. The common stock controlled the corporation, and the money supplied by the preferred stock had been wasted through fraudulent conduct, illegal investments, and culpable mismanagement. Fraudulent, illegal and wasteful transactions were in contemplation. Members of the board of directors were financially interested in rival enterprises, were not giving their time to the affairs of the company, and dissensions existed among the officers and directors, so that the rights of plaintiff were jeopardized. The company was in imminent danger of insolvency. Its assets consisted largely of gas wells, and unless a receiver were appointed the company would be managed in the interest of its rivals, its assets would be exhausted and squandered, and the preferred stockholders would lose not only their dividends but their investment. The prayer was for judgment for \$35, for the appointment of a receiver to conduct the business of the company, and for other relief.

The intervening petitions were of the same character.

The case may be disposed of upon the findings of fact. The evidence appears to have been voluminous, and little of it is abstracted. The plaintiff and the interveners appear to have been satisfied with the findings of fact and rested upon them. This court cannot say that any others should have been made, and under the well-established rule the facts found embrace all the facts of the case open to consideration on appeal.

"Much testimony is quoted by both parties in support of their respective positions upon which neither the referee nor the court made findings. This court can consider the written instruments executed by the parties, other written documents, the pleadings, admissions and stipulations, and findings of fact. It can also consider the evidence upon any branch of the case which is all in depositions, as that procured by the plaintiff to explain his inability to produce the notes [376] and mortgages which Carolus had assumed. But it can not found its judgment upon oral testimony not reduced to findings of fact by the trial court. If the parties desired findings in respect to the matters covered by such testimony a request for further findings should have been made. (Shuler v. Lashhorn, 67

Kan. 694, 74 Pac. 264.) Therefore many matters debated in the briefs are not open to consideration." (Lynds v. Van Valkenburgh, 77 Kan. 24, 33, 93 Pac. 615.)

The findings show that the corporation was organized in 1908, and was authorized to do business in Kansas in July, 1909. Fifty thousand dollars of the common stock were issued to S. R. Walker in exchange for oil and gas leases which cost him but a small sum of money and his labor in obtaining them. A decision of the board of directors that the leases were valuable was implied by the exchange of stock for them, and the charter of the company made such a decision conclusive. The preferred stock was sold at par. Officers of the company received a commission for disposing of this stock, and the finding is that payment of these commissions was unfair treatment of the purchasers of stock. There is no finding that payment for services of this character was *ultra vires*, or was not regularly provided for, or was accepted with knowledge of illegality. One share of common stock was given with each share of preferred stock. This action the court found to be proper if the board of directors deemed it for the best interest of the company, and there is no finding that the board of directors did not so regard it. Holders of preferred shares purchased other shares of common stock, so that instead of the corporation being controlled by holders of common stock only, the preferred stockholders owned 82 per cent of the common stock.

There is no finding that any officer or director of the corporation was guilty of any fraud or bad faith or breach of trust in any transaction alleged in the petition to be fraudulent, and excepting the criticism for [377] paying commissions on the sale of stock, a matter not alleged in the petition, there is no finding of fraud or bad faith or breach of trust in the conduct or management of any of the company's business. It is expressly found that the expenditures made in Morris and Chase counties and in Oklahoma, which consumed the proceeds of the sale of preferred stock not invested in the Muncie field, were made in good faith and without wrongful intent.

The court found that the laws of Oklahoma did not permit the defendant to hold the stock of the Mal-Millan company, but there is no finding that this fact had any effect whatever on the finances of the defendant. There is no finding that the state of Oklahoma ever complained, or that the operations of the defendant were embarrassed or the value of the investment reduced because of the prohibition. The defendant presents a forceful argument in favor of the legality of the purchase, and if a similar question should ever be presented to the courts of Oklahoma

the decision may be interesting to ponder. The subject is of no importance now. The court found that the Mal-Millan company had no property of any value and was considerably in debt, and the investment may be considered as lost through poor business judgment, although the court made the following finding concerning it:

"The investment made in the stock of the Mal-Millan Company has not proven worthless, but the Mal-Millan Company is a going concern, producing the highest grade of crude petroleum found in Oklahoma, which commands the highest market price, and the same is being sold by said Mal-Millan Company as produced, and said Mal-Millan Company is rapidly paying off its debts and getting on a sound financial basis."

Some of the directors, how many is not stated, held interests in other gas companies, their entire attention was not devoted to the defendant's interests, and from about May 1, 1911, to January 4, 1912, there were dissensions among the directors. In August, 1911, the [378] board of directors was increased from nine to eleven members. At the regular stockholders' meeting held on January 4, 1912, more than three months before the referee was appointed to hear the case and eighteen months before the court made its findings of fact, a new board of directors was elected in which no dissension existed, and of which no complaint is made. There is no finding that the business affairs of the defendant were being manipulated in the interest of rival companies by the old board, or were so neglected by the old board as to endanger the welfare of the company, or that the business policies pursued during the period when the directors were inharmonious were not for the best interest of all the stockholders. On the other hand, the findings show that the period from January 1, 1911, until the receiver was appointed in August, 1911, was the period of the company's greatest prosperity. Its earnings were brought up to about \$3000 per month through the operation of its gas wells and of a pipe line which had been constructed with money borrowed for the purpose in 1910 with the approval of the entire board. The company was bringing in new gas wells, which policy the referee and the court recommended should be continued. It had rapidly liquidated the indebtedness incurred to build the pipe line and for development work, and was anticipating the payment of dividends which the petition itself alleged the defendant was able to pay. On August 7, 1911, eight days before this suit was commenced, the board of directors by unanimous vote authorized the secretary and treasurer to proceed with the payment of dividends on the preferred stock, and at the same meeting the board of direc-

tors by unanimous vote provided for the redemption of the preferred stock and dividends accrued thereon—a part of the relief the plaintiff prayed for—by the creation of a sinking fund for the purpose—a method which the court adopted.

There is no finding of culpable waste or squandering [379] of assets. The findings state that the proceeds of the sale of the preferred stock were spent with entire unanimity on the part of the board of directors. The corporation was engaged in prospecting for gas and oil. It takes no finding by a court to establish the truth of the fact that if wells bored prove to be dry there are no returns. The business judgment of the board of directors, which the plaintiff could impugn only in case of recklessness or extravagance equivalent to breach of trust, is questioned in nothing but the Mal-Millan transaction, which occurred before the plaintiff acquired her stock, and long before the action was commenced the defendant had turned its energy to the development of the Muncie field. Instead of being in imminent danger of insolvency when the receiver was appointed, the findings show the defendant owed but \$2500, while it owned a pipe line, practically paid for, which cost \$11,000 to build, and owned gas wells which produced a total income of \$16,378.19 between February 10 and September 15 and were producing an income of \$3000 per month.

At the time the resolution to pay dividends on the preferred stock and to create a sinking fund for the redemption of the preferred stock were adopted the corporation owed debts to the amount of about \$5000, which were due and payable. It proceeded to pay out in the liquidation of this indebtedness the sum of \$2893.85, which left \$19.40 in the treasury. This sum passed into the hands of the receiver upon his appointment.

No demand was made by the plaintiff or by the interveners or by any other stockholder of the company upon the directors for payment of a dividend. Very soon after the suit was commenced the president of the defendant offered personally to pay the plaintiff her dividend but the offer was refused.

The foregoing constitutes a summary of the findings of fact so far as they bear upon the appointment and [380] retention of the receiver. They do not sustain the allegations of the petition upon which the appointment of the receiver was based, and did not warrant the court in continuing to withhold the management of the corporation from those to whom the stockholders and the law committed it.

Generally a corporation may contract with its officers and directors if the transaction be untainted by bad faith. If payment of

commissions by the old board of directors on the sale of stock constituted an actionable appropriation of the funds of the company, something which the court refrained from finding, the remedy was for the stockholders to request the board to compel restoration. Doubtless a request upon the new board of January, 1912, would have received attention, but if upon request the board of directors refused to act, the stockholders, or a single stockholder suing for all, could have brought the action. Taking the findings of fact as they stand, employment of the extraordinary remedy of absolute ouster of the old board for accepting commissions for selling stock would have been improper, and application of the remedy to the new board was without any justification.

Bad judgment in the Mal-Millan venture and ill success before the company returned to active exploitation of the Muncie field were not grounds for the appointment of a receiver. The right to supplant the board of directors acting in August, 1911, with a receiver depended upon the financial condition of the company at that time and upon what the policies in process of execution by the board of directors then in authority seemed to promise. Beginning with the determination to build the pipe line, the policies of the company so far as they are disclosed by the findings of fact were sound. Its directors were acting in good faith and within their lawful powers. No single transaction constituting a breach of trust or jeopardizing the welfare of the company is stated. The business [381] was prosperous, and the directorate, instead of denying claims of preferred stockholders, was recognizing them and preparing to satisfy them.

Conceding for present purposes that the plaintiff was entitled to receive a declared dividend on her stock and consequently was a creditor, her claim could not rise superior to the claims of creditors holding current obligations of the company which were due and payable. (*Branch v. Jesup*, 106 U. S. 468, 475, 1 S. Ct. 495, 47 U. S. (L. ed.) 279.) The discharge of those obligations could not constitute misconduct on the part of the defendant's managing officers, much less ground for peremptory removal.

Other supposed grounds for the receivership have been discussed in connection with the statement of the findings of fact. The result is the receiver was improvidently appointed and his retention in office after the court discovered the facts was unjustifiable.

"Before a receiver can properly be appointed it is necessary that the plaintiff should have a probable cause of action against the defendant, and that the benefit to be derived from such cause of action might be lost or substantially impaired if the receiver were

not appointed." (*Elwood v. Greenleaf First Nat. Bank*, 41 Kan. 475, syl. ¶ 4, 21 Pac. 673.)

"Dissatisfaction by a minority of the stockholders of a corporation with its management by the majority, in the absence of fraud or insolvency, is not sufficient to authorize the court to appoint a receiver at the instance of the minority." (*Fluker v. Emporia City R. Co.* 48 Kan. 577, syl. ¶ 2, 30 Pac. 18.)

"The appointment of a receiver rests largely within the discretion of the court, and before it will take the property and business of a liquidating bank from the control of the directors into its own hands, upon the application of a stockholder, it must appear that the danger of loss or injury to the rights of the plaintiff is clearly proved, and the necessity and right for the appointment of a receiver free from reasonable doubt." (*Watkins v. Lawrence Nat. Bank*, 51 Kan. 254, syl. ¶ 4, 32 Pac. 914.)

The principle here stated applies with even greater [382] force when it is proposed to take the property and business of a solvent concern in promising circumstances out of the hands of its directors at the instance of a piqued stockholder holding but a slight fraction of the corporate stock.

The decision in the case of *Feess v. Mechanics' State Bank*, 84 Kan. 828, 115 Pac. 563, L.R.A.1915A, 606, covers all essential features of this case. In view of the full and clear statement of principles contained in that decision it is held that the appointment and retention of the receiver in this case constituted an abuse of judicial discretion.

The plaintiff undertakes to distinguish the *Feess* case by pointing out that it involved the appointment of a receiver for a solvent bank, one of whose valuable assets was public confidence, and that the receiver was directed to wind up the affairs of the corporation. The effort to distinguish fails. General principles governing the duties of the courts of this state in respect to the appointment of receivers were stated, as the following quotations from the syllabus and the opinion show:

"Under the law a majority of the stockholders have the control of a corporation and the majority of its directors have power to determine the policy to be pursued and to manage and direct its affairs, and the minority must submit to their judgment so long as the majority act in good faith and within the limitation of the law." (Syl. ¶ 7.)

"It was held in *Re Lewis*, 52 Kan. 660, 35 Pac. 287, that under the code a receiver may be appointed at the suit of a stockholder 'where the business and affairs of a corporation have been so mismanaged that it has become insolvent, and where it is made to appear that all the officers and directors

of the same have conspired together to divert its business to another company, dissipate its funds, and fraudulently absorb and apply its assets to the individual benefit of such officers.' (Syl. ¶ 1.) Conduct and conditions less serious than those enumerated would justify the appointment of a receiver, but it is a power that should be sparingly and cautiously exercised. It is a last-resort [383] provision and is only to be employed where there is a pressing necessity and no other adequate remedy is afforded.

. . . The policy pursued in respect to loans and discounts seems to have been satisfactory to a majority of the directors and to those owning the controlling interest and more than nine-tenths of the capital stock. Those owning the majority of the stock claimed the right to control the management and policy of the bank, and a number of the matters of which complaint is made grew out of the differences of opinion in respect to what was the better policy. The law gives the majority of the stockholders the right to control the policy and business of a corporation and the minority must submit to their decisions when the majority act in good faith and within their powers.

"It has been said that 'the very foundation principle of a corporation is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their charter rights. No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.'" (pp. 836, 839.)

Other principles recognized and applied in the Feess case, but not stated so formally, are that business transactions which are merely unwise, irregularities and misconduct which are not so culpable as to jeopardize the corporation and the rights of stockholders, and dissensions among directors, so long as a majority of them control, do not warrant the appointment of a receiver.

The plaintiff further seeks to distinguish the Feess case on the ground that the defendant here was insolvent, and to make the defendant insolvent the total issue of preferred stock in the sum of \$50,000 is counted among its liabilities. Besides this, it is claimed the plaintiff was at all times merely a creditor of the corporation and not a stockholder, a view in which the district court concurred.

The plaintiff's stock certificate, copied above, evidenced [384] the rights of a stockholder of the company and not the rights of a bondholder or creditor. The plaintiff purchased shares of the original capital stock of the company, received a certificate of stock,

cast her fortunes with the company, took with it the risk of its ventures, and depended upon the net earnings of the company for returns upon her investment. She was not guaranteed a seven per cent annual dividend at all events. If there were no net earnings she received nothing and could not, as creditors may do, appropriate capital or general assets to the satisfaction of her claim. The fact that preferred stock had no vote and the corporation reserved the right to retire preferred stock by redeeming it did not change this express feature of the contract. So long as she remained a stockholder her only source of returns was net earnings, and if there were debts of the company she could not share such assets with creditors, in case of dissolution, but was merely preferred over common stockholders in case there were assets to distribute.

To sustain the contention that the plaintiff was merely a bondholder or creditor and not a stockholder of the corporation and was entitled to interest and not dividends, the plaintiff cites the text found in 10 Cyc. 574 concerning the doctrine that the guaranty of stated dividends creates an absolute debt. This text was deduced from three decisions. The first is *Williams v. Parker*, 136 Mass. 204. It is based upon a statute. The opinion reads:

"The question which underlies all others in this case is whether the guaranty that each share of the preferred stock 'shall receive semiannual dividends of four dollars on each share' is an absolute guaranty, or is conditional upon the earning of sufficient profits by the corporation. This depends upon the construction to be given to the St. of 1855, c. 143. No condition is expressed in the statute, and the natural meaning of the words used is, that the corporation is to guarantee to each holder of preferred stock that he shall, while the corporation does business, receive semiannual dividends [385] of four dollars on each share; so that, if the net earnings of the corporation are insufficient to pay such dividends, the corporation shall make good the difference out of any property it has. If the legislature had intended that the holders of preferred stock should only be entitled to a preference over the common stockholders in dividends to the extent of four dollars semiannually on each share, and should never receive a greater dividend than this, it would have been easy to express this intention accurately; and the only guaranty required of the corporation would have been, that it should appropriate the net earnings first to the payment of a dividend of four dollars semiannually upon each share of the preferred stock. . . . The cases cited, in which either the preferred stock was issued without statutory authority,

or the dividends thereon by the terms of the promise or guaranty were held to be, either expressly or impliedly, payable out of the net earnings of the corporation, afford but little aid in the construction of the St. of 1855, c. 143." (pp. 206, 207.)

The plaintiff's certificate of stock in express terms conditioned payment of dividends on net earnings of the corporation.

The next case cited is *West Chester, etc. R. Co. v. Jackson*, 77 Pa. St. 321. It arose under a special statute passed to aid a railroad company which required more money to complete its road than could be realized from the sale of authorized stock and bonds. The act recited, "that making a floating debt for that purpose would be onerous to the management of the road and probably unduly hazard the interest of the stockholders" (p. 322), and provided for an issue of preferred stock bearing eight per cent annual dividends payable out of net earnings and redeemable after one year when the profits of the road would justify. The court treated this act as one to enable a corporation to borrow needed money, and said:

"The payment for his shares by Mr. Gray, and the issuing of the certificates to him by the defendant, made as complete a contract as if he had been a purchaser of bonds instead of a subscriber for stock. And his contract rights were precisely defined by the Act of 1855. [336] In effect, it was an agreement for the advance of money to an embarrassed railroad company. A corporation may issue new shares and give them a preference as a mode of borrowing money, where it has power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." (p. 327.)

In the case of *Sternbergh v. Brock*, 225 Pa. St. 279, 74 Atl. 166, 133 Am. St. Rep. 877, 24 L.R.A.(N.S.) 1078, the supreme court of Pennsylvania said of this decision:

"In *West Chester, etc. R. Co. v. Jackson*, 77 Pa. St. 321, a loose expression was used, when it was said that 'preferred stock is only a form of mortgage.' Whatever the extent of the preference in that case may have been, speaking generally, stock, whether it be common or preferred, does not represent indebtedness; its possession means ownership of the company." (p. 284.)

The last case cited in support of the Cyc. text is that of *Burt v. Rattle*, 31 Ohio St. 116. It involved the interpretation of a statute which the court regarded as one to enable corporations of a certain class to borrow money by means of preferred stock. The statute contained a provision relieving holders of preferred stock from liability for debts of the corporation. The constitution of the state imposed individual liability for debts upon stockholders, and if holders of

preferred stock issued under the statute were stockholders the statute was unconstitutional. If they were creditors the statute was valid. The preferred stock which was issued was secured by mortgage. The court held that the statute was valid and the preferred stockholders were creditors. Very clearly this decision evidences no general rule, and the position of the supreme court of Ohio on the subject under consideration must be sought for elsewhere. It may be found in the case of *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496. A portion of the opinion reads:

"The question in the case is, whether the certificates are certificates of stock or certificates of indebtedness? . . . The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor, [337] but he is not a creditor save as to dividends after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor; he cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent; if the latter, he takes no interest in the company's affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is the one or the other depends upon a proper construction of the contract he holds with the company. . . . As supporting the claim that it was not stock that was issued but certificates of indebtedness, special attention is called in argument to those portions of the certificates which provide that holders shall not vote upon them at any meeting of the holders of the capital stock of the company; that the rights of the holders to the dividends are guaranteed, and are to be secured by mortgage on the property, rights and income; that no further or other mortgage shall thereafter be made to the prejudice of the holders of the preferred stock; that the dividends are guaranteed by The Cincinnati, Hamilton & Dayton company, which company had executed a mortgage to Stanley Matthews, trustee, to secure the payment of dividends." (pp. 154, 155.)

The decision was that the certificates were certificates of stock and not certificates of indebtedness. In discussing the features of the certificates which are similar to those contained in the plaintiff's certificate, the court said:

"It further stipulates that the holders of the certificates of stock shall not have or

exercise the right to vote the same at the meeting of the stockholders of the company, thus indicating that it was stock they intended to authorize the issue of and not certificates of indebtedness, for the inhibition against voting would be wholly useless had it been intended that the holders should become creditors. The provision is not unusual. It is sometimes found in the statute itself.

. . . Nor [388] is it, in this instance unreasonable. The promise to the preferred stockholders was to award them the first net earnings, the holders of the common stock to share in such of the net earnings as they might, by good management, be able to make over and above the eight per cent. As the burden was upon the common stockholders, the power to manage might fairly be left with them. In any view, it is fair to treat the proviso as but an arrangement between two classes of stockholders which did not concern the public. It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential.

. . . Nor did the stipulation guaranteeing to the holders of the preferred stock payment of dividends thereon negative the idea that they were stockholders. It was not a stipulation to pay dividends in any event, but a stipulation to pay only out of surplus profits, for the company must be presumed to have proceeded in view of the terms of the second section of the act referred to, and the general rule of law on the subject. That rule is that payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock. Dividends to either are to come from one common source, to wit: from funds properly applicable to the payment of dividends, that is to say, net earnings. In the nature of things this must be so. As well might one member of a partnership be permitted to appropriate to his own use assets of the firm to the prejudice of creditors, as for a stockholder of a corporation to do it. A contract to permit this to be done would be contrary to public policy and void." (pp. 157, 158.)

Notes reviewing cases bearing upon this subject may be found in 27 L.R.A. 136 and 73 Am. St. Rep. 227. Some leading cases on the subject are the following: *Hamlin v. Toledo*, etc. R. Co. 78 Fed. 664, 47 U. S. App. 422, 24 C. C. A. 271, 36 L.R.A. 826; *Heller v. National Marine Bank*, 89 Md. 602, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L.R.A. 438; *Field v. Lamson*, etc. Mfg. Co. 162 Mass. 388, 38 N. E. 1126, 27 L.R.A. 136; *Branch v. Jesup*, 106 U. S. 468, 475, 1 S. Ct. 495, 27 U. S. (L. ed.) 279; *Warren v. King*, 108 U. S. 389, 398, 2 S. Ct. 789, 27 U. S. (L. ed.) 769; *Hamlin v. Continental Trust Co.*

78 Fed. 664, 47 U. S. App. 422, 435, 24 C. C. A. 271, 36 L.R.A. 826; *Chaffee v. Rutland R. Co.* 55 Vt. 110.

[389] The plaintiff's stock falls within the general description of preferred stock given in 10 Cyc. 568:

"Preferred stock is not an indebtedness of the corporation, or an absolute agreement to pay certain dividends upon its shares, but is merely a pledge of its profits in favor of certain shares in preference to the others, in other words an agreement to give a preference to particular shares over the other shares in the division of profits, but only in case there shall be profits to divide. Hence if it appears in any case that no profits have been earned the holders of preferred stock cannot maintain actions against the company to enforce payment of the guaranteed dividends."

The result is the plaintiff was not a creditor of the corporation by virtue of her purchase of preferred stock.

The district court misconceived the law on this subject, regarded the preferred stock as a debt, and held dividends on the preferred stock to be "interest," as appears by the following conclusion of law:

"That at the commencement of this suit the defendant was indebted to plaintiff and said interveners for accrued interest on their said shares of preferred stock as follows, to wit: To plaintiff in the sum of \$35; to D. P. Smyers in the sum of \$70; to J. M. Smythe in the sum of \$7; to Harry Lee Inscho in the sum of \$35; and to other holders of its preferred stock of the defendant in the various sums of money which had accrued as interest on said preferred stock up to the commencement of this suit, all aggregating the sum of \$1,373.75."

On August 7, 1911, the board of directors of the defendant adopted the following resolutions:

"Resolved, that the Mid-continent Development Company hereby exercises its option and obligates itself to redeem the preferred stock of this company by paying par value thereof with accrued dividends at the rate of 7% from date of issuance."

"Resolved, that the Mid-continent Development Company shall redeem the preferred stock of this company with accrued dividends; and 75% of the gross [390] earnings, which is from now on, be formed into a sinking fund for that purpose to be known as a preferred stock fund and to be kept and maintained for that purpose, which shall be apportioned to the preferred stockholders as often as 25% of the entire amount due is accumulated and this process of distribution shall continue until the entire amount of the preferred stock and accrued dividends shall have been paid in full."

The court held that these resolutions constituted a contract on the part of the defendant to redeem the preferred stock and to create a sinking fund for that purpose in accordance with the second resolution. Possibly this was true as to those preferred stockholders only who assented to the arrangement. However this may be, the two resolutions must be read together, and when so construed they do nothing more than pledge seventy-five per cent of the gross earnings accruing "from now on" to the redemption of preferred stock. The portion of the gross earnings so set apart was to be apportioned as often as twenty-five per cent of the preferred stock with accrued dividends was accumulated, until all preferred stockholders were paid in full. Holders of preferred stock remained stockholders having no right to demand redemption until an apportionment of accrued earnings was made, and then became creditors only with respect to the apportionment. Any other interpretation of the resolutions perverts their manifest purpose. The only enforceable obligation created by the resolution was to create the sinking fund and make apportionments, and it is idle to say that by virtue of the resolutions the entire issue of \$50,000 of preferred stock became a liability of the company to be taken into consideration in determining solvency. It is not claimed that any apportionment of gross earnings was possible within the eight days which elapsed between the adoption of the resolutions and the appointment of the receiver. The bookkeeping liability of a corporation on its capital stock is not a feature in determining solvency, which refers to ability to satisfy [391] creditors. It is not claimed that dividends due on the preferred stock would so deplete assets as to render the corporation insolvent. The express claim is there existed net earnings to pay them. The corporation was solvent, and the claim just stated will now be considered.

The plaintiff in her brief properly describes the action as an equitable one to subject the property of the defendant to payment of her claims as a preferred stockholder.

The dividend assured being payable "yearly . . . from time of issuance" at a stated rate per cent upon the amount of stock, the plaintiff was entitled to a return upon her stock for each year. That is, the dividends were cumulative. The decisions are quite uniform to this effect. The case of *Fidelity Trust Co. v. Lehigh Val. R. Co.* 215 Pa. St. 610, 7 Ann. Cas. 613, 64 Atl. 829, states the principles and refers to a number of authorities.

The dividend claimed by the plaintiff was payable out of net earnings only.

The findings of fact read as follows:

"5. Finding its operations in Oklahoma wholly remunerative, the defendant resumed work in Wyandotte County, Kansas, in the Muncie field. The defendant found it necessary to build a pipe line for the purpose of connecting the company's wells with certain manufacturing plants, to whom the defendant expected to sell its gas. Up to that time the entire \$50,000 of preferred stock had been sold and the money spent. The defendant, therefore, had to borrow and did borrow about \$11,000, and used it for the purpose of building said pipe line.

"7. . . . The borrowing of the \$11,000, as above stated, was a necessity. This borrowed money was used, as aforesaid, in building said pipe line in the fall and winter of 1910. This line was built with the expectation of furnishing gas to four prospective customers, namely: United Zinc & Chemical Company, the Santa Fe's Icing Company's Plant, the Santa Fe Elevator and the town of Turner, with whom the defendant had contracts for such purpose.

[392] "8. The defendant continued to drill new wells, and the Chemical Company to use more gas until on or about the 10th of August, 1911, the Chemical Company paid to the Development Company about \$3,000 in payment of gas consumed during the preceding thirty days. Between February 10th and September 15th, 1911, the defendant received from the Chemical Company for gas the total sum of \$16,378.19, and the defendant company applied this money on the repayment of the money borrowed to build the pipe line, in drilling wells and connecting them with the pipe line and in paying the general expenses of the Development Company. This \$16,378.19 is the only income ever received by the defendant. The building of the pipe line, the drilling of other wells and connecting them with the pipe line was development work. The money made by the defendant from the sale of its gas in the year 1911 was used, in a great measure, for development work and could properly have been used for the payment, in part at least, of the accrued dividends on the preferred stock.

"11. The gross receipts of sales of gas up to the 15th day of August, 1911, were about \$2800 per month; the net receipts were about \$2000 per month. As the gas yield in the Muncie field is decreasing in quantity, the Muncie gas field being a shallow one, your Referee considers it good business management and in the interests of the stockholders to drill as much as a well per month. This would cost about \$750 or more. The operating expenses would be \$500. So a fair estimate of the amount of money which could be devoted to the payment of preferred stock and dividends would be about \$1500 per month, or one-half of the gross receipts."

The findings further state that when the resolutions of August 7, 1911, were adopted the company owed \$5000, which was then due and payable, which indebtedness had been contracted for building the pipe line, drilling wells, and current expenses. A part of this indebtedness consisted of three promissory notes aggregating \$1500, current accounts amounting to \$400, and a disputed account of about \$600.

The latter part of finding number 8, that the money made by the defendant from the sale of gas in the year 1911 was used in a great measure for development work, and that such money could have been used, in [393] part at least, to pay dividends on preferred stock, states conclusions drawn from the specific facts found. Unless consistent with the specific facts found the conclusions are valueless.

Analyzing the findings of fact, it appears that the total earnings up to September 15, a month after the receiver was appointed, were \$16,378.19. What the earnings were up to August 15, when the action was commenced, or up to August 7, when the resolutions were adopted, is not stated. If it be assumed that the earnings for the month preceding September 15 were equal to the average, about \$2800, earnings up to the time the action was commenced were about \$13,578.19. When the action was commenced the indebtedness of the company was \$2500. One thousand dollars of this sum was upon current accounts and so was not a part of the debt incurred for building the pipe line. Not more than \$1500 of the money borrowed to build the pipe line remained unpaid. Therefore something like \$9500 of the money borrowed to build the pipe line had been paid. Gross receipts from the sale of gas averaged \$2800 per month, and net receipts averaged \$2000 per month. Average expenses per month were therefore \$800. The total expenses for six months were \$4800, and for seven months were \$5600. Using the smaller sum, the money paid on the pipe-line debt and the money necessary for current expenses would amount to \$14,300, or more than the receipts for the period, to say nothing of expenditures for drilling new wells and net earnings available for the payment of dividends.

The findings state the sum of \$16,378.19 received from the chemical company was the only income ever received. What became of the contracts with the Santa Fe Iceing Company, the Santa Fe Elevator Company and the town of Turner is not disclosed, and there is no finding that gas sold had not all been paid for. If, however, the average income were \$2800 per month, as stated in finding number 11, and the statement is repeated in finding number 15, not copied above, the in-

come [394] from February 10 to August 15 should have been \$16,800, and the income to September 15 should have been \$19,600.

The result is the findings convict themselves of utter unreliability.

The definition of the term "development work," inserted quite unnecessarily in the findings, may be accepted. The building of the pipe line was development work, but \$11,000 of borrowed money were used to build the pipe line. This borrowed money constituted a debt of the corporation incurred antecedent to earnings and in order that there might be earnings. Earnings used to pay that debt were not spent in development work and cannot be counted as a part of the income spent "in a great measure for development work." Suppose the plaintiff were the holder of a certificate of indebtedness, as she claims to be, and that her money had been used to build the pipe line, earnings used to repay her would not be used in development work but in discharging her debt. In finding number 11 it is said that operating expenses for the future consistent with good business management would be about \$500 per month. As already shown, the finding is that operating expenses were about \$800 per month. Payments for gas sold appear to have been made about the 10th of the month for the preceding thirty days. There must have been operating expenses preceding such payments. Counting from January 1 to August 15 at the rate of \$500 per month, operating expenses would amount to \$3750. But using the dates specified in the findings, operating expenses from February 10 to August 15 would amount to \$3000. This sum added to the sum deduced from the findings as paid on the pipe-line debt makes \$12,500 paid out for other than development work. If, therefore, the operating expenses be figured at what they should have been instead of at what they actually were, still finding number 8 that the money made from [395] the sale of gas was used in great measure for development work is untrue.

There is no finding whatever of the number of new wells brought in by the defendant in 1911, or of their cost, or of the cost of connecting them with the pipe line—one of the important subjects of the litigation. It does appear from the financial result of bringing in new wells that the income rose to its highest point, \$3000 per month, on August 10. For bringing in new wells the defendant was sued, a receiver was appointed, and judgment was rendered against it. Yet the referee and the court find that the policy of drilling new wells ought to be continued and that earnings ought to be withheld from preferred stockholders for their own benefit sufficient to bring in one new well a month at a cost of \$750 or more. If from January to August

one new well a month were brought in at a cost of \$750 per well, the sum of \$6000 was expended in doing that which was inequitable and vicious for the board of directors to do, but which was entirely equitable and just for the receiver to do.

It is manifest that a judgment based upon findings of fact of this character cannot stand.

Whatever the income of the defendant may have been, the findings do show that it was all spent to repay the money borrowed to build the pipe line, to drill wells and to connect them with the pipe line, and to pay general expenses. The existence or nonexistence of net earnings may be determined from these facts.

The case of *Burk v. Ottawa Gas, etc. Co.* 87 Kan. 6, Ann. Cas. 1913D 772, 123 Pac. 857, involved the equitable right of a stockholder to enforce payment of noncumulative dividends on preferred stock payable out of net profits. The opinion delivered in that case reads as follows:

"The directors of the corporation owed a positive duty to pay a dividend to the preferred stockholders whenever in any year there were net profits available. The funds that might be used for that purpose could not rightfully be expended for extensions merely for [396] the benefit of the business, nor could they be withheld to meet the expenses of the next year. Inasmuch as the only possible source of profit to the preferred stockholder from his investment is the distribution of earnings in the year in which they accrue, he has a right to insist that an accounting shall be taken annually, and that the surplus of one year, available for a dividend, shall not be carried over to meet a possible deficiency of the next.

"The holder of the preferred stock, however, is not generally a creditor until a dividend is declared, but as equity regards as done that which ought to be done, if under the facts of this case a dividend or dividends ought to have been declared in a certain year or years to such stockholders, they should be regarded as creditors to such extent from such time or times, in this equitable action. The company's contract with the preferred stockholder is not to pay him at all events the amount of the net profits of each year up to six per cent, but to declare a dividend on that basis. The obligation to declare a dividend arises only when there is (or as to the stockholder ought to be) money available with which to pay it. Although the business of the year may show the earning of net profits, counting as gain what has gone into betterments, yet if the money taken in has been expended in performance of a duty superior to that owed to the stockholder, no obligation to declare a dividend can arise." (p. 16.)

For obvious reasons the fact that dividends are cumulative and so are not lost for failure to declare them each year may be taken into account in determining whether or not there ought to be money available with which to pay them and in estimating the duties of the corporation to stockholders, and to others, such as creditors.

In the *Burk* case the only debts of the corporation were fixed charges, so that the rule stated in the syllabus for computing the net profits of the *Ottawa Gas Company* did not refer to the payment of other debts out of earnings. In the opinion, however, principles general in their application were stated. Although the terms "net profits" and "surplus" were employed, [397] and those terms are technically distinguishable from "net earnings," they were not used in the technical sense, and referred to the same fund which in this case is denominated "net earnings." In the *Burk* case a superior duty was owed to patrons entitled to extensions. In this case a superior duty was owed to creditors.

The effort of the plaintiff to establish her position as a creditor holding simply a certificate of indebtedness is a tacit acknowledgment that the right of a stockholder to earnings is inferior to the rights of creditors. The plaintiff's preference was merely the preference of one class of stockholders over another class, and no stockholder, preferred or common, could claim as a dividend any portion of earnings necessary to satisfy the matured demands of ordinary general creditors.

It is not necessary to go beyond the plaintiff's brief for authorities on this subject. Speaking generally, net earnings are what remain of gross receipts after deducting the expenses of producing them. Speaking generally, net earnings cannot be withheld to liquidate bonded indebtedness maturing in the future, nor other indebtedness in its nature permanent, nor to liquidate floating indebtedness properly convertible into bonded indebtedness, and a situation might arise in which a corporation ought to borrow money to pay preferred dividends. But as was said in the case of *Hazeltine v. Belfast, etc. R. Co.* 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330, cited by the plaintiff, the question whether money on hand shall be regarded as net earnings "depends usually on several considerations—is a relative question—not always susceptible of clear demonstration—and is a matter to a considerable extent of good judgment in conducting the company's business and of good faith in upholding its contracts on the part of directors." (p. 416.)

In the case of *Belfast, etc. R. Co. v. Belfast*, 77 Me. 445, [398] 1 Atl. 362, a case cited by the plaintiff involving the right to a noncumulative dividend, the same court said:

"The difficulty is in deciding what should be considered as net earnings; that is, net earnings such as are applicable to dividends. In a general sense, net earnings are the gross receipts less the expenses of operating the road to earn such receipts. But several kinds of charges must first come out of net earnings before dividends are declared. The creditor comes in for consideration before the stockholder. The property of a corporation is a trust fund pledged for the payment of its debts. Therefore, if there is a bonded, funded, permanent or standing debt, the interest on it must be reckoned out of net earnings. If there is a floating debt, which it is not wise and prudent to place in the form of a funded debt, or to postpone for later payment, that should also be paid. If the financial situation of the company is such as to render it expedient to commence or continue the scheme of a sinking fund for the extinguishment of the company's indebtedness some day or other, an annual contribution out of the net earnings for that purpose would be reasonable." (p. 452.)

Numerous citations of decisions by federal courts appear in the plaintiff's brief, and the rule for estimating net earnings applied by those courts is clear.

"A certificate for shares of stock in a railroad corporation declared that such stock should be entitled to preferred dividends, out of the net earnings, not to exceed a specified rate, after payment of mortgage interest in full. After the certificate was issued, the corporation borrowed money and issued bonds therefor bearing interest, and also took leases, on rent, of connecting railroads: *Held*, that the holder of the certificate was not entitled to be paid a dividend, before payment of the interest on such bonds, or of such rent." (St. John v. Erie R. Co. 10 Blatch. 271, 21 Fed. Cas. No. 12,226, syl.)

This decision was affirmed in the case of St. John v. Erie R. Co. 22 Wall. 136, 22 U. S. (L. ed.) 743.

In the case of Union Pacific R. Co. v. U. S. 99 U. S. 402, 25 U. S. (L. ed.) 274, the rule was extended to allow payment for permanent improvements, consisting of [399] station buildings, shops, etc., out of earnings. The syllabus reads:

"The 'earnings' of the road include all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property. 'Net earnings,' within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock." (Syl. ¶ 2.)

In the case of Warren v. King, 108 U. S. 389, 2 S. Ct. 789, 27 U. S. (L. ed.) 769, it was said:

"Thus he can have no income on his stock unless there are net earnings. Those net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay." (p. 398.)

The brief for the plaintiff directs attention to the rules announced by the highest courts of Connecticut and Massachusetts. The following quotations indicate the views of those courts.

"The general rule, even in the absence of any statute on the subject, is that dividends, in a going concern, can be properly declared and paid only out of profits, and not out of capital, or assets required for the security and payment of creditors. Morawetz on Private Corporations (1st ed.) § 344; Redfield on Railways, § 240; 2 Thompson on Corporations, § 2152. This rule applies whether the stock upon which the dividend is declared is common stock or, as in this case, preferred stock. Warren v. King, 108 U. S. 389 [2 S. Ct. 789, 27 U. S. (L. ed.) 769]; Cotting v. New York, etc. R. Co. 54 Conn. 156-169." (Davenport v. Lines, 72 Conn. 118, 128, 44 Atl. 17.)

"A corporation, under statutory authority, issued preferred stock, the certificates of which provided that the holders thereof were entitled to dividends thereon annually out of net profits, in preference to the holders of any other stock of the corporation, to the amount of a certain rate per cent; . . . The capital of the [400] corporation became seriously impaired, and its indebtedness amounted to a large sum, and was payable on demand or on short time. The assets, though appearing to be largely in excess of the indebtedness, would have suffered a very great shrinkage from the valuation put upon them if disposed of to pay debts or to close up the business. During a portion of the time only were there net profits sufficient to warrant the payment of dividends on the preferred stock at the rate named in the certificates. The directors of the corporation refused to declare dividends, in part because they believed that it would endanger the ability of the corporation to pay its debts, and in part because they did not deem it proper so to do on account of the impairment of the capital. Held, that the directors did not appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity." (Field v. Lamson, etc. Mfg. Co. 162 Mass. 388, syl. ¶ 4, 38 N. E. 1126, 27 L.R.A. 136.)

Citations might be extended indefinitely, but it is not necessary. In the case of *Ryan v. Leavenworth, etc.* R. Co. 21 Kan. 365, this court said:

"The claims of stockholders in a corporation are subordinate to the claims of creditors, and the stockholders are not entitled to any division of the profits and moneys of a corporation until all its debts are paid." (Syl. ¶ 7.)

The origin of the pipe-line debt was such that it was justly entitled to absorb earnings before stockholders received dividends. It appears to have been payable as the company had funds and what there was left of it in August, 1911, was due. Without elaborating further, in board of directors did not disregard the rights of the preferred stockholders by paying off the pipe-line debt.

The court knows what everybody knows, that the flow of gas from natural gas wells tends to diminish. The bringing in of new wells is not only a necessity to enable a producer to utilize his plant and fulfill his contracts with consumers, but failure to adopt such a policy means ultimate extinction of his business. In such a situation the drilling of new wells is a part of the cost of producing the mineral sold and is properly [401] chargeable to expense. Finding number 11 shows that to have been the situation in the Muncie field. If wells had been brought in and then not used, but simply capped and laid by for future use, the analogy of investing earnings in permanent improvements to the disadvantage of stockholders entitled to annual dividends would hold. But the defendant was simply getting the product of its gas field to market at the cost of drilling new wells. With the pipe-line debt paid dividends were certain, and the plaintiff could lose nothing because her dividends were cumulative. Indeed, the plaintiff would have had fair ground for charging the directors of the defendant with slack management if they had not developed the field and kept up production by drilling new wells. There is no place in the figures disclosed by the findings for excessive expenditures in drilling new wells.

Finding No. 8 being that the total sum earned by the company was expended to repay the money to build the pipe line, to drill wells and connect them with the pipe line, and to pay general expenses, there were no net earnings to distribute.

At the directors' meeting of August 7, the following resolution was adopted:

"Resolved, That the directors hereby authorize the secretary and treasurer to proceed with the payment of the fixed yearly dividend from date of issuance at 7% and prepare a list of the preferred stockholders with the amount due to each."

At that time there was a little more than \$2900 in the treasury, which was at once paid

out on the debts of the company. The money was not net earnings, and the duty to pay the debts of the company was superior to the duty to pay dividends on the preferred stock.

The judgment of the district court is reversed and the cause is remanded with direction to sustain the motion to discharge the receiver, sustain the motion for judgment in favor of the defendant on the findings of fact, and render judgment in favor of the defendant against the plaintiff and the interveners for costs.

NOTE.

Preferred Shareholder as Creditor or Stockholder of Corporation.

The holder of preferred or guaranteed shares of stock in a corporation is in general subject to all the liabilities of a holder of common stock, the peculiar and distinguishing characteristic of preferred stock being that it entitles the holder to a preference over other stock in the distribution of corporate profits. See 7 R. C. L. tit. *Corporations*, p. 200. The holder of preferred stock is entitled to no preference over creditors of the corporation. See the note to *Lloyd v. Pennsylvania Vehicle Co.* 20 Ann. Cas. 1197. His preferential right is confined to the dividends and these do not become enforceable debts against the corporation until they are declared. See the note to *Northwestern Marble, etc. Co. v. Carlson*, Ann. Cas. 1913B 552. In other words, a holder of preferred shares is a stockholder and not a creditor of the corporation.

United States.—*St. John v. Erie R. Co.* 22 Wall. 136, 22 U. S. (L. ed.) 743; *Warren v. King*, 108 U. S. 389, 2 S. Ct. 789, 27 U. S. (L. ed.) 769; *Nickols v. New York, etc. R. Co.* 15 Fed. 575 (reversed on other grounds 119 U. S. 296, 7 S. Ct. 209, 30 U. S. (L. ed.) 363); *Hamlin v. Toledo, etc. R. Co.* 78 Fed. 664, 47 U. S. App. 422, 24 C. C. A. 271, 36 L.R.A. 826; *Ellaworth v. Lyons*, 181 Fed. 55, 104 C. C. A. 1; *Shaffer v. McCulloch*, 192 Fed. 801, 113 C. C. A. 535; *Spencer v. Smith*, 201 Fed. 647, 120 C. C. A. 75; *National Electric Signaling Co. v. Fessenden*, 207 Fed. 915, 125 C. C. A. 363.

Connecticut.—See *State v. Norwich, etc. R. Co.* 30 Conn. 295.

Illinois.—*Hamblock v. Clipper Lawn Mower Co.* 148 Ill. App. 618. And see *People v. St. Louis, etc. R. Co.* 176 Ill. 572, 52 N. E. 292, 35 L.R.A. 656.

Indiana.—*Grover v. Cavanagh*, 40 Ind. App. 340, 82 N. E. 104.

Kansas.—See the reported case.

Kentucky.—See *Rider v. Delker*, 145 Ky. 634, 140 S. W. 1011; compare *Smith v.*

Southern Foundry Co. 166 Ky. 208, 179 S. W. 205.

Maine.—Belfast, etc. R. Co. v. Belfast, 77 Me. 445, 1 Atl. 362, 23 Am. & Eng. R. Cas. 736; Spear v. Rockland-Rockport Lime Co. 113 Me. 285, 93 Atl. 754. See also Bates v. Androscoggin, etc. R. Co. 49 Me. 491.

Massachusetts.—Boston Safe Deposit, etc. Trust Co. v. Adams, 219 Mass. 175, 106 N. E. 590.

Michigan.—See Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Ohio.—Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496, 43 Am. & Eng. R. Cas. 339.

Pennsylvania.—Warren v. Queen, 240 Pa. St. 154, 87 Atl. 595; Marshall v. American Caramel Co. 9 Pa. Dist. 152. See also Pittsburgh, etc. R. Co. v. Allegheny County, 63 Pa. St. 126.

Rhode Island.—Taft v. Hartford, etc. R. Co. 8 R. I. 310, 5 Am. Rep. 575.

South Carolina.—State v. Cheraw, etc. R. Co. 16 S. C. 528.

Texas.—Reagan Bale Co. v. Henermann, 149 S. W. 228.

Vermont.—Chaffee v. Rutland R. Co. 55 Vt. 110.

In Hamlin v. Toledo, etc. R. Co. 78 Fed. 664, 47 U. S. App. 422, 24 C. C. A. 271, 36 L.R.A. 826, the court stated the rule thus: "One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. . . . The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both a creditor and debtor by virtue of his ownership of stock.'" So in Hamblock v. Clipper Lawn Mower Co. 148 Ill. App. 618, the court said: "Dividends upon preferred stock are not a debt that is guaranteed. The right to a dividend is not a debt. There is no debt until the dividend is declared, and the right to declare it does not exist until there is a fund from which it can properly be made. Therefore preferred shareholders are not creditors of the company, by virtue of their stock certificates." In St. John v. Erie R. Co. 22 Wall. 136, 2 U. S. (L. ed.) 743, it was said: "The original takers of the preferred stock were creditors. They abandoned that position and became stockholders. They thereupon ceased to be the former, and can only be regarded as the latter. They surrendered their

debts and received in return stock of the same amount, which gave them a chance for annual dividends of seven per cent, and a voice by voting in the choice of those by whom the affairs of the company were to be administered. What they were to receive was not interest, but dividends; and they were to receive them in priority to the holders of the common stock." And in Spear v. Rockland-Rockport Lime Co. 113 Me. 285, 93 Atl. 754, the court, holding that a preferred stockholder was not a creditor, said: "He is a stockholder, although his peculiar rights arise from contract. He is a stockholder as to creditors in general, and his rights are subordinate to theirs. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts. . . . He is entitled to a dividend out of net earnings only." In Boston Safe Deposit, etc. Co. v. Adams, 219 Mass. 175, 106 N. E. 590, the court said that preferred stockholders though having the rights of creditors as against the common stockholders were not creditors of the corporation.

On the other hand in Smith v. Southern Foundry Co. 166 Ky. 208, 179 S. W. 205, wherein it appeared that the petition showed that some of the dividend payments of a corporation were past due, it was held that a preferred stockholder might be treated as a corporate creditor to that extent if it appeared that the directors had declared a dividend or that profits had been earned and the directors had refused wrongfully to declare a dividend.

SUTTON

v.

FINDLAY CEMETERY ASSOCIATION.

Illinois Supreme Court—October 27, 1915.

270 Ill. 11; 110 N. E. 315.

Cemeteries — Injunction against Maintenance.

While a cemetery is not a nuisance per se, yet underdrainage of a cemetery, which would pollute a stream used by an adjoining landowner to water his stock, will be enjoined without requiring a prior judgment at law establishing the nature of the nuisance.

[See note at end of this case.]

Same.

A cemetery is not a nuisance per se, and its use cannot be enjoined because offensive

commissions by the old board of directors on the sale of stock constituted an actionable appropriation of the funds of the company, something which the court refrained from finding, the remedy was for the stockholders to request the board to compel restoration. Doubtless a request upon the new board of January, 1912, would have received attention, but if upon request the board of directors refused to act, the stockholders, or a single stockholder suing for all, could have brought the action. Taking the findings of fact as they stand, employment of the extraordinary remedy of absolute ouster of the old board for accepting commissions for selling stock would have been improper, and application of the remedy to the new board was without any justification.

Bad judgment in the Mal-Millan venture and ill success before the company returned to active exploitation of the Muncie field were not grounds for the appointment of a receiver. The right to supplant the board of directors acting in August, 1911, with a receiver depended upon the financial condition of the company at that time and upon what the policies in process of execution by the board of directors then in authority seemed to promise. Beginning with the determination to build the pipe line, the policies of the company so far as they are disclosed by the findings of fact were sound. Its directors were acting in good faith and within their lawful powers. No single transaction constituting a breach of trust or jeopardizing the welfare of the company is stated. The business [381] was prosperous, and the directorate, instead of denying claims of preferred stockholders, was recognizing them and preparing to satisfy them.

Conceding for present purposes that the plaintiff was entitled to receive a declared dividend on her stock and consequently was a creditor, her claim could not rise superior to the claims of creditors holding current obligations of the company which were due and payable. (Branch v. Jesup, 106 U. S. 468, 475, 1 S. Ct. 495, 47 U. S. (L. ed.) 279.) The discharge of those obligations could not constitute misconduct on the part of the defendant's managing officers, much less ground for peremptory removal.

Other supposed grounds for the receivership have been discussed in connection with the statement of the findings of fact. The result is the receiver was improvidently appointed and his retention in office after the court discovered the facts was unjustifiable.

"Before a receiver can properly be appointed it is necessary that the plaintiff should have a probable cause of action against the defendant, and that the benefit to be derived from such cause of action might be lost or substantially impaired if the receiver were

not appointed." (Elwood v. Greenleaf First Nat. Bank, 41 Kan. 475, syl. ¶ 4, 21 Pac. 673.)

"Dissatisfaction by a minority of the stockholders of a corporation with its management by the majority, in the absence of fraud or insolvency, is not sufficient to authorize the court to appoint a receiver at the instance of the minority." (Fluker v. Emporia City R. Co. 48 Kan. 577, syl. ¶ 2, 30 Pac. 18.)

"The appointment of a receiver rests largely within the discretion of the court, and before it will take the property and business of a liquidating bank from the control of the directors into its own hands, upon the application of a stockholder, it must appear that the danger of loss or injury to the rights of the plaintiff is clearly proved, and the necessity and right for the appointment of a receiver free from reasonable doubt." (Watkins v. Lawrence Nat. Bank, 51 Kan. 254, syl. ¶ 4, 32 Pac. 914.)

The principle here stated applies with even greater [382] force when it is proposed to take the property and business of a solvent concern in promising circumstances out of the hands of its directors at the instance of a piqued stockholder holding but a slight fraction of the corporate stock.

The decision in the case of Feess v. Mechanics' State Bank, 84 Kan. 828, 115 Pac. 563, L.R.A.1915A, 606, covers all essential features of this case. In view of the full and clear statement of principles contained in that decision it is held that the appointment and retention of the receiver in this case constituted an abuse of judicial discretion.

The plaintiff undertakes to distinguish the Feess case by pointing out that it involved the appointment of a receiver for a solvent bank, one of whose valuable assets was public confidence, and that the receiver was directed to wind up the affairs of the corporation. The effort to distinguish fails. General principles governing the duties of the courts of this state in respect to the appointment of receivers were stated, as the following quotations from the syllabus and the opinion show:

"Under the law a majority of the stockholders have the control of a corporation and the majority of its directors have power to determine the policy to be pursued and to manage and direct its affairs, and the minority must submit to their judgment so long as the majority act in good faith and within the limitation of the law." (Syl. ¶ 7.)

"It was held In Re Lewis, 52 Kan. 660, 35 Pac. 287, that under the code a receiver may be appointed at the suit of a stockholder 'where the business and affairs of a corporation have been so mismanaged that it has become insolvent, and where it is made to appear that all the officers and directors

of the same have conspired together to divert its business to another company, dissipate its funds, and fraudulently absorb and apply its assets to the individual benefit of such officers.' (Syl. ¶ 1.) Conduct and conditions less serious than those enumerated would justify the appointment of a receiver, but it is a power that should be sparingly and cautiously exercised. It is a last-resort [383] provision and is only to be employed where there is a pressing necessity and no other adequate remedy is afforded. . . . The policy pursued in respect to loans and discounts seems to have been satisfactory to a majority of the directors and to those owning the controlling interest and more than nine-tenths of the capital stock. Those owning the majority of the stock claimed the right to control the management and policy of the bank, and a number of the matters of which complaint is made grew out of the differences of opinion in respect to what was the better policy. The law gives the majority of the stockholders the right to control the policy and business of a corporation and the minority must submit to their decisions when the majority act in good faith and within their powers.

"It has been said that 'the very foundation principle of a corporation is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their charter rights. No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.'" (pp. 836, 839.)

Other principles recognized and applied in the *Feess* case, but not stated so formally, are that business transactions which are merely unwise, irregularities and misconduct which are not so culpable as to jeopardize the corporation and the rights of stockholders, and dissensions among directors, so long as a majority of them control, do not warrant the appointment of a receiver.

The plaintiff further seeks to distinguish the *Feess* case on the ground that the defendant here was insolvent, and to make the defendant insolvent the total issue of preferred stock in the sum of \$50,000 is counted among its liabilities. Besides this, it is claimed the plaintiff was at all times merely a creditor of the corporation and not a stockholder, a view in which the district court concurred.

The plaintiff's stock certificate, copied above, evidenced [384] the rights of a stockholder of the company and not the rights of a bondholder or creditor. The plaintiff purchased shares of the original capital stock of the company, received a certificate of stock,

cast her fortunes with the company, took with it the risk of its ventures, and depended upon the net earnings of the company for returns upon her investment. She was not guaranteed a seven per cent annual dividend at all events. If there were no net earnings she received nothing and could not, as creditors may do, appropriate capital or general assets to the satisfaction of her claim. The fact that preferred stock had no vote and the corporation reserved the right to retire preferred stock by redeeming it did not change this express feature of the contract. So long as she remained a stockholder her only source of returns was net earnings, and if there were debts of the company she could not share such assets with creditors, in case of dissolution, but was merely preferred over common stockholders in case there were assets to distribute.

To sustain the contention that the plaintiff was merely a bondholder or creditor and not a stockholder of the corporation and was entitled to interest and not dividends, the plaintiff cites the text found in 10 Cyc. 574 concerning the doctrine that the guaranty of stated dividends creates an absolute debt. This text was deduced from three decisions. The first is *Williams v. Parker*, 136 Mass. 204. It is based upon a statute. The opinion reads:

"The question which underlies all others in this case is whether the guaranty that each share of the preferred stock 'shall receive semiannual dividends of four dollars on each share' is an absolute guaranty, or is conditional upon the earning of sufficient profits by the corporation. This depends upon the construction to be given to the St. of 1855, c. 143. No condition is expressed in the statute, and the natural meaning of the words used is, that the corporation is to guarantee to each holder of preferred stock that he shall, while the corporation does business, receive semiannual dividends [385] of four dollars on each share; so that, if the net earnings of the corporation are insufficient to pay such dividends, the corporation shall make good the difference out of any property it has. If the legislature had intended that the holders of preferred stock should only be entitled to a preference over the common stockholders in dividends to the extent of four dollars semiannually on each share, and should never receive a greater dividend than this, it would have been easy to express this intention accurately; and the only guaranty required of the corporation would have been, that it should appropriate the net earnings first to the payment of a dividend of four dollars semiannually upon each share of the preferred stock. . . . The cases cited, in which either the preferred stock was issued without statutory authority,

times not been strictly adhered to. In cases where, although the thing sought to be restrained is not a nuisance *per se*, the right to that relief is so clear as to be free from substantial doubt the relief will be granted without first resorting to an action at law to declare the thing a nuisance. This question was fully discussed in *Pana v. Central Washed Coal Co.* 260 Ill. 111, 102 N. E. 992, 48 L.R.A.(N.S.) 244, where the authorities on the subject are cited and reviewed and the rule approved that if there is a substantial dispute as to the fact or law and the question is in doubt, a trial at law will be required before equity will interfere. It is only in cases where the unreasonable or unlawful use of property to the injury of others is clearly proved that it is unnecessary the question should first be determined in an action at law.

Barrett v. Mt. Greenwood Cemetery Assoc. supra, was a proceeding in equity to enjoin the drainage of a cemetery into a running stream of water, and the injunction was sustained without requiring a resort first to an action at law. Some portions of the cemetery grounds were so wet and swampy that water would rise in openings dug for graves to such an extent as to cause their abandonment. It was proposed to under-drain this land and empty the drainage into a running stream of water which flowed through the land of complainants. The stream was fed from springs, and the water from it was used by complainants for stock, for cows kept for dairy purposes, for making ice, and to some extent for domestic purposes. One of the complaining parties harvested ice to the extent in value of from \$5000 to \$6000 a year and sold it for refrigerating and domestic purposes or use. The court said that the conclusion that the water percolating through the [18] soil into the tile and thence running into the brook would contaminate the water therein and render it unfit for some of the purposes for which it was used was established by a clear preponderance of the evidence and was in accord with common understanding.

We are of opinion the evidence in this case left it free from substantial doubt that the proposed under-drainage of defendant's cemetery would contaminate and injuriously affect the water on complainant's premises for the uses to which it was put, and complainant was therefore entitled to the writ of injunction restraining the under-drainage of the cemetery into the branch. The chancellor erred in not so decreeing, but did not err in denying the injunction as prayed in the amended prayer, restraining the use of the land for burial purposes.

The complainant contends that even without the under-drainage the burial of human

bodies in the cemetery will contaminate the air on complainant's land and pollute the water of the branch. The court sustained defendant's objection to the plaintiff's offer of proof upon this question. In view of the character and lay of this land and the nature of the proof proposed to be made, we are satisfied it could not, under the rules of law above referred to, have justified awarding the writ of injunction. The great weight of the proof showed the land was not low, swampy land. It slopes from south to north, and in a distance of about thirty rods, which is its width, has a fall of from five to eight feet. Water does not accumulate and stand on it, nor is it water-logged, as charged in the amendment to the bill. Water on its surface finds its way with reasonable speed into the branch, and even if complainant's witnesses had been permitted to testify, and had testified, that in their opinion the use of the land for burial purposes, without any under-drainage, would injuriously affect complainant's premises and pollute the water of the branch, the very nature of the case is such it would not have established [19] the fact so clearly and free from substantial doubt as to have justified enjoining, in this proceeding, the use of the land as a burial ground. It is not enough that it threatened to or might become a nuisance, but the proof would be required to go to the extent of satisfactorily showing that a nuisance is inevitable from the proposed use of the premises. In *McCutchen v. Blanton*, 59 Miss. 116, it was said: "Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare. Relief by injunction is so severe in its consequences that it is not to be granted in such a case except when the right to it is clearly and conclusively made out. To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power. It is not enough to show a probable and contingent injury, but it must be shown to be inevitable and undoubted." This is the rule in this State and generally throughout the United States. A cemetery may be objectionable or offensive to the taste of an adjoining owner but it is not a nuisance *per se*, and its use cannot be enjoined merely because it is offensive to the esthetic sense of an adjoining proprietor. Before it can be abated or its use enjoined it must be clearly and satisfactorily proven to be a nuisance, and this cannot be done by evidence tending to show that it might become such.

Under the proof we think the Appellate Court erroneously remanded the case with directions to the trial court to grant the

decree as prayed in the bill as amended, and its judgment will be reversed and the cause remanded to the trial court, with directions to grant an injunction restraining the defendant from under-draining its cemetery grounds into the west fork of the Eversman branch and denying the other relief prayed.

Reversed and remanded, with directions.

Rehearing denied December 9, 1915.

NOTE.

Equitable Relief against Cemetery as Nuisance.

In the earlier cases involving the granting of equitable relief against the establishment or maintenance of a cemetery on the ground of its being a nuisance, it was held generally that cemeteries are not nuisances per se, but that the question whether a particular cemetery is a nuisance is to be decided according to the circumstances of the case, and that unless a cemetery is shown to be a nuisance in fact its establishment or maintenance will not be enjoined. *Braasch v. Cemetery Assoc.* etc. 69 Neb. 300, 5 Ann. Cas. 132; *Nelson v. Swedish Evangelical Lutheran Cemetery Assoc.* 111 Minn. 149, 20 Ann. Cas. 790. The foregoing doctrine is recognized by the reported case as well as by other recent cases. *Harper v. Nashville*, 136 Ga. 141, 70 S. E. 1102; *New Orleans v. St. Louis Church*, 11 La. Ann. 244; *Morton v. St. Patrick's Roman Catholic Church Soc.* 56 Misc. 71, 105 N. Y. S. 1100; *Wahl v. Methodist Episcopal Cemetery Assoc.* 197 Pa. St. 197, 46 Atl. 913. Thus, in *Harper v. Nashville*, supra, the court said: "Cemeteries are a necessity. A place where the dead may be given decent Christian burial must be established, and the location of such must necessarily be upon some tract of land more or less suitable and commodious; and it is impossible to find a tract of land that is not contiguous to the lands of some one else. And inasmuch as cemeteries must be established and should be located where they are reasonably accessible, it is rarely possible to so fix their location, when they are designed for the use of a populous town or city, where they will not be in more or less close proximity to some residence; and unless the soil of the land used as a cemetery and that of the contiguous owners is such as to cause a drainage which will produce a contamination of the waters, thereby putting in jeopardy the health or lives of the owners of the contiguous lands and the health of their families, or unless the air would be contaminated, courts of equity will not interfere by the grant of injunctive relief to prevent the establishment and location of the cemetery.

Cemeteries are not per se nuisances, and it is only in exceptional cases that their establishment and location would be enjoined by a court of equity. Where it is shown that the location of a cemetery in some place would contaminate the water used for drinking purposes or for watering cattle or other domestic animals, and that thereby the health of the residents upon the adjacent lands would be endangered, and that some other place sufficiently convenient and accessible could be procured, and that the location of the cemetery at the latter place is not objectionable upon any valid ground, equity might interfere to prevent its location in the place where it is shown there are sound reasons for apprehending danger to the life or health of those residing nearby."

Before a cemetery can be abated or its use enjoined, it must be clearly and satisfactorily proven to be a nuisance, and this cannot be done by evidence merely tending to show that it might become such. See the reported case. See also *Morton v. St. Patrick's Roman Catholic Church Soc.* 56 Misc. 71, 105 N. Y. S. 1100; *Wahl v. Methodist Episcopal Cemetery Assoc.* 197, Pa. St. 197, 46 Atl. 913. And since a cemetery is not a nuisance per se, its use cannot be enjoined merely because it is offensive to the esthetic sense of an adjoining proprietor, however objectionable or offensive it may be to his taste. See the reported case.

While cemeteries may become nuisances in fact, and as such are subject to injunctive action by the health authorities, an order of a local board of health that the use of the defendant's lands or any part thereof for cemetery purposes will be detrimental to the public health and therefore is prohibited, will not be upheld where it appears that the only consequences of an evil nature that can be anticipated from the use of the defendant's land for cemetery purposes are the remote possibility of the contamination of wells in its vicinity (which are already endangered by the close proximity of privies), and the distribution of disease germs by the air, as these dangers are too slight and uncertain to be the basis of injunctive relief. *Morton v. St. Patrick's Roman Catholic Church Soc.* 56 Misc. 71, 105 N. Y. S. 1100.

In the reported case it is held that in cases where, although the cemetery sought to be restrained is not a nuisance per se, the right to equitable relief by injunction is so clear as to be free from substantial doubt, relief will be granted without resorting to an action at law to declare the thing a nuisance. So, in a case wherein it appeared that the proposed underdrainage of a cemetery would discharge into a watercourse and would contaminate and injuriously affect the water on the complainant's premises for the

uses to which it was put, the watering of his stock, etc., it was held that the complainant was entitled to a writ of injunction restraining the underdrainage of the cemetery into the watercourse. *Barrett v. Mt. Greenwood Cemetery Assoc.* 159 Ill. 385, 42 N. E. 891, 50 Am. St. Rep. 168, 31 L.R.A. 109. And see the reported case.

Where a cemetery constitutes a nuisance, under the circumstances of the case, its continuance may be enjoined. *Furstenburg v. Brissey*, 28 Okla. 591, 115 Pac. 465. See also *Palmer v. Hickory Grove Cemetery*, 84 App. Div. 600, 82 N. Y. S. 973, *affirmed* 106 App. Div. 613, 95 N. Y. S. 1150. Thus, where a statute (Comp. Laws Okla. 1909, § 966) declared it to be unlawful for any person, corporation or association to establish or maintain a cemetery less than three-fourths of a mile from any tract of land platted as an addition to any city or town, or platted into blocks to be sold for residence purposes, wherein lots had been sold, and declared (§ 967) the maintenance of a cemetery in violation of the act to be a nuisance, and provided for its abatement by an action by the owner of any lot within the lands platted, it was held that a person bringing himself within the statute was entitled to an injunction against the establishment of a cemetery within the prohibited area. *Furstenburg v. Brissey*, 28 Okla. 591, 115 Pac. 465. And likewise, under a statute (Stat. Wis. 1898, § 1454) prohibiting the establishment of a cemetery within fifteen rods of any habitable dwelling, it has been held that an injunction would lie against a violation thereof, and that the fact that the first grave in a plot of land proposed to be used as a cemetery was a little more than fifteen rods from a house made no difference, as the statute was aimed at the grounds as a whole, and it was unquestionable that a considerable part of the grounds laid out and actually used for burial purposes were within the limit. *Maede v. Broehm*, 151 Wis. 563, 139 N. W. 408.

In *Austin v. Austin City Cemetery Assoc.* 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, it was held that a cemetery was entitled to an injunction against the enforcement of a void ordinance declaring a person to be guilty of a misdemeanor who buried the body of any human being within the corporate limits of the city. And in an opinion following that decision (28 S. W. 1023), it was held that the fact that a cemetery was used and controlled by the city within its limits was not a standard for use in determining whether other cemeteries of like condition would or would not be nuisances. In *Stanley v. Hill*, 135 Ga. 711, 70 S. E. 577, an action to enjoin the establishment of a cemetery, it was held that under a town charter,

the mayor and the council had the power to prohibit the establishment of a cemetery within the town limits, and where the uncontradicted evidence showed that they had taken affirmative action to that end, it was held that it was not error to direct a verdict which had the effect of enjoining the establishment of the cemetery. In *Union Cemetery Assoc. v. Kansas City*, 252 Mo. 466, 161 S. W. 261, it was held that an ordinance prohibiting all future burials in a cemetery was unreasonable and void, and its enforcement would be enjoined, where it appeared that the ordinance was not passed for the protection of the public health, but was passed at the instigation of real estate agents and speculators who thought the cemetery stood in the way of the city's development in that direction.

The validity of state or municipal regulations or restrictions as to the burial of the dead is discussed in the note to *Laurel Hill Cemetery v. Francisco*, 14 Ann. Cas. 1080.

FIRST NATIONAL BANK

v.

G. GESKE AND COMPANY.

Washington Supreme Court—May 14, 1915.

85 Wash. 477; 148 Pac. 593.

Frauds, Statute of — Necessity of Pleading as Defense.

The defense of statute of frauds is waived, not being pleaded or otherwise raised in the trial court, though the complaint fully disclosed the basis of plaintiff's claim.

[See 78 Am. St. Rep. 650, and see generally Ann. Cas. 1912D 46.]

Delivery Avoiding Statute — Constructive Delivery.

Where G. orders lumber of F., and F. then orders of T., and T. on the order of and primarily billing it to F. delivers it to G., this amounts to a delivery to F., and by F. to G.; the latter, under Rem. & Bal. Code, § 5290, taking F.'s contract for sale to G. out of the statute of frauds.

[See note at end of this case.]

Sales — Parties to Transaction.

There is not a sale by T. to G., where G. ordered lumber of F., and F. ordered it of T., and T. delivered it to G., and primarily billed it to F., and wrote G. to protect it, though after F. ordered it of T. G. promised T. to see that it got its money.

Liability for Purchase Money — Defenses — Payment to Third Person.

Regarding right of recovery from G. by the assignee of F.'s claim for the price of

lumber which F. sold G., it is immaterial that G., knowing of the assignment, under its oral promise, void under Rem. & Bal. Code, § 5289, to see that T., who had sold the lumber to F., got its money, paid T.

Appeal from Superior Court, King county:
SMITH, Judge.

Action by First National Bank, plaintiff, against G. Geske and Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

William Wray for appellant.
James Kiefer for respondent.

[478] *ELLIS, J.*—This is an action by the assignee of a bill for a sale of lumber against the purchaser for the purchase price. Prior to July 26, 1914, the Farrell Lumber Company, a copartnership, had a contract with the defendant, G. Geske & Company, a corporation, to furnish lumber for the construction of a bridge. On that day a car load of lumber was needed which the Farrell Lumber Company could not furnish at once. It therefore ordered the lumber from the Taylor Mill Company, a corporation, at the purchase price of \$231.30, directing that it be delivered to the defendant. To hasten the matter, one Snyder, president of the defendant, on the same day called upon the Taylor Mill Company and urged the necessity of getting the lumber out promptly. The representatives of the Taylor Mill Company demurred, asking assurance of payment. Snyder replied, in effect, "I will see that you get your money," or "I will stand good for it." It is undisputed that at this time Snyder asked that the lumber be billed to the Farrell Lumber Company because he was buying it from them and wanted the account kept entire, saying, "When I am buying lumber from them (Farrell Lumber Company) I want it all kept together. You send one bill to them and one to me and I will see that you get your money." The salesman and billing clerk of the Taylor Mill Company so testified, and Snyder testified to the same effect and in almost the same terms. The evidence is also undisputed that the Farrell Lumber Company knew nothing of this conversation.

It seems clear that the Taylor Mill Company, at the time it took the order from the Farrell Lumber Company, took it without demurrer and intended to fill it for the Farrell Lumber Company, and actually did so at once, and a little later [479] actually billed it to the Farrell Lumber Company, without demurrer and without notice that it claimed to be selling the lumber to Geske &

Company direct. The bill or invoice was dated August 4, 1913, and reads: "Sold to Farrell Mill Company for Geske & Co., Renton." Then follows the car number and an itemized description of the lumber with the aggregate selling price, \$231.30. It is unquestioned that the Farrell Lumber Company immediately assigned this account to the plaintiff and received thereon ninety per cent of its face at the time of the assignment. There is no evidence whatever that the plaintiff ever had any knowledge or notice that the Taylor Mill Company claimed that the sale was made to Geske & Company.

There is evidence that, at the time of this sale, the Taylor Mill Company was indebted to the Farrell Lumber Company in a sum equal to or a little more than the amount of this order, and the Farrell Lumber Company credited the Taylor Mill Company with the amount of this order on that account. There is evidence also of subsequent transactions which would have changed this balance, but we regard this as immaterial on the real issue as to whether the transaction here in question is to be regarded as a sale to the Farrell Lumber Company or to Geske & Company.

The court found that the Farrell Lumber Company sold and delivered the lumber to the defendant, Geske & Company, at an agreed price of \$231.30; that immediately thereafter the Farrell Lumber Company, by an assignment in writing, transferred to the plaintiff its account and claim against the defendant for the purchase price of the lumber, in consideration of an advance then made by the plaintiff to the Farrell Lumber Company, and that no part of the money due thereon has been paid. The court concluded, as a matter of law, that the plaintiff is entitled to judgment for the amount mentioned, with interest and costs. Judgment went accordingly, and the defendant has appealed.

[480] The appellant contends that there can be no recovery in this action because the contract price for the lumber was more than fifty dollars and there was no memorandum of the sale in writing signed by the party to be charged, as required by the statute of frauds, Rem. & Bal. Code, § 5290 (P. C. 203, § 5). There is no merit in this contention. The statute of frauds was not pleaded as a defense nor raised in any other manner in the court below, though the complaint fully disclosed the basis of the respondent's claim. Moreover, the lumber was actually delivered, thus bringing the case within the exception made by the statute itself. To avoid this fact, it is argued that there was no competent evidence of the delivery. We shall not discuss the evidence, since the answer admits the delivery of the lumber to the appellant, and the evidence,

as we have seen, clearly shows that it was delivered on the order of, and primarily billed to, the Farrell Lumber Company. This was equivalent to a delivery to that company and by it to the appellant.

Nor do we find any merit in the claim that this lumber was sold directly to the appellant by the Taylor Mill Company. The fact that appellant's president, after the order had been made by the Farrell Lumber Company, promised to see that the Taylor Mill Company would get its money did not make the sale a sale direct to the appellant. On the contrary, his statement at the time to the effect that, since he was buying from the Farrell Lumber Company, he wanted it all kept together and directed that a bill be sent to the Farrell Lumber Company, clearly indicates that he then regarded the sale as being made to that company. The fact that the Taylor Mill Company complied with his request and sent the bill according to his direction also shows that the Taylor Mill Company regarded the Farrell Lumber Company as the purchaser and primarily liable for the debt. At the time the duplicate bill was mailed, the Taylor Mill Company wrote Geske & Company:

[481] "Confirming conversation with your Mr. Snyder recently we ask you to protect us to the amount of \$231.30 on account lumber delivered to Renton for the Farrell Mill Co."

This letter on its face clearly shows that at that time the transaction was not regarded by the Taylor Mill Company as a sale directly to Geske & Company. A remittance was not requested, but merely "We ask you to protect us," thus clearly indicating that the Farrell Lumber Company was the one to whom credit was primarily given.

The fact that the appellant has paid this bill to the Taylor Mill Company is immaterial. Whatever its moral duty in the premises, it was under no legal obligation to do so. Under the evidence here presented, its promise was a mere verbal undertaking to answer for the debt of another. It was not in writing, and hence could not have been enforced. *Rem. & Bal. Code*, § 5289 (P. C. 203, § 3); *Pressentin v. Hawkeye Timber Co.* 77 Wash. 388, 137 Pac. 999; *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D 849.

This payment raises no equity in appellant's favor, since its president admitted that he knew the bill had been assigned to the respondent when he made the payment to the Taylor Mill Company and took from that company a bond for protection in making the payment. This evidence was clearly competent as tending to show that the appellant never regarded itself as primarily liable for the debt.

The findings of the trial court were clearly supported by the evidence. The judgment is affirmed.

Morris, C. J., Main, Crow, and Fullerton, JJ., concur.

NOTE.

Symbolical or Constructive Delivery of Goods within Statute of Frauds.

Introductory, 566.

General Rule:

Symbolical Delivery, 566.

Constructive Delivery in Absence of Symbol, 567.

Requisites of Delivery:

Intent of Parties, 568.

Right to Possession, 569.

Introductory.

This note discusses the question that arises under the statute of frauds where there has been no actual delivery of the goods sold but it is claimed that there has been a constructive delivery, by the passing of a symbol or otherwise, sufficient to dispense with the statutory requirement of written evidence of the sale. The scope of the note does not extend to the question of the delivery of goods as effective to pass title where the statute of frauds is not involved, nor does it include a consideration of what acts amount to a receipt or acceptance within the statute, except as those acts are judicially treated with reference to constructive delivery.

For cases on the subject of a delivery to a carrier as taking a sale of goods out of the statute of frauds, see the notes to *Gatiss v. Cyr*, 2 Ann. Cas. 544, and *Kemensky v. Chapin*, 9 Ann. Cas. 1168. The continuance of an existing possession by a vendee as a sufficient delivery to take a verbal sale of goods out of the statute is discussed in the notes to *J. H. Silkman Lumber Co. v. Hunholz*, 13 Ann. Cas. 713, and *Wilson v. Hotchkiss*, reported post, this volume, at page 570. The act of a buyer in selling or offering to sell goods as a sufficient acceptance to satisfy the statute is considered in the note to *Beedy v. Brayman Woodenware Co.* Ann. Cas. 1913B 273.

General Rule.

SYMBOLICAL DELIVERY.

The general rule is that the delivery of goods required by the statute of frauds in the absence of payment or a written memorandum of the sale is not necessarily an actual delivery. Where the goods are of pon-

derous bulk, a delivery of such evidence of title as confers the right to immediate possession, when made with the intent to pass and receive the title and possession, is a symbolical delivery of the goods and has been generally held to be a constructive delivery sufficient to satisfy the statute. *Searle v. Keeves*, 2 Esp. (Eng.) 598 (order for delivery of barrels of rice); *Currie v. Anderson*, 2 El. & El. 592, 105 E. C. L. 592 (bill of lading); *Puckett v. Reed*, 31 Ark. 131 (ginner's receipt for cotton, entitling holder to possession); *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11 (order for delivery of cotton in warehouse); *Lewis-Simas-Jones Co. v. Kee*, 27 Cal. App. 135, 148 Pac. 973 (order for potatoes stored in warehouse); *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663 (certificate of stock); *Bass v. Walsh*, 39 Mo. 192 (sale ticket of bales of hay on wharf); *Mueller v. Guye*, 12 Mo. App. 589 (order entitling bearer to goods); *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364 (keys of storehouse); *Wadhams v. Balfour*, 32 Ore. 313, 51 Pac. 642 (indorsed bill of lading with sample of wheat); *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832 (key to granary). See also *Meredith v. Meigh*, 2 El. & Bl. 364, 75 E. C. L. 364, 17 Jur. 649; *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *Stockwell v. Baird*, 1 Marv. (Del.) 420, 31 Atl. 811; *Johnstone v. Watson*, 1 Ga. 348; *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Harvey v. St. Louis Butchers' Joint Stock*, etc. Assoc. 39 Mo. 211; *Gray v. Davis*, 10 N. Y. 285; *Hollingsworth v. Napier*, 3 Caines (N. Y.) 182, 2 Am. Dec. 268. And see the reported case. *Compare* *Bentall v. Burn*, 5 Dowl. & R. 284, 3 B. & C. 423, 10 E. C. L. 138, R. & M. 107, 21 E. C. L. 392, 3 L. J. K. B. 42, 27 Rev. Rep. 391, 107 Eng. Rep. (Reprint) 791; *Farina v. Home*, 16 M. & W. (Eng.) 119 (holding that a wharfinger's warrant is no more than an offer to hold the goods as warehouseman, and that the wharfinger holds as agent of the vendor or consignee until he agrees to hold for the assignee); *Gooch v. Holmes*, 41 Me. 523 (delivery of order for bank bills on deposit held to be no delivery of the bills).

"The statute has never been, in this state, nor in England, whence we derived it, construed to abolish the doctrine of symbolical delivery. Whoever receives in such mode as the nature of the property or its situation makes necessary, receives as actually as by manual caption, or asportation, or some direct interference with the corpus of the property. With regard to bulky articles, or those not immediately accessible, symbolical delivery, by something which may be proved in pais, of a satisfactory nature, satisfies the reason and policy of the statute. . . . The

order for delivery, although not evidence of a contract, nor even a memorandum of one, was nevertheless a thing absolutely potent to confer the right of immediate possession, except as against warehouse liens (of which none are shown), and even stronger evidence of that right, than would have been a gin receipt. The jury, under the evidence and law of the case, as presented by the court, did not err in finding that the defendants received the cotton. This satisfies the statute." *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11.

CONSTRUCTIVE DELIVERY IN ABSENCE OF SYMBOL.

A constructive delivery other than by the delivery of a symbol has been held to be a sufficient compliance with the statute of frauds. *Salter v. Woollams*, 2 M. & G. 650, 40 E. C. L. 559; *Chaplin v. Rogers*, 1 East. (Eng.) 192; *Nicholls v. White*, 103 L. T. N. S. (Eng.) 800; *Brown v. Wade*, 42 Ia. 647; *Smith v. Bloom*, 159 Ia. 592, 141 N. W. 32. See also *Dixon v. Buck*, 42 Barb. (N. Y.) 70; *Reinhart v. Gregg*, 8 Wash. 191, 35 Pac. 1075; *Pike v. Vaughn*, 39 Wis. 499. Thus, in *Brown v. Wade*, *supra*, the question was whether there had been a delivery of cattle. It appeared that the seller pointed out certain of his cattle which were running with others in the pasture and designated their price, and the purchaser agreed to take the cattle at the stipulated price. The court held that there was a delivery of the cattle, saying: "What constitutes a delivery depends largely upon the character and situation of the property. . . . See 3 Parsons on Contracts, 5 ed. p. 34, and cases cited. On page 44 of the same work it is said: 'We think that if the seller does in any case what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself to the buyer, this is always a delivery.' This rule seems to us eminently just and practical. Nothing more should be required than what is usual, convenient and proper. See also Story on Sales, fourth edition, p. 282 and cases cited. The evidence shows that the cattle were running out on the range. All that was necessary to complete the sale was that the right of dominion over them should be transferred from Brown to Davis. To this end it could not be necessary that Davis should take them into his manual custody, and drive them off the range, or remove them to another part of it. The interest and the convenience of the purchaser required that the cattle should remain where they were, and he had a right to leave them there. It was only necessary that the cattle should be pointed out, that Brown should

agree that Davis might have them in part pay for the land, and that Davis should agree to take them as such payment where they were and as they were, and then the delivery was complete." So in *Nicholls v. White*, 103 L. T. N. S. (Eng.) 800, the court said: "There are certain cases to which this principle of constructive delivery and receipt do not apply, but there are others to which it is not unreasonable that it should apply, and the sale of a haystack standing upon his own land by a farmer is, according to one's knowledge of what happens, the sort of case to which one would not be unwilling to apply the principle of constructive delivery and constructive receipt. What happens every day is that a farmer sells a stack of hay, and the sale carries with it a license to the buyer to come and cut it at reasonable hours without asking permission. The buyer or the seller or a third person may cart the hay away. Meanwhile the hay remains on the vendor's land as much, and no more in his physical possession, as it was before it was sold. But he has, it may be said, parted with the possession because he has given constructive permission to the purchaser to come and handle the hay as and when he likes. And the purchaser has constructively accepted the hay, because it was the intention of the parties that he should get no further delivery of it. It seems to me that there is no case to which the doctrine of constructive delivery and receipt could be better applied. But there must be evidence of such constructive delivery and receipt. Putting aside the oral evidence as found by the learned judge in this case there are two documents before us. What is the meaning of the first document, the telegram which the defendant sent: 'Don't send press; am writing' It means, 'If I (the defendant) did not send a telegram, I know that you would send the press.' Is not that very good evidence that the defendant had delivered possession of this hayrick to the plaintiff, and that the plaintiff was not only entitled to send but would send his men whenever he chose to cut and tie this hay? It seems to me that that by itself might be very good evidence that the vendor had done all he could to deliver possession to the purchaser. Then comes the defendant's letter in which he says: 'Would you be kind enough to give up possession?' How is that document got over by saying that the man did not know what he was saying? Why should he not know? He knew the trade, and he knew what he had done in regard to the sale. In these circumstances I think that there was evidence of constructive delivery and receipt of this hay."

In *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509, it was said: "We do not

wish to shake any of the cases in which the actual delivery required by the statute has been dispensed with, but those cases have gone far enough; our leaning should be towards the plain meaning of the statute. The circumstances which are to be tantamount to an actual delivery, should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties." In *Shindler v. Houston*, 1 N. Y. 261, 40 Am. Dec. 316, it appeared that the parties met on the dock where some lumber belonging to the plaintiff was piled, they agreed on a sale at a certain price, and the plaintiff said: "The lumber is yours." The court held that there was no delivery, saying: "The declarations relied upon as evidence of a delivery and acceptance constitute a part of the contract, and of course are obnoxious to all the evils and every objection against which it was the policy of the law to provide. The acts of part payment, of delivery and acceptance mentioned in the statute are something over and beyond the agreement of which they are a part performance, and which they assume as already existing. . . . I am aware that there are cases in which it has been adjudged, that where the articles sold are ponderous a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited furnishes an example of this kind. But to aid the plaintiff, an authority must be shown that a stipulation in the contract of the sale, for the delivery of the key or other indicia of possession, will constitute a delivery and acceptance within the statute. No such case can be found. The entire contract being void by the statute the stipulation in reference to a constructive delivery would fall with the other provisions."

Whether there has been constructive delivery is a mixed question of law and fact. *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Bass v. Walsh*, 39 Mo. 192.

Requisites of Delivery.

INTENT OF PARTIES.

The intent of the parties is a necessary part of a constructive delivery. *Brand v. Focht*, 3 Keyes (N. Y.) 409, 1 Abb. App. Dec. 185, 5 Abb. Pr. N. S. 225, *affirming* 26 Super. Ct. 426, 30 How. Pr. 313; *Smith v. Mason*, Anth. N. P. 146, 7 N. Y. Com. L. Rep. 100; *Pike v. Vaughn*, 39 Wis. 499. Where delivery of a part is relied on as constructive delivery of the whole, it must appear that the part was delivered as representative of the whole. *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946. The delivery of a

sample as such is not a symbolical delivery of the goods. *Richardson v. Smith*, 101 Md. 15, 4 Ann. Cas. 184, 60 Atl. 612, 109 Am. St. Rep. 552, 70 L.R.A. 321; *Johnson v. Smith*, Anth. N. P. 60, 7 N. Y. Com. L. Rep. 63; *Gold v. Gross*, 146 N. Y. S. 164. "It is not the mere taking the sample that would amount to a delivery. If a symbolical delivery is relied on, it must appear to be a delivery by the vendor, and an acceptance by the vendee, with a view to change the possession. A mere taking a sample in his hand, without any express understanding that such taking of the sample was to be a delivery, would amount to nothing." *Carver v. Lane*, 4 E. D. Smith (N. Y.) 168.

In *Brand v. Focht*, 3 Keyes (N. Y.) 409, 1 Abb. App. Dec. 185, 5 Abb. Pr. N. S. 225, the court said: "A delivery of the property to satisfy the requirements of the statute, must be a delivery by the vendor, with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intent of taking possession as owner, and this rule can only be satisfied by something done subsequently to the sale, unequivocally indicating the mutual intentions of the parties.

. . . Now it is quite clear that these vendees never did, and never intended, to make any delivery of this coal, in whole or in part, to the plaintiff upon the contract of sale which he sets up, and it is equally clear that they never delivered the bill of lading with any intent to complete and perfect that sale. Nay, it is very manifest that they never intended to part with the bill of lading, except upon the condition and understanding that the plaintiff would purchase the cargo of coal therein mentioned, at the rate of six dollars and fifty cents a ton. This he peremptorily declined to do, and retained the bill of lading, against the remonstrance of the defendant's agent. He clearly had no right so to retain it, and now setting it up as evidence of the delivery of the coal under the contract of sale made in March, is a fraud upon the defendants. They never delivered it to the plaintiff with any such intent or for any such purpose, and it cannot now be permitted to the plaintiff that he should avail himself of this bill of lading, thus improperly retained by him, to make a title in himself to this coal. The contract of sale not being in writing, as no part of the purchase money was paid, and no delivery in whole or in part of the property purchased, and no symbolical delivery, it follows that the plaintiff was never vested with the title to this coal; he never had possession of it, actual or constructive; he was not the owner, and cannot, therefore, maintain this action." And in *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946, it was said: "If the deliv-

ery be of part for all, this constructive or symbolical delivery must plainly appear. In the case before us it is difficult to repose quietly on the belief that there was an agreement of the two minds that the sale was concluded. No money was paid; no writing made; no clear and distinct understanding had as to the terms and times of payment. The whole reliance of the seller here is on a constructive delivery of three sheep for a flock in the range, whose number is not known, and the three were not of the flock in the range, but pets near the house. . . . We cannot subscribe to the assumption that the evidence shows any acceptance and delivery of the three sheep as representative of the herd wandering in the range."

RIGHT TO POSSESSION.

The delivery of a thing which is not potent to confer the right to possession is not a compliance with the statute. *Johnson v. Smith*, Anth. N. P. 60, 7 N. Y. Com. L. Rep. 63 (delivery of export entry in alleged sale of sugars, held not to be sufficient); *Jachrisson v. Poppe*, 3 Bosw. (N. Y.) 171 (wherein the court said: "A delivery by the plaintiff of an order, which did not give the defendants any legal control over the property mentioned in the order, is not, in contemplation of law, a delivery of such property").

Accordingly, where the goods are in the custody of a third person and may not be delivered on the demand of the purchaser, there is no delivery. *Bentall v. Burn*, 5 Dowl. & R. 284, 3 B. & C. 423, 103 E. C. L. 138, R. & M. 107, 21 E. C. L. 392, 3 L. J. K. B. 42, 27 Rev. Rep. 391, 107 Eng. Rep. (Reprint) 791; *Farina v. Home*, 16 M. & W. (Eng.) 119; *Gooch v. Holmes*, 41 Me. 523.

And it has been held that a symbolical delivery in order to be effectual within the statute must confer the right to the possession of goods which are susceptible of immediate actual delivery. *Stevens v. Stewart*, 3 Cal. 140. In that case the court said: "The defendant relies on the statute of frauds. To avoid this defense the plaintiffs show that after the parol agreement for the sale of the goods, they delivered to defendant an order upon the master of the vessel for the goods. It appears that upon presenting the order, the defendant was answered that the goods were not ready to be discharged, and would not be for several days, whereupon he abandoned the contract. It is now insisted by the plaintiffs that the delivery of an order for the goods was such a delivery as takes the case out of the statute of frauds. Several cases have been cited to show that a delivery of an order is a delivery of the goods. But it seems very certain that it is only so considered where the goods are sus-

ceptible of immediate delivery. There are other cases, where no question is raised as to the validity of the contract, or the effect of the statute of frauds, where the point to be decided was, as to the kind of delivery which effected a change of property, or completed the execution of the contract. In many such cases, although the goods cannot be immediately delivered, the delay is implied as one of the stipulations. But where delivery is necessary to make the contract, a symbolic delivery can only be effectual where it can be immediately followed by an actual delivery. It is urged that the proof in this case shows that the defendant purchased with the knowledge that the goods were on shipboard, and therefore made the bargain with the implied understanding that they could only be delivered within such reasonable time as it required the vessel to discharge. This would be a good argument, if the contract had been in writing, to prevent the defendant from avoiding it for want of delivery. But the argument itself proves a nondelivery, and there cannot be at the same time a delivery which takes the case out of the statute and a good legal excuse for nondelivery."

But the parties may agree, as a part of a constructive delivery, that the goods shall be actually delivered at a later date. *Salter v. Woollams*, 2 M. & G. 650, 40 E. C. L. 559 (delivery of rick of hay).

WILSON

v.

HOTCHKISS.

California Supreme Court—December 24, 1915.

171 Cal. 617; 154 Pac. 1.

Frauds, Statute of — Delivery of Goods — Retention of Vendee in Possession.

Under the statute of frauds providing that sales of personal property for a price of \$200 or more shall be invalid unless there be some written memorandum, except where the buyer accepts part of the goods, the mere words of the buyer, who was already the pledgee in possession, or proof of his acts of dominion over the property inconsistent with his former rights as pledgee, may establish a transfer of possession from that of a pledgee to that of complete ownership.

[See note at end of this case.]

Same.

Where sale of personal property is made to a buyer in possession, the statute of frauds

does not require him to quit it and to retake possession as the new owner.

[See note at end of this case.]

Same.

In an action for the price agreed on a parol sale of stock for a price more than \$200, to a buyer already in possession as pledgee, the evidence is held to make the buyer's acceptance of possession as complete owner a question for the jury.

[See note at end of this case.]

Appeal from Superior Court, City and County of San Francisco: HUNT, Judge.

Action by Virginia E. Wilson, plaintiff, against W. J. Hotchkiss, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Titus, Creed & Dall for appellant.

Franklin P. Bull for respondent.

[618] HENSHAW, J.—The first trial of this cause resulted in a verdict and judgment in favor of the plaintiff. Defendant's appeal was considered by the district court of appeal of the third district, where every legal consideration pressed upon the attention of that court is clearly, fully, and satisfactorily disposed of. (*Wilson v. Hotchkiss*, 21 Cal. App. 392, 132 Pac. 88.) That court very properly ordered a reversal of the judgment and a new trial for the failure of the trial court to give any instructions touching the statute of frauds and its applicability to the contract under consideration. Upon the new trial such instructions were given. Again the verdict of the jury was for plaintiff, and once more defendant appeals. It may not be questioned but that the court quite fully and quite accurately instructed the jury as to the nature of the acts by a vendee under a parol contract within the statute of frauds which would be sufficient to satisfy the requirements of that statute. But complaint is made over the court's refusal to give the following: "Mere words are not sufficient to prove a receipt or acceptance of the personal property to take an oral contract of sale of personal property, for a price exceeding two hundred dollars, out of the statute of frauds." It is said that this refused instruction embodies an unquestioned principle of law, first declared in New York in *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, and approved in this state in the very early cases of *Gardet v. Belknap*, 1 Cal. 399, and [619] *Malone v. Plato*, 22 Cal. 103. These cases and the principle of law for which appellant contends therefore demand examination. *Shindler v. Houston* was a sale by oral contract of lumber in the possession of the vendor, and piled on a dock. Standing in front of the lumber, the vendor and the vendee agreed upon the price, and the plaintiff then said, "The lumber is

yours." There was absolutely no other delivery, no change of possession, and the true meaning of the decision is that where delivery and change of possession are necessary to comply with the statute of frauds, an oral declaration does not alone constitute such delivery. To precisely the same effect is *Gardet v. Belknap*, where there was not the slightest pretense that the brandy which the defendant orally purchased had ever been removed from the plaintiff's store, or that the defendant had exercised, or attempted to exercise, any dominion over it, the plaintiff resting his case solely upon the oral declaration of the vendee at the time of the purchase and as a part of the contract of purchase. In *Malone v. Plato*, defendant was charged with having purchased horses of the plaintiff. The transaction rested wholly in parol, defendant saying, "I will take them. I will be back in half an hour and pay for them." The horses remained in plaintiff's stable. Defendant refused to complete this oral contract, and pleaded the statute of frauds. This court again said that it appears to be entirely settled that to comply with the requirements of the statute of frauds, "*the transfer of possession must be evidenced by acts and cannot be effected by mere words.*" With the soundness of these declarations as bearing upon the facts to which they were applied, no criticism can be made. But what were the essential facts? They were that for their validity each contract required a delivery of the article sold, and the holding is merely that the language of the vendor that "the property is yours," or the language of the vendee, "I will take the property," does not measure up to the requirement of the statute. This principle and these decisions have no bearing on or relationship to cases such as the one at bar—cases where the actual possession is in the vendee and the real question is whether that possession has been transformed from that of bailment or pledge to that of complete ownership. Where a sale is made to a vendee in possession, whatever may have been the nature of his prior possession, the [620] law does not require a quitting of it and a retaking of possession as the new owner. (*Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. All that is required is evidence showing that the possession is retained by the vendee in his new capacity of owner. And what evidence will establish this? Manifestly it may be established by proof of acts of dominion over the property inconsistent with his former holding as bailee or pledgee, but equally may it be established by his declarations that he so holds the property as owner. On principle this must be so, for it would indeed be strange if a pledgee, for-

mally reciting the oral contract by which he had purchased the property and declaring that he held possession of it no longer as pledgee but as absolute owner, could have the evidence of these declarations excluded from the consideration of the jury upon the ground that they were mere declarations and not a part of his acts or conduct in dealing with the property. They are essentially a part of his acts and conduct, and so we find it declared as "well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts and declarations of the purchaser may be given in evidence for that purpose." (*Garfield v. Paris*, 96 U. S. 557, 24 U. S. (L. ed.) 821.) And without multiplying citations, reference may be made to *Browne on Statute of Frauds*, section 321e, where he states: "The conduct of the buyer showing an acceptance . . . may be drawn . . . from what he says." And again quoting from the same author, page 433, footnote, "An examination of the cases will show that evidence has uniformly been received even in New York of the conduct of the parties, i. e., what they did and said, without in any way discriminating between acts of doing and acts of saying." (See also *Mechem on Sales*, sec. 382; *Williston on Sales*, sec. 87.) It follows that the court ruled correctly in refusing to give the proffered instruction.

Plaintiff's evidence went to establish that her assignor in selling his stock ceased to have any connection with the corporation and so forfeited his position as manager; that he was temporarily retained by the defendant purchaser in his managerial position at an increased compensation, the increase being paid by the defendant himself; that defendant was the pledgee of the stock at the time of the sale; that the [621] vendor was jointly liable with the vendee upon certain promissory notes; that as a part of the consideration the vendor was to be released from liability on those notes; that in fact the vendee did pay those notes and never made demand upon the vendor for recoupment; that the vendee publicly declared that he had bought the vendor's stock and that the vendor no longer had any interest in the company. Here certainly is enough, and more than enough, evidence to justify the submission of the cause to the jury, whose verdict will not here be disturbed. (*Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.)

The judgment and order appealed from are therefore affirmed.

Lorigan and Melvin, JJ., concurred.
Hearing in Bank denied.

NOTE.**Continuance of Existing Possession by Vendee as Sufficient Delivery to Take Verbal Sale of Goods Out of Statute of Frauds.**

The reported case supports the rule recognized in *J. H. Silkman Lumber Co. v. Hunholz*, 13 Ann. Cas. 713, to the effect that when goods are in the possession of the vendee, it is not necessary to a valid delivery within the statute of frauds that the vendor shall repossess himself of the property and then redeliver it to the vendee, since it is sufficient if the vendee retains possession, claiming the goods as his own expressly or by reasonable implication and under such circumstances as indicate a mutual intention to change the nature of the possession from a bailment to ownership. The court in the reported case further holds that the delivery may be established as against the vendee by mere words, when those words are his own declaration that he holds as owner.

Several recent cases have considered the question of the continuance of an existing possession by a vendee as sufficient delivery to take a verbal sale of goods out of the statute of frauds, and have supported the rule that while it is not necessary for the seller to retake the property and redeliver it to the buyer, it is necessary to a delivery that the conduct of the buyer shall be inconsistent with the supposition that the former possession remains unchanged. *Wilson v. Hotchkiss*, 21 Cal. App. 392, 132 Pac. 88; *Charlotte Harbor, etc. R. Co. v. Burwell*, 56 Fla. 217, 48 So. 213; *Young v. Ingalsbe*, 208 N. Y. 504, 102 N. E. 590, *affirming* 151 App. Div. 375, 135 N. Y. S. 939 (same case on former appeal, 138 App. Div. 587, 122 N. Y. S. 707). In *Young v. Ingalsbe*, 151 App. Div. 375, 135 N. Y. S. 939, the appellate division pointed out that the acts done must bind the party against whom the validity of the sale is asserted. Adverting to the former appeal the court said: "Upon that there was evidence of a verbal sale of the testator's interest in certain law books to the plaintiff in 1906, and an agreement that the price thereof should be applied upon the said indebtedness of the plaintiff. It was sought by plaintiff to avail himself of this sale to prevent the running of the statute of limitations. The books were already in the possession of the plaintiff. There was no evidence of any affirmative act of delivery by the said testator or of acceptance by the plaintiff of said books. We accordingly held that the sale was void by the statute of frauds, and being void it did not operate as a payment which would take the claim out of the statute of limitations. Upon this trial further evidence was offered to the ef-

fect that after this verbal contract of sale the plaintiff assumed possession of such law books, removed the tags that were thereupon and put his own name upon them. Such acts were, in my judgment, sufficient to constitute an acceptance by him of such law books providing defendant were here claiming the benefit of that sale. The validity of the sale, however, is not here asserted by the defendant but by the plaintiff as against the defendant's testator, and as against him there was no act of delivery shown which takes the case out of the statute of frauds. . . . While enough has been shown to constitute an acceptance on the part of the plaintiff if the defendant were here seeking to enforce the contract, nothing whatever has been shown to constitute a delivery on the part of the defendant's testator when the sale is sought to be enforced by the plaintiff. The mere agreement that the moneys were to be applied upon the indebtedness is not a positive act in any way constituting a delivery or constituting an assent to the acceptance by the plaintiff. It is merely part of the verbal contract of sale, which the law has held is not sufficient to pass title." *Affirming* that judgment, the court of appeals (208 N. Y. 503) said: "Each act of the plaintiff was individual and independent. His possession of the books, if had at the time of the agreement, was not on the strength of or pursuant to it, but under another and prior arrangement; and, if acquired subsequent to the contract, was without a delivery and through his sole and exclusive act. Under either hypothesis the title of the deceased to the books did not pass to the plaintiff by virtue of a receipt and acceptance because he did no act by which he relinquished his dominion or recognized and confirmed that of the plaintiff over them."

CRIGGER

v.

COCA-COLA BOTTLING COMPANY.

Tennessee Supreme Court—October 1, 1915.

132 Tenn. 545; 179 S. W. 155.

Food — Liability of Manufacturer to Consumer.

The duty of one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous of exercising care to see that nothing unwholesome or injurious is

contained in the bottle or package is not in the nature of an implied warranty, and is based upon negligence.

[See 4 Ann. Cas. 1123; 15 Ann. Cas. 1076; 16 Ann. Cas. 492; Ann. Cas. 1913B 1110; Ann. Cas. 1915C 140; 111 Am. St. Rep. 713.]

Same.

One who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, or articles inherently dangerous is liable for breach of a duty to the public in the preparation thereof, regardless of the privity of contract to any one injured for a failure to properly safeguard and perform such duty.

Foreign Substance in Beverage.

In an action for damages for an illness caused by swallowing a decomposed mouse in a bottle of Coca-Cola purchased from a local dealer to whom it had been sold by a bottling company, the evidence is held to sustain a finding that the bottling company was not at fault.

[See note at end of this case.]

Certiorari to Court of Civil Appeals.

Action by H. C. Crigger, plaintiff, against Coca-Cola Bottling Company, defendant. Judgment for defendant in trial court. Judgment affirmed by Court of Civil Appeals. Plaintiff petitions for certiorari. The facts are stated in the opinion. **AFFIRMED.**

King & Lanier for plaintiff.

Bell, Terry & Bell and *Caruthers Ewing* for defendant.

[546] FANCHER, J.—The plaintiff drank a bottle of Coca-Cola, a beverage sold generally on the market as wholesome and harmless. In doing so he took into his mouth, and partially swallowed, a decomposed mouse, which caused him to become very sick, and he sues for damages. The defendant does not make the beverage, but buys it in barrels from the manufacturer and bottles it.

The bottle in question was sold by defendant to a local dealer and by him sold to plaintiff.

The question presented is, whether a bottling company engaged in bottling Coca-Cola, a beverage made [547] by another, warrants to the ultimate consumer that its bottle contains no injurious, harmful, or deleterious substance, or is the bottling company liable only for negligence, or the omission to use proper care in the work?

The proof shows that the method used at the bottling plant is fully equal to the best. The empty bottle is passed through vats of strong caustic soda solution and then rinsed under pressure with water as hot as the bottle will stand, then inspected by the use of a strong electric light, then brushed out with

a rapidly revolving brush and again rinsed; the bottle is again inspected over a brilliant electric light, and then filled with Coca-Cola, using a fine strainer, when it is capped, and finally inspected.

The trial judge charged the jury on the theory that if the defendant was free from negligence in the bottling of the beverage there was no liability. The jury found in favor of the defendant, and judgment was accordingly entered. The court of civil appeals affirmed on the ground that the declaration averred negligence and the jury had found against plaintiff on that question.

The case is briefed here in support of the petition for *certiorari*, and by the defendant, as to whether there is an implied warranty on the part of the Coca-Cola Bottling Company, which results in favor of the ultimate consumer, regardless of any question of negligence. The declaration, liberally treated, will admit [548] the question, and the case must be determined upon that standard.

In the case recently determined by this court of *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80, opinion by Mr. Justice Green, the defendant was held liable to the ultimate consumer for injuries from drinking a bottle of Coca-Cola in which was contained a cigar stub. The bottle in that case was bought from an intermediate dealer, to whom the defendant manufacturer had sold it, and it was held that want of contract or privity between defendant and the person injured constituted no defense. It was determined in that case that beverages fall within the class of articles such as foods and medicines, where a liability may exist upon the ground that one placing upon the market such products in sealed bottles assumes a duty to the general public of exercising care to see that nothing unwholesome or injurious is contained in the bottle. For a negligent breach of this duty the defendant was liable.

In the present case, we are to inquire a step further. Does this duty exist regardless of negligence, and is it in the nature of an implied warranty? Some of the cases seem to so hold. The case of *Jackson Coca Cola Bottling Co. v. Chapman* 106 Miss. 864, 64 So. 791, 7 Neg. & Com. Cas. Ann. 112, note, seems to go this extent, citing *Watson v. Augusta Brewing Co.* 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1180, 110 Am. St. Rep. 157.

[549] In the *Augusta Brewing Co. Case*, the supreme court of Georgia stated the rule to be:

"When a manufacturer makes, bottles, and sells . . . a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed

with the beverage which, if taken into the human stomach, will be injurious."

It does not appear that the direct question was at issue in that case as to a warranty, regardless of negligence. Most of the cases on the question show some negligence or omission of duty or care, and are based upon that idea.

There are many authorities holding an implied warranty to exist, as between seller and buyer of articles to be used for a specific purpose, that such articles are proper and suitable for the use to which they are to be applied. But we see no reason or principle upon which a warranty might run with an article for consumption like a warranty of title running with land. We think the real ground of liability of the seller to an ultimate consumer is, more properly speaking, a duty one owes to the public not to put out articles to be sold upon the markets for use injurious in their nature, of which the general public have not means of inspection to protect themselves. This duty has been applied to manufacturers of drugs, foods, beverages, poisons, and other things inherently dangerous.

One of the leading cases on the subject is *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. [550] That case is referred to in many more recent opinions. A manufacturing druggist was held liable for negligently putting up, labeling, and selling as and for the extract of dandelion, a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison, whereby the plaintiff was injured, on the ground of a breach of a public duty, and that this was the result whether the injured person is an immediate customer of defendant or not. Negligence was the basis of liability in that case, as it was in most cases of this nature. See notes 57 Am. Dec. (Extra Ann.) 568; *Salmon v. Libby*, 219 Ill. 421, 76 N. E. 573; *Tomlinson v. Armour*, 75 N. J. L. 748, 70 Atl. 314, 19 L.R.A.(N.S.) 923 (negligence in preparation of canned meat); note to *McQuad v. Roas* [85 Wis. 492, 55 N. W. 705, 39 Am. St. Rep. 864] 22 L.R.A. 195; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715 (negligence in furnishing unwholesome meat); *Huset v. J. I. Case Threshing Mach. Co.* 120 Fed. 865, 57 C. C. A. 237, 61 L.R.A. 303; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64 (negligence by manufacturer in selling dangerous article he knew to be an explosive); *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339 (negligence in sale of unwholesome provisions, but holding that vendor is bound to know that they are sound and wholesome); *Craft v. Parker* [96 Mich. 245, 55 N. W. 812] 21 L.R.A. 139, note; *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392, 41

Am. Rep. 728 (opinion by Cooley, J., holding that a high degree of care is required of a druggist, but that actual negligence cannot be dispensed with as a necessary element [551] in liability when mistake has occurred); *Fleet v. Hollenkemp*, 13 B. Mon (Ky.) 219, 56 Am. Dec. 563 (holding *caveat venditor* should apply to a druggist in seeing that his drugs are what they are pretended to be, and that he cannot escape liability on a pretext that it was an accidental or innocent mistake); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L.R.A. 612, 20 Am. St. Rep. 324 (liability to ultimate consumer for wrong of proprietor of medicine in the prescription and direction as to dose); *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932 (liability without regard to privity of contract for knowingly selling and delivering to another, who is injured thereby (an article intrinsically dangerous, without notice to purchaser of intrinsic danger); *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L.R.A. 428, 88 Am. St. Rep. 909 (druggist liable from incompetency or negligence in selling to one person wrong poisonous medicine, whereby third person is injured); *Farrell v. Manhattan Market Co.* 198 Mass. 271, 84 N. E. 481, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076 (reviewing established English cases that hold there is no implied condition or warranty that a food is fit to be eaten, unless sold by a dealer and the food is selected by him, and concluding that this is the true rule); *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B 884 (that finding for plaintiff for injuries from what might be ptomaine poisoning is not warranted without any [552] evidence that the defendant was negligent in purchasing its food supplies).

From a careful consideration of the subject, and after mature thought, we are of opinion as follows:

1. That one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to any one injured for a failure to properly safe-guard and perform that duty.

2. This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure foods, beverages and medicines we believe with Judge Cooley, as expressed in *Brown v. Marshall*, supra, that negligence is a necessary element in the right of action, and the better au-

thorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury without some negligent act or omission.

In the present case, the mouse may have gotten into the bottle by some unavoidable accident, but proper inspection should have disclosed the fact, and if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the Bottling Company plant, we would consider it our duty to reverse the case, because of the high duty resting on the defendant. [553] But the jury was told to inquire whether the mouse was in the bottle when it left the hands of this company, and, if so, whether its presence there was due to the negligence of the company. The court suggested to the jury the theory of the defendant that there was opportunity for malevolent persons to open this bottle and put the mouse into it before or after it left the factory, and they should use their common sense as men in deciding the issue. In view of the extraordinary care shown to exist at the bottling plant and the verdict of the jury, it may be that this thing occurred without the fault of the defendant. There are sufficient inferences that may be drawn from the facts to sustain the finding.

Affirmed.

NOTE.

Liability for Injury Resulting from Foreign Substance in Beverage.

Generally.

In an early case it was said: "If a taverner sells wine (knowing it to be corrupt) to another as sound, good, and not corrupt, without any express warranty, still an action of deceit lies against him, for there was a warranty in law. So if I come into a tavern to eat, and he gives and sells to me beer and flesh which are corrupt, by which I am put into a great sickness, I shall have against him my action in the case clearly, even although he made no guaranty to me." 9 H. 6, 53, as stated in 1 Roll. Abr. tit. Action sur Case, (P) pl. 1 & 2.

Beverages may be regarded as food and indeed pure food laws generally define food as including "all articles used as food or drink by man." 11 R. C. L. tit. *Food*, p. 1108. And see the note to *Com. v. Pflaum*, Ann. Cas. 1913E 1287. A great majority of the recent cases hold that the ultimate consumer of products sold in cans or sealed packages may bring his action direct against the packer or manufacturer. 11 R. C. L. tit. *Food*, p. 1123.

Accordingly it is held that a manufacturer is liable to an ultimate consumer for an injury resulting from a foreign substance in a beverage which he has manufactured. *Watson v. Augusta Brewing Co.* 124 Ga. 121, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L.R.A. (N.S.) 1178; *Martin v. Waycross Coca-Cola Bottling Co. (Ga.)* 89 S. E. 495; *Roberts v. Anheuser-Busch Brewing Assoc.* 211 Mass. 449, 98 N. E. 95; *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791. In *Watson v. Augusta Brewing Co.* supra, the rule was stated as follows: "When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious. The duty not negligently to injure is due by the manufacturer, in a case of the particular character of the one under consideration, not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended."

In the reported case the rule is stated to be that while the liability of a manufacturer of a beverage for an injury caused by a foreign substance therein is not dependent on a privity of contract between him and the person injured, his liability must depend on some negligent act or omission. The facts and the holding in *Boyd v. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80, are partially stated in the reported case. In that case it was also held that the plaintiff was not guilty of contributory negligence in failing to examine the beverage for a foreign substance, the court saying: "It is next said that the plaintiffs below were guilty of contributory negligence in not examining more closely the bottle and its contents. We think there is nothing in this. The proof shows that the bottle and the fluid were both of a dark color, and the cigar stub could not be readily discerned. Furthermore, it is to be presumed that the contents of sealed packages put on the market to be used as a food or beverage are fit to be so used. A consumer is not negligent in failing to examine the same for poisonous substances."

The English Sale of Goods Act 1893 (s. 14, sub. 1) provides that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . there is an implied condition that the goods shall be reasonably fit for such purpose." Subdivision 2 pro-

vides that "where goods are bought by description from a seller who deals in goods of that description . . . there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." In *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. (Eng.) 608, it appeared that the plaintiff brought an action to recover expenses to which he was put by the death of his wife caused by typhoid fever of which the infection was caught from milk supplied by the defendants. The defendants were held to be liable, the court holding that subsection 1 was applicable. And in *Wren v. Holt* [1903] 1 K. B. (Eng.) 610, it appeared that the plaintiff was poisoned by arsenic contained in beer bought at the defendant's beerhouse. The plaintiff testified that he went to the defendant's beerhouse because beer of a certain brand was there supplied. A judgment for the plaintiff was affirmed, the appellate court holding that there was a sale of goods by description within subsection 2, and that the defect was not one that could be discovered by inspection.

For a discussion of the question of implied warranty on a sale of food see the notes to *National Cotton Oil Co. v. Young*, 4 Ann. Cas. 1123, and *Farrell v. Manhattan Market Co.* 15 Ann. Cas. 1076. As to the recovery of consequential damages for the breach of an implied warranty of sale, see the notes to *Jackson v. Watson*, 16 Ann. Cas. 492; *Doyle v. Fuerst*, Ann. Cas. 1913B 1110; *Mazetti v. Armour*, Ann. Cas. 1915C 140. The liability of a water company to a consumer for furnishing impure water is treated in the note to *Gosser v. Ohio Valley Water Co.* Ann. Cas. 1915C 685.

Illustrations.

In *Watson v. Augusta Brewing Co.* 124 Ga. 121, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L.R.A. (N.S.) 1178, it appeared that the plaintiff was injured by swallowing several pieces of glass while drinking some soda water which he had purchased from a merchant, and it was held that he could recover damages from the manufacturer of the beverage for the injury sustained.

In *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791, the court affirmed a verdict for the plaintiff for damages resulting from the drinking of Coca-Cola from a bottle containing a dead mouse. To the same effect is *Martin v. Waycross Coca-Cola Bottling Co.* (Ga.) 89 S. E. 495, wherein the appellate court said in holding that a nonsuit should not have been granted in the trial court: "There is evidence from

which the jury could have inferred that in this instance the liquid, which was a brand of Coca-Cola and putrid mouse juice, of itself caused the sickness from which the plaintiff testified she suffered, and that she would have been made sick by it, even if she had not seen that there was a decaying mouse in the bottle. She testified that she took a large swallow before she saw the mouse; and it is not, as a matter of law, to be concluded that the nausea from which she suffered was due to the mental shock caused by seeing a dead mouse in the liquid she was imbibing, rather than that the nausea, sickness, and pain were primarily due to the poisonous nature of the hideous brew, which her physical nature revolted against and attempted to expel without her mind consciously becoming a collaborator in the effort, and before the mind became a participant in the suffering. . . . In our opinion, while the evidence in the present case perhaps does not require a jury to find that the nature of the liquid sold by the defendant and swallowed by the plaintiff was the proximate cause of physical suffering and injury to her person, it is sufficient to authorize such a finding. It is uncontradicted that she was made sick; and of course one may recover for sickness caused by the negligence of another. . . . The fact that a particular plaintiff was sick only a short time, or that a critical illness did not result as a consequence of the negligence of the defendant, might minimize the damages recoverable, but it would hardly so bring the case under the maxim 'de minimis non curat lex' as to deprive the plaintiff of a right to recover. That the plaintiff in the present case was cured of the effect caused by the rodent whose ghastly condition is portrayed in the testimony does not necessarily make this a case in which the Latin 'curat' is synonymous with cure rat, or rat cure. We apprehend that the learned trial judge regarded the case as one in which the only suffering endured by the plaintiff was mental pain consequent upon the discovery of a rotten mouse in the bottle of Coca-Cola from which she was drinking. If the evidence was subject to no other construction, his judgment would undoubtedly be correct, under the decision in *Chapman v. Western Union Tel. Co.* [88 Ga. 763, 15 S. E. 901, 17 L.R.A. 430, 30 Am. St. Rep. 183]; but it is clear to our minds that there was sufficient evidence, in due accord with the petition, to have authorized a jury to find that the physical sickness and physical pain of the plaintiff was caused by the physical effort to repel a poisonous fluid; and for this reason we hold that the court erred in awarding a nonsuit. If the plaintiff, after having swallowed an unnatural and deleterious com-

118 Ark. 277.

pound, which necessarily was injurious to her body, and which caused physical pain and sickness, to her damage, suffered additional mental pain, which was consequent and directly dependent upon her physical suffering, this would merely aggravate the injury."

In *Roberts v. Anheuser-Busch Brewing Assoc.* 211 Mass. 449, 98 N. E. 95, it appeared that the plaintiff, relying on advertisements wherein the defendant had represented that a mixture called Malt Nutrine which it manufactured was healthful and beneficial to women and children and to those needing strength and nourishment and free from all injurious substances, purchased a bottle of the mixture from a merchant, the taking of which caused the illness of his wife and child because of the presence of ptomaine poisons in the mixture. It was held that the defendant was liable.

In *Watson v. Augusta Brewing Co.* 124 Ga. 121, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L.R.A.(N.S.) 1178, the court in discussing the question whether the plaintiff could recover damages for mental suffering growing out of an injury resulting from swallowing pieces of glass contained in soda water which he had drunk said: "The only remaining point to be considered is whether or not the plaintiff in this case can recover for mental suffering growing out of his injury; and if so, to what extent. It is a familiar principle that where a physical injury has been sustained the person injured may recover for mental suffering caused by or growing out of his bodily hurt. One may not recover, however, for mental suffering which is not reasonable, or which is merely fanciful. It can hardly be disputed that a reasonable fear of death constitutes mental suffering of a very keen sort. It is not unreasonable, we think, for one who has swallowed several pieces of glass to entertain a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury. But after the glass has been removed from his stomach and he is apparently restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease. He may not continue for an indefinite period to vex his soul with dread on account of having been 'cut on the inside' and hold the defendant liable for his apprehensions. It follows, therefore, that so much of the petition as seeks to recover on account of mental suffering endured since the glass was removed from the plaintiff's stomach should be stricken."

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY

v.

DAGUE.

Arkansas Supreme Court—April 26, 1915.

118 Ark. 277; 176 S. W. 138.

Damages — Measure — Loss of Article Having No Market Value.

The measure of damages for loss by a carrier of an article which has no market value is the value of the article to the shipper; and, in ascertaining the value, inquiry may be made into the constituent elements of the article and the cost to the shipper of producing it.

[See note at end of this case.]

New Trial — Newly Discovered Evidence — Diligence Insufficient.

A carrier against which a judgment had been rendered for the loss of freight sought a new trial for newly discovered evidence, and showed that the loss was reported in December, 1913, and that an investigation was at once started to find the article described in the bill of lading, as a "model plow;" that the agents of the carrier looked for something like a plow and could not find it; that the traveling claim adjuster after the trial found in unclaimed freight packages, in a warehouse between the initial and terminal stations, a small box which contained the model plow. When delivered for shipment the box was plainly marked, "Model Plow or Soil Pulverizer." It is held that denial of new trial was within the court's discretion.

Damages — Value of Article Having No Market Value — Evidence Sufficient.

A shipper suing a carrier for the loss of an article having no market value, and showing that he was a mechanic, and giving a detailed estimate of the materials going into the article and the reasonable cost of constructing the same, may recover the value of materials furnished and the work done by others, as shown by his uncontradicted testimony.

[See note at end of this case.]

Appeal from Circuit Court, Miller county:
ARNOLD, Judge.

Action by M. H. Dague, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[278] M. H. Dague sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the loss of certain property which he delivered to the railroad company at Newport, Arkansas, for shipment to Texarkana, Arkansas.

It appears from the record that on the 19th day of December, 1913, the plaintiff delivered to the defendant for transportation a certain model machine of a soil pulverizer for which he had letters patent; and that at the time he made the delivery he explained to the defendant the character and nature of the machine. It was packed in a box, was labelled "Model of Pulverizer Machine," and was addressed to M. H. Dague, Texarkana, Arkansas. The machine was lost in transportation, and, after waiting some months for the company to trace it, the plaintiff instituted this action.

The suit was commenced on the 29th day of April, 1914, and the trial had on the 15th day of June, 1914. At the trial the plaintiff testified as to what it would cost him to have the machine constructed and placed the total amount at \$583.40, \$200 of which he claimed for services performed by himself in working on the model. The remaining \$383.40 was for material furnished and for work done by other parties. He gave a detailed statement of these items, and testified that he was a mechanic and that the prices were reasonable. The jury returned a verdict [279] in his favor for \$383.40, and from the judgment rendered the defendant has appealed.

E. B. Kinsworthy, R. E. Wiley, Troy Pace
and *T. D. Crawford* for appellant.
Webber & Webber for appellee.

[280] HART, J. (*after stating the facts*).—(1) In the case of *Southern Exp. Co. v. Owens*, 146 Ala. 412, 9 Ann. Cas. 1143, 41 So. 752, 119 Am. St. Rep. 41, 8 L.R.A.(N.S.) 369, the court held that in an action to recover for the loss of an article which had no market value the measure of damages should be the value of the article to the plaintiff, and, in ascertaining this value, inquiry may be made into the constituent elements and the [281] cost to the plaintiff of producing the article. In that case the court said:

"Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be true that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable."

Several cases are cited supporting that opinion, and other cases announcing the same

principle are cited in the case note. In the instant case the plaintiff had procured letters patent upon his plow and had constructed a model to be used in selling the plow. He shipped the model from Newport to Texarkana over the defendant's line of railway and it was lost in transit. The court followed the principles of law above announced in the admission of testimony and in its instructions to the jury.

It is insisted by counsel for the defendant that the court erred in failing to grant it a new trial on account of newly discovered evidence. In support of its motion, it introduced the affidavits of its agents to the effect that the loss of the machine was reported in December, 1913, and that an investigation was at once started to find the plow; that the property was described in the bill of lading as a model plow; that they were looking for something like a plow and were not able to find it; that some time in August, 1914, the traveling freight claim adjuster for the defendant and one of its agents while looking over some unclaimed freight packages in the company's warehouse in Little Rock, a station between Newport and Texarkana, located a box about thirty inches square and [282] about twelve inches high, and upon looking into it found that it contained the model plow which plaintiff had lost; and that before this time an examination of the unclaimed freight packages in stations between Newport and Texarkana had been made and they had been unable to find the plow.

After the railroad company found the plow it asked the court to set aside the judgment and require the plaintiff to accept the model and resubmit to the jury for its decision the question of damages sustained by the plaintiff for the detention of the plow.

(2) The court did not abuse its discretion in refusing this request of the defendant. It is true, according to the testimony introduced by the defendant, that the box containing the plow did not look like a plow and was not marked "model plow" on the box. According to the testimony of the plaintiff, however, when the property was delivered for shipment the box was plainly marked "model plow or soil pulverizer." It was shipped from a point in the northern part of the State to a station in the southern part of the State and the whole route was over the defendant's main line of road. Though the defendant made some effort to trace the plow after its loss was reported to it, still, under the circumstances, it cannot be said that it used due diligence in doing so. The property was lost in the latter part of December and was not found until some time in the following August.

Again, it is insisted by counsel for defendant that the verdict is excessive; but we do not agree with them in that contention. The

plaintiff testified that he was a mechanic himself and gave a detailed estimate of the materials that went into the model and the reasonable cost of constructing same. These items amounted to \$383.40. His testimony was in no manner contradicted and the jury properly found for him in that amount.

The judgment will be affirmed.

NOTE.

Measure of Damages for Loss or Destruction of Property Having No Market Value.

Introductory, 579.

Writings, Books, Portraits, Works of Art and the Like, 579.

Other Property, 581.

Introductory.

In the present note the recent cases discussing the measure of damages for the loss or destruction of property having no market value are reviewed. The earlier decisions on this question are collected in the notes to Southern Exp. Co. v. Owens, 9 Ann. Cas. 1143, and Watt v. Nevada Central R. Co. 62 Am. St. Rep. 772.

As to the measure of damages for the conversion of or the failure to deliver household goods and wearing apparel, see the notes to Barker v. Lewis Storage, etc. Co. 3 Ann. Cas. 889, and Rogers v. O. K. Bus, etc. Co. reported post, this volume, at page 581.

For a discussion of the question whether an action of trover will lie for the conversion of property having no commercial value, see the note to Vaughn v. Wright, Ann. Cas. 1914B 821.

Writings, Books, Portraits, Works of Art and the Like.

The measure of damages which may be recovered for the loss or destruction of a writing, book, portrait or other article of a similar nature, which has no market value, seems to be the amount of its actual value to the owner, which value must be ascertained from a consideration of all the facts which affect its value to the owner. The foregoing rule has been applied in the following recent cases: Wood v. Cunard Steamship Co. 192 Fed. 293, 112 C. C. A. 551, 41 L.R.A.(N.S.) 371 (loss of manuscript of manual on Greek grammar); Kates Transfer, etc. Co. v. Klassen, 6 Ala. 301, 59 So. 355 (loss of photographs); Barker v. S. A. Lewis Storage, etc. Co. 79 Conn. 342, 65 Atl. 143, 118 Am. St. Rep. 141 (conversion of books); Walton v. Western Union Tel. Co. 189 Ill. App. 606 (loss of typewritten manuscript of testimony); Drake v. Auerbach, 37

Minn. 505, 35 N. W. 367 (conversion of vouchers accompanied by affidavit of correctness); Austin v. Millspaugh, 90 Miss. 354, 43 So. 305, 122 Am. St. Rep. 315 (destruction of architect's plans); Shewalter v. Wood (Mo.) 183 S. W. 1127 (conversion and destruction of manuscripts and heirlooms); Frankenstein v. Thomas, 4 Daly (N. Y.) 256 (conversion of painting); Heald v. Macgowen, 15 Daly 233, 5 N. Y. S. 450 (conversion of electrotype plates); Jelalian v. New York, etc. R. Co. 134 App. Div. 381, 119 N. Y. S. 136 (failure of carrier to deliver Persian rug); Taft v. Smith, 76 Misc. 283, 134 N. Y. S. 1011 (conversion of unpublished manuscript containing names of customers); Lovell v. Shea, 60 Super. Ct. 412, 18 N. Y. S. 193 (conversion of stereotyped book plates); Leoncini v. Post, 13 N. Y. S. 825 (loss of sheet music with annotations and transcriptions inscribed thereon); Spice v. Waters, 65 Barb. (N. Y.) 227 (conversion of paintings, manuscripts, etc. dictum); St. Louis, etc. R. Co. v. Green, 44 Tex. Civ. App. 13, 97 S. W. 531 (loss of hand-painted china); Missouri, etc. R. Co. v. Dement (Tex.) 115 S. W. 635 (loss of portraits and family Bible); Pennington v. Redman Van, etc. Co. 34 Utah 223, 97 Pac. 115 (conversion of heirlooms and keepsakes); Nicolais v. Dominion Exp. Co. 20 British Columbia 8, 28 West. L. Rep. 754, 6 West. W. Rep. 1202, 18 Dominion L. Rep. 464 (destruction of architect's drawings). Thus, in Austin v. Millspaugh, 90 Miss. 354, 43 So. 305, 122 Am. St. Rep. 315, it appeared that the plaintiff while a guest at the defendant's hotel placed in the custody of the defendant a package containing architectural drawings, plans and specifications, which were lost by the defendant's negligence. In an action to recover the value of the property the court held that it was error to refuse the following instruction: "The court charges the jury that, in case they shall find a verdict for the plaintiff, then they should assess such damages in his favor as will, in their judgment, under all the testimony in the case, fully, fairly, and reasonably compensate him for the loss sustained; that they should not value plaintiff's property, so lost as testified about, at any fanciful or unreasonable price, nor, on the other hand, should they consider it of little or no value, because of its want of market price; but they should, as nearly as they can, from the testimony in the case, determine the reasonable, just, and fair value of the property to the plaintiff, at the time it was delivered to the defendant's porter, at the depot."

In Kates Transfer, etc. Co. v. Klassen, 6 Ala. App. 301, 59 So. 355, the court said, in stating the measure of damages recoverable from a carrier for the loss of photographs: "The photographs were articles of property that were lost that cannot be said to have a

marketable value that could be shown, but, as said in *Southern Exp. Co. v. Owens*, 146 Ala. 413, 426, 41 So. 752, 755, 8 L.R.A.(N.S.) 369, 119 Am. St. Rep. 41, 9 Ann. Cas. 1143: 'It does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable. . . . As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover.' *Cooney v. Pullman Palace-Car Co.* 121 Ala. 372, 373, 25 So. 715, 53 L.R.A. 690." In *Nicolaï v. Dominion Exp. Co.* 20 British Columbia 8, 28 West. L. Rep. 754, 6 West. W. Rep. 1202, 18 Dominion L. Rep. 464, an action against a carrier to recover damages for the destruction by fire of architect's drawings, it appeared that the drawings had not been accepted in a competition and they were not such as could be used for another building than the one for which they were designed, owing to the peculiar shape of the land on which the building was to be erected. It was held that the measure of damages was not the cost of the production of the drawings, but their value to the plaintiff for the purposes of exhibition to prospective clients as evidence of his skill. Similarly, in *Shewalter v. Wood* (Mo.) 183 S. W. 1127, the plaintiff brought an action against his divorced wife to recover damages for the wilful and malicious conversion and destruction of manuscripts and family heirlooms. The court said: "As to such things as family pictures and heirlooms, which cannot be replaced and are valuable only to the owner, the most fundamental rule of damages that every wrongful injury to person or property should be adequately and reasonably compensated would seem to require the allowance of damages in compensation of the reasonable special value of such articles to their owner. . . . His measure of damages is the reasonable value of the heirlooms to him, which, of course, includes the lesser market value. The evidence of plaintiff tends to show that defendant did convert the ladle, spoons, waiter, urn, and Bible and that all these articles belonged to the class we have defined for the conversion of which special damages should be allowed and further tends to show that defendant wilfully destroyed manuscripts, etc., of plaintiff of value to him, but to no one else." It was also held that the plaintiff could not recover both the actual value of the articles destroyed and their special value as that would be a recovery of double compensation.

In *Walton v. Western Union Tel. Co.* 189 Ill. App. 606, the action was brought against a telegraph company to recover damages for the loss of a typewritten transcript of testimony. It was held that the usual cost of such a manuscript might properly be taken as its value and as the damages recoverable.

But the measure of damages which may be recovered for the loss or destruction of articles of the kind heretofore referred to is not a fanciful price which the owner may place on them for special reasons, such as their value based on sentiment alone. *St. Louis, etc. R. Co. v. Green*, 44 Tex. Civ. App. 13, 97 S. W. 531; *Missouri, etc. R. Co. v. Dement* (Tex.) 115 S. W. 635.

It is provided by statute in California (Civil Code, § 3333) that "for the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." In *Willard v. Valley Gas, etc. Co.* 171 Cal. 9, 151 Pac. 286, the court in holding that the statute was applicable in an action against a gas company to recover the value of a rare book and some scrap books destroyed in a fire caused by the company's negligence said: "The testimony of Mr. Willard related to certain scrap books and other data which he had used and was accustomed to use in his occupation as a writer. Some of these contained the results of collecting clippings during many years. The fire also destroyed a rare book, written by one of Mr. Willard's ancestors, and entitled 'The Body of Divinity.' It is contended that the measure of damages to be applied to property having no market value is that laid down by section 3355 of the Civil Code, and that, defendant having possessed no notice of the value of this sort of property to the owner before the fire, it may not be held liable for the value thereof as established by the evidence. But respondents contend that the rule to be applied to property having no market value is fixed by section 3333 of the Civil Code as the amount which would compensate the owner for all detriment proximately caused by its destruction, 'whether it could have been anticipated or not.' This contention is correct. Section 3354 of the Civil Code fixes the market price as the amount recoverable by the owner of property who has been deprived of its possession; but that section excepts from its provisions those of the two following sections. It therefore appears that section 3355 deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value. It is clear that the scrap books could have no market value, but that they might be of great value

to a literary man. It was therefore proper for Mr. Willard to testify regarding their value to him. The same rule is applicable to the old book."

Other Property.

The rule applicable in estimating the amount of damages recoverable for the loss or destruction of property other than writings, books, portraits and works of art and which has no market value seems to be the same as in the case of a loss or destruction of those articles, that is, the actual value to the owner taking into consideration the use to which the property is to be put. *State v. Stoddard* (Ala.) 69 So. 980 (action on bond of officer for loss of military equipment); *Pascal v. Chicago, etc. R. Co. (Ia.)* 139 N. W. 279; *Murray v. Postal Tel.-Cable Co.* 210 Mass. 188, Ann. Cas. 1912C 1183, 96 N. E. 316; *Wilson v. St. Louis, etc. R. Co.* 129 Mo. App. 347, 108 S. W. 612 (failure of carrier to deliver stock hogs); *Wichita Falls, etc. R. Co. v. Gant* (Okla.) 156 Pac. 672 (destruction and injury to pasture and fence posts); *Kansas City Southern R. Co. v. Hurley* (Okla.) 160 Pac. 910 (destruction of natural drainage of lot); *Swank v. Elwert*, 55 Ore. 487, 105 Pac. 901; *Galveston, etc. R. Co. v. Crippen* (Tex.) 147 S. W. 361 (injuries to race horse); *Clayton v. Phillip* (Tex.) 159 S. W. 117 (conversion of house); *International, etc. R. Co. v. Parke* (Tex.) 169 S. W. 397 (loss of stock cattle); *Galveston, etc. R. Co. v. Patterson* (Tex.) 173 S. W. 273 (loss of Hereford bull). And see the reported case. See also *Southern Kansas, etc. R. Co. v. Hughey* (Tex.) 182 S. W. 361. Thus in *Swank v. Elwert*, supra, it was said: "The measure of damages for the destruction or conversion of personality . . . if the property has no market value at the time and place of conversion, either because of its limited production, or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than anyone else, then it may be estimated with reference to its value to him." And in *Pascal v. Chicago, etc. R. Co. (Ia.)* 139 N. W. 279, the court, in determining the measure of damages for the destruction of manure by a fire caused by one of the defendant's locomotives, said: "Plaintiff was permitted to show the actual value of the manure at the place where it was burned, and the ruling is objected to. As we understand the record, the manure had been hauled from the plaintiff's stables on the farm, and that it had no market value there, nor had it a market value at Pochahontas, which was the nearest town thereto. Under such circumstances, it was competent to show the fair, actual value of the manure." So, in *Murray v. Postal Tel.-Cable Co.* 210 Mass. 188, Ann. Cas. 1912C

1183, 96 N. E. 316, in discussing the admissibility of evidence as to the cost of the labor and material of a gown made to order, for the loss of which the action was brought, the court said: "The exceptions to the admission of evidence really involve the measure of the plaintiff's damages. The gowns, having been made to order for a particular customer, may have had no market value, and evidence of the cost of the labor and material was competent as bearing upon the question."

But the amount of damages recoverable cannot be based on a fanciful or imaginary value alone. *Lloyd v. Haugh, etc. Storage, etc. Co.* 223 Pa. 148, 72 Atl. 516; *Galveston, etc. R. Co. v. Giles* (Tex.) 126 S. W. 282.

ROGERS ET AL.

v.

**O. K. BUS AND BAGGAGE COMPANY
ET AL.**

Oklahoma Supreme Court—May 4, 1915.

46 Okla. 289; 148 Pac. 837.

Trial — Taking Case from Jury — Undisputed Evidence.

Under the procedure and practice in this state in trials by jury, it is the well-established and settled law that, even though the testimony is undisputed, it should be so convincing that all reasonable men must draw the same conclusion from the facts proven, before the court is authorized to sustain a demurrer to the evidence, or direct a verdict.

Evidence — Value of Chattels.

It is the well-known and generally accepted rule that, when a witness testifies as to the value of chattels in common use, it will be inferred that he means their market value, unless a different basis of value is fixed by the witness, or it is apparent that the witness bases his value on a different foundation.

Opinion Evidence — Value of Wearing Apparel — Right of Owner to Testify.

The owner of wearing apparel may testify as to its value in an action to recover damages for the loss thereof. Rules of evidence are not so technical as to require expert witnesses to prove the reasonable or market value of chattels in common use, where it is apparent from the facts proven that the value of the articles is within the knowledge of persons of ordinary intelligence and experience.

[See note at end of this case.]

Evidence — Admissibility — Disregard of Technicalities.

Rules of evidence are established for the

purpose of enabling the court and jury to ascertain the true facts concerning the matters in controversy, and not for the purpose of hindering and delaying justice, by the enforcement of technical abstract phrases defining the rules for the admissibility of evidence.

Error to County Court, Coal county:
WELLS, Judge.

Action by Joplin Rogers et al., plaintiffs, against O. K. Bus and Baggage Company et al., defendants. Judgment for defendants. Plaintiffs bring error. The facts are stated in the opinion. REVERSED.

G. T. Ralls for plaintiffs in error.

O. M. Threadgill for defendants in error.

[290] ROBERTS, C.—This case was originally brought in the county court of Coal county by the plaintiffs in error, also plaintiffs below, against the Missouri, Kansas & Texas Railway Company, the O. K. Bus & Baggage Company, and D. M. Phillips, defendants. The petition alleges and the proof shows that the O. K. Bus & Baggage Company was simply a fictitious name, and that D. M. Phillips was the sole owner and proprietor of said company. During the progress of the case the cause of action was dismissed as to the railway company, and also as to the O. K. Bus Company, leaving D. M. Phillips the sole defendant.

For cause of action the plaintiffs, among other facts, allege that:

"On or about the 4th day of October, 1907, plaintiff Sallie Rogers was on a passenger train en route from Chickasha to Lehigh, Okla.; that Lehigh is a station on a line of railway of the defendant the Missouri, Kansas & Texas Railway Company, and in order to reach Lehigh it became necessary for plaintiff to pass through Oklahoma City; that on her journey from Chickasha to Lehigh plaintiff had with her certain baggage, consisting of one large trunk, containing wearing apparel and jewelry; that as an incident to said journey it became necessary to have said trunk transferred from the depot of the St. Louis & San Francisco Railway Company in Oklahoma City to the depot of the Missouri, Kansas & Texas Railway Company; that plaintiff contracted with and employed defendant D. M. Phillips, as owner and proprietor of the O. K. Bus, Baggage & Carriage Company, to transfer said trunk from the depot of St. Louis & San Francisco Railway Company to the depot of the Missouri, Kansas & Texas Railway Company, and deliver the same to the Missouri, Kansas & Texas Railway Company in a good condition, and for a valuable consideration the said D. M. Phillips, as owner and

proprietor of the O. K. Bus, Baggage & Carriage Company, undertook and became bound and liable to safely transfer and deliver said trunk to the Missouri, Kansas & Texas Railway Company at its depot in Oklahoma City.

[291] "That these plaintiffs intended to leave Oklahoma City on their journey to Lehigh, and that plaintiff Joplin Rogers purchased for himself and plaintiff Sallie Rogers tickets over the Missouri, Kansas & Texas Railway Company from Oklahoma City to Lehigh, and paid therefor the usual fare; that plaintiffs requested the defendants to produce the baggage aforesaid, but said defendants failed to produce said baggage, and, though often requested to do so, still fails and refuses to deliver said baggage to plaintiffs, which said baggage was wholly lost by the negligence of the defendants. And plaintiffs further allege that they were the owners of the above-described baggage, and that they have received no payment for the same from the defendants.

"That at the time the said baggage was delivered to the defendant D. M. Phillips, he issued to plaintiffs a check or receipt for the same, which has become lost and cannot be found.

"That at the special instance and request of the defendant, plaintiffs made great effort and went to great expense to produce the delivery of said baggage, and in so doing expended certain sums of money and lost much time.

"Various items of damage suffered by plaintiffs by reason of the loss of such trunk and its contents, in addition to the value of said trunk and contents thereof, which are more particularly shown in an itemized account hereto attached, marked Exhibit A, and made a part hereof, are as follows: Phone messages, 75 cents; fare to Oklahoma City and return on two trips, \$16.60; loss of time, \$10; and special damages by reason of the fact that said trunk contained a large part of the wardrobe of plaintiff Sallie Rogers and her son, and that they were unable to immediately or for a long time to replace the same, and were at great expense and inconvenience in procuring clothing necessary and incident to their station in society, paying dressmakers' bills, being deprived of the pleasure of society, the sum of \$125. The value of said trunk, together with its contents, was the sum of \$408, and the same has been wholly lost to the plaintiffs through the negligence of the defendant, whereby plaintiffs have sustained great damages in the sum of \$663.60."

For answer the defendants file a general denial, unverified.

The case was tried to the court and jury. In support of their cause of action by plain-

tiffs, Mrs. Rogers testified, among [292] other things, as follows:

"Q. What is your name? A. Mrs. Joplin Rogers. Q. Where do you reside? A. Lehigh, Okla. Q. How long have you lived at Lehigh? A. 23 years. Q. Do you know D. M. Phillips? A. I have met him. Q. Along about October, 1907, where were you living? A. At Lehigh. Q. Did you take a trip to Chickasha about that time? A. Yes, sir. Q. How long did you remain at Chickasha? A. Several weeks. Q. Do you remember when you left Chickasha for Oklahoma City? A. Some time in the month of October, 1907. Q. When you reached Oklahoma City did you employ the O. K. Bus & Baggage Company to transfer your trunk to the Missouri, Kansas & Texas Station? A. Before we arrived at Oklahoma City a gentleman came on the train, gave me a check for my trunk, and I paid him to transfer it. Q. Have you called for your trunk? A. Yes. Q. Have you made any effort to locate it? A. Yes. Q. Do you know what was in your trunk? A. I made a list of the articles. Q. You made a list of the articles contained in it? A. Yes. Q. Now, to refresh your memory, that list was introduced as evidence and marked Exhibit A, the list that you made—you made soon after the trunk was lost? A. Several days after I discovered the trunk was lost. Q. Can you remember the different articles you had in the trunk at the time it was lost? A. Yes. Q. I believe you state that you made a list of the articles you had in the trunk, and that that list was filed in the trial of this suit two years ago. A. Yes, sir. Q. The list that you made and filed in the court at the trial before, also the exhibit in the petition, were copies of that list? A. Yes. Q. Mrs. Rogers, I will ask you to examine this and see if you know what it is. A. A list of articles contained in the trunk. Q. Have you the original list? A. No, sir; I left it in the court. Q. What was the value of the trunk at that time? A. \$12. Q. I will ask you to refresh your memory from this memorandum and name another article contained in the trunk at the time it was lost. A. One lady's hat. Q. Do you remember the market value of that article at that time? A. Yes. Q. What was the market value of the hat at that time in Oklahoma City? A. \$15. Q. Mrs. Rogers, did you own the trunk that you delivered to the defendant herein for transportation some time in the month of October, 1907? A. Yes, sir. Q. Have you that trunk now? A. No, sir. Q. Mrs. Rogers, were you familiar [293] with the articles contained in the trunk that was lost? A. Yes, sir. Q. Do you know who placed them in the trunk? A. Yes, sir; I placed them in the trunk. Q. Who bought the goods? A. I bought

them. Q. Mrs. Rogers, you state that you were the owner of the trunk that was lost containing articles belonging to yourself and family, and that afterwards you made a list of the articles contained in the trunk? A. Yes, sir. Q. When did you make out that list? A. I made out the list as I could remember the articles after I discovered that the trunk was lost. Every time I would think of an article that was in the trunk, I would place it on the list. Q. Did you give your attorneys a list of the articles contained in the trunk the day of the trial? A. Yes, sir. Q. Name the first article that you remember. A. A trunk. Q. Did you buy that trunk? A. Yes, sir. Q. Do you remember what you paid for it? A. I paid \$12 for it. Q. At the time the trunk was lost do you remember what articles were in it? A. Yes, sir. Q. Refresh your memory, and then, independent of any memorandum, state if you know another article that was lost at the time you delivered the trunk to the defendant herein besides the trunk. A. Yes. Q. State what other article was lost at the time mentioned herein. A. A hat. Q. Who bought that hat? A. I did. Q. What did you pay for the hat? A. It was a handmade hat, and I paid \$15 for it. Q. What condition was the hat in when you delivered the trunk to the defendant herein? A. The hat was in good condition; I had never worn it. Q. Was the hat worth as much at the time it was lost as it was when you bought it? A. Yes. Q. State, if you know, what the reasonable market value of the hat was, or a hat of similar kind, at the time you delivered the trunk to the defendant herein to be transported to the Missouri, Kansas & Texas Railway depot in Oklahoma City? (Defendant objects for the reason that it is not the proper way to prove the value of the hat. Objection sustained. Plaintiff excepts.) Q. Did you lose any other articles at that time? A. Yes. Q. What was it? A. A pair of lady's slippers. Q. Who was the owner of the slippers? A. I was. Q. What did you pay for them? A. \$5. Q. At the time they were lost do you remember what the condition of the slippers were? A. Yes. Q. State to the jury the reasonable market value of the goods at the time you delivered them to the defendant in that community at that time. (Defendant objects for the reason that the witness has not shown herself properly qualified to testify as to the value of the articles contained [294] in said trunk. Objection sustained. Plaintiff excepts.) Q. Do you remember another article contained in the trunk? A. Yes, sir. Q. Name one. A. A black dress. Q. How long had you had the dress? A. Only a short time; it had never been worn. Q. Do you know what the dress cost? A. Yes, sir.

Q. Who bought it? A. I did. Q. At the time it was lost do you know the condition as compared with its condition when you bought it? A. Yes, sir; it was in good condition. Q. Do you know what the reasonable market value of the dress was in Oklahoma City at that time? A. Yes, sir. Q. Have you seen similar articles bought and sold on the market? A. Yes, sir. Q. Do you know the exact value of the dress just prior to and subsequent to the time the dress was lost? A. Yes, sir. Q. What was it? (Defendant objects, for the reason that the witness has not shown herself properly qualified to testify as to the value of the dress. Objections sustained. Plaintiff excepts. It is hereby agreed by the plaintiff and defendant in this case as to the questions and answers to the remaining articles said to have been in said trunk in question shall virtually be the same, the objections the same, and the rulings of the court the same.) Q. Do you know any other article that was lost in the trunk? A. Yes. Q. Name one. A. One linen dress. Q. Who bought the linen dress? A. I did. Q. How much did you pay for it? A. \$12. Q. Was the dress in the trunk at the time you delivered it to the defendant herein? A. Yes, sir. Q. Do you know what the reasonable market value of the dress was, or one of similar kind at that time in that community? A. Yes, sir. Q. What was the reasonable market value of this article at that time and in that community? (Defendants object, for the reason that the witness has not shown herself properly qualified to testify as to the value of the articles contained in the trunk mentioned herein. Objection sustained. Plaintiff excepts.)"

The foregoing is a sample of the testimony offered and the ruling of the court thereon. It is apparent that the plaintiffs were unable to introduce their testimony as to the value of the goods lost, and upon the question of the loss of the goods there is no controversy.

At the close of the plaintiffs' testimony, the defendant D. M. Philips lodged the following demurrer:

[295] "Comes now the defendant and demurs to the testimony introduced by the plaintiffs in this case and says that it is not sufficient to make out a case against the defendant and in favor of the plaintiffs." "Demurrer sustained, and case dismissed, to which the plaintiffs except."

This ruling of the court seems to be upon the theory that it required expert testimony to establish the value of the trunk and the contents thereof, and that the witnesses have not shown themselves qualified by reason of special knowledge or information as to the value of goods of that class and character to place a value thereon. In this the court

committed error. It is well established in this state that expert witnesses are not needed to prove the market value of chattels in common use, where such value is within the knowledge of persons of ordinary intelligence and experience, and that, where a witness testifies generally as to the value of articles in common use, it will be assumed that the market value is meant, unless it appears from the testimony of the witness that he bases the value given upon some other consideration. Such has been the holding of this court practically since its organization.

The plaintiff Mrs. Rogers testified not only that she bought the goods, and the price she paid for them, many of which had never been worn or used, but also that she had personal knowledge of the market value of the goods in Oklahoma City, the place where the trunk was lost, and not only that, but she testified that she knew the actual value of the goods, and notwithstanding her qualifications in that particular, and her testimony in that behalf, the court for some unaccountable reason was of the opinion that she was not qualified to state either the value of the goods or the market value thereof. On a trial for the conversion of goods, defendant may be asked as to the value of the goods at the time they were taken. *Robinson v. Peru Plow, etc. Co.* 1 Okla. 140, 31 Pac. 988.

"Expert witnesses are not needed to prove the . . . market value of chattels in common use, where such value is [296] within the knowledge of persons of ordinary intelligence and experience." *Filson v. Territory*, 11 Okla. 351, 67 Pac. 473.

In speaking upon this subject, and the tendency of courts, Justice Burford uses this language:

"There is too much of a tendency to require experts to testify as to matters of everyday occurrence and common knowledge. The average farmer at this day and age is possessed of sufficient intelligence and experience to enable him to tell the market price of farm products, live stock, and those articles they make common use of in their business, and generally are better qualified to fix the values than persons who are engaged in some specialty, and buy only when they can get a good bargain, and then sell the article at less than its value in order to encourage trade." *Supra*.

In this case the witness seemed to be a lady of more than ordinary intelligence, and who had had experience in purchasing goods of the character contained in the trunk, she knew the goods and knew their condition better than any other person. She knew and testified as to the extent of which they had been worn or used. She testified as to their original cost, which was proper, under the

circumstances, and as to their reasonable value at the time they were delivered to the defendant. Her testimony was competent, and should have been submitted to the jury.

For these reasons, we are of the opinion that this case should be reversed and remanded for new trial, and we so recommend.

By THE COURT.—It is so ordered.

NOTE.

Measure of Damages for Conversion of, or Failure to Deliver, Household Goods.

It is the purpose of this note to review the recent decisions involving the measure of damages for the conversion of, or the failure to deliver, household goods. The earlier cases are collected in the notes to *Barker v. Lewis Storage, etc. Co.* 3 Ann. Cas. 889, and *Watt v. Nevada Cent. R. Co.* 62 Am. St. Rep. 772.

For a discussion of the measure of damages for the loss or destruction of property having no market value, see the notes to *Southern Express Co. v. Owens*, 9 Ann. Cas. 1143, and *St. Louis, etc. R. Co. v. Dague*, reported ante, this volume, at page 577.

It is generally held that the amount of recovery for the conversion of, or the failure to deliver, household goods is not limited to the price which could be realized by a sale in the market, the owner being allowed to recover the value of the goods to him based on his actual money loss resulting from his being deprived of the property. And in arriving at that value all the circumstances and conditions are to be considered, not including, however, any sentimental or fanciful value which he may attach to the goods. The reason for the rule seems to be that articles of this character cannot be said to have a marketable value which is fairly indicative of their real value to their owner and of his loss by being deprived of them. *Birmingham R. etc. Co. v. Hinton*, 157 Ala. 630, 47 So. 576; *Kates Transfer, etc. Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355; *Buerger v. Mabry* (Ala.) 73 So. 135; *Mathews v. Livingston*, 86 Conn. 263, Ann. Cas. 1914A 195, 85 Atl. 529; *Aufderheide v. Fulk* (Ind.) 112 N. E. 399; *Barbrick v. White Sewing Mach. Co.* 180 Mich. 535, 147 N. W. 493; *St. Louis, etc. R. Co. v. Dunham*, 36 Okla. 724, 129 Pac. 862; *O. K. Transfer, etc. Co. v. Neill* (Okla.) 159 Pac. 272; *Lloyd v. Haugh, etc. Storage, etc. Co.* 223 Pa. St. 148, 72 Atl. 516, 21 L.R.A.(N.S.) 188; *Atchison, etc. R. Co. v. Smythie*, 55 Tex. Civ. App. 557, 119 S. W. 892; *Benedict v. Chicago, etc. R. Co.* (Tex.) 91 S. W. 811; *Missouri, etc. R. Co. v. Dement* (Tex.) 115 S. W. 635; *Galveston, etc. R. Co. v. Giles* (Tex.) 126 S. W.

282; *Galveston, etc. R. Co. v. Wallraven* (Tex.) 160 S. W. 116; *Pecos, etc. R. Co. v. Grundy* (Tex.) 171 S. W. 318; *Smith v. Mine, etc. Supply Co.* 32 Utah 21, 88 Pac. 683. See also *Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267; *Souther v. Hunt* (Tex.) 141 S. W. 359; *McCarthy v. Blackwell* (Tex.) 162 S. W. 1163. Thus in *Aufderheide v. Fulk*, supra, it was said: "Articles in actual use in furnishing and equipping a home, and wearing apparel in use, even though they may have some second-hand market value, are not governed by the general rule of market value, for the law recognizes that they have a value when so used in the home that is not fairly estimated by their value as secondhand goods on the market. Where subordinate rules for the measure of damages run counter to the paramount rule of fair and just compensation, the former must yield to the principle underlying all such rules. For the loss of such property so situated and used, the measure of damages in case of conversion is the value to the owner under all the circumstances, based on actual damages sustained by being deprived of his property, not including any mere sentimental or fanciful value he may for any reason place upon it." In *Ross v. Chicago, etc. R. Co.* 119 Mo. App. 290, 95 S. W. 977, an action against a carrier to recover damages for the loss of a davenport, the court, in holding that evidence of the value of the davenport at the place of consignment was admissible, said: "It is . . . contended that the court committed error in the admission of evidence of the value of the goods at Kansas City, whereas the measure of damages for loss in shipment is the value at their destination. As a rule, this is true. . . . But there are exceptions to the rule. We have a case illustrating an exception to the rule in this state, where the property lost in transit had no market value. It was held that, in the absence of proof to the contrary, evidence at the point of shipment was admissible, as it 'was the only kind of which the nature of the case was susceptible.' [*Lachner v. Adams Express Co.* 72 Mo. App. 13.] The 'davenport' in question was second-hand furniture which class of furniture has no regular market value."

The rule governing the measure of damages recoverable for the loss or conversion of household goods applies also where damages are sought to be recovered for the loss or conversion of clothing and wearing apparel. *Aufderheide v. Fulk* (Ind.) 112 N. E. 399; *Jelalian v. New York, etc. R. Co.* 134 App. Div. 381, 119 N. Y. S. 136; *Erie R. Co. v. Steinberg* (Ohio) 113 N. E. 814; *St. Louis, etc. R. Co. v. Dunham*, 36 Okla. 724, 129 Pac. 862; *O. K. Transfer, etc. Co. v. Neill* (Okla.) 159 Pac. 272; *Lloyd v. Haugh, etc.*

Storage, etc. Co. 223 Pa. St. 148, 72 Atl. 516, 21 L.R.A.(N.S.) 188; Hofford v. New York Cent. etc. R. Co. 43 Pa. Super. Ct. 303, *quoting* 73 N. Y. 167; Houston Transfer, etc. Co. v. Whitcomb (Tex.) 147 S. W. 358; Galveston, etc. R. Co. v. Wallraven (Tex.) 160 S. W. 116; Pecos, etc. R. Co. v. Grundy (Tex.) 171 S. W. 318. See also Souther v. Hunt (Tex.) 141 S. W. 359.

The owner of household goods or wearing apparel may testify as to their value to him in an action to recover damages for their conversion, the objection to the testimony going to its weight rather than to its admissibility. Birmingham R. etc. Co. v. Hinton, 157 Ala. 630, 47 So. 576; Willard v. Valley Gas, etc. Co. 171 Cal. 9, 151 Pac. 286; McCarthy v. Blackwell (Tex.) 162 S. W. 1163; Pecos, etc. R. Co. v. Grundy (Tex.) 171 S. W. 318. See also Wulschner-Stewart Music Co. v. Faulkner, 55 Ind. App. 208, 103 N. E. 665; Houston Transfer, etc. Co. v. Whitcomb (Tex.) 147 S. W. 358. And see the reported case. Compare Galveston, etc. R. Co. v. Giles (Tex.) 126 S. W. 282.

Evidence of the cost price of household goods or wearing apparel is, it seems, admissible in an action for their loss or conversion. Kates v. Transfer, etc. Co. v. Klassen, 6 Ala. App. 301, 59 So. 355; Barbrick v. White Sewing Mach. Co. 180 Mich. 535, 147 N. W. 493; Jelalian v. New York, etc. R. Co. 134 App. Div. 381, 119 N. Y. S. 136; Galveston, etc. R. Co. v. Giles (Tex.) 126 S. W. 282; Smith v. Mine, etc. Supply Co. 32 Utah 21, 88 Pac. 683. In one case it was said in stating the reason for the admissibility of this kind of testimony: "The cost of an article may, or may not, be some evidence of its actual value. If the article in question has a market value when fresh or new, and the time of inquiry is within a short or reasonable time after its purchase in the market, then the cost price, taken in connection with the use or wear of the article, usually affords some evidence, at least, of actual value. Ordinarily the cost price is a fluctuating one, and depends upon so many extraneous conditions that the cost cannot be taken as the basis or measure of damage or loss, and for that reason the law has wisely provided that, whenever an article or thing in use has a known market value, this value and no other must control as the measure of recovery. In permitting evidence of the cost of the article in fixing its value, regard must therefore be had to all the conditions and circumstances; and where the time at which the cost is fixed, in view of all the circumstances, is too remote from the time of injury, the cost may not afford any guide whatever, and should not be permitted. In such cases the present market value of the article when new, if it has no other market

value, would afford a better guide as a starting-point, and the actual value of the article should be determined by deducting from the cost price such an amount as its past use and wear would reduce its value in comparison to a new article of like kind. But in any case resort to the cost should be had only for the purpose of a starting-point, and as a means to ascertain the true or actual value of the article. It is in this sense that the courts lay down the rule, as we understand it, that cost is some evidence of value, and hence, in a proper case, may be admitted. The object of the law in all cases is to compensate the injured person for his loss—no more, no less. To attain this object, the rule of market value has been adopted as the one more nearly approximating the end in view. There are, however, exceptional cases where the rule cannot be applied to its full extent. When such is the case, the rule is to be followed as nearly as the circumstances of the case permit; but a party is not to be deprived of his property simply because his case may not fall within the regular rule governing the measure of damages." Smith v. Mine, etc. Supply Co. 32 Utah 21, 88 Pac. 683. But a verdict based solely on evidence of the cost price of the articles cannot be supported, especially where they have been in use for some time. Birmingham R. etc. Co. v. Hinton, 157 Ala. 630, 47 So. 576; Independent Linen Supply, etc. Laundry Co. v. Zakrowsky, 158 N. Y. S. 721; International, etc. R. Co. v. Bartek (Tex.) 175 S. W. 1106. See also Morris v. Harder's Fireproof Storage, etc. Co. 187 Ill. App. 72.

In an action for the conversion of a piano, evidence that the defendant had allowed a certain sum for the piano on the purchase price of a player piano was held to be admissible, the court saying: "It is also insisted that the court erred in allowing defendant's witness Udell to testify on cross-examination that defendant allowed \$200 for the piano on the purchase price of a player piano at \$650, over defendant's objection that if something was allowed to a credit, it would not be a valuation of the piano that was fair. No authority is cited to sustain this position. It may be true that appellant allowed more than it would have paid in cash, yet it was a valuation of some kind placed upon the piano by appellant at the time that it was converted, would at least tend to show its market value, and was eminently proper to go to the jury. The fact that the price of \$200 allowed was on the purchase price of an instrument of greater value would be proper to consider in determining the weight to be given this evidence, but did not affect the admissibility." Wulschner-Stewart Music Co. v. Faulkner, 55 Ind. App. 208, 103 N. E. 665.

270 Ill. 75.

**NORTH AVENUE BUILDING AND
LOAN ASSOCIATION ET AL.**

v.

HUBER.

Illinois Supreme Court—October 27, 1915.

270 Ill. 75; 110 N. E. 312.

**Building and Loan Associations —
Loan to Nonmember.**

Where a building and loan association is authorized to lend only to its stockholders to the amount of stock held, and, after a loan to a stranger by a third party, attempts to purchase the note and mortgage therefor, its act is *ultra vires*, since it cannot do indirectly that which it could not do directly.

[See note at end of this case.]

Same.

When a building and loan association purchases a note and mortgage of one not a stockholder when it is authorized only to lend to its stockholders, it cannot foreclose a mortgage, its act in purchasing it being *ultra vires*; nor can its assignor be held a trustee and the mortgage be foreclosed by him for the association.

[See note at end of this case.]

Error to Branch C. Appellate Court, First District.

Action by North Avenue Building and Loan Association et al., plaintiffs, against Christina Huber et al., defendants. Judgment for plaintiffs in Circuit Court, Cook county: WALKER, Judge. Judgment modified by Appellate Court. Defendant named brings error. The facts are stated in the opinion. REVERSED.

Frederick Mains for plaintiff in error.

Christian Meier for defendants in error.

[75] **FARMER, C. J.**—This case comes to this court upon a writ of *certiorari* to the Appellate Court for the First District to review the judgment of that court modifying, and affirming as modified, a decree of the circuit court of Cook county in a foreclosure suit begun and prosecuted by defendants in error against plaintiff in error and others.

The plaintiff in error, Christina Huber, and John Huber, are husband and wife. Prior to October 24, 1895, they became and were indebted to E. S. Dreyer & Co. in the [76] sum of \$14,000 and to Kemper Bros. in the sum of \$4,000. On said date, October 24, 1895, they executed a note, payable to the order of themselves, for \$18,000, due in five years, with interest at six per cent per annum, payable semi-annually, and evidenced by coupon notes. The note was secured by a trust deed on real

estate given to William Kemper as trustee. The Hubers indorsed the note and delivered it, with the trust deed, to Kemper, a member of the firm of Kemper Bros. The indebtedness of the Hubers to E. S. Dreyer & Co. was paid by a check drawn on the bank account of Kemper Bros., and the indebtedness to Kemper Bros. was satisfied by giving the Hubers credit on its indebtedness to that firm of \$4,000. William Kemper was the treasurer of the defendant in error building association and banked the money coming into his hands as such treasurer to the account of Kemper Bros. Said firm of Kemper Bros. also deposited the firm's money in the same bank and to the same account. At the time William Kemper drew the check for the payment of the indebtedness of the Hubers to E. S. Dreyer & Co., Kemper Bros. had a balance in bank to their credit of \$17,047.25. Of that amount \$8,185.88 was funds of the defendant in error association. On November 12, 1895, the directors of the association at a regular meeting adopted a resolution that the association buy a \$10,000 interest in the \$18,000 note and trust deed of the Hubers and caused an order to be drawn for the payment of the money to William Kemper. Upon receipt of it he delivered, without indorsement, the note and trust deed to the association. A memorandum attached to the voucher to William Kemper stated the association was to hold the papers and receive the interest on \$10,000 and Kemper was to receive it on \$8,000. On November 18, 1895, the association bought an additional \$4,000 interest in the Huber note and trust deed, and on September 8, 1896, the association bought the remaining \$4,000 interest in the Huber note and trust deed. The Hubers paid the [77] interest on the note up to April 24, 1910, since which time they have paid nothing.

In the original bill to foreclose the trust deed the North Avenue Building and Loan Association and William Kemper were the complainants. The bill alleged the note was given for a loan made to the Hubers by the building association and that the trust deed was executed to secure the same. The bill was demurred to, and among the special grounds of demurrer assigned were that the bill did not allege the Hubers, or either of them, were stockholders or members of the association at the time the loan was made, and that the making of the loan was *ultra vires* and *malum prohibitum*. Without the court having ruled upon the demurrer, complainants asked and were granted leave to file an amended bill. There was a demurrer and plea to the amended bill, which were overruled, and plaintiff in error, Christina Huber, answered the bill. Subsequently an engrossed amended bill was filed by leave of court, in which the association and William Kemper,

as trustee, were complainants. This bill alleges that the statement made in the original bill that the loan was made by the association to the Hubers was erroneous; that it arose from a misunderstanding of the facts by the solicitors for the complainants and was made without the knowledge of the complainants. The bill then alleges the loan of \$18,000 was made to the Hubers by William Kemper; that the association had funds on hand, for which there was no demand from its members, and that it purchased the note and trust deed for the benefit of the members of the association and was then the legal holder and owner of the note. The bill alleges Christina Huber asserts that the purchase of the note and trust deed was an *ultra vires* act and that the association acquired no title to the securities thereby; that if such transaction should be held to be *ultra vires*, in that event the legal title to the note would be in William Kemper for the use of the association as the equitable owner of the [78] note and trust deed, and the trust deed should be foreclosed and the money realized therefrom held by Kemper as trustee for such person as may be equitably entitled thereto.

Christina Huber answered, denying the statement made in the original bill that the loan was made by the association to the Hubers was a mistake, and alleging that the complainant association was informed of and knew the contents of the bill at the time it was filed and persisted in said statement until the filing of the engrossed amended bill, which occurred long after the filing of the original bill and after evidence was heard. The answer sets up as matter of estoppel the admissions in the original bill, and also sets up that the investment of the association's money in the purchase of the note and trust deed was *ultra vires* and prohibited by statute.

The cause was referred to a master in chancery to take the testimony and report his conclusions. The master reported that the Hubers were not members of or stockholders in the North Avenue Building and Loan Association; that the loan was not made to them by said association but was made by Kemper, who, in making it, used \$8,185.88 of the association's funds; that such use was without the authority of the association, and did not make it, in whole or in part, a loan by the association; that after the loan was made by Kemper the association purchased, or attempted to purchase, the securities as an investment; that the transactions were beyond the powers of the association, and the title to the trust deed and note did not pass to it but remained in Kemper, charged in equity with a trust in favor of the association. The master further reported that Kemper had a right to foreclose the trust deed but would be required to account to the association for the proceeds received from the foreclosure.

The master found and reported the amount due, principal, interest and \$200 attorney fees, to the \$20,165; that Kemper, as trustee for the association, had a lien on the premises described in the trust [79] deed for the said sum, and recommended a decree of foreclosure. Objections and exceptions to the master's report were overruled and a decree entered in accordance with the master's recommendations. The Appellate Court modified the decree as to the amount allowed for master's fees and in some other small matters, and as modified affirmed the decree of the circuit court.

The act under which the defendant in error building association was organized authorized it to loan its funds only to members of the association, and no loan was authorized to be made by the association in any sum in excess of the amount of stock held by the borrowing member. It is contended, however, by the association, that the loan was not made by it but was made by William Kemper and that the association bought the securities as an investment. This was the conclusion of the master, and the decree of the circuit court and the judgment of the Appellate Court affirming the decree of foreclosure were based upon that theory. It is conceded the association was unauthorized to make loans to anyone except members of and stockholders in the association, but it is contended that the loan was made by Kemper, and that by the purchase of it from him the equitable title to it passed to the association; that the legal title remained in Kemper in trust for the use and benefit of the association, and said association had a right to have the trust deed foreclosed by Kemper as such trustee and for its use. Considering the loan as having been made by Kemper to the Hubers, the association had no more authority to purchase it than it would have had to make it in the first instance. The power of the association in loaning its money was expressly limited by the statute to making loans to its members, only, and this excluded the power to purchase notes of persons not members of the association. The attempted purchase of the note and trust deed was therefore unauthorized and *ultra vires*.

[80] In *National Home Building, etc. Assoc. v. Bank*, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245, 64 L.R.A. 399, a building association exchanged real estate it had lawfully acquired with a party for other real estate and assumed the payment of a mortgage on the real estate it acquired in the trade. Afterward the board of directors of the association passed a resolution that the assumption clause in the deed was made without authority and directed the execution and a tender back to the grantor of a quit-claim deed for the property. This was done but the deed was not accepted. The holder of the note

filed a bill to foreclose and asked for a decree against the building and loan association for any deficiency that might exist. This was resisted by the association on the ground that the clause assuming the mortgage was inserted in the deed without its knowledge and authority and was *ultra vires*, and that it had tendered back a quit-claim deed to the party from whom the conveyance was made. The circuit court entered a decree of foreclosure and for any deficiency that might exist against the association. This court reversed the decree for a deficiency on the ground that building associations have no power to acquire or hold real estate except such as has been mortgaged to them, and held the purchase of the property and assumption of the mortgage thereon were acts beyond the powers of the corporation. The contention of the holder of the incumbrance that the corporation had received the benefit of its contract and was estopped to raise the question of *ultra vires* was fully discussed, and it was held the case did not fall within the class of cases to which that doctrine is applicable. In part the court said: "It would be contradictory to say that a contract is void for an absolute want of power to make it and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity or some act of the other part chargeable by law with notice of the want of power." The court quoted with approval from *Central Transp. Co. v. Pullman's Palace* [81] Car Co. 139 U. S. 24, 11 S. Ct. 478, 35 U. S. (L. ed.) 55, that all contracts made by a corporation beyond the scope of its powers are unlawful and void and no action can be maintained on them. The court further quoted from the same case: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable, only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action be-

cause such prerequisites might, in fact, have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." This court pointed out the distinction between cases where the act of the corporation was beyond the powers conferred upon it by law, and cases where the act was within the scope of its powers but where there was a failure to comply with some regulation or where the power was improperly exercised. In *Steele v. Fraternal Tribunes*, 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160, it was held if a contract with a corporation is beyond the powers conferred upon it by law, neither the corporation [82] nor the party dealing with it can be estopped to raise the question of *ultra vires*.

It seems clear under the decisions in this State, that if the trust deed had been made to secure a loan to the Hubers by the association no right to foreclose it would have been created. Is the association in any better position because the trust deed was made to secure a loan by Kemper and the securities purchased of him by the association? The association is in a court of equity asking equitable relief. Its alleged right to claim such relief grows out of its attempt to do an act which it had no authority to do. If it should be held, as insisted upon, that by the transaction the association became the equitable owner of the securities while the legal title still remained in Kemper, as trustee, for its use, and that by the transaction it became entitled to a foreclosure of the trust deed, it would establish a rule that the association could do indirectly what it is prohibited by law from doing directly. It is true, the Hubers have never paid the note and their moral obligation to pay it may be unaffected by the defense here interposed, but that would not justify holding the association is entitled to enforce payment by the remedy here sought to be pursued. Whatever the remedy of the association may be, we do not think it is by way of foreclosure in a court of equity. As said in *National Home Building Assoc. v. Bank*, supra: "No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner." See also *Central Transp. Co. v. Pullman's Palace Car Co.* supra.

In our opinion the decree of the circuit court and the judgment of the Appellate Court were erroneous, and they are reversed and the cause remanded.

Reversed and remanded.

Rehearing denied December 9, 1915.

NOTE.**To Whom Building and Loan Association May Loan Money.**

The reported case holds that where the power of a building and loan association with respect to loaning its money is expressly limited by statute to loans to its members, it cannot indirectly make a loan to a nonmember. Hence, the attempted purchase of a note and trust deed of a nonmember is an unauthorized and ultra vires act on the part of the association.

The purpose of a building and loan association is to loan money to its own members. *Cutbill v. Kingdom*, 1 Exch. (Eng.) 494, 505, 17 L. J. Exch. 177; *Morrison v. Glover*, 4 Exch. 430, 19 L. J. Exch. 20, 14 J. P. 84; *Kelly v. Mobile Bldg. etc. Assoc.* 64 Ala. 501; *Massey v. Citizens' Bldg. etc. Assoc.* 22 Kan. 624. And it has been said that "in the absence of express statutory authority a building and loan association cannot loan its money outside of its own members." *Vermont Loan, etc. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318. Statutes in the various jurisdictions have generally expressly prohibited building and loan associations from lending their funds to nonmembers. *Freehold Loan, etc. Soc. v. Farrell*, 31 U. C. C. P. 453; *Standard Sav. etc. Assoc. v. Aldrich*, 163 Fed. 216, 89 C. C. A. 646, 20 L.R.A.(N.S.) 393; *Home Bldg. etc. Assoc. v. McKay*, 217 Ill. 551, 75 N. E. 569, 108 Am. St. Rep. 263; *St. Joseph, etc. Loan, etc. Assoc. v. Thompson*, 19 Kan. 321; *National Inv. Co. v. National Sav. etc. Assoc.* 49 Minn. 517, 52 N. W. 138; *State v. Greenville Bldg. etc. Assoc.* 29 Ohio St. 92; *State v. Oberlin Bldg. etc. Assoc.* 35 Ohio St. 258; *Anderson v. Cleburne Bldg. etc. Assoc.* 4 Willson Civ. Cas. Ct. App. (Tex.) § 174, 16 S. W. 298. See also *Howard Mut. Loan, etc. Assoc. v. McIntyre*, 3 Allen (Mass.) 571; *In re Kennett Square Bldg. Assoc.* 12 Pa. Dist. 630, 28 Pa. Co. Ct. 110; *Green v. Hamilton Provident Loan Co.* 31 U. C. C. P. 574. A loan to a nonmember in contravention of such a statutory prohibition is an ultra vires act on the part of the association. *Kadish v. Garden City Equitable Loan, etc. Assoc.* 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256. See also *Howard Mut. Loan, etc. Assoc. v. McIntyre*, 3 Allen (Mass.) 571. And see the reported case.

Where the loan is made to a member, the fact that the joint obligation of the member and another is taken, or that the loan is secured by a mortgage executed by a third person, does not open the defense of ultra vires. *People's Bldg. etc. Assoc. v. Billing*, 104 Mich. 186, 62 N. W. 373.

Where a building and loan association has no power to loan money except to members, it has been held that the application for a loan

by a nonmember is virtually an application for membership in the association, and that the application for a loan and the issue of stock must be considered as one transaction, the result of which makes the borrower a member of the association. *Boleman v. Citizens' Loan, etc. Assoc.* 114 Wis. 217, 90 N. W. 199.

In *Lockwood v. Robbins*, 4 Ohio Dec. (Reprint) 192, 1 Cleve. L. Rep. 101, it was held that where a building and loan association was forbidden by its charter to loan money to anyone except its members or depositors, a loan was valid where the borrower deposited twenty-five dollars before obtaining the loan, but immediately withdrew the deposit after the loan was obtained.

**FIRST NATIONAL BANK OF
MONTPELIER**

v.

BERTOLI.

Vermont Supreme Court—January 13, 1914.

*87 Vt. 297; 89 Atl. 359.***Bills and Notes — Negotiable Instruments Law — Time of Taking Effect.**

Negotiable Instruments Law (Acts 1912, No. 99) by the provisions of section 185 does not apply to negotiable instruments made and delivered prior to June 1, 1913.

Husband and Wife — Power of Wife to Contract.

Prior to the passage of Acts 1884, No. 140, relating to the property of married women (P. S. 3037-3051), a note executed by a married woman was void at law, but by such statute the disability of a married woman to contract with others than her husband is removed so far as her separate property is concerned, with a special limitation that nothing contained therein shall authorize her to become surety for her husband's debts except by way of mortgage duly executed, etc.

Suretyship for Husband.

A husband, being indebted to plaintiff bank for \$14,500 and being requested to change the indebtedness, procured his wife to execute a note to the bank for \$5,000 after one of the bank's officers had informed her that it was desired only as security for her husband's indebtedness and that the first money received on his collections would be applied in payment of the note. The husband was given credit on other notes for the amount of the wife's note, which was renewed from time to time until after the husband's death, when she was induced to pay a large portion thereof and give a new note for the balance, having proved the last

renewal note as a claim against her husband's estate. It is held that the transaction showed that the wife executed the note as surety for her husband only, and that the notes as renewed were therefore void as violating P. S. c. 147, providing that a married woman may not become surety for her husband, and hence the note given in partial surrender of the last renewal note was without consideration and unenforceable.

[See note at end of this case.]

Evidence — Varying Writing — Apparently Independent Transaction as Suretyship Contract.

That a married woman signed a note to plaintiff bank which on its face was a contract apparently independent of her husband's indebtedness to the bank does not preclude her from showing the true intent of the transaction and that she in fact executed the note as surety for him.

Suretyship — Liability Independent or Secondary — Test.

Whether a transaction between a married woman and her husband's creditor is one of suretyship or independent may depend on whether she received in person or for the benefit of her estate the consideration on which the contract depended; the question being determined, not from the form of the contract nor from its basis, but from its real purpose and effect.

Bills and Notes — Illegality — Effect of Renewal after Disability Removed.

Where a married woman executed a note to a bank which was several times renewed, the fact of such renewals, and that the last note was executed by her when sole for a remaining balance of the debt, does not preclude her from urging any defense against it that she might have made against the original note.

[See Ann. Cas. 1916A 826.]

Suretyship — Waiver of Defense by Surety — Claim against Principal's Estate.

Where a wife executed a note to plaintiff as surety for her husband, and after executing several renewals her husband died, when she paid a part of the note to the bank and executed the note sued on for the balance, the fact that she proved the last renewal as a claim against her husband's estate does not affect her right to defend her liability on the note for the balance of the debt to the bank on the ground that it was void because she was incapable of becoming surety for her husband.

Consideration for Suretyship Contract by Wife — Evidence Inadmissible.

A married woman having executed a note to a bank as surety for her husband who had executed a mortgage to the bank covering their homestead, the title to which was then in him, the fact that pending her indebtedness to the bank he conveyed the title of the homestead to her without consideration does not authorize the introduction of the mortgage in a suit against her by the bank, on

the theory that the mortgage tended to show consideration for her note.

Appeal and Error — Bill of Exceptions — Incorporation of Transcript by Reference.

That the transcript was "referred to and made a part of a particular exception" is not sufficient to give the transcript standing as part of the bill of exceptions so as to entitle the contents thereof to supersede the statement made in the bill.

Evidence — Conclusion of Witness — Purpose of Transaction.

On an issue as to whether a note of a married woman was an independent transaction or given as surety for her husband, an offer to prove by plaintiff's cashier that, if plaintiff took the note without any investigation of the parties or genuineness of the signature, it would appear that the transaction was done merely for collateral security as defendant claims and to get rid of the complaint of a bank examiner, is properly refused as an offer to elicit argument from the witness and not to show facts.

Hearsay — Statements of Principal to Surety — Inadmissible against Creditor.

In an action against a widow on a note executed by her to pay the balance of a debt which she had incurred as surety to plaintiff for her husband since deceased, statements made by him not in the presence of any of the officers of plaintiff bank by way of inducement to secure the witness' signature to the original note with his wife are hearsay and not admissible on the theory that the husband was the bank's agent to secure the note from his wife.

Agency — Proof — Acts and Declarations of Agent.

The fact of agency cannot be shown by the mere acts and declarations of the alleged agent.

Exceptions from Washington County Court:
FISH, Judge.

Action by First National Bank of Montpelier, plaintiff, against Maria Bertoli, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion. REVERSED.

J. W. Gordon and S. Hollister Jackson for defendant.

Edwin M. Harvey for plaintiff.

[299] TAYLOR, J.—The action is general and special assumpsit to recover on a note signed by the defendant and payable to the plaintiff. There was trial by jury and verdict directed for the plaintiff for the amount of the note with interest.

The defendant was the wife of the late Henry J. Bertoli. They had lived together as husband and wife for more than twenty years

prior to his death on March 22, 1911. Mr. Bertoli was a granite manufacturer in the city of Montpelier. He had done business at the plaintiff bank for more than fifteen years [300] prior to his death. On September 11, 1908, he had paper which the plaintiff bank had discounted and held to the amount of about \$14,500. Previous to this time the United States bank examiner had had some talk with the officers of the bank in regard to the amount of Mr. Bertoli's paper held by the bank. The plaintiff's evidence tended to show that it called upon Mr. Bertoli to reduce his indebtedness and that after some talk with him he presented on September 11, 1908, a note payable to the order of the plaintiff ninety days from September 11, 1908, for five thousand dollars signed by the defendant and one G. Gentili; that the plaintiff bank took this note and surrendered to Mr. Bertoli and cancelled as paid about four thousand dollars of his notes, indorsing the balance of the five thousand dollar note upon other notes held by the bank against him; that the plaintiff bank knew at the time they received the note of the defendant and Gentili that the defendant was Harry J. Bertoli's wife; that no part of the proceeds of said note went for the benefit, directly or indirectly, of the defendant or Gentili or to them together; that it held this note for the ninety days, whereupon Mr. Bertoli presented a renewal note signed by the defendant and Gentili for ninety days and that there were five renewals of said note at intervals of ninety days by the defendant and Gentili; that the discounts were paid by Mr. Bertoli on each of such renewal notes; that the last renewal of the five thousand dollar note by both the defendant and Gentili was on November 12, 1909; that thereafter the note was renewed by the defendant signing it alone, and the bank knew that it thereby released Gentili; that the defendant's renewals extended a little beyond the date of the husband's death on March 22, 1911; that Arthur G. Eaton was cashier of the plaintiff and did all the business relating to matters in controversy as a duly authorized agent of the plaintiff; that at the time the plaintiff took the note of the defendant and G. Gentili, both signers did not own property above mortgages to exceed three thousand dollars; that the plaintiff received no security whatever for the said five thousand dollar note. The plaintiff's evidence further tended to show that on January 16, 1902, some six years previous to the giving of the five thousand dollar note, Mr. Bertoli gave a mortgage of his homestead to the plaintiff for three hundred and five dollars "and to secure other and further indebtedness" but this mortgage was not given by Mrs. Bertoli.

[301] The defendant's evidence tended to show that her husband had asked her to sign the five thousand dollar note in 1908 and that

she refused to sign it; that thereupon Mr. Eaton representing the plaintiff, came to her and urged her to sign the note on the ground that it would be taken and held only as security for her husband's indebtedness to the plaintiff; that her husband, Mr. Bertoli, had a great deal of money coming due and more than enough to cover the five thousand dollar note and that the first money received on his collection would be applied in payment of this note; that her signing the note would help the bank with the examiner; that on this understanding she finally consented to sign the note and renewed the same from time to time during the lifetime of the said Mr. Bertoli; that after his death on March 22, 1911, Mr. Eaton, representing the bank, came to the defendant and asked her to pay the note out of five thousand dollars of insurance money that she had received on the life of her husband; that she objected to the payment of the note and told Mr. Eaton that it belonged to the estate to pay it; that he told her that he would take her home and just leave her \$500 for a homestead; that she afterwards saw her attorney and that he told her she would have to pay it; that she then went to the bank on April 24, 1911, and paid on the note \$3,468.76 and gave a note which is the note in suit for the balance of \$1,673.90; that she proved the note against her husband's estate upon the advice of the commissioners; that she subsequently dismissed her first attorney and employed others; that there was never any consideration moving between the plaintiff and the defendant for the original five thousand dollar note or any renewals thereof or of the note in suit; that the defendant never had any benefit of the proceeds of said note and that she only signed it by way of surety for her husband's indebtedness to the plaintiff; that the defendant never authorized her husband to exchange her original five thousand dollar note for his, as the plaintiff's evidence tended to show was done, and that she never knew that such a transaction occurred until the time of the trial; that her husband never had any authority to dispose of her note in the way he did; that the note was not payable to him but was payable to the plaintiff itself.

At the close of all the evidence the court directed a verdict for the plaintiff for the amount due on the note on the ground that all the evidence showed no question to be submitted to the [302] jury and that as a matter of law the plaintiff was entitled to recover. The defendant excepted to the action of the court in ordering a verdict and rendering judgment thereon.

On the foregoing facts was the defendant entitled to go to the jury?

Defendant claims that there was evidence tending to show that the note created no obligation against her and that it was with-

out consideration. Whether her contention is well founded depends upon her true relation to the transaction. It is argued that there was evidence for the jury tending to show that the obligation attempted to be created was that of surety for her husband's debt to the plaintiff, which the law forbids. If that is the legal effect of the transaction, it will not be doubted that she cannot be held liable (a) on the original note and its renewals because of the statute prohibiting a married woman from becoming surety for her husband's debt, P. S. 3039; nor (b) on the note in suit given after her husband's death in part payment of the last renewal note, because, if void, it furnished no consideration for her promise after she become sole. *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

In directing the verdict for the plaintiff, the court, in effect, ruled that the evidence, if tending to show that the first note was given merely as collateral to the husband's debt, was rendered immaterial by her subsequent conduct in giving renewal notes and finally in paying part and giving the note sued on for the balance. Confessedly there was evidence tending to show that the original undertaking, whatever its form and legal effect, was, in essence, an undertaking of suretyship. The case states that defendant's evidence tended to show that after her husband had asked her to sign the original note and she had refused, plaintiff's representative came to her and prevailed upon her to sign it upon the understanding that it would be taken and held only as security for her husband's indebtedness to the bank, and that on the same understanding the note was renewed from time to time during the lifetime of her husband; so that there was evidence tending to show that defendant's relation to the transaction remained unchanged during the time covered by the several renewals all of which were made during the lifetime of her husband.

[303] Considering the evidence in the light most favorable to the defendant, although the original note signed by the defendant and Gentili was in form a promise from the defendant to the plaintiff and on its face the defendant was maker and not surety, still it was signed with express understanding that it was to be held by the plaintiff only as security for Mr. Bertoli's existing indebtedness to satisfy the objections of the bank examiner; it was further agreed that the first money received by the bank on Mr. Bertoli's collections should be applied in payment of this note; no part of the proceeds of the note inured to the benefit of the signers; it was used, without the knowledge of the defendant, until after the final transaction in which the note in suit was given, to pay and

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discharge a portion of Mr. Bertoli's indebtedness to the bank; at the time of receiving the note the plaintiff knew that the defendant was wife of the principal debtor and that the note was signed by her for use as collateral security. On these facts was she undertaking to become surety for her husband's debts within the meaning of P. S. 3039?

The inquiry is not affected by the recent negotiable instruments act, as its provisions do not apply to negotiable instruments made and delivered prior to June 1, 1913. No. 99, Acts of 1912, § 195. Prior to the passage of No. 140, Acts of 1884, relating to the property rights of married women, now embodied in P. S. chapter 147, a note executed by a woman while *femme covert* was held to be absolutely void at law. *Brown v. Sumner*, 31 Vt. 371; *Southworth v. Kimball*, 58 Vt. 337, 2 Atl. 120. By No. 140, Acts of 1884, the disability of a married woman to contract with others than her husband was removed so far as her sole and separate property is concerned, but with the special limitation that "nothing herein contained shall authorize a married woman to become surety for her husband's debts except by way of mortgage duly executed as now provided by law." This limitation is now contained in P. S. 3039.

In applying this limitation upon the right of a married woman to make contracts with any person other than her husband, we should take into consideration the extent of her disability before the act of 1884. As has been said, her contracts were absolutely void *at law*. In equity, however, she was deemed a *femme sole sub modo* in dealing with her separate estate. Her debts contracted in its management and for its benefit, or for her benefit on the credit of such estate, in equity were enforced [304] against such estate, whether personal or real, unless the instrument creating the estate protected it against being charged with such debt; but her general contracts not thus connected with and growing out of her separate estate, being void at law, were not, even in equity, enforced against such estate unless legally made a charge thereon, by mortgage, if real estate, or by pledge and delivery, if personal property. *Dale v. Robinson*, 51 Vt. 20, 29, 31 Am. Rep. 669; *Priest v. Cone*, 51 Vt. 495, 31 Am. Rep. 695. But in no case could she be held personally liable. The theory upon which recovery was had out of her separate estate was that the credit was given to the estate and not to the wife individually. There was no personal liability. *Sargeant v. French*, 54 Vt. 384, 391. It follows that before the passage of No. 140, Acts of 1884, a married woman could not bind herself personally as surety for, or guarantor of, the debt of another, nor even in equity charge her separate estate by such an undertaking; for to charge

her separate estate it was not enough to show her promise to pay the debt. It was necessary to show further that the debt for the payment of which the promise was made went to the benefit of her separate estate, or to her benefit on the credit of such estate. *Southworth v. Kimball*, 58 Vt. 337, 339, 2 Atl. 120. With this as a background, it remains to be considered how far the act of 1884 emancipated a married woman from the disabilities that the then existing law imposed upon her right to make contracts.

While, as was said in *Dietrich v. Hutchinson*, 81 Vt. 160, 171, 69 Atl. 661, it is an enabling act and not a disabling or restrictive act, it was not the intention of the legislature to set a married woman wholly "free from the thralldom of the common law." It was designed to remove her disabilities so far, and so far only, as could safely be done without prejudice to the marriage relation. It was regarded as against public policy to permit the wife to contract with her husband, or to make contracts with others affecting her property in which the husband continued to have rights by virtue of a marital relation, viz.: property not held to her sole and separate use. As to such property she is still under the common-law disability. *Rowley v. Shepardson*, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078; *Laird v. Perry*, 74 Vt. 454, 52 Atl. 1040, 59 L.R.A. 340; *Hubbard v. Hubbard*, 77 Vt. 73, 2 Ann. Cas. 315, 58 Atl. 969, 107 Am. St. Rep. 749, 67 L.R.A. 969; *Ainger v. White*, 85 Vt. 446, 82 Atl. 666. For the same reason, it was also regarded as being unwise to permit her to make contracts with others by which she became [305] surety for her husband's debts except by way of mortgage. Nor do we look far to discover the reason for this limitation upon her right to make contracts. Dependence and natural feelings of trust and confidence arising from the marital relation unfit the wife to "deal at arm's length" with her husband, or with one seeking to fortify his claim against the husband, as is amply illustrated by what the defendant's evidence tended to show happened in this case. Our law makers thought, it seems, that the wife would be deterred from making improvident contracts of suretyship for her husband by requiring that such contract should be by way of mortgage only, thus warning her of the consequences of her act.

Such being the policy of the law, the courts should scan with jealous eye any attempt by indirection to accomplish what the law forbids. While freedom to contract with others than her husband with reference to her sole and separate estate, in the present state of the law, may permit a wife to borrow money on the credit of such estate with which to pay her husband's debts,—a question which we do not need to decide for such was not the

case at bar,—the courts will look behind the mere form of the transaction to discover its true import; and if it appears that the spirit, if not the letter, of the statute abridging the power of the wife to contract is being infringed, it becomes their duty to afford her the protection that the law guarantees. As was said in *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301: "If it appears that an elaboration of outward details was, as both parties knew, but a cloak to cover an attempt to conclude a contract in violation of the statute, the indirection in method by which they have proceeded will not avail to save the transaction." Also in *Long v. Crosson*, 119 Ind. 3, 21 N. E. 450, 4 L.R.A. 783: "Whatever device may be resorted to for the purpose of evading the statute, if the person seeking to enforce the contract knew of, or participated in, the design, or purpose, remained ignorant, courts will deal with the transaction according to its substance, regardless of the form in which it has been disguised."

In states where the common-law disability of a *femme covert* to contract still exists so far as to prevent her from becoming surety for her husband's debts the decisions are numerous and nearly all to the same effect. A few more recent cases are noticed to illustrate their trend.

[306] An acknowledgement by a married woman of liability for advances made her husband, and her undertaking that the amount of such advances should be set off against her interest in certain lands, was invalid under Code 1896, § 2529, providing that the wife shall not become surety for the husband. *Horton v. Hill*, 138 Ala. 625, 36 So. 465. Where a husband and wife executed a joint note as a basis of credit for goods to be furnished the husband in conducting his business, "and for things for her family," to be furnished out of the payee's store, the wife's relation to the note, as to the goods to be supplied, and which were supplied, to the husband for carrying on his business, was that of surety only. *Smith v. Hardman*, 99 Ga. 381, 27 S. E. 731. A wife who executed a mortgage on her homestead as additional security for notes executed by her husband was merely a surety as to the execution of the mortgage. *Lingenfelter v. Bowman*, 156 Ia. 649, 137 N. W. 946. Under Code §§ 1754, 1783, 5087, positively forbidding any assumption by a wife of the debts of her husband, if a creditor of the husband in any manner receives in payment of his debt money of the wife, knowing it to be hers, the wife can recover of him the amount so paid. *Lewis v. Howell*, 98 Ga. 428, 25 S. E. 504. A contract based on a mere colorable transaction to which the lender is a party and a wife the borrower, the purpose of which is to make the

wife surety or the husband, will not be enforced against her. *Johnson v. A. Leffler Co.* 122 Ga. 670, 50 S. E. 488. Where a married woman gave a note to one to whom her husband was indebted in satisfaction of the indebtedness, the wife was not the less a surety because of the fact that the note was given to one to whom the husband was then indebted. *Harbaugh v. Tanner*, 163 Ind. 574, 71 N. E. 145. A husband applying to a bank for a loan was refused, but was told that he could have it on a note with the wife as principal, or that the loan would be made to the wife. Upon the husband's afterward tendering the note signed by him and his wife with the wife's signature above his own, the proceeds of the note were placed to the husband's credit on the bank's books. The cashier of the bank knew that the husband was the only person to be benefited by the note, and the wife had nothing to do with the transaction except to sign the note; she neither having applied for a loan nor having been seen nor consulted by the bank. *Held*, that the loan was to the husband as principal, with the wife as surety. The device of placing the [307] wife's signature above the husband's would not evade the statute making the wife's estate not liable upon her contract to be another's surety. *Farmers' Bank v. Beck* (Ky.) 114 S. W. 1189. Where the husband and wife signed a note jointly, the word "Principal" appearing after the wife's name, when the fact was that the note was executed for the purpose of taking up a note executed by the husband with another as surety, the wife was surety merely, and was therefore not bound. *Postell v. Crumbaugh*, 23 Ky. L. Rep. 2193, 66 S. W. 830. A married woman cannot bind herself by a note given as surety for her husband in order to secure the payment of money nominally received by her, yet in fact, received for the use of her husband. *Feather v. Feather*, 116 Mich. 384, 74 N. W. 524, 4 Detroit Leg. N. 1209. Where a loan is made to a husband, and he gets the money, and the land on which the deed of trust, signed by the husband and wife, is given, belongs to the wife, her position is that of surty to him. *Bruegge v. Bedard*, 89 Mo. App. 543. Under Pub. St. c. 176, § 2, providing that no contract or conveyance by a married woman as surety for her husband, nor any undertaking by her in his behalf, shall be binding on her, a wife is not liable on a note given by her for money borrowed by her, and used to pay his note to the person from whom she borrowed the money, provided such payment was a part of the agreement whereby the money was loaned to her. *Newport First Nat. Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351. Where goods were billed and receipted for in the husband's name, and the wife had nothing to do with ordering them, and there was no evidence

that the sellers believed they were giving credit to her, she is not liable for the price because afterwards, when an attachment was about to be made against the husband, she agreed that she and her husband would pay for the goods if the attachment was forborne, since that only tends to prove a promise to pay to the debt of another. *Mitchell v. Miller*, 54 N. Y. S. 180, 25 Misc. 179. Where a husband is largely indebted to a bank of which he is president, and borrows money to pay the debt, and his wife, who is in no way responsible for it, gives her individual note, secured by bank stock, and her bond, secured by a mortgage, which is joined in by her husband, the wife is surety only for the debt of her husband. *Stewart v. Stewart*, 207 Pa. St. 59, 56 Atl. 323. Where one who had loaned a husband money took the note of husband and wife without having had negotiations [308] or communications with her as to the matter, he cannot invoke against her an estoppel to set up that she was a mere surety. *Ritter v. Bruss*, 116 Wis. 55, 92 N. W. 361.

The fact that the defendant signed the note, which, on its face, was a contract with the plaintiff apparently independent of her husband's indebtedness, does not preclude her from showing the true intent of the transaction. It is not necessary that she bring herself within the rules by which the rights of sureties are ordinarily determined. *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956. In the latter case it was held that it was always competent for a married woman who has signed a personal obligation with her husband to show that her relation to the obligation is that of surety. It is consistent with the policy of the law limiting her right to become surety for her husband's debts to permit her to show that a note signed by her in which her husband does not join is given as collateral security of her husband's indebtedness, when, as here, it appears that the other party to the note was cognizant of all the facts. Indeed, it seems that the case was tried in the court below upon this theory, as the evidence tending to support such claim was received without objection.

A satisfactory test as to whether the transaction was one of suretyship within the meaning of P. S. 3039 is whether the defendant received in person, or for the benefit of her estate, the consideration upon which the contract depends; and the question is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from its real purpose and effect. The defendant's evidence, if believed, presented a case clearly within the disabling statute and brought the knowledge of the facts home to the plaintiff. It follows that she was at least entitled to go to the jury. The questions of burden of proof and whether on the

plaintiff's case she would have been entitled to a directed verdict are not presented, as these questions were not raised below.

The fact that the note was renewed several times and that the note in suit was given after the defendant became *sole* does not, as has already been seen, affect the defendant's liability. In the circumstances, any defence that could be made against the original note may be made against renewals thereof. *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600. The last renewal note being void as to the defendant, the note sued on fails of consideration, [309] on the authority of our own cases cited above. The cases in this State cited by the plaintiff on the question of consideration are not in point, none of them involving the disability of married women to contract and they are entirely in harmony with our cases in which that question is ruled against the plaintiff's contention. The fact that she proved the note against her husband's estate does not affect her right to make this defence. While it might throw light upon her claim as to what the transaction in fact was, it would not, as the plaintiff contends, furnish consideration for the note and would not preclude her from asserting that the note was void.

Against defendant's objection and exception the court received in evidence a mortgage to the bank executed by Mr. Bertoli alone covering the homestead, the title to which was then in him. This mortgage was given more than six years before the first note signed by the defendant was delivered to the bank and secured past and future indebtedness of Bertoli to the bank. The mortgage was in force at the time said note was given. The mortgage was offered and received upon the theory that, in connection with the evidence of the surrender to Bertoli of indebtedness to the amount of the note given by the defendant, and with the offer to show further that after the note was given by the defendant she acquired title to the homestead by a series of conveyances without consideration, the surrender by the plaintiff to Bertoli of his notes secured by the mortgage for the wife's unsecured note furnished a consideration moving to the defendant for her note to the bank.

The plaintiff's contention cannot be sustained. Among other objections, the defendant insisted that the mortgage did not tend to show consideration for the note; and that was, so far as appears, its only materiality. At the time the original note was given title to the mortgaged property was in the husband. The only property interest she then had in the premises was a homestead interest, and as to that the mortgage was void, as she did not join in its execution. *P. S.* 2553; *Martin v. Harrington*, 73 Vt. 193, 50 Atl. 1074, 87 Am. St. Rep. 704. If it had appeared that she gave the note to relieve the mort-

gaged premises of so much of the indebtedness resting upon it (which did not in fact appear), it would not have benefited her separate estate, as there was no valid incumbrance resting upon it. The fact that she subsequently acquired title to the mortgaged premises relieved by so much of [310] the incumbrance placed upon it by her husband would not relate back to furnish consideration for the note, certainly unless it appeared that the note was given in contemplation of the subsequent transfer to her. On the case presented it was error to receive the mortgage.

On this question the transcript of the evidence was "referred to and made part of this exception." This reference is not sufficient to give the transcript standing as part of the bill of exceptions. It will not be permitted to contradict or override the statement of the bill unless made controlling. It is not enough to refer to it generally. *State v. Howard*, 83 Vt. 6, 24, 74 Atl. 392; *Lawson v. Crane*, 83 Vt. 115, 118, 74 Atl. 641; *Slack v. Bragg*, 83 Vt. 404, 412, 76 Atl. 148. This being so, we dispose of the question as it is presented in the exceptions.

As bearing upon the question whether the plaintiff accepted the original note in the way its evidence tended to show the defendant offered to show by its cashier that, "if the plaintiff took the note without any investigation of the parties or genuineness of the signature, it would appear that the whole thing was done merely for the purpose of collateral security, as the defendant claims, and to get rid of the complaint of the bank examiner." The offer was excluded to which the defendant was allowed an exception. This was not error. The offer was not to show facts but to elicit argument from the witness. If the offer had been to show that the bank made no such inquiries as a basis for argument, a different question would be presented, which we do not need to consider now, as the question is not raised by the exception.

The sworn statement of G. Gentili who signed the original note with the defendant by agreement was used as a deposition, reserving the right to object to matters of substance. Certain portions of this statement, on the plaintiff's objection, were excluded on the ground that the statements of Bertoli referred to in the deposition were not made in the presence of any of the officers of the bank, to which the defendant was allowed an exception. The case shows that the rejected statements were made by Bertoli to the witness and the defendant with no representative of the bank present. They were by way of inducement to secure the witness's signature to the note and were clearly hearsay and so properly excluded unless they fall within the rule that permits declarations of an agent made in the course of his [311] agency to be

shown as part of the transaction. The rule invoked by the defendant requires that the utterance of the agent must have been made in and about the business on which the agent was employed and while actually engaged in that business. 3 Wig. § 1797.

The defendant contends that Bertoli was the bank's agent to procure this note and that as such his declarations would be evidence against the plaintiff. Defendant says further that she had a right to show what authority Bertoli had and that she had no better way to do this than to show what he said to induce her and Gentili to sign the note.

As to the latter contention, it is enough to say that the fact of agency cannot be shown by the mere acts and declarations of the alleged agent. *Prouty v. Nichols*, 82 Vt. 181, 72 Atl. 988, 137 Am. St. Rep. 996. The case does not support the defendant's claim that Bertoli was acting as agent of the bank. On the plaintiff's case, if an agent, it was for the signers of the note to effect delivery, and the defendant's evidence did not present a case of agency. There being no other theory urged upon which this evidence was admissible, we hold that it was properly excluded.

Judgment reversed and cause remanded.

NOTE.

Right of Married Woman to Become Surety for Husband.

I. Introductory, 597.

II. By Express Contract of Suretyship:

1. Jurisdictions in Which Right Is Upheld:
 - a. Rule Stated, 597.
 - b. Illustrations, 598.
2. Jurisdictions in Which Right Is Denied:
 - a. Rule Stated, 601.
 - b. Illustrations, 602.
3. Conflict of Laws, 603.

III. By Pledge or Mortgage of Property:

1. Jurisdictions in Which Right Is Upheld:
 - a. Rule Stated, 604.
 - b. Illustrations, 606.
2. Jurisdictions in Which Right Is Denied:
 - a. Rule Stated, 608.
 - b. Illustrations, 609.
3. Conflict of Laws, 611.

I. Introductory.

The general disability of coverture existing under the common law precluded the right of the wife to become surety for her husband. The early view was well expressed in *Ben-*

net v. Smith, 4 Pa. L. J. Rep. 456, 3 Pa. L. J. 138, as follows: "Looking upon the transaction merely as one where one party holds a station of influence in relation to another, it is discountenanced by the law because of the danger that undue influence may be exerted. . . . But there is an objection of serious importance growing out of the ultimate operation of this contract. If the wife should have to pay the money, then the husband becomes her legal debtor, and she will have her remedy against him. She will then become the plaintiff, getting judgment, issuing execution, and selling her husband's property for her benefit. How can these things be, consistently with the harmony of the marriage relation? 'Whom God hath joined together let no man put asunder.'"

Constitutional and statutory provisions in the various jurisdictions have caused a considerable departure from the general common-law doctrine, but the rule on the particular point under consideration has not been uniformly established. The purpose of this note is to collate the cases dealing with the inquiry whether a married woman may become surety for her husband. Statutes are treated only as they are involved in the cases. The scope of the note is not confined to technical suretyship, but includes the general question of security. For convenience in presentation, however, the distinction made in some statutes between the assumption of a general liability and the pledge of specific property is followed throughout the note.

II. By Express Contract of Suretyship.

1. JURISDICTIONS IN WHICH RIGHT IS UPHeld.

a. Rule Stated.

The rule obtains in many jurisdictions that a married woman may assume by express contract a general liability as surety for her husband.

England.—*Hulme v. Tenant*, 1 Bro. C. C. 16, 28 Eng. Rep. (Reprint) 958, Dick. 560, 21 Eng. Rep. (Reprint) 388 (as to separate estate). See also *Turnbull v. Duval* (1902) A. C. 429, 71 L. J. P. C. 84, 87 L. T. N. S. 154; *Bischoff v. Frank*, 89 L. T. N. S. 188 (guaranty set aside because of unfair advantage); *Chaplin v. Brammall* (1908) 1 K. B. 233, 77 L. J. K. B. 366, 97 L. T. N. S. 860 (security set aside because of unfair advantage); *Montreal Bank v. Stuart* [1911] A. C. 120, 103 L. T. N. S. 641, 27 Times L. Rep. 117, 80 L. J. P. C. 75 (guaranty and mortgage set aside because of unfair advantage).

Canada.—*Kerr v. Stripp*, 40 U. C. Q. B. 125 (as to separate estate); *Frazee v. Mc-*

Farland, 43 U. C. Q. B. 281 (as to separate estate). See also Gold Medal Furniture Co. v. Stephenson, 23 Manitoba 159, 10 Dominion L. Rep. 1, 23 West. L. Rep. 664, 49 Can. L. J. 337, *appeal quashed* 15 Dominion L. Rep. 342; Union Bank v. Crate, 19 Ont. W. Rep. 299; Canada Furniture Co. v. Stephenson, 19 Manitoba 618.

Arkansas.—Holland v. Bond, 189 S. W. 165. *Compare* McCarthy v. People's Sav. Bank, 108 Ark. 151, 156 S. W. 1023; Goldsmith Bros. Smelting, etc. Co. v. Moore, 108 Ark. 362, 157 S. W. 733 (prior to Act of 1915).

Hawaii.—Hackfeld v. Medcalf, 20 Hawaii 47, Ann. Cas. 1912D 105.

Kansas.—Live Stock Commission Co. v. Haston, 68 Kan. 749, 75 Pac. 1028; State Bank v. Maxson, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196, 6 Detroit Leg. N. 1034 (applying law of Kansas).

Maryland.—Frederick-Town Sav. Inst. v. Michael, 81 Md. 487, 32 Atl. 189, 340, 33 L.R.A. 628.

Massachusetts.—Major v. Holmes, 124 Mass. 108; Robertson v. Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466.

Mexico.—U. S. Banking Co. v. Veale, 84 Kan. 385, 114 Pac. 229, 37 L.R.A.(N.S.) 540 (applying law of Mexico).

Minnesota.—Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337.

Missouri.—Grandy v. Campbell, 78 Mo. App. 502; Benton v. German-American Nat. Bank, 45 Neb. 850, 64 N. W. 227 (applying law of Missouri). See also Johnston v. Gawtry, 11 Mo. App. 322; Moeckel v. Heim, 46 Mo. App. 340.

Nebraska.—Smith v. Spalding, 40 Neb. 339, 58 N. W. 952; McKell v. Merchants' Nat. Bank, 62 Neb. 608, 87 N. W. 317. See also State Sav. Bank v. Scott, 10 Neb. 86, 4 N. W. 314; Briggs v. Beatrice First Nat. Bank, 41 Neb. 17, 59 N. W. 351. See also Westervelt v. Baker, 56 Neb. 63, 76 N. W. 440; Union Stock Yards Nat. Bank v. Coffman, 101 Ia. 594, 70 N. W. 693 (applying law of Nebraska).

New York.—Bowery Nat. Bank v. Sniffen, 54 Hun 394, 7 N. Y. S. 520. And see 14 McKinney's Consol. Laws, N. Y. Ann. pp. 70, 74.

North Carolina.—Royal v. Southerland, reported in full, post, this volume, at page 623.

North Dakota.—Colonial, etc. Mortg. Co. v. Stevens, 3 N. D. 265, 55 N. W. 578.

Ohio.—Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611; Corwin v. Cook, 8 Ohio Dec. (Reprint) 432, 8 Cinc. L. Bul. 4; Dunkham v. Bruce, 9 Ohio Dec. (Reprint) 682, 16 Cinc. L. Bul. 291. See also Hershizer v. Florence, 5 Ohio Dec. (Reprint) 551, 6 Am. L. Rec. 500.

Oklahoma.—Cooper v. Indian Territory Bank, 4 Okla. 632, 46 Pac. 475.

South Dakota.—Colonial, etc. Mortg. Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108; Miller v. Purchase, 5 S. D. 232, 58 N. W. 556.

Virginia.—Frank v. Lilienfeld, 33 Grat. 377.

West Virginia.—Hughes v. Hamilton, 19 W. Va. 366; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917 (contract in writing binding as to separate estate); Duty v. Sprinkle, 64 W. Va. 39, 60 S. E. 882.

Furthermore, the same rule would seem to obtain in jurisdictions in which it has apparently not been expressly announced.

Connecticut.—Wagner v. Mutual L. Ins. Co. 88 Conn. 536, 91 Atl. 1012. And see section 4545, General Statutes of 1902. *Compare* Bank of New England v. Smith, 43 Conn. 327; Smith v. Williams, 43 Conn. 409; Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 Atl. 205 (prior to 1877).

Illinois.—Wright v. Remington, 41 N. J. L. 48, 32 Am. Rep. 180 (applying law of Illinois); Stone v. Billings, 167 Ill. 170, 47 N. E. 372; Holmes v. Williams, 69 Ill. App. 114, *reversed* on other grounds 177 Ill. 386, 53 N. E. 93; Burr v. Tobey, 182 Ill. App. 228. *Compare* Schmidt v. Postel, 63 Ill. 58; Doyle v. Kelly, 75 Ill. 574 (prior to Act of 1874).

Iowa.—Low v. Anderson, 41 Ia. 476; Spafford v. Warren, 47 Ia. 47. *Compare* Jones v. Crosthwaite, 17 Ia. 393; Wolf v. Van Metre, 23 Ia. 397; Sweazy v. Kammer, 51 Ia. 642, 2 N. W. 506.

Maine.—Mayo v. Hutchinson, 57 Me. 547.

Mississippi.—Frierson v. Williams, 57 Miss. 451 (as to charge on equitable estate). And see Mississippi Code of 1906, § 2517.

Tennessee.—See Pub. Acts 1913, c. 26, p. 59, referred to in Young v. Brown, 188 S. W. 1149. *Compare* Robertson v. Wilburn, 1 Lea 633; McClure v. Harris, 7 Heisk. 379.

b. Illustrations.

The *Arkansas* Act of 1915, enabling a married woman to contract as a feme sole, and construed to authorize the execution by a married woman of a promissory note for a debt of her husband, has been held not to contravene the constitutional provision that the property of a married woman shall not be subject to the debts of her husband, since that provision means that her property shall not be subject to her husband's debts, without some affirmative act on her part. *Holland v. Bond*, 189 S. W. 165. Prior to the Act of 1915, a married woman could contract only in reference to her separate property or business, and could not become surety for her husband unless by the contract of suretyship she created a lien on her separate estate or some part thereof. *McCarthy v. People's Sav. Bank*, 108 Ark. 151, 156 S. W. 1023; *Goldsmith Bros. Smelting, etc. Co. v. Moore*, 108

Ark. 362, 157 S. W. 733; Holland v. Bond, 189 S. W. 165.

The rule in *Hawaii* was stated in Hackfeld v. Medcalf, 20 Hawaii 47, Ann. Cas. 1912D 105 as follows: "While it is true, under our statute, a married woman cannot contract with her husband, there is no reason or rule of law prohibiting her from entering into a contract as surety for her husband. Indeed, the statute (sec. 2252, R. L.), cited by counsel for plaintiff, with two exceptions only, and the contract of suretyship is not one of those, provides that 'a married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole.' This language is broad and comprehensive, and we think includes the contract of suretyship."

In *Iowa* it has been provided by statute that "contracts may be made by a wife and liabilities incurred, and the same enforced by or against her, to the same extent and the same manner as if she were unmarried." Code 1897, § 3164. Apparently that statute has not been construed with reference to the right of a married woman to become surety for her husband on general contract. (See *infra*, this note as to pledge or mortgage of separate estate.) However, this and related statutes were construed generally in *Spafford v. Warren*, 47 Ia. 47, wherein the court said: "Coverture, in Iowa, ought to be no shelter to the wife against the enforcement of the rights of others growing out of her contracts. As she has all the rights of the husband, she must assume all his obligations." And see *Low v. Anderson*, 41 Ia. 476. Formerly it was held that the wife could not bind herself personally as surety for her husband. *Jones v. Crosthwaite*, 17 Ia. 393; *Wolf v. Van Metre*, 23 Ia. 397; *Sweazy v. Kammer*, 51 Ia. 642, 2 N. W. 506.

Under the *Maine* statute of 1866, which conferred on married women the general power of contract, the power of contracting as a surety has been upheld in broad terms, which apparently include suretyship for the husband. *Mayo v. Hutchinson*, 57 Me. 546.

The *Massachusetts* statute has been applied in a case wherein it was said: "Before the St. of 1874, c. 184, . . . contracts could only be made by a married woman in reference to her separate property, business or earnings. . . . But this statute has removed that restriction, and in the broadest terms enables a married woman to 'make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole,' and does not require that the consideration of her contracts should inure to her own benefit. The provision that nothing in this act shall authorize her 'to convey property to, or make contracts with, her husband,' is evidently not intended to impose any new restriction on

her capacity, but merely to affirm the rule of the common law, so far as her husband is the other party to her grant or contract; and does not prevent both of them from binding themselves by a joint promise to a third person, within the authority conferred by the statute. *Parker v. Kane*, 4 Allen 346. The female defendant in each of the cases before us is therefore liable to the plaintiff upon her contract with him, although, by reason of her incapacity to contract with or to sue her husband, no contract of indemnity could be made or implied as between them, as there might be in the case of two promisors capable of contracting with and suing each other. A contract of indemnity between principal and surety is no part of and nowise affects their contract with the creditor." *Major v. Holmes*, 124 Mass. 108. For cases before the statute of 1874, see *Athol Mach. Co. v. Fuller*, 107 Mass. 437; *Yale v. Wheelock*, 109 Mass. 502.

The *Minnesota* rule was set forth in *Northwestern Mut. L. Ins. Co. v. Allis*, 23 Minn. 337, wherein the court said: "The first of these points depends on Laws 1869, c. 56. Section 3 of that act reads: 'No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any debts or contracts of his wife, entered into either before or during coverture, except for necessities furnished to the wife after marriage, where he would be liable at common law.' It is argued that, as this note and mortgage were to secure the debt of the husband, she is not liable personally upon them, under this section. Apparently, a good answer to this is that the obligation of the note and mortgage is her debt as well as that of the husband; and, unless the section can be construed as disabling her to make a contract, the consideration for which is a prior debt of her husband, this answer must be conclusive. The defendant claims that, as at the common law the wife was not liable for the husband's debts, the section was not necessary to exclude such liability, and that the section could not have been inserted for that purpose, but must have been for the purpose of disabling her to contract a liability in consideration of such a debt. To give this effect to the section would be to allow inference and conjecture to qualify and restrict the meaning of the clear and precise language of the act removing the wife's common-law disability to contract. Section 2 provides that 'any married woman shall be capable of making any contract, either by parol or under seal, which she might make if unmarried, and shall be bound thereby.' Then follow clearly expressed exceptions to her power to contract without her husband, relating only to her real estate. Section 4 expressly retains the common-law disabilities of husband and wife to contract with each other relative to the

real estate of either, or to any authority from one to the other to convey real estate, and continues: 'But, in relation to all other subjects, either may be constituted the agent of the other, or contract each with the other, as fully as if the relation of husband and wife did not exist.' In view of this clear enabling language, and of the clearly expressed exceptions to it, no implication against the force of such language can be allowed from the language of section 3, unless such implication necessarily follows from the presence of the section in the act. It may not have been strictly necessary to insert the section for the purpose of preventing any question as to the liability of one for the debts of the other; but, in view of the difficulties of the subject, it was very proper to be inserted for that purpose, and we think such was its purpose. The note and mortgage were therefore valid."

In *Missouri* the rule has been stated as follows: "Under our present statute relating to married women, the wife is no longer subject to the common-law disability to contract, except only when she attempts to contract with her husband. This exception remains because the statute did not remove the husband's disabilities. As to the wife, however, the new section engrafted by the revision of 1889, provides that she 'shall be deemed a feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued,' etc. R. S. 1889, sec. 6864. 'The power to contract here given is as broad as that of a feme sole—not limited to any particular class of contracts, or confined to any species of property.' *Brown v. Dressler*, 125 Mo. 589. Or, as the St. Louis court of appeals states it, 'the intention of the legislature was to confer upon a married woman the absolute freedom of contract as to all the world, except her husband.' *McCorkle v. Goldsmith*, 60 Mo. App. 475. Under the facts agreed in the case at bar, the defendant, a married woman, contracted with the plaintiff to stand as security for her husband on the note in suit. This was as binding on the defendant as if she had been single and unmarried." *Grandy v. Campbell*, 78 Mo. App. 502.

The *Nebraska* rule was announced in *McKell v. Merchants' Nat. Bank*, 62 Neb. 608, 87 N. W. 317, wherein it was said: "After considering the married woman's act from almost every point of view, this court stands irrevocably committed to the doctrine that a married woman is liable on her contract of suretyship, if made with reference to and upon the faith and credit of her separate estate." In *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, the court said: "The statute does not undertake to confer upon a married woman an unrestricted

power to make contracts, but such right is limited to contracts made with reference to, and upon the faith and credit of, her separate property or estate. Upon such contract she is liable, but all her other engagements and obligations are void as at common law. To hold unqualifiedly that a married woman has the same right to enter into contracts, and to the same extent, as a man would be to disregard the qualifying clause of said section 2, which confers upon her the authority to 'enter into any contract with reference to the same [her property] in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.'"

In *New York* the statute of 1884, providing generally that a married woman may contract as if unmarried, has been held to authorize the wife to become surety for her husband, notwithstanding that contracts between husband and wife were by the same statute prohibited. *Bowery Nat. Bank v. Sniffen*, 54 Hun 394, 7 N. Y. S. 520. The contract of suretyship must be in writing. *Mitchell v. Miller*, 25 Misc. 179, 54 N. Y. S. 180; *Bauer v. Ambs*, 144 App. Div. 274, 128 N. Y. S. 1024. And it must be supported by a consideration. *Bauer v. Ambs*, 144 App. Div. 274, 128 N. Y. S. 1024; *Harlem River Bank v. Meyer*, 16 N. Y. S. 872. Before the statute of 1884, a married woman could become surety for her husband, but only by expressly charging her separate estate. *Ledlie v. Vrooman*, 41 Barb. (N. Y.) 109; *Hanse v. DeWitt*, 63 Barb. (N. Y.) 53; *Phillips v. Wicks*, 45 How. Pr. (N. Y.) 477; *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216, 18 N. Y. 265, 72 Am. Dec. 503; *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613, 1 Am. Rep. 601; *Yale v. Dederer*, 68 N. Y. 329; *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. Rep. 141; *Woolsey v. Brown*, 74 N. Y. 82; *Phillips v. Wicks*, 36 Super. Ct. (N. Y.) 254; *Queens County Bank v. Leavitt*, 56 Hun 426, 10 N. Y. S. 193. See also *Sexton v. Fleet*, 2 Hilt. (N. Y.) 477.

The *North Dakota* statute was construed in *Colonial, etc. Mortg. Co. v. Stevens*, 3 N. D. 265, 55 N. W. 578, wherein the court said: "The one which bears most directly upon the question is section 2590 of the Comp. Laws. It declares that 'either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.' This statute is very broad in its language. It is true that the contract must be one respecting property; but we cannot assent to the view that it must relate to the married woman's separate property. . . .

A contract to pay money is a contract respecting property."

In *West Virginia* under the separate estate chapter in the Code of 1868 a feme covert as to her separate estate was regarded as a single woman, and she could in writing bind her estate as surety for her husband. The language which declared that a wife might hold certain estate to her sole use free from her husband's control and debts was held only to change the common-law rule by which the husband acquired ownership of all her personality and the use of the rents and profits of her realty, and such statute did not prevent the wife from subjecting her estate to her husband's debts. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917. "By the Act of 1891 it was provided that 'no married woman shall become the security, indorser, or guarantor of or for her husband,' etc. See Code 1891, p. 621, c. 66, s. 11. This section was repealed by Act of February 16, 1893. See chapter 3, Acts 1893, p. 6. It was not intended that the Act of 1891 should have any retroactive effect." *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

2. JURISDICTIONS IN WHICH RIGHT IS DENIED.

a. Rule Stated.

In many jurisdictions a married woman is incapable of assuming by express contract a general liability as surety for her husband.

Alabama.—*Schening v. Cofer*, 97 Ala. 726, 12 So. 414; *Richardson v. Stephens*, 114 Ala. 238, 21 So. 949; *Memphis, etc. Nat. Bank v. Clarke*, 117 Ala. 292, 22 So. 988; *Horton v. Hill*, 138 Ala. 625, 36 So. 465; *Lamkin v. Lovell*, 176 Ala. 334, 58 So. 258; *Union Nat. Bank v. Chapman*, 7 App. Div. 450, 39 N. Y. S. 1051 (applying law of Alabama); *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L.R.A. 513 (applying law of Alabama); *Staples v. City Bank, etc. Co.* 70 So. 115. See also *Hixon v. Hetherington*, 57 Ala. 165; *Sample v. Guyer*, 143 Ala. 613, 42 So. 106; *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

Delaware.—*Kohn v. Collison*, 1 Marv. 109, 27 Atl. 834; *Wright v. Parvia, etc. Co.* 1 Marv. 325, 40 Atl. 1123; *Schmid v. Spicer*, 92 Atl. 991.

District of Columbia.—*Waters v. Pearson*, 39 App. Cas. 10.

Georgia.—*Love v. Lamar*, 78 Ga. 323, 3 S. E. 90; *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241; *Monroe v. Haas*, 105 Ga. 468, 30 S. E. 654; *Jones v. Weichselbaum*, 115 Ga. 369, 41 S. E. 615; *Johnson v. A. Leffler Co.* 122 Ga. 670, 50 S. E. 488; *Hamilton v. Jenkins*, 7 Ga. App. 136, 66 S. E. 397; *Thompson v. Wilkinson*, 9 Ga. App. 367, 71 S. E. 678; *Booth v. Merchants'*

Bank, 9 Ga. App. 650, 72 S. E. 44; *Hill v. Bazemore*, 17 Ga. App. 107, 86 S. E. 397. See also *Kempton v. Hallowell*, 24 Ga. 52, 71 Am. Dec. 112; *White v. Stocker*, 85 Ga. 200, 11 S. E. 604; *Lewis v. Howell*, 98 Ga. 428, 25 S. E. 504; *Nelms v. Keller*, 103 Ga. 745, 30 S. E. 572; *Hawes v. Glover*, 126 Ga. 305, 55 N. E. 62; *National Bank v. Smith*, 142 Ga. 663, 83 S. E. 526, L.R.A.1915B 1116.

Idaho.—See also *Jaeckel v. Pease*, 6 Idaho 131, 53 Pac. 399. See also *Bank of Commerce v. Baldwin*, 14 Idaho 75, 93 Pac. 504, 17 L.R.A.(N.S.) 676.

Indiana.—*Vogel v. Leichner*, 102 Ind. 55, 1 N. E. 554; *Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. 580, 8 L.R.A. 795; *Wolf v. Zimmerman*, 127 Ind. 486, 26 N. E. 173; *Leschen v. Guy*, 149 Ind. 17, 48 N. E. 344; *Harbaugh v. Tanner*, 163 Ind. 574, 71 N. E. 145; *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301; *Johns C. Groub Co. v. Smith*, 31 Ind. App. 685, 68 N. E. 1030; *Davis v. Neighbors*, 34 Ind. App. 441, 73 N. E. 151; *Washburn v. Gray*, 49 Ind. App. 271, 97 N. E. 190; *Smith v. McDonald*, 49 Ind. App. 464, 97 N. E. 556; *Pabst Brewing Co. v. Schuster*, 55 Ind. App. 375, 103 N. E. 950; *Wright v. Fox*, 56 Ind. App. 315, 103 N. E. 442; *Gillett v. Citizens Nat. Bank*, 56 Ind. App. 694, 104 N. E. 775. See also *Coats v. McKee*, 26 Ind. 223; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565.

Kentucky.—*Deposit Bank v. Stitt*, 107 Ky. 49, 52 S. W. 950, 21 Ky. L. Rep. 671; *Hall v. Hall*, 118 Ky. 656, 82 S. W. 269, 26 Ky. L. Rep. 553; *Lucas v. Hagedorn*, 158 Ky. 369, 164 S. W. 978; *Russell v. Rice*, 44 S. W. 110, 19 Ky. L. Rep. 1613; *Crumbaugh v. Postell*, 49 S. W. 334, 20 Ky. L. Rep. 1366; *Travers v. Wood*, 50 S. W. 60, 20 Ky. L. Rep. 1819; *Milburn v. Jackson*, 52 S. W. 949, 21 Ky. L. Rep. 700; *Skinner v. Lynn*, 51 S. W. 167, 21 Ky. L. Rep. 185; *Postell v. Crumbaugh*, 66 S. W. 830, 23 Ky. L. Rep. 2193; *Magoffin v. Boyle Nat. Bank*, 69 S. W. 702, 24 Ky. L. Rep. 585; *Planters' Bank, etc. Co. v. Major*, 76 S. W. 331, 25 Ky. L. Rep. 702, rehearing denied 80 S. W. 1089, 26 Ky. L. Rep. 234; *Bowron v. Curd*, 88 S. W. 1106, 28 Ky. L. Rep. 58; *Black v. McCarley*, 126 Ky. 825, 104 S. W. 987, 31 Ky. L. Rep. 1198; *Louisville Third Nat. Bank v. Tierney*, 128 Ky. 836, 110 S. W. 293, 18 L.R.A.(N.S.) 81, 33 Ky. L. Rep. 418; *Farmers' Bank v. Beck*, 114 S. W. 1189. See also *Woodrough v. Perkins*, 1 Bibb. (Ky.) 290; *Bidwell v. Robinson*, 79 Ky. 29; *Mundo v. Anderson*, 109 Ky. 147, 58 S. W. 520, 22 Ky. L. Rep. 663; *Thomas v. Boston Banking Co.* 157 Ky. 473, 163 S. W. 480; *McClelland v. Hamilton*, 5 Ky. L. Rep. 58. Compare *Skinner v. Carr*, 51 S. W. 799, 21 Ky. L. Rep. 525.

Louisiana.—*Lawes v. Chinn*, 4 Mart. N. S. 388; *McMicken v. Smith*, 5 Mart. N. S. 427;

Durnford v. Gross, 7 Mart. O. S. 465; Maloney Succession, 124 La. 672, 50 So. 647; Mechanics', etc. Bank v. Jones, 6 La. Ann. 123; State v. Bradley, 37 La. Ann. 623. See also Hollingsworth v. Spanier, 32 La. Ann. 203; Louisiana State Bank v. Rowell, 7 Mart. N. S. 344.

Michigan.—Emery v. Lord, 26 Mich. 431; West v. Laraway, 28 Mich. 464; Kitchell v. Mudgett, 37 Mich. 81; Reed v. Buys, 44 Mich. 80, 6 N. W. 111; Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116, 35 N. W. 853; Fechheimer v. Pierce, 70 Mich. 440, 38 N. W. 325; Littlefield v. Dingwall, 71 Mich. 223, 39 N. W. 38; Marquette First Nat. Bank v. Hanscom, 104 Mich. 67, 62 N. W. 167; Feather v. Feather, 116 Mich. 384, 74 N. W. 524, 4 Detroit Leg. N. 1209. See also Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200, 10 Detroit L. N. 36; State Bank v. Maxson, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196, 6 Detroit Leg. N. 1034.

New Hampshire.—Farmington Nat. Bank v. Buzzell, 60 N. H. 189; Luther v. Cote, 61 N. H. 129; Citizens' Nat. Bank v. Davis, 62 N. H. 695; A. Storrs, etc. Co. v. Wingate, 67 N. H. 190, 29 Atl. 413; Newport First Nat. Bank v. Hunton, 69 N. H. 509, 45 Atl. 351. See also Penacook Sav. Bank v. Sanborn, 60 N. H. 558; Bergeron v. Dartmouth Sav. Bank, 63 N. H. 195; Wells v. Foster, 64 N. H. 585, 15 Atl. 216; Iona Sav. Bank v. Boynton, 69 N. H. 77, 39 Atl. 522; Newport First Nat. Bank v. Hunton, 70 N. H. 224, 46 Atl. 1049.

New Jersey.—Swing v. Woodruff, 41 N. J. L. 469; Mawhinney v. Cassio, 63 N. J. L. 412, 43 Atl. 676; Seigman v. Streeter, 64 N. J. L. 169, 44 Atl. 888; Vliet v. Eastburn, 64 N. J. L. 627, 46 Atl. 735, 1061; People's Nat. Bank v. Schepflin, 73 N. J. L. 29, 62 Atl. 333.

Pennsylvania.—Bennet v. Smith, 4 Pa. L. J. Rep. 456, 3 Pa. L. J. 138; Patrick v. Smith, 165 Pa. St. 526, 30 Atl. 1044, 36 W. N. C. 10; Harper v. O'Neil, 194 Pa. St. 141, 44 Atl. 1065; Peter Adams Paper Co. v. Cassard, 206 Pa. St. 179, 55 Atl. 949; Sibley v. Robertson, 212 Pa. St. 24, 61 Atl. 426; Murray v. McDonald, 236 Pa. St. 26, 84 Atl. 579; Manor Nat. Bank v. Lowery, 242 Pa. St. 559, 89 Atl. 678; Underwood's Estate, 5 Pa. Co. Ct. 621; Ruffner v. Luther, 19 Pa. Co. Ct. 349; Weigle v. Mercer, 1 Pa. Super. Ct. 490, 38 W. N. C. 171; North East Pennsylvania First Nat. Bank v. Short, 15 Pa. Super. Ct. 64; McCrea v. Sisler, 17 Pa. Super. Ct. 175; Atkins v. Grist, 44 Pa. Super. Ct. 310; Riland v. Schaeffer, 45 Pa. Super. Ct. 636; Oswald v. Jones, 98 Atl. 784.

South Carolina.—See Habenicht v. Rawls, 24 S. C. 461, 58 Am. Rep. 268; Aultman v. Rush, 26 S. C. 517, 2 S. E. 402; Livingston v. Shingler, 30 S. C. 159, 8 S. E. 842; McGee v. Cunningham, 69 S. C. 470, 48 S. E. 473. Compare Witte v. Wolfe, 16 S. C. 256, citing

Pelzer v. Campbell, 15 S. C. 581 (decisions before statute of 1882).

Texas.—Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537; Wilson v. Dearborn, 179 S. W. 1102, denying rehearing 174 S. W. 296; In re McFaden, 3 Nat. Bankr. Reg. 104, 16 Fed. Cas. No. 8,785 (applying law of Texas); Grosman v. Union Trust Co. reported in full, post, this volume, at page 613.

Vermont.—Montpelier First Nat. Bank v. Bertoli, 88 Vt. 421, 92 Atl. 970. And see the reported case.

Wisconsin.—Ritter v. Brusa, 116 Wis. 55, 92 N. W. 361; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82. See also Goll v. Fehr, 131 Wis. 141, 111 N. W. 235.

b. Illustrations.

The *Alabama* statute provides that "the wife shall not, directly or indirectly, become the surety for the husband." Code, § 4497. See Lamkin v. Lovell, 176 Ala. 334, 58 So. 258.

In *Georgia* the supreme court has said: "The Civil Code, sec. 2488, provides that 'while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her husband, in extinguishment of his debts, shall be absolutely void.' In construing this section, it has been repeatedly held that any contract of suretyship entered into by a married woman, whether in behalf of her husband or any other person, is void, and at her instance will be so declared." Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

The *Indiana* statute (Burns 1901, § 6964; R. S. 1881, § 5119) was quoted and explained in Field v. Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301, as follows: "That section is as follows: 'A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void.' . . . It was intended to prevent the making of contracts in the nature of suretyship undertakings by married women in all cases. In Harbaugh v. Tanner (1904) 163 Ind. 574, it was said: 'One of the principal reasons for enacting the statute forbidding married women to enter into contracts of suretyship, and providing that such contracts were void, was to prevent them from squandering or encumbering their property as sureties for improvident husbands.'"

In *Kentucky* section 2127, Kentucky Statutes, provides in part as follows: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage,

to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance; but her estate shall be liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as in this act provided." *Lucas v. Hagedorn*, 158 Ky. 369, 164 S. W. 978. "In transactions of this kind the courts must look to the substance; and whatsoever the parties themselves may designate or name the undertaking of the wife, if in fact it be an attempted assumption by her of the debt of another, she must be held not liable unless she binds herself in the statutory mode. Any other course will speedily result in a nullification of the statute." *Crumbaugh v. Postell*, 49 S. W. 334, 20 Ky. L. R. 1366. But "although section 2127 of the statutes provides, in substance, that a married woman shall not be liable upon a contract in which she is merely the surety, this provision does not exempt her from liability if she receives the consideration for which the note was executed." *Thomas v. Boston Banking Co.* 157 Ky. 473, 163 S. W. 480.

In *Louisiana* the statutory provisions are as follows: "The wife cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." Rev. Civ. Code, art. 2398. "The wife cannot become security for her husband's debts. Id. art. 1790." See *Maloney, Succession*, 124 La. 672, 50 So. 647.

In *New Hampshire* it has been provided by statute as follows: "No contract or conveyance by a married woman, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her. P. S. c. 176, s. 2." *Newport First Nat. Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351. The attempt on the part of a married woman to become a surety for her husband is not a waiver of her disability; but since she is not disabled to present the defense of disability, such defense is waived where it is not presented before judgment. *Bergeron v. Dartmouth Sav. Bank*, 63 N. H. 195.

The *New Jersey* rule was set forth in *People's Nat. Bank v. Schepflin*, 73 N. J. L. 29, 62 Atl. 333, as follows: "Section 5 of our revised Married Woman's Act of 1874, as amended in 1895 (Pamph. L. p. 821; Gen. Stat. p. 2017), declares that any married woman shall have the right to bind herself by contract in the same manner and to the same extent as though she were unmarried—'provided, that nothing herein shall enable such married woman to become an accommodation indorser, guarantor or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability

of any other person; provided further, however, that if on the faith of any indorsement, contract of guaranty or suretyship, promise to pay the debt or answer for the default or liability of any other person, any married woman obtains, directly or indirectly, any money, property or other thing of value, for her own use, or for the use, benefit or advantage of her separate estate, she shall be liable thereon as though she were unmarried.'

. . . Since the notes were intended to be and were in fact indorsed by the husband, she was his surety if the money was in fact borrowed by him from the bank. . . . Contracts of suretyship and promises to pay the debt of another person are equally within the ban of the first proviso of section 5 of the married woman's act. . . . Moneys once received by the wife, although they be borrowed, become her property, which the statute permits her to give away or lend as she pleases. So she may pledge or mortgage her separate property to secure the debt of her husband or any third party. But the statute disables her from mortgaging her future to secure the debt of another, which is the effect of a contract of suretyship or the like." *In Vliet v. Eastburn*, 64 N. J. L. 627, 46 Atl. 735, 1061, the proviso imposing liability on a married woman where she obtains something of value was construed; and in that case the court said: "The provision of 1895 does not alter the general policy of the law which withholds from married women the power to make contracts of suretyship. . . . Although the contract of suretyship is still without force in itself as beyond the legal capacity of a married woman, yet if she does in fact make such a contract, and 'on the faith of it obtains anything of value,' she shall be liable as if sole. Thus construed, the reason of the statute is supported by many analogous instances when a contract not in itself valid becomes incontestable and a liability thereon arises, by reason of some act done by an innocent party in reliance upon it."

3. CONFLICT OF LAWS.

In general the validity of a contract whereby a married woman becomes surety for the debt of her husband is determined by the law of the place where it is made. *Benton v. German-American Nat. Bank*, 45 Neb. 850, 64 N. W. 227; *Union Nat. Bank v. Chapman*, 7 App. Div. 450, 39 N. Y. S. 1051; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L.R.A. 513 (where the parties do not clearly intend that it shall be governed by the laws of another jurisdiction); *Robinson v. Kline*, 21 Pa. Dist. 839 (the contract is made where the note is delivered and the consideration paid); *Peter*

Adams Paper Co. v. Cassard, 206 Pa. St. 179, 55 Atl. 949; Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587. Applying the *lex loci contractus*, the court in *State Bank v. Maxson*, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196, 6 Detroit Leg. N. 1034, said: "The contract was made in Kansas, and must be controlled by the law of that state. . . . Counsel, however, contend that, under section 17 of the married woman's act of Kansas, it must be held that the defendant is protected under the laws of this state. That section provides: 'Any woman who shall have been married out of this state shall, if her husband afterward becomes a resident of this state, enjoy all the rights as to property which she may have acquired by the laws of any other state, territory or country, or which she may have acquired by virtue of any marriage contract or settlement made out of this state.' 2 Gen. Stat. 1897, c. 123, § 17. Counsel's contention is that, under this statute, 'if a woman acquires property under the laws of this state, when it is assailed in the courts of this state she is entitled to the protection of the laws of this state, and that under the laws of this state it could not be taken for the husband's debt.' It is true that, under a contract made in this state, the wife's property cannot be taken for the husband's debt unless the wife expressly agrees in writing that it may be so taken; that is, unless the contract binds her separate property specifically. The Kansas statute above quoted gives the wife the right to the enjoyment of all her property, but, as held in *Deering v. Boyle* [8 Kan. 525], her property is subject to seizure and sale upon contract made by her, the same as the husband's property is liable."

But the effect of a contract as constituting a charge on real property is controlled by the law of the place where the property is situated. *Frierson v. Williams*, 57 Miss. 451; *Johnston v. Gawtry*, 11 Mo. App. 322; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587 (holding that a contract valid where made will be enforced if it does not contravene the law or policy of the forum). Compare *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666. In *Frierson v. Williams*, supra, the court said: "It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the *lex loci contractus*, it is void everywhere. This position is true, if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this state, and that she contracted with reference to this separate estate, and

intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. . . . The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this state. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. . . . If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister state, adjudge it void to that extent, if attempted to be enforced here; but the principle of comity does not require a state to regard the laws of any other state, so far as they may affect contracts in relation to real estate situated in the former state."

In a jurisdiction wherein a married woman cannot become surety for her husband, it has been held that in an action on such a contract made in another jurisdiction, the law of the place where the contract is made will be presumed to be the same as the law of the forum until the contrary is shown. *Peter Adams Paper Co. v. Cassard*, 206 Pa. St. 179, 55 Atl. 949.

It has been held that the enforcement of a valid contract of suretyship against a married woman is not contrary to the public policy of a state wherein such contract could not have been made. *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180. Compare *Grosman v. Union Trust Co.* reported in full, post, this volume, at page 613. In *Wright v. Remington*, supra, the court said: "That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York state married woman's act, by which the married woman is restrained from assuming a liability as surety, I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality or attacks the interest of the body of the citizens of our state. This does neither, and there is no force in the objection taken upon this ground."

III. By Pledge or Mortgage of Property.

1. JURISDICTIONS IN WHICH RIGHT IS UPHOLD.

a. Rule Stated.

Inasmuch as a wife who mortgages her property to secure the payment of her hus-

band's debt is generally regarded as a surety (see the notes to Hackfeld v. Medcalf, Ann. Cas. 1912D 105, and Browne v. Bixby, 5 Ann. Cas. 642), the right of a married woman to pledge or mortgage her property for her husband's debt is here considered without regard to the fact that in some jurisdictions the wife in such a case does not stand in the position of a surety. (See Philadelphia Sav. Fund Soc. v. Lasher, 144 Ill. App. 653; Hall v. Hall, 118 Ky. 656, 26 Ky. L. Rep. 553, 82 S. W. 269.)

In a majority of jurisdictions a married woman, subject to the statutory requirements as to the manner of so doing, may pledge or mortgage her property for the security of her husband's debts.

England.—Standford v. Marshall, 2 Atk. 69, 26 Eng. Rep. (Reprint) 441; Africa Bank v. Cohen [1909] 2 Ch. (Eng.) 129, 78 L. J. Ch. 767, 100 L. T. N. S. 916, 25 Times L. Rep. 625 (contingent right recognized in the Transvaal).

Canada.—Frazee v. McFarland, 43 U. C. Q. B. 281. See also Royal Trust Co. v. Lloyd, 9 West. W. Rep. 122, 32 West. L. Rep. 354, 25 Dominion L. Rep. 802; Euclid Ave. Trusts Co. v. Hoha, 24 Ont. L. Rep. 447, *affirming* 23 Ont. L. Rep. 377, 18 Ont. W. Rep. 787. *Compare* Klock v. Chamberlin, 15 Can. Sup. Ct. 325.

Arkansas.—Collins v. Wassell, 34 Ark. 17; Scott v. Ward, 35 Ark. 480; Petty v. Grisard, 45 Ark. 117; Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308; Goodrum v. Merchants', etc. Bank, 102 Ark. 326, Ann. Cas. 1914A 511, 144 S. W. 198; Harper v. McGoogan, 107 Ark. 10, 154 S. W. 187. See also Johnson v. Graham Bros. Co. 98 Ark. 274, 135 S. W. 853; Goldsmith Bros. Smelting, etc. Co. v. Moore, 108 Ark. 362, 157 S. W. 733.

California.—Farmers', etc. Bank v. DeShorb, 137 Cal. 685, 70 Pac. 771. See also Connecticut L. Ins. Co. v. McCormick, 45 Cal. 580; Bull v. Coe, 77 Cal. 56, 18 Pac. 808, 11 Am. St. Rep. 235; Alexander v. Bosworth, 26 Cal. App. 589, 147 Pac. 607; Dunlap v. Sunset Lumber Co. 26 Cal. App. 131, 146 Pac. 53 (*distinguishing* Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028).

Colorado.—Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Nippel v. Hammond, 4 Colo. 211.

Connecticut.—Stafford Sav. Bank v. Underwood, 54 Conn. 2, 4 Atl. 248.

District of Columbia.—Kaiser v. Stickney, 131 U. S. clxxxvii, 26 (L. ed.) 176; Hitz v. Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 U. S. (L. ed.) 156.

Florida.—Dzialynski v. Jacksonville Bank, 23 Fla. 346, 2 So. 696; Ballard v. Lippman, 32 Fla. 481, 14 So. 154; Thompson v. Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193; Springfield Co. v. Ely, 44 Fla. 319, 32 So.

892; Cobb v. Bear, 57 Fla. 370, 49 So. 29. See also Staley v. Hamilton, 19 Fla. 275.

Hawaii.—Hackfeld v. Medcalf, 20 Hawaii 47, Ann. Cas. 1912D 105.

Illinois.—Young v. Graff, 28 Ill. 20; Pomeroy v. Manhattan L. Ins. Co. 40 Ill. 398; Edwards v. Schoeneman, 104 Ill. 278; Post v. Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Stone v. Billings, 167 Ill. 170, 47 N. E. 372; Philadelphia Sav. Fund Soc. v. Lasher, 144 Ill. App. 653; Burr v. Tobey, 182 Ill. App. 228. *Compare* Swift v. Castle, 23 Ill. 209 (trust estate); Wilhelm v. Schmidt, 84 Ill. 183.

Iowa.—See Wolff v. Van Metre, 19 Ia. 134; Low v. Anderson, 41 Ia. 476; Sweazy v. Kammer, 51 Ia. 642, 2 N. W. 506; Lingenfelter v. Bowman, 156 Ia. 649, 137 N. W. 946.

Kansas.—Live-Stock Commission Co. v. Haston, 68 Kan. 749, 75 Pac. 1028. See also Hubbard v. Ogden, 22 Kan. 363; Moody v. Stubbs, 94 Kan. 250, 146 Pac. 346.

Kentucky.—Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867; Miller v. Sanders, 98 Ky. 535, 33 S. W. 621; Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174 (pledge of insurance policy); Morrison v. Morrison, 113 Ky. 507, 68 S. W. 467, 69 S. W. 1102, 24 Ky. L. Rep. 340; Hall v. Hall, 118 Ky. 656, 82 S. W. 269, 26 Ky. L. Rep. 553; Hite v. Reynolds, reported in full, post, this volume, at page 619; New York L. Ins. Co. v. Miller, 56 S. W. 975, 22 Ky. L. Rep. 230; Magoffin v. Boyle Nat. Bank, 69 S. W. 702; 24 Ky. L. Rep. 585. *Compare* Paducah v. Duke, 2 Ky. L. Rep. (abstract) 229; Hirschman v. Brashears, 2 Ky. L. Rep. 246; Hughes v. Shannon, 13 Ky. L. Rep. (abstract) 782; Miller v. Cropper, 16 Ky. L. Rep. (abstract) 395; Hirschman v. Brashears, 79 Ky. 258.

Maryland.—Emerick v. Coakley, 35 Md. 188; Comegys v. Clarke, 44 Md. 108.

Massachusetts.—Bartlett v. Bartlett, 4 Allen 440; Hall v. Tay, 131 Mass. 192.

Michigan.—Watson v. Thurber, 11 Mich. 457; Frickee v. Donner, 35 Mich. 151; Marx v. Bellel, 114 Mich. 631, 72 N. W. 620; Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200, 10 Detroit Leg. N. 36; Lewis v. Doyle, 182 Mich. 141, 148 N. W. 407; Ehle v. Looker, 182 Mich. 248, 148 N. W. 378.

Minnesota.—Wolf v. Banning, 3 Minn. 202; Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337.

Mississippi.—Enochs v. Newton, 65 Miss. 86, 3 So. 141. And see Mississippi Code 1906, § 2517. See also (under earlier statutes) Russ v. Wingate, 30 Miss. 440; Foxworth v. Magee, 44 Miss. 430; Klein v. McNamara, 54 Miss. 90.

Missouri.—Schneider v. Staihr, 20 Mo. 269; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Hach v. Hill, 106 Mo. 18, 16 S. W. 948; Ferguson v. Soden, 111 Mo. 208, 19 S. W. 727, 33

Am. St. Rep. 512; Meads v. Hutchinson, 111 Mo. 620, 19 S. W. 1111; McCollum v. Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L.R.A. 480; Jones v. Edeman, 223 Mo. 312, 122 S. W. 1047; Bell v. Bell, 133 Mo. App. 670, 113 S. W. 667.

Nebraska.—Stevenson v. Craig, 12 Neb. 464, 12 N. W. 1; Buffalo County Nat. Bank v. Sharpe, 40 Neb. 123, 58 N. W. 734; Briggs v. Beatrice First Nat. Bank, 41 Neb. 17, 59 N. W. 351; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; Holmes v. Hull, 50 Neb. 656, 70 N. W. 241; Linton v. Cooper, 53 Neb. 400, 73 N. W. 731; Grand Island Banking Co. v. Wright, 53 Neb. 574, 74 N. W. 82; Fisk v. Osgood, 58 Neb. 486, 78 N. W. 924; Bode v. Jussen, 93 Neb. 482, 140 N. W. 768; Wilson v. Neu, 1 Neb. (unofficial) Rep. 42, 95 N. W. 502.

Nevada.—Cartan v. David, 18 Nev. 310, 4 Pac. 61.

New Jersey.—DeRonge v. Elliott, 23 N. J. Eq. 486 (assignment of insurance policy); Campbell v. Tompkins, 32 N. J. Eq. 170; Ferdon v. Miller, 34 N. J. Eq. 10; Merchant v. Thompson, 34 N. J. Eq. 73; Baldwin v. Flagg, 36 N. J. Eq. 48; Butterfield v. Okie, 36 N. J. Eq. 482; Colonial Bldg. etc. Assoc. v. Griffin, 85 N. J. Eq. 455, 96 Atl. 901; Davidson v. Biddleman, 82 N. J. L. 92, 81 Atl. 366; Hallowell v. Daly, 56 Atl. 234. See also Robbins v. Abrahams, 5 N. J. Eq. 405.

New York.—Leavitt v. Pell, 25 N. Y. 474, affirming 27 Barb. 322; Albion Bank v. Burns, 46 N. Y. 170; Demarest v. Wynkoop, 3 Johns. Ch. 120, 8 Am. Dec. 467; Talman v. Hawxhurst, 4 Duer. 221. And see 14 McKinney's Consol. Laws, N. Y. Ann. pp. 70, 87.

Ohio.—Mack v. Kaetzel, 2 Ohio Dec. (Reprint) 313, 2 West. L. Month. 412; Arnold v. Wilder, 6 Ohio Dec. (Reprint) 819, 8 Am. L. Rec. 348.

Oregon.—Moore v. Fuller, 6 Ore. 272, 25 Am. Rep. 524; Gray v. Hollard, 9 Ore. 513; Barrell v. Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 U. S. (L. ed.) 511 (applying law of Oregon); Cross v. Allen, 141 U. S. 528, 12 S. Ct. 67, 35 U. S. (L. ed.) 843 (applying law of Oregon).

Pennsylvania.—Black v. Galway, 24 Pa. St. 18, affirming 1 Phila. 494, 11 Leg. Int. 98; Lytle's Appeal, 36 Pa. St. 131; Haffey v. Carey, 73 Pa. St. 431; Juniata Bldg. etc. Assoc. v. Mixell, 84 Pa. St. 313; Citizens' Sav. etc. Assoc. v. Heiser, 150 Pa. St. 514, 24 Atl. 733; Kulp v. Brant, 162 Pa. St. 222, 29 Atl. 729, (assignment of insurance policy); Siebert v. Valley Nat. Bank, 186 Pa. St. 233, 40 Atl. 472, 42 W. N. C. 319; Dusenberry v. Mutual L. Ins. Co. 188 Pa. St. 454, 41 Atl. 736, assignment of insurance policy; Herr v. Reinoehl, 209 Pa. St. 483, 58 Atl. 862; Righter v. Livingston, 214 Pa. St. 28, 63 Atl. 195; Kuhn v. Ogilvie, 17 Pa. Co. Ct. 635; In re Andress's

Estate, 14 Phila. (Pa.) 240, 38 Leg. Int. 5. See also Manor Nat. Bank v. Lowery, 242 Pa. St. 559, 89 Atl. 678.

Tennessee.—McFerrin v. White, 6 Cold. 499; Voorhies v. Granberry, 5 Baxt. 704; Molloy v. Clapp, 2 Lea 586; Grotenkemper v. Carver, 9 Lea (Tenn.) 280; Young v. Brown, 188 S. W. 1149. Compare Head v. Temple, 4 Heisk. 34; Nichol v. Nichol, 4 Baxt. 145.

Virginia.—Christian v. Keen, 80 Va. 369; Lee v. United States Bank, 9 Leigh (Va.) 200; Muller v. Bayly, 21 Grat. 521.

Wisconsin.—Fitzgerald v. Dunn, 112 Wis. 37, 87 N. W. 803; Goll v. Fahr, 131 Wis. 141, 111 N. W. 235.

b. Illustrations.

The *Arkansas* constitution (article 9, section 7 of the constitution of 1874) providing, in effect, that the property of a married woman shall not be subject to the debts of her husband, means that her property shall not be subject to the debts of her husband without some affirmative act on her part to make her liable; hence, the provision does not prevent a married woman from pledging or conveying her property to secure the debts of her husband. Holland v. Bond, 189 S. W. 165.

Applying the *Connecticut* statute, the court in *Stafford Sav. Bank v. Underwood*, 54 Conn. 2, said: "The only question is—Can a married woman mortgage her real estate to secure a debt of her husband? the plaintiff not seeking to hold the wife upon the note. This question depends largely upon the power given to a married woman by the statute of this state, which provides that 'all conveyances of the real estate of married women, executed by them jointly with their husbands and duly acknowledged and recorded, shall be valid and effectual to transfer such estate, and all conveyances by the husband alone of the real estate of the wife shall be ineffectual to convey her interest therein.' Gen. Statutes. p. 353, sec. 10. It is manifest that under this statute the only limitation upon the wife's power of alienation of her real estate is the consent of her husband. When that is evidenced by his joining her in the execution and acknowledgment of the deed, the power of the wife to transfer her estate is perfect and unrestricted. She may convey her estate absolutely and for any purpose she may desire: she may sell it for a valuable consideration, or she may give it in charity, or transfer it by the ordinary method of conveyance between husband and wife to her husband, either with or without a money consideration. The power of the wife to make an absolute conveyance under the statute cannot be doubted, and as the greater includes the less, it must follow

as a logical deduction that she has power to make a conditional conveyance and may mortgage her estate to secure any valid debt, either of herself or her husband."

The rule in *Illinois* was explained in *Edwards v. Schoeneman*, 104 Ill. 278, as follows: "It is first urged that appellant, being a married woman, had no power to mortgage her property to pay her husband's debts. The solution of this question depends upon the law in force at the time the mortgages were executed. The first mortgage, having been executed and acknowledged in 1873, will be controlled by 'An act concerning conveyances,' in force July 1, 1872 (Laws of 1872, page 282), the 18th section of which declares: 'Any married woman, being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same in respect to her right, title, claim or interest in such estate, as if she were sole.' Section 19 provides that the acknowledgment may be the same as if she was sole. This act is in substance the same as an act approved March 27, 1869. (Laws of 1869, page 350.) Indeed, it is almost a literal copy of the Act of 1869. Under the last named act this court held, in a number of cases, that a married woman might, by joining with her husband in the execution of a deed or mortgage relating to the sale or disposition of her real estate, bind and conclude herself, the same as a feme sole. *Hogan v. Hogan*, 89 Ill. 427, is a case which may be regarded as conclusive on the question. We have placed the same construction on the Act of 1872, *supra*, that we did on the Act of 1869, as may be seen by an examination of *Barnes v. Ehrman*, 74 Ill. 402. Without, therefore, going back to inquire what the rights and powers of a married woman in regard to a sale or disposition of her real estate were at common law, or even under the statute of 1861, there can be no doubt in regard to the right of appellant to mortgage her lands, as she did in this instance, by joining with her husband in the execution of the mortgage, as provided by the Act of 1872. As respects the second mortgage, which was executed in 1877, the Act of 1872, cited above, was in force, having been incorporated in the revision of 1874, and in addition, sec. 9, chap. 68, Rev. Stat. 1874, page 577, which confer upon a married woman the power to sell and convey her lands in the same manner that her husband can property belonging to him. Under the Act of 1872 it was essential to the validity of a deed or mortgage that the husband should join with the wife when she attempted to convey her real property,

but under the provision of section 9, which was incorporated in the revision of 1874, this obstacle was removed, and a married woman was placed upon a perfect equality with her husband, in so far as the conveyance of her lands was concerned."

The *Kentucky* statute (quoted in *Hite v. Reynolds*, reported in full, post, this volume, at page 619) expressly provides how a married woman may charge her estate for the debts of another, and unless the statutory method is followed she is not bound. *Bowron v. Curd*, 88 S. W. 1106, 28 Ky. L. Rep. 58. It has been held that an insurance policy could be set apart, within the meaning of the statute, by a written contract of pledge accompanied by the actual delivery of the policy. *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174; *New York L. Ins. Co. v. Miller*, 56 S. W. 975, 22 Ky. L. Rep. 230. Prior to 1894 a married woman could not mortgage her separate estate to secure a debt of her husband. *Paducah v. Duke*, 2 Ky. L. Rep. (abstract) 229; *Hughes v. Shannon*, 13 Ky. L. Rep. (abstract) 782; *Miller v. Cropper*, 16 Ky. L. Rep. (abstract) 395; *Hirschman v. Brashears*, 79 Ky. 259; *Magill v. Mercantile Trust Co.* 81 Ky. 129; *Merchants', etc. Bldg. etc. Assoc. v. Jarvis*, 92 Ky. 566, 18 S. W. 454, 13 Ky. L. Rep. 797; *Morrison v. Morrison*, 113 Ky. 507, 68 S. W. 467, 69 S. W. 1102, 24 Ky. L. Rep. 340.

Construing the *Missouri* statute the court in *Schneider v. Stahr*, 20 Mo. 269, said: "It cannot be maintained that the Act of the 5th March, 1849, exempting the property of married women from the debts of their husbands, was designed to prevent *femes covert* from disposing of their real property by a voluntary conveyance, for whatever purpose they thought proper. If married women, clothing their deeds with the solemnities required by law to make them effectual, will convey away their estates the law does not interpose to prevent them. Without their consent signified in the manner prescribed by law, their property cannot be taken by execution to satisfy their husbands' debts. But if they will voluntarily give it away, they cannot be prevented. The husband and wife may unite in a sale of the wife's land, and apply the money thus obtained in payment of the husband's debts. If this can be done, what is to prevent her from joining in a mortgage with her husband and thereby subject her land to the satisfaction of his liabilities?" However, in *Bell v. Bell*, 133 Mo. App. 570, 113 S. W. 667, it was held that a mortgage to secure the payment of a pre-existing debt of the husband was invalid for lack of a consideration.

The *Nebraska* rule was set forth as follows in *Bode v. Jussen*, 93 Neb. 482, 140 N. W. 768: "Can a mortgage by a married woman

upon her separate property, given to secure the debt of her husband, be enforced? The law upon that point must be taken as settled in this state. Section 2, ch. 53, Comp. St. 1911, which is the same as it was the time the mortgage in suit was executed, provides: 'A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.' This section of the statute was carefully considered by this court in *Grand Island Banking Co. v. Wright*, 53 Neb. 574. The authorities are there collated and carefully considered, and the conclusion reached that, where a wife executes a mortgage upon her own real estate to secure an indebtedness of her husband, the mortgage will be sustained; but, if the wife also signs the note, she cannot be held upon that for any deficiency after the sale of the premises, where it is not disclosed that in executing the note and mortgage it was the intention to bind her property generally."

In *New Jersey*, in *Butterfield v. Okie*, 36 N. J. Eq. 482, the court said: "There can be no doubt that a wife may make a valid mortgage to secure the debt of her husband, and such a mortgage will be upheld, even though it is made simply by way of gift to the husband, and to secure his bond founded on a mere moral consideration, but such an instrument, being purely voluntary so far as the wife is concerned, cannot be upheld against her creditors."

The clause in the *Oregon* constitution declaring "that the property and possessory rights of every married woman at the time of marriage, or afterward acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband" has been held merely to preserve the property of the wife from its compulsory subjection to the debts or contracts of the husband and not to affect her voluntary disposal of her property. *Barrell v. Tilton*, 119 U. S. 637, 7 S. Ct. 332, 30 U. S. (L. ed.) 511.

In *Pennsylvania* the clause of the enabling Act of 1893 which provided "but she may not become accommodation indorser, maker, guarantor or surety for another" has been held to prohibit only the incurring of a liability which carries the risk of a general judgment, and not to affect the power of a married woman to pledge specific property as security for her husband. *Herr v. Reinoehl*, 209 Pa. St. 483, 58 Atl. 862.

The law of the *Transvaal* concerning the validity of a mortgage was set forth as follows in *Africa Bank v. Cohen* [1909] 2 Ch. (Eng.) 129, 78 L. J. Ch. 767, 100 L. T. N. S. 916, 25 Times L. Rep. 625: "Unless and un-

til a married woman who does not fall within certain exceptions has gone through certain formalities she is under the Roman-Dutch law incapacitated and incapable of entering into a contract of suretyship for her husband. I may expand that statement of the law and state my own view as follows: A married woman's contract of suretyship for her husband cannot be described (in terms familiar in our own law) as being either void or voidable. It must be stated, I think, in the form that she has a contingent capacity to become bound by such a contract. Thus, if she holds a particular character, that of a trader, or if she receives a pecuniary benefit from the contract (a matter which may have to be ascertained *ex post facto*), or if after explicit explanation of the exact nature of her rights she formally renounces the *Senatus Consultum Velleianum* and the *Authentica si qua mulier*, she may be bound by such a contract. But unless and until some one of those conditions is satisfied the contingency upon which she becomes capable has not happened and she remains incapable of becoming bound by the contract."

2. JURISDICTIONS IN WHICH RIGHT IS DENIED.

a. Rule Stated.

In some jurisdictions a married woman may not pledge or mortgage her property as security for the payment of her husband's debts.

Alabama.—*Bibb v. Pope*, 43 Ala. 190; *Denchaud v. Berrey*, 48 Ala. 591; *Northington v. Faber*, 52 Ala. 45; *Conner v. Williams*, 57 Ala. 131; *Boyleston v. Farrior*, 64 Ala. 564; *Rogers v. Torbert*, 66 Ala. 547; *Prince v. Prince*, 67 Ala. 565; *Lansden v. Bone*, 90 Ala. 446, 8 So. 65; *Hawkins v. Ross*, 100 Ala. 459, 14 So. 278; *McNeil v. Davis*, 105 Ala. 657, 17 So. 101; *Elston v. Comer*, 108 Ala. 76, 19 So. 324; *Clement v. Draper*, 108 Ala. 211, 19 So. 25; *Giddens v. Powell*, 108 Ala. 621, 19 So. 21; *Osborne v. Cooper*, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117; *Richardson v. Stephens*, 114 Ala. 238, 21 So. 949; *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39; *Price v. Cooper*, 123 Ala. 392, 26 So. 238; *Russell v. Peavy*, 131 Ala. 563, 32 So. 492; *Day v. Shiver*, 137 Ala. 185, 33 So. 831; *Henderson v. Brunson*, 141 Ala. 674, 37 So. 549; *Harper v. T. N. Hayes Co.* 149 Ala. 174, 43 So. 360; *Allen v. Pierce*, 163 Ala. 612, 50 So. 924, 136 Am. St. Rep. 92; *Evans v. Faircloth-Byrd Mercantile Co.* 165 Ala. 176, 21 Ann. Cas. 1164, 51 So. 785; *Eubanks v. Anniston Mercantile Co.* 171 Ala. 488, 55 So. 98; *Hanchey v. Powell*, 171 Ala. 597, 55 So. 97; *Sibert v. Hughes*, 174 Ala. 426, 56 So. 1012; *Mills v. Hudmon*, 175 Ala. 448, 57 So. 739; *Lamkin v. Lovell*, 176 Ala. 334, 58 So. 258; *Interstate Bank v. Wesley*, 178 Ala. 186, 59 So. 621; *Spencer v. Leland*, 178 Ala. 282, 59 So. 593;

Elkins v. Henry Bank, 180 Ala. 18, 60 So. 96; Corinth Bank, etc. Co. v. King, 182 Ala. 403, 62 So. 704; People's Bank v. Steinhart, 186 Ala. 205, 65 So. 60; Bley v. Lewis, 188 Ala. 535, 66 So. 454; Gravlee v. Cannon, 195 Ala. 549, 70 So. 719; Vinegar Bend Lumber Co. v. Leftwich, 72 So. 538; Lippincott v. Mitchell, 94 U. S. 767, 24 U. S. (L. ed.) 315 (applying law of Alabama). See also Campbell v. Hughes, 155 Ala. 591, 47 So. 45; Marbury Lumber Co. v. Woolfolk, 186 Ala. 254, 65 So. 43; Hall v. Gordon, 189 Ala. 301, 66 So. 493. *Compare* Bradford v. Greenway, 17 Ala. 797, 52 Am. Dec. 203; Blakeslee v. Mobile L. Ins. Co. 57 Ala. 205; Burrus v. Dawson, 66 Ala. 476 (equitable separate estate).

Georgia.—Dunbar v. Mize, 53 Ga. 435; Klink v. Boland, 72 Ga. 485; Smith v. Head, 75 Ga. 755; Love v. Lamar, 78 Ga. 323, 3 S. E. 90; Mickleberry v. O'Neal, 98 Ga. 42, 25 S. E. 933; Jones v. Weichselbaum, 115 Ga. 369, 41 S. E. 615; Gross v. Whitely, 128 Ga. 79, 57 S. E. 94; Sharpe v. Denmark, reported in full, post, this volume, at page 617; Whitchard v. Exchange Nat. Bank, 15 Ga. App. 190, 82 S. E. 770. See also Hicks v. Johnston, 24 Ga. 194; Keaton v. Scott, 25 Ga. 652, 71 Am. Dec. 196; Freeman v. Mutual Bldg. etc. Assoc. 90 Ga. 190, 15 S. E. 758; Cartersville First Nat. Bank v. Bayless, 96 Ga. 684, 23 S. E. 851; Hawes v. Glover, 126 Ga. 305, 55 S. E. 62 (holding that the defense of coverture is a personal privilege). *Compare* Brodnax v. Aetna Ins. Co. 128 U. S. 236, 9 S. Ct. 61, 32 U. S. (L. ed.) 445 (applying law of Georgia).

Indiana.—Allen v. Davis, 99 Ind. 216; Warey v. Forst, 102 Ind. 205, 26 N. E. 87; Brown v. Will, 103 Ind. 71, 2 N. E. 283; Cupp v. Campbell, 103 Ind. 213, 2 N. E. 565; Engler v. Acker, 106 Ind. 223, 6 N. E. 342; Crooks v. Kennett, 111 Ind. 347, 12 N. E. 715; Swank v. Hufnagle, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105; McCormick Harvesting Mach. Co. v. Scovell, 111 Ind. 551, 13 N. E. 58; Bartholomew v. Pierson, 112 Ind. 430, 14 N. E. 249; Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L.R.A. 795 (statute for benefit of married woman herself, not stranger); Merchants', etc. Bldg. Assoc. v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Harrison Bldg. etc. Co. v. Lackey, 149 Ind. 10, 48 N. E. 254; Government Bldg. etc. Inst. v. Denny, 154 Ind. 261, 55 N. E. 757; International Bldg. etc. Assoc. v. Watson, 158 Ind. 508, 64 N. E. 23; Webb v. John Hancock Mut. L. Ins. Co. 162 Ind. 616, 69 N. E. 1006, 66 L.R.A. 632; Field v. Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301; Union Cent. L. Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; Field v. Campbell, 68 N. E. 911, *denying rehearing* 67 N. E. 1040; Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151; Wredman v. Falls Ann. Cas. 1917B.—30.

City Sav. etc. Assoc. 40 Ind. App. 478, 82 N. E. 476; Washburn v. Gray, 49 Ind. App. 271, 97 N. E. 190; Evans v. Beaver, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666 (applying law of Indiana). See also Trimble v. State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163; Kelley v. York, 183 Ind. 628, 109 N. E. 772; Webb v. John Hancock Mut. L. Ins. Co. (Ind.) 66 N. E. 470. *Compare* Herron v. Herron, 91 Ind. 278; Frazer v. Clifford, 94 Ind. 482; Orr v. White, 106 Ind. 341, 6 N. E. 909; Gardner v. Case, 111 Ind. 494, 13 N. E. 36.

Louisiana.—Banks v. Trudeau, 2 Mart. N. S. 39; Fireman's Ins. Co. v. Cross, 4 Rob. 508; Cuny v. Brown, 12 Rob. 82; Byerley v. Walker, 118 La. 265, 42 So. 931; Keating v. Wilbert, 119 La. 461, 44 So. 265; Krouse v. Neal, 42 La. Ann. 950, 8 So. 471; Berwick v. Sheriff, 49 La. Ann. 201, 21 So. 692. See also Caldwell v. Trezevant, 111 La. 410, 35 So. 619; Beasley v. Jenkins, 117 La. 577, 42 So. 145. *Compare* Louisiana Bank v. Farrar, 1 La. Ann. 49; Farrar v. New Orleans Gaslight, etc. Co. 2 La. Ann. 873.

New Hampshire.—Stokell v. Kimball, 59 N. H. 13; Buss v. Woodward, 60 N. H. 58; Parsons v. Rolfe, 66 N. H. 620, 27 Atl. 172. *Compare* Pittsfield Sav. Bank v. Berry, 63 N. H. 109.

South Carolina.—Aultman, etc. Co. v. Rush, 26 S. C. 517, 2 S. E. 402; Aultman, etc. Co. v. Gibert, 28 S. C. 303, 5 S. E. 806; Livingston v. Shingler, 30 S. C. 159, 8 S. E. 842; Chambers v. Bookman, 32 S. C. 455, 11 S. E. 349; Goodgion v. Vaughn, 32 S. C. 499, 11 S. E. 351; Kincaid v. Anderson, 33 S. C. 260, 11 S. E. 766; Pelzer v. Durham, 37 S. C. 354, 16 S. E. 46; Dunbar v. Foreman, 40 S. C. 490, 19 S. E. 186; Kuker v. Carter, 42 S. C. 84, 20 S. E. 22; Kuker v. McIntyre, 43 S. C. 117, 20 S. E. 976; Christensen v. Wells, 52 S. C. 497, 30 S. E. 611; People's Nat. Bank v. Epstein, 44 Fed. 403 (applying law of South Carolina). See also McGee v. Cunningham, 69 S. C. 470, 48 S. E. 473; U. S. Gayle, 50 Fed. 169 (applying law of South Carolina). *Compare* Witsell v. Charleston, 7 S. C. 88; Connor v. Edwards, 36 S. C. 563, 15 S. E. 706 (under statute of 1870); Scottish American Mortg. Co. v. Mison, 38 S. C. 432, 17 S. E. 244; Hester v. Barker, 42 S. C. 128, 20 S. E. 52 (under statute of 1887).

b. Illustrations.

The Alabama statute was set forth as follows in Hanchey v. Powell, 171 Ala. 597, 55 So. 97: "Section 4497 of the Code of 1907 expressly provides that 'the wife shall not, directly or indirectly, become the surety for the husband.' It is needless to consider the technical definitions of the word 'surety,' as our court has repeatedly applied this statute to facts similar to the transaction in ques-

tion, and has in effect held that if the wife gives a mortgage to secure a debt contracted by the husband, and not for her as her agent, and for which she was not originally liable in law or equity, as distinguished from a mere moral obligation growing out of the fact that she or her estate had been benefited by the money lent the husband, the said mortgage was invalid, and would be canceled at her instance. The test being whether or not she was originally liable in law or equity for the debt, and not whether or not she was benefited by same, if the mortgage is given to secure a debt for which the husband was alone liable, it fails within the prohibition of said section 4497."

In *Georgia* it has been said: "While the wife is given the right to contract as a feme sole, and to own property, yet she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate made to a creditor of her husband in extinguishment of his debts shall be absolutely void. Civil Code, § 2488. It is also declared by statute that the property of the wife shall not be liable for the payment of any debt, default or contract of her husband. Civil Code, § 2474. It is not open to dispute that these code sections absolutely deny the liability of the wife on a note executed by her as surety for a principal who also signs the note. In this kind of a transaction, the wife attempts to bind her separate estate by indirection. By signing the note as surety she assumes a liability which, but for the statute, could be reduced to judgment, and its payment enforced against her separate estate by execution. If the wife cannot bind her separate estate generally by entering into a contract of suretyship, surely she cannot bind a specific portion of her separate property by hypothecating it to pay another's debt. The case of *Klink v. Boland*, 72 Ga. 485, holds that one cannot take property belonging to the wife as security for a credit sale made to the husband. If the debt is the husband's the wife cannot assume its payment, either by promising to pay the debt as a surety, or by pledging her property to pay it. It is not the form of suretyship, nor whether the liability as surety is general, or only limited to the value of the pledged separate estate, which the law condemns. The spirit and purpose of the statute is to prevent the appropriation of the wife's property to the payment of a secondary or collateral liability." *Gross v. Whitely*, 128 Ga. 79, 57 S. E. 94. The Code of 1863 excepted from its prohibition estates controlled by a marriage settlement. *Brodnax v. Etna Ins. Co.* 128 U. S. 236, 9 S. Ct. 61, 32 U. S. (L. ed.) 445.

Applying the *Indiana* statute, the court in *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565, said: "This section (§ 5119, R. S. 1881)

prohibits a married woman from entering into a contract of suretyship, in any manner whatever, and declares all such contracts void as to her. That a mortgage executed by a wife upon her separate property, to secure the debt of her husband, is a contract of suretyship, and that such contracts are invalid, is not the settled law of this state." In *Frazer v. Clifford*, 94 Ind. 482, the court sketched the history of the *Indiana* legislation on this subject, saying: "When the note and mortgage in suit were executed, 'An act concerning married women,' approved March 25th, 1879, which took effect on the 31st day of May, 1879, was in force as a law of this state. In section 10 of this act it was provided as follows: 'A married woman shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person.' Acts 1879, p. 161. This section remained in force at least until the 19th day of September, 1881, when it was, perhaps, superseded or repealed by implication by the broader and more comprehensive provisions of section 4 of the Act of April 16th, 1881, concerning husband and wife. Section 18 of this latter act provides that 'all laws and parts of laws within the purview of this act, or (and) inconsistent therewith, are hereby repealed.' Acts 1881, p. 531. In section 4 of this latter act (§ 5119, R. S. 1881) it is provided as follows: 'A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void.' Prior to the taking effect of the Act of March 25th, 1879, concerning married women, on the 31st day of May, 1879, the law of this state, in relation to the right and power of a married woman to encumber her own separate real property, was contained in section 5 of 'An act touching the marriage relation and liabilities incident thereto,' approved May 31st, 1852. This section 5 provided as follows: 'No lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried: Provided, That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join.' 1 R. S. 1876, p. 550. Under and by virtue of the power conferred upon a married woman by this section of the statute, it was repeatedly held by this court that she and her husband might execute a valid mortgage on her separate lands to secure the debt of her husband."

In *Louisiana* a married woman cannot bind herself or her property for the debt of her husband. See Rev. Civ. Code, art. 2398: *Keating v. Wilbert*, 119 La. 461, 44 So. 265. "It is well settled in our jurisprudence that

the courts will look through all disguises and protect the wife in her property." *Byerley v. Walker*, 118 La. 265, 42 So. 931. But by early statutes, exceptions were made to the general rule and particular banks were authorized to accept a pledge by a married woman as security for the debt of her husband. *Louisiana Bank v. Farrar*, 1 La. Ann. 94; *Farrar v. New Orleans Gaslight, etc. Co.* 2 La. Ann. 873. See also *Mechanics, etc. Bank v. Rowly*, 2 La. Ann. 372.

In *New Hampshire* it has been said: "No contract or conveyance by a married woman as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her." Laws 1876, c. 32. This chapter is entitled 'An act to remove the disabilities of married women;' but, so far as it applies to this case, it is a disabling act, imposing a new protective incapacity. At common law, a married woman could charge her separate estate with the payment of her husband's debts. *Babbitt v. Morrison*, 58 N. H. 419; *Thompson v. Fla.*, 58 N. H. 490. By this statute no 'conveyance by a married woman as surety or guarantor for her husband' is binding on her. The plaintiff's conveyance of her land as security for her husband's debt was a conveyance by her as surety for him, within the meaning of the statute." *Buss v. Woodward*, 60 N. H. 58. For cases decided under the law prior to the statute of 1876, see *Thompson v. Fla.*, 58 N. H. 490; *Pittsfield Sav. Bank v. Berry*, 63 N. H. 109.

In *South Carolina* under the statute of 1870 and until 1882 a married woman could mortgage her property to secure the debt of her husband. And under the statute of 1887 the question was one of intention; where the mortgage contained an express intention to charge the separate estate the court was obliged to hold the mortgage to be valid. But by the Act of 1891 the question was made one of power, and if the mortgage was executed as security for the husband's debt it was one which the married woman had no power to make. *Chambers v. Bookman*, 32 S. C. 455, 11 S. E. 349; *Connor v. Edwards*, 36 S. C. 563, 15 S. E. 706 (citing *Pelzer v. Campbell*, 15 S. C. 581, 40 Am. Rep. 705); *Scottish, etc. Mortg. Co. v. Mixson*, 38 S. C. 432, 17 S. E. 244; *Reid v. Stevens*, 38 S. C. 519, 17 S. E. 358; *Dunbar v. Foreman*, 40 S. C. 490, 19 S. E. 186; *Hester v. Barker*, 42 S. C. 128, 20 S. E. 52.

In *Texas* under earlier statutes a married woman apparently could mortgage her separate property for the security of her husband's debts. *Beattie v. Keller*, 49 S. W. 408. But see the construction placed on the Act of March 21, 1913, by the federal court in *Grosman v. Union Trust Co.* reported in full, post, this volume, at p. 613.

3. CONFLICT OF LAWS.

It has been generally held, in regard to the validity of a mortgage by a married woman on her real property to secure her husband's debt, that the *lex rei sitae* governs. *Africa Bank v. Cohen* [1909] 2 Ch. (Eng.) 129, 78 L. J. Ch. 767, 100 L. T. N. S. 916, 25 Times L. R. 625; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193; *Post v. Springfield First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105. See also *Burr v. Tobey*, 182 Ill. App. 228. Thus in *Thomson v. Kyle*, supra, the court said: "It is not denied by appellants that had the mortgage sought to be foreclosed in this case been executed in this state, it would have been valid and enforceable under our laws. . . . It is insisted, however, that under the laws of Alabama a married woman is without capacity to bind herself or her property as security for the debt of her husband, and as the mortgage sought to be enforced in this case was executed, and the debt secured thereby was payable in that state, and all the parties were there domiciled, that those laws necessarily entered into and became a part of the contract rendering it void in that state; and that, being void in Alabama, it is by virtue of interstate law, void in Florida. It may be admitted that this argument has strong application to the note executed by Mrs. Thomson with her husband, which the mortgage was given to secure, for the note being a general personal obligation, if void by the laws of the state in which it was extended and made payable, it ought likewise to be void in every other state where it is sought to be enforced. But it does not follow that because Mrs. Thomson is not bound by the note it is for that reason totally void. It still remains a valid obligation of her husband which she can in this state secure by a mortgage of her separate statutory property. *Dzialynski v. Jacksonville Bank*, 23 Fla. 346, 2 So. 696. We do not understand that any principle of interstate law requires us to test the validity or sufficiency of conveyances of, or liens upon, real estate in this state by the laws of other states or nations, even though such contracts may have been executed, or given to secure the performance of some act, within their jurisdiction. The reasons why we should not are obvious. The subject-matter with reference to the title of which the conveyance or lien is executed, being at the time of such execution an immovable thing, not only located beyond the control of that sovereignty within whose jurisdiction the contract is executed, and forever so to remain, but then within the exclusive jurisdiction of another independent sovereignty, and forever so to re-

main, the parties to such conveyance are presumed to have contracted, at least so far as the immovable thing is concerned, with reference to the laws of that jurisdiction within whose borders the thing is situated. And no sovereign state, without express legislative sanction, is presumed to surrender to owners of immovable property within its limits the power to encumber or change the title thereto in any other manner than that pointed out by its laws. It is, therefore, almost universally held that so far as real estate or immovable property is concerned, we must look to the laws of the state where it is situated for the rules which govern its descent, alienation and transfer, and for the construction, validity and effect of conveyances thereof. *U. S. v. Crosby*, 7 Cranch 115 [3 U. S. (L. ed.) 287]; *McGoon v. Scales*, 9 Wall. 23 [19 U. S. (L. ed.) 545]; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627 [24 U. S. (L. ed.) 858]; *Gault v. Van Zile*, 37 Mich. 22; *Bissell v. Terry*, 69 Ill. 184; *West v. Fitz*, 109 Ill. 425; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713; *Curtis v. Hutton*, 14 Ves. Jr. (Eng.) 537; *Frierson v. Williams*, 57 Miss. 451; *Crolly v. Clark*, 20 Fla. 849; *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; and it is to the same law that we must look for the rules governing the capacity of the parties to such contracts or conveyances, and their rights under the same. *Doyle v. McGuire*, 38 Ia. 410; *Baum v. Birchall*, 150 Pa. St. 164, 24 Atl. 620; *Chapman v. Robertson*, 6 Paige (N. Y.) 627, 31 Am. Dec. 264; *Larendon's Succession*, 39 La. Ann. 952, 3 So. 219; *Cassidy's Succession*, 40 La. Ann. 827, 5 So. 292; 2 *Parsons on Contracts*, 572; *Story on Conflict of Laws*, sec. 431; *Rorer on Interstate Law*, p. 263. It would seem, therefore, that upon principle the mortgage in this case should be subjected to the laws of this state, in order to ascertain its validity, construction and the capacity of the parties to execute it, rather than to the laws of the state of Alabama, within whose borders the real estate is not situated, and as to which her laws can have no extra-territorial effect. . . . We hold that, notwithstanding Mrs. Thomson's incapacity by the laws of Alabama to execute the mortgage sought to be foreclosed here, she was capable under our laws of executing in Alabama a mortgage upon her separate statutory real property in this state to secure her husband's debt." And in *Africa Bank v. Cohen* [1909] 2 Ch. (Eng.) 129, 78 L. J. Ch. 767, 100 L. T. N. S. 916, 25 Times L. Rep. 625, it was said: "Where, as we find to be the case here, the *lex situs* declares an instrument of suretyship intended to operate upon real estate to be void because of an incapacity of one of the parties, except upon certain conditions which have not been fulfilled, to bind herself by such an instrument, it is the duty of this forum to

respect the *lex situs* and to treat the instrument as of no validity against that party. In such a case, where our court recognizes an incapacity to contract so as to bind herself on the part of the person sued, it plainly cannot at the same time make a decree as the plaintiffs here ask, either for specific performance of the engagement by which she was incapable of binding herself, or, as the plaintiffs alternatively ask, award damages for its nonperformance. There have been no doubt cases where our courts have by their judgment indirectly affected real property out of the jurisdiction, where the parties to the action have been within the jurisdiction, as the parties to this action are. Acting in personam and not in rem—"upon the conscience," in the language of one of these judgments, 'of the person living here,' *Lord Cranstown v. Johnston*, 3 Ves. Jr. 170, 182—the court has given effect to contractual or equitable rights and so indirectly affected, as I have said, immovable property abroad. Several of these cases, such, for example, as *Ex p. Pollard*, Mont. & C. 239, were cited to us in argument, and most, if not all of them, are referred to and classified in Mr. Foote's work, pp. 186, 192. But in none of those cases have our courts given effect to a contractual or equitable right in personam which the *lex rei sitae* would treat as incapable of creation. No case has been cited to us, and, upon principle, I should be surprised if any could be found, in which this jurisdiction in personam has been assumed where according to the *lex situs*, the party sued was incapable of making the contract sued upon, and where therefore the court of the country in which the property indirectly to be affected lay would treat the English decree, in the language of Lord Campbell in *Norris v. Chambers*, 3 DeG. F. & J. 583, as 'brutum fulmen.'

In *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105, the court said: "In the argument on the petition for a rehearing, counsel contend that we were in error in holding that a mortgage executed by a married woman in Ohio as surety for her husband cannot be enforced in this state, and they refer us to cases holding that the construction of a contract is governed by the law of the place where it is made. But the argument is unavailing, for counsel mistake the point in dispute. The question is not how the contract shall be construed, but had the married woman capacity to execute it? The question is one of capacity, not of construction. The trial court was not asked to construe a mortgage, but to enforce one which our statute declares shall not be enforceable. The purpose of the suit is not to obtain a judicial interpretation of a contract, but to foreclose a mortgage which our law declares a married woman has no capacity to

execute. We suppose it quite clear that if the mortgagor has no capacity to execute a deed or mortgage, the instrument cannot be enforced, although the incapacity is established by the law of the place where the land is situated."

But in *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666, wherein it appeared that the land on which the mortgage was given was situated in Ohio, but that the parties resided and the payment was to be made in Indiana, in which state a married woman was incapable of making a contract of suretyship in any form, it was held that the mortgage was void in Ohio as well as in Indiana, although by the laws of Ohio the mortgage would have been valid.

It has been held that the *lex loci contractus* governs the assignment of an insurance policy by a married woman as security for her husband. *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205, wherein the court said: "It is . . . contended . . . that . . . the assignment must be held sufficient 'upon the theory that the policy being an Ohio contract, and the assignment being a mere incident to the policy, both the policy and assignment are to be construed according to the laws of Ohio; and, further, that the assignment is a chattel mortgage of the insurance money, the situs of which is in Cincinnati, Ohio, and that the assignment is therefore to be construed by the laws of Ohio, and that by the laws of that state the assignment is valid.' It is true that the policy itself is an Ohio contract and governed by the laws of that state, but this rule has no application to the contract of assignment which, though made by indorsement on the policy, is yet a separate and distinct contract from that of the policy. . . . We need not decide what would be the proper rule if the transaction in question were a mortgage. It is not a mortgage, and the words quoted above do not stamp it with that character. In the written transfer itself, it is denominated an 'assignment' four times, and what it undertakes to do is to 'assign, set over, and transfer' the policy. The appellee and her husband owned a chose in action, represented by the policy. This chose in action was for money to become due in Ohio. We apprehend that if a person residing in Indiana, who holds a note or claim against a citizen or corporation in Ohio, and attempts, by indorsement, to 'assign, set over and transfer' such note or claim 'and all sums of money that may become due by virtue thereof,' it would hardly be claimed that this was a mortgage on the money to become due in Ohio, and that although the transfer of the note might be void so as to retain the legal title of the same in the assignor, yet that an interest in the money in Ohio would be

conveyed to the assignee. We regard the position of appellant's counsel (that the attempted transfer of the policy, though void as an assignment, is still valid as a chattel mortgage) as utterly untenable. It is the policy that constitutes the chose in action attempted to be transferred, and the situs of the policy is the domicile of the owner, and by the laws of the place where the transfer was made or attempted to be made, the contract must be controlled."

GROSMAN ET AL.

v.

UNION TRUST COMPANY.

United States Circuit Court of Appeals, Fifth Circuit—January 4, 1916.

228 Fed. 610.

Conflict of Laws — Enforcing Foreign Contract — Public Policy of Forum.

A contract, though valid under the law of the place where it was made, will not be enforced in a jurisdiction where to so enforce it would involve a disregard of the established public policy of that jurisdiction.

[See 5 R. C. L. tit. *Conflict of Laws*, p. 911.]

Husband and Wife — Contracts by Wife — Suretyship for Husband.

Rev. St. Tex. 1911, art. 4621, as amended by Act March 21, 1913 (Acts 33d Leg. c. 32), provides that neither the separate property of the wife, nor the rents from her real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. Article 4624, as amended by the same act, after providing that the separate property of the husband and certain community property shall not be subject to the payment of debts contracted by the wife, except for necessities, contains a proviso that the wife shall never be the joint maker of a note, or a surety on any bond or obligation of another, without the joinder of her husband with her in making such contract. It is held that a contract made by the wife alone, by which she undertakes to become a surety on a bond or obligation on which her husband is a principal is forbidden by the statute, as the word "another" cannot reasonably be given such a meaning as would prevent the husband from being regarded as "another" than his wife, and the wife may not become a surety on

bonds and obligations in which the husband cannot join.

[See note at end of this case.]

Same.

Act Tex. March 21, 1913 (Acts 33d Leg. c. 32), amending Rev. St. 1911, arts. 4621, 4622, 4624, governing a married woman's liability on contracts, evidences the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas.

[See note at end of this case.]

Appeal from United States District Court, Northern District of Texas: **MEKK**, Judge.

Action by Union Trust Company, plaintiff, against Minnie Kahn Grosman et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **REVERSED**.

F. M. Etheridge, Joseph M. McCormick and H. L. Bromberg for appellants.
Wm. H. Atwell for appellee.

Sitting: **PARDEE** and **WALKER**, Circuit Judges, and **SPEER**, District Judge.

[611] **WALKER, J.**—On May 23, 1914, the appellant Mrs. Minnie Kahn Grosman, who has been a resident of Texas since her birth, while on a visit to Chicago, accompanied by her husband, Hiram Grosman, also a resident citizen of Texas, executed a guaranty or suretyship contract, signed by her alone, by the terms of which she made herself a surety for a debt of her husband's firm, Hiram Grosman & Co., evidenced by its note, signed in the firm name by her husband. Some months after Mrs. Grosman's return to her home in Texas, and after the maturity of the obligation of Hiram Grosman & Co. which was referred to in the suretyship contract, this suit was brought against her, against her husband's firm, and against the individuals composing it. The objects of the suit were a recovery against the defendants other than Mrs. Grosman on the obligation for which she signed as surety or guarantor, and also on other obligations, the foreclosure of an asserted lien on personal property by which those obligations were secured, and a recovery against Mrs. Grosman on her contract above mentioned. At the time of the institution of the suit a writ of attachment was issued, which was levied on real estate in the city of Dallas which belonged to Mrs. Gros-

man and was her separate property. Mrs. Grosman duly pleaded her coverture and raised the [612] question of the right of the plaintiff to have enforced by the court in which the suit was brought the liability which was asserted against her. By the decree appealed from the court adjudged in favor of the plaintiff and against Mrs. Grosman the amount called for by her guaranty or suretyship contract, less a credit allowed on account of the application upon the demand of the plaintiff of the proceeds of the sale of personal property upon which a lien in its favor was decreed, and for the amount decreed against Mrs. Grosman ordered the foreclosure of the lien of the writ of attachment levied on her separate property and the sale of that property.

Evidence was adduced to the effect that under the law of Illinois, the state in which Mrs. Grosman signed the instrument sought to be enforced against her, her act had the effect of creating a valid and enforceable contract. It is contended in behalf of Mrs. Grosman that, notwithstanding the validity of the contract where it was made, the decree appealed from was unwarranted, because the effect of it was to contravene a public policy of Texas, established by express legislative enactment. The doctrine which this contention invokes is a well-settled one. A statement and application of it are found in the opinion in the case of *The Kensington*, 183 U. S. 263, 22 S. Ct. 102, 46 U. S. (L. ed.) 190. That case involved the question of the enforceability in the courts of the United States of a provision of a contract of a carrier made in Belgium; the provision being valid there, and the contract expressly providing that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made." It was insisted that the law of Belgium should be applied, though the provision in question contravened a public policy applied by the courts of the United States. With reference to this position the court said:

"The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither

by comity nor by the will of contracting parties can the public policy of a country be set at naught." *The Kensington*, 183 U. S. 269, 22 S. Ct. 104, 46 U. S. (L. ed.) 190.

The result was that the court, concluding that the provision in question was one which contravened a rule of public policy applied in the forum in which the provision came into question, decided that it was not there enforceable. In a much earlier case in the same court the ruling was to the effect that the enforcement of a contract, no matter where made or where to be executed, if that contract is in violation of the law or contravenes the public policy of the government in a forum of which its enforcement is sought, cannot be compelled in that forum. *Kennett v. Chambers*, 14 How. 38, 52, 14 U. S. (L. ed.) 316. For other statements and applications of the same rule, see *Emery v. Burbank*, 163 Mass. 326, 39 N. E. 1026, 47 Am. St. Rep. 456, 28 L.R.A. 57, 5 [613] *Ruling Case Law*, 944, and notes. In an action to enforce any kind of liability, the law of the forum is material in so far as it sets a limit of policy beyond which such obligations as the one asserted will not be enforced there. *Cuba R. Co. v. Crosby*, 222 U. S. 473, 478, 32 S. Ct. 132, 56 U. S. (L. ed.) 274, 38 L.R.A. (N.S.) 40. We do not understand that there is a controversy in this case as to the proposition that a court charged with the administration of the laws of Texas is not required to enforce a contract made in another jurisdiction, and valid there, when to do so involves a disregard of an established public policy of Texas. But it is contended by the counsel for the appellee that the statute law of Texas, which is invoked by the counsel for the appellant, does not evidence the existence of a public policy of that state which would be contravened by the enforcement of the contract in question by a court which administers the laws of that state.

This brings us to a consideration of the statute laws of Texas, to which our attention is directed. Before the taking effect of an act of the Legislature of Texas which was approved March 21, 1913 (Acts 33d Leg. c 32), article 4621 of the Revised Statutes of Texas of 1911 defined the separate property of the husband and of the wife; article 4622 defined the community property of the husband and wife; and article 4624 specified what contracts could be made by the wife. Under the law as it existed while the three articles mentioned were in force, a married woman could only bind herself by a contract entered into for necessities of herself or children or for the benefit of her separate estate. *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537; *Noel v. Clark*, 25 Tex. Civ. App. 136, 60 S. W. 356; *Stroter v. Brackenridge*, 102 Tex. 386, 118 S. W. 634. In immediate con-

nection with the provisions above mentioned is found the following, being article 4625 of the same compilation:

"Judgment and Execution in Such Cases.—

Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff."

The act of March 21, 1913, amended articles 4621, 4622, and 4624. It did not mention article 4625. That article remains in force to some extent, at least, unless it has been deprived of all operative effect as a result of the incompatibility of any of its provisions with those of the later enactment of March 21, 1913. Article 4621, as it was amended by that act, defines the separate properties of the husband and of the wife, provides, subject to qualifications in the case of the wife, for each having the sole management, disposition, and control of his or her separate property, specifies how named separate property of the wife may be conveyed or transferred, and contains the provision that:

"Neither the separate property of the wife, nor the rents from the wife's real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings shall be subject to the payment of debts contracted by the husband."

[614] Article 4622, as amended, specifies what shall be deemed the common property of the husband and wife—commonly called the community property—and designates the part of it which shall be under the control, management, and disposition of the wife alone, "subject to the provisions of article 4621, as hereinabove written." Article 4624, as amended, reads as follows:

"Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payments of debts contracted by the wife, except those contracted for necessities furnished her or her children: Provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

Whatever enlargement of a married woman's right to bind herself by contract can be regarded as having been effected by the act above referred to is subject to the qualification or exception stated in the proviso

found in amended article 4624, which has just been quoted. So far as that proviso affects the right of a married woman to become a surety, its explicit prohibition is that:

"The wife shall never be . . . a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

We think the language of this provision forbids a married woman becoming surety for another, unless her husband joins her in the suretyship contract. The word "another," used as it is in that proviso in describing any bond or obligation of any one besides the wife, cannot reasonably be given such a meaning as would prevent the husband being regarded as another than his wife within the purpose of the proviso. Giving to the proviso the meaning its words express, for the bond or obligation of another to be one as to which a married woman may become a surety, it must be one with reference to which her husband may join her in a contract of suretyship. This excludes a bond or obligation upon which the husband is a principal, as he cannot be his own surety. The result is that the wife is forbidden to become a surety when, from the nature of the case, her husband cannot join her as a cosurety. At any rate, the husband, in becoming a principal on a bond or obligation, cannot well be regarded as joining his wife in the separate contract by which she undertakes to bind herself as a surety. The two obligations are separate and distinct in their natures and consequences, though one of them is collateral to the other.

Whatever doubts as to the correctness of these conclusions might exist, if the proviso in question stood by itself, we think are removed when it is considered in connection with the above-quoted provision of article 4621 as amended. The embodying of the two provisions in the same statute we think clearly manifests a legislative purpose to forbid a married woman becoming a surety for an obligation on which her husband is a principal. It cannot be supposed that it was in the legislative contemplation that the quoted provision of amended article 4621, prohibiting the subjecting to the payment of debts contracted by the husband of the wife's separate property and specified parts of the [615] community property, was to be effective only in the case of the wife failing to become a surety for her husband's debts. If it was so supposed, the will of the Legislature would not control, unless it happened to coincide with that of the wife. The conclusion is that a contract made by the wife alone, by which she undertakes to become a surety on a bond or obligation on which her husband is a principal, is one which a mar-

ried woman is forbidden by the statute law of Texas to make, and the enforcement of which against her separate property or against specified parts of the common property of herself and husband is prohibited by the same law.

When the act of March 21, 1913, is considered in connection with the previously existing statute law which it amended, we think it clearly discloses a legislative purpose to enlarge the capacity of the married women of Texas to bind themselves by contract and to extend their powers over property, both their separate property and specified parts of the community property; but we think, also, that with equal clearness it manifests a purpose to provide, for the protection of the property interests of Texas married women, safeguards which are put beyond their power to remove or dispense with. The act evidences the establishment, or rather the continuance with modifications it makes, of a well-defined public policy of preventing the diminution of the estates of the married women of Texas by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations. A notable feature of that policy is disclosed by the prohibition found in the provision of article 4621, as it was amended, that:

"Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband."

An effect of this provision is to forbid courts which administer the laws of Texas to afford a remedy for the enforcement against the mentioned property interests of the wife of debts contracted by the husband. The denial of such a remedy is general in its terms. It is not confined to Texas contracts of the kind mentioned, but is broad enough in its terms to apply to such contracts wherever made, though they may be valid and enforceable where they were made. It well may happen that an attempt to enforce an obligation, recognized as valid where it was entered into, will fail where the remedy sought is one which is forbidden by the law of the forum. *Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102, 27 U. S. (L. ed.) 104; and see notes to *Union Nat. Bank v. Chapman*, 57 L.R.A. 513, 522, and to *International Harvester Co. v. McAdam*, 26 L.R.A. (N.S.) 774. Certainly it would be overtaxing the comity, which reasonably may be expected to influence the forum resorted to, to call for the enforcement by it of such a remedy, when the obvious purpose of the law of the forum in forbidding the remedy is to

prevent the setting at naught of a public policy established by the same law.

The conclusions are that it is a part of the public policy of Texas, established by statute, to prevent the separate property of its married women being subjected to the payment of such a demand as the one [616] asserted against Mrs. Grosman in this case, and that the decree appealed from is erroneous, in that it subjected her separate property to the payment of that demand.

It follows that the decree against Mrs. Grosman should be reversed; and it is so ordered.

Rehearing denied February 1, 1916.

NOTE.

As a result of the construction placed on the Texas statutes in the reported case, the court holds that a contract by a married woman as surety for her husband is against the public policy of the state of Texas, and therefore that such a contract, although valid under the law of the place where it is made, is not enforceable under the Texas law.

A discussion of the right of a married woman to become surety for her husband, and a particular reference to the question of the conflict of laws on that point, will be found in the note to *First Nat. Bank v. Bertoli*, reported ante, this volume, at page 590.

SHARPE

v.

DENMARK ET AL.

Georgia Supreme Court—February 11, 1915.

143 Ga. 156; 34 S. E. 554.

Husband and Wife — Contracts of Wife — Suretyship for Husband.

Where certain sureties on the bond of a tax collector borrowed money from a bank and loaned it to the wife of the tax collector, who paid it to the county in settlement of a shortage due the county by the collector, and the wife executed a mortgage to the sureties on her land to secure the payment of the money thus loaned, such a transaction would come within the provisions of the statute, which declares that a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and that any sale of her separate estate, made to a creditor of her hus-

band in extinguishment of his debts, shall be absolutely void.

(a) In such a case the sureties on the husband's bond are his creditors within contemplation of law.

(b) It follows that a mortgage executed and delivered by the wife, on land belonging to her individually, to the sureties on her husband's bond, as set out in the first head-note, is absolutely void, and, on foreclosure proceedings in behalf of the sureties, the wife can defend on such ground and defeat the proceedings.

[See note at end of this case.]

New Trial Improperly Denied.

The court erred in refusing a new trial.

(Syllabus by court.)

Error to Superior Court, Toombs county: RAWLINGS, Judge.

Action by Remer L. Denmark, administrator, et al., plaintiffs, against Sallie C. Sharpe, defendant. Judgment for plaintiffs. Defendant brings error. The facts are stated in the opinion. REVERSED.

C. W. Sparks and Hines & Jordan for plaintiff in error.

Hitch & Denmark and Enoch J. Giles for defendants in error.

[157] HILL, J.—Remer L. Denmark as administrator on the estate of James H. Odom, Joseph H. Odom, and A. G. Williamson were plaintiffs in a case seeking the foreclosure of a mortgage executed by Sallie C. Sharpe for the purpose of securing her promissory note for \$4,425.26, payable to the order of James H. Odom, Joseph H. Odom, and A. G. Williamson. The defendant admitted the execution of the note and mortgage, and defended on the ground that they had been fully paid by a conveyance of certain land to one of the plaintiffs, James H. Odom, by Miss Sallie Odom, her aunt. The suit was further defended on the ground that the note and mortgage were given to pay the debt of her husband, who was tax-collector of Toombs county, and who, according to an audit of his books, had been found to be short in his accounts and indebted to the county in a certain sum. The plaintiffs were sureties on his bond as tax-collector; and the consideration of the mortgage was alleged to be for money borrowed of one of the plaintiffs for the purpose of paying the amount claimed to be due by the tax-collector and his sureties on the bond. On the trial of the issue thus raised by the pleadings, and after evidence and charge of the court, the jury returned a verdict for the plaintiffs. The defendant, being dissatisfied with the verdict, made a motion for a new trial, which was overruled, and she excepted.

The motion for a new trial complains of the charge of the court, and of failure to charge, and that the verdict is contrary to the law and the evidence. The plaintiffs contend, that Mrs. Sharpe voluntarily borrowed the money from James H. Odom, Joseph H. Odom, and A. G. Williamson, for the purpose of paying it to Toombs [158] County for a shortage of her husband due to the county as tax-collector; that she herself received the money from the plaintiffs and paid it over to the ordinary of Toombs county; that the lenders were not the creditors of her husband to be paid with the money borrowed, and were not parties to any scheme or arrangement between the husband and wife to borrow the money for such purpose. On the other hand, it is insisted that the sureties were creditors of the husband, and that the mortgage was given to the creditors for money with which to pay the husband's debt, and is void because it is in violation of the statute which provides that "while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by the assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her husband, in extinguishment of his debts, shall be absolutely void." Civil Code, § 3007. Are the sureties here creditors of the husband?

"One who has entered into contract with a party as indorser, guarantor, or surety," is a creditor. 11 Cyc. 1195, and cases cited. *Banks v. McCandless*, 119 Ga. 793, 47 S. E. 332; *Tifton Nat. Bank v. Smith*, 142 Ga. 663, 83 S. E. 526, L.R.A.1915B 1116, was an action by the bank against Mrs. Smith to recover the amount due on a note signed by her, payable to the order of the James Manufacturing Company, and indorsed by that company and W. E. James. The defendant pleaded, that the note was given to the company without consideration, and was made by her solely as an accommodation to W. E. James and the company, in order that the latter might secure the indorsement of E. A. Buck on notes given to the Commercial National Bank and the American National Bank of Macon; that she was a married woman, and E. A. Buck had full notice of that fact and of all the circumstances attending the execution of the note and the purposes for which it was made; that in substance her contract was one of suretyship, and being a married woman she was not liable thereon, by reason of the statute forbidding a married woman to bind her separate estate by a contract of suretyship. The jury found for Mrs. Smith. It was held: "One who contracts with the payee of an accommodation note, executed by a married woman, that on the faith of its security he will indorse a note for the payee for discount at a bank, and receives her note with full knowledge of

all the facts, enters into an arrangement to make [159] the married woman ultimately liable to pay the debt of another; and such a contract will fall within the law's condemnation of contracts of suretyship by a married woman." We think the instant case comes within the principle decided in the *Smith* case. The sureties are creditors of the husband; and when the wife's separate estate is mortgaged to secure those creditors, who have borrowed the money from a bank to lend the defendant's wife for the purpose of paying the deficit in her husband's account as tax-collector, and the creditors take the wife's mortgage on her land, given to secure the note of the creditors, with a full knowledge of all the facts, as the evidence in this case discloses, this is but another way of making the wife a surety by taking her property in pledge to pay the husband's debt. The evidence is undisputed that one of the creditors, James H. Odom, agreed to raise the money with which to pay the shortage of the husband as tax-collector, and thus relieve him and his sureties, if Mrs. Sharpe would secure the sureties by a mortgage, which was done. It is argued that this was an original undertaking on the part of the wife, and that she voluntarily mortgaged her property to secure the money borrowed by the sureties in order to lend it to the wife, who was to settle the shortage with the county; but it is equally true that if the sureties are creditors of the husband—and we hold that they are,—this act is, on the principle decided in the *Smith* case, making the wife liable to pay the debt of her husband, which the law says shall not be done. So, irrespective of the instructions of the court to the jury, and of the failure to charge as complained of, we think that the wife's property, under the facts of this case, cannot be thus taken in extinguishment of her husband's debts.

From what has been said, it follows that the court erred in refusing a new trial.

Judgment reversed.

All the Justices concur, except Fish, C.J., absent.

NOTE.

In the reported case it is held that a mortgage given by a married woman to secure sureties on her husband's bond is void, on the ground that the sureties are to be regarded as creditors of the husband and that any arrangement which makes a married woman ultimately liable to pay the debt of another falls within the statutory condemnation of contracts of suretyship by a married woman. The question of the right of a wife to become surety for her husband is fully treated in the note to *First Nat. Bank v. Bertoli*, reported ante, this volume, at page 590.

HITE

v.

REYNOLDS ET AL.

Kentucky Court of Appeals—March 12, 1915.

163 Ky. 502; 173 S. W. 1108.

Suretyship — Agreement to Resort First to Surety — Evidence Sufficient.

Evidence held to sustain a finding that the wife of a purchaser of mortgaged land mortgaged her separate property to the mortgagee for the amount of the incumbrance, on the agreement that the mortgagee in case of default should first resort to her property before resorting to the property purchased by her husband, who executed notes to the vendor for the price.

Husband and Wife — Contracts of Wife — Suretyship for Husband.

Under Ky. St. § 2127, providing that no part of a married woman's estate shall be subjected to the payment for the debt of another, including her husband, unless set apart for that purpose by deed or mortgage, a wife's separate property may be mortgaged by her and her husband to secure the debt of the husband or another, regardless of whether her property is a homestead.

[See note at end of this case.]

Marshaling Assets — Necessity of Common Debtor — Injury to Third Persons.

Equity will not marshal securities except as against a common debtor, and will never do so where it will work injustice to an innocent third person.

Evidence — Parol to Vary Writing — Showing Consideration.

Under Ky. St. § 472, providing that the consideration of any writing with or without seal may be impeached or denied by pleading verified by oath, the true consideration of a deed may be shown though it contradicts the writing.

Pleading — Verification — Time to Object to Failure to Verify.

Under Civ. Code Prac. § 138, providing that no objection shall be taken after commencement of the trial to any pleading for want of verification, want of verification to a petition alleging a mistake in a deed will be treated as waived when not objected to.

Appeal from Circuit Court, Graves county.

Action by M. W. Reynolds et al., plaintiffs, against Mrs. J. E. Hite et al., defendants. Judgment for plaintiffs. Defendant named appeals. The facts are stated in the opinion. **AFFIRMED.**

Moorman & Warren for appellant.
Hester & Hester for appellees.

[503] **SETTLE, J.**—This litigation arose out of the sale and conveyance by the appellee, M. W. Reynolds, of a seventy-two-acre tract of land lying in Graves County, to John W. Hite and E. R. O'Connor. The appellant, Mrs. J. E. Hite, wife of John W. Hite, owned in her own right a thirty-acre tract of land in the same county, upon which she, her husband and E. R. O'Connor, their adopted son, resided. Shortly after reaching his majority O'Connor married, following which he and the Hites found the thirty-acre farm too small for their joint needs, so they concluded to sell it and invest the proceeds, as far as they would go, in a larger tract of land, better suited to their purposes. To this arrangement Mrs. J. E. Hite seems to have fully assented and was a party.

Thereafter J. W. Hite and E. R. O'Connor, with the consent of Mrs. J. E. Hite, opened negotiations with the appellee Reynolds looking to the purchase of his seventy-two-acre farm. At that time the appellee R. S. Wilson held a mortgage on Reynolds' farm, to secure a note of \$800.00 for money he had loaned Reynolds. The appellant, Mrs. J. E. Hite, J. W. Hite and E. R. O'Connor were advised of the existence of this mortgage. Reynolds offered to sell J. W. Hite and E. R. O'Connor his farm at the price of \$1,800.00; \$800.00 to be paid in cash and the remainder in five notes of \$200.00 each, bearing six per cent. interest from date, payable in one, two, three, four and five years, respectively, and secured by a vendor's lien on the land. The cash payment was, as Reynolds informed Hite and O'Connor, desired to pay the \$800.00 note held against Reynolds by Wilson, and discharge the mortgage lien given on his farm to the latter. J. W. Hite and E. R. O'Connor expressed their willingness to pay \$1,800.00 for Reynolds' farm upon the terms proposed, but admitted their inability to make the \$800.00 cash payment. They, however, told Reynolds that they or Mrs. J. E. Hite had a thirty-acre farm which they could sell for \$800.00 and would give him a mortgage on the farm to secure the \$800.00 payment. Reynolds refused to accept the mortgage, but informed them that as he wanted to pay the \$800.00 he owed Wilson, the latter might be willing to accept the mortgage for \$800.00 on the Hite thirty-acre farm in satisfaction of the mortgage debt of that amount Reynolds was owing him.

[504] Thereupon J. W. Hite, O'Connor and Reynolds went to see Wilson and laid the matter before him. Wilson refused to accept a mortgage on the Hite thirty-acre farm in satisfaction of the note and mortgage of Reynolds held by him, but agreed that Reynolds might sell his farm to Hite and O'Connor for \$1,800.00; that he would accept the joint note of Hite and O'Connor for \$800.00, se-

cured by a mortgage on the Hite thirty-acre farm, and give them a year to pay it, but that he would still hold his lien on the Reynolds farm as additional security for the \$800.00, and that as Reynolds was to give Hite and O'Connor from one to five years to pay the remaining \$1,000.00 of the \$1,800.00 they were to give him for his land, he (Wilson) would expect his \$800.00 note to be paid before Reynolds was paid the \$1,000.00 due him, and, if not so paid, he would enforce its satisfaction by a sale of the Hite land under his mortgage before enforcing his lien on the Reynolds land.

The trade was closed between the parties upon the terms proposed by Wilson, and Reynolds and wife in accordance therewith executed to J. W. Hite and E. R. O'Connor a deed conveying them the seventy-two acres of land, upon receiving which J. W. Hite and E. R. O'Connor executed to Reynolds their five joint notes of \$200.00 each, bearing interest and payable as above stated. At the same time J. W. Hite and E. R. O'Connor executed their joint note to the appellee R. S. Wilson for the \$800.00 due him, and the mortgage agreed to be given on the Hite thirty-acre farm to secure its payment was also executed by J. W. Hite and his wife, the appellant J. E. Hite, as had been agreed between them, Wilson and Reynolds. The deed and mortgage were written by the Clerk of the Graves County Court, and a vendor's lien was retained in the deed on the seventy-two acres of land, to secure the payment of the five notes of \$200.00 each executed by J. W. Hite and E. R. O'Connor to Reynolds, it being provided therein that if the makers failed to pay the first or any one of the \$200.00 notes when due, all should immediately become due and payable. The deed also retained a lien on the land to secure the \$800.00 note held by R. S. Wilson, in respect to which it says:

"It is understood, agreed and made a part of the consideration herein, that the \$800.00 note above described is and shall be superior to the balance of the [505] notes described herein, and the said last notes are not collectable until after said first note has been fully paid."

The mortgage from J. E. Hite and J. W. Hite to R. S. Wilson, in addition to setting out the \$800.00 note executed by J. W. Hite and E. R. O'Connor to R. S. Wilson, and describing the thirty-acre tract of land, contains this recital:

"And in order to further secure the payment of the said note the parties of the first part hereby grant, sell and mortgage to the party of the second part, etc."

Shortly after the execution of the mortgage to R. S. Wilson by J. W. Hite and J. E. Hite on the thirty-acre farm of the latter,

she sold and, in conjunction with her husband, conveyed the land to one T. L. Cameron, at the price of \$800.00 and accepted his note therefor, payable on the day the note of \$800.00 to R. S. Wilson, secured by the mortgage, became due. The deed to Cameron was made subject to the mortgage lien in favor of Wilson. After thus purchasing the land of the Hites, Cameron advised them that he would be unable to pay for it and offered to reconvey it to Mrs. Hite in satisfaction of the note which he had executed to her. This offer she accepted, and Cameron thereupon executed to her a deed reconveying her the land, which reinvested her with the legal title, subject to the mortgage in favor of Wilson.

J. W. Hite and E. R. O'Connor having failed to pay at their maturity the \$800.00 note of Wilson and the first of the \$200.00 notes of Reynolds, Wilson and Reynolds instituted a joint action against them and Mrs. J. E. Hite, whereby Wilson sought to recover of J. W. Hite and E. R. O'Connor personal judgment for the amount of the \$800.00 note they had executed to him, and to enforce, first, his mortgage lien on the Hite thirty-acre farm for its payment, and second, his lien on the Reynolds land for the balance; and Reynolds sought a personal judgment against J. W. Hite and E. R. O'Connor for the aggregate amount of the several notes, to wit: \$1,000.00, due him, and the enforcement of his vendor's lien on the seventy-two-acre farm in satisfaction thereof.

It was, in substance, alleged in the petition that the draftsman of the deed from Reynolds to J. W. Hite and E. R. O'Connor, by the fraudulent procurement of the latter, or mistake on his part, erroneously inserted [506] therein the clause quoted above instead of stating, as he was instructed by Reynolds and Wilson to do, what had actually been agreed upon by the parties to the conveyance, viz.: that the appellant, Mrs. J. E. Hite's, thirty-acre tract of land, in the event of the nonpayment at maturity of the \$800.00 note due Wilson, should first be subjected to its payment; and that Wilson's lien on the seventy-two acre tract sold by Reynolds to J. W. Hite and E. R. O'Connor to further secure its payment, which was superior to that retained by Reynolds to secure the payment of the five \$200.00 notes executed to him by J. W. Hite and E. R. O'Connor, should next be enforced, if necessary, for such balance thereof as the Hite land did not pay. The court was asked to reform the deed by making the corrections indicated.

By their joint answer J. W. Hite and E. R. O'Connor denied the alleged mistake in the deed from Reynolds to them, and also denied that the contract under which they purchased the Reynolds land required the sale first of

Mrs. J. E. Hite's land to pay the Wilson \$800.00 note; and alleged that she gave the mortgage on her land to secure its payment, with the agreement and understanding that it would be enforced and her land sold in satisfaction of the Wilson note, only in the event it was not paid by the enforcement of the lien which Wilson also held on the Reynolds land to secure its payment.

The appellant, J. E. Hite, filed a separate answer, containing substantially the same denials and averments found in the joint answer of J. W. Hite and E. R. O'Connor; and further alleging that the thirty-acre farm upon which she gave the mortgage was owned and occupied by her as a homestead; that it was of less value than \$1,000.00 and that she executed the mortgage to secure the \$800.00 note to Wilson under an agreement that she was to be conveyed by the deed from Reynolds, such an interest in the seventy-two-acre tract of land as would equal the value of her thirty-acre farm, but that the deed was not so made. The affirmative matter of the two answers was controverted by reply.

Following the taking of proof by the parties and the submission of the case, the circuit court gave the appellee R. S. Wilson personal judgment against the defendants, J. W. Hite and E. R. O'Connor, for the amount of the \$800.00 note, with six per cent interest from August 21, 1913, and the appellee M. W. Reynolds personal judgment [507] against them for \$1,080.00, with six per cent interest from August 21, 1913; adjudged the enforcement of Wilson's mortgage lien on the Hite thirty-acre tract of land and the lien given him by the deed from M. W. Reynolds to J. W. Hite and E. R. O'Connor on the seventy-two acres of land therein conveyed the latter, by a sale of the lands to satisfy his lien debt, but directed that the Hite land be sold first for that purpose, and then the Reynolds land to pay such part of the debt as may not have been discharged by the sale of the Hite land. Also adjudged the enforcement of Reynolds' lien on the seventy-two-acre tract and directed its sale in satisfaction of his debt, subject to the prior lien and debt of Wilson, or so much thereof as may not have been satisfied by the sale of the Hite land. From that judgment Mrs. J. E. Hite has appealed.

It is proper to say in this connection that the record furnishes no proof whatever of any such agreement as that set up in the answer of Mrs. Hite. On the contrary, the absence of any such agreement or understanding is established by her deposition, for it frankly admits that she consented to mortgage her thirty-acre farm to secure Wilson's note, to aid her husband and adopted son in purchasing the Reynolds land; and that she

sold her farm to Cameron because she wished and intended that its proceeds should be used by her husband and adopted son in paying for the Reynolds land. The deposition also contains the admission that there was no agreement between her, Reynolds and Wilson, or between her and her husband or son, that she was to be conveyed an interest in the Reynolds land as a consideration for mortgaging or selling her land.

It is equally manifest from her testimony, and other evidence as well, that she was fully informed of the nature and terms of the contract under which Reynolds sold his farm to her husband and son; that she even went to the trouble of going with her husband to view the Reynolds land before its sale to him and the son was consummated, and that her husband had full authority from her to act for her in selling her land or in representing that she would mortgage it for the purpose of enabling him and the son to buy the Reynolds farm.

According to the testimony of R. S. Wilson, M. W. Reynolds, Sam Hall, Mrs. Mary Fortner and ——— Lockhart, the trade as made between Reynolds and Wilson, [508] J. W. Hite and E. R. O'Connor, was that J. W. Hite and E. R. O'Connor were to buy the Reynolds farm at the price of \$1,800.00; \$800.00 of which was to be paid in their note of that amount executed to R. S. Wilson and due one year after date, to be secured by a mortgage on the thirty-acre farm owned by Mrs. J. E. Hite; and that for the remaining \$1,000.00 J. W. Hite and E. R. O'Connor were to execute to Reynolds their five notes of \$200.00 each, payable in one, two, three, four and five years, respectively, which notes were to be secured by a lien on the Reynolds farm, and that upon the same farm R. S. Wilson was also to have a lien, as additional security for the \$800.00 note executed to him by J. W. Hite and E. R. O'Connor; but that this lien, while superior to that of Reynolds for the several notes aggregating \$1,000.00 executed to him by J. W. Hite and E. R. O'Connor, was not to be enforced by Wilson until he had first exhausted his mortgage lien on the Hite thirty-acre farm. These facts, corroborated by the other witnesses mentioned, will more clearly appear from the following questions and answers taken from the deposition of Wilson:

"Q. Which place was to furnish the money first towards paying your debt? A. My understanding was that they were to pay me out of the one they sold, the Hite land. Q. Then if I understand you, in the talk between you and the parties O'Connor said they had sold the Hite land, or contracted it to a party, at \$800.00, and agreed that you could have a mortgage on this land to secure you, and if that failed to pay all of the \$800.00

to you then Reynolds agreed that you should collect the balance out of his land. A. Yes, sir, that was what was said about it. Q. The deed that was actually written provides that the \$800.00 should be a superior lien and be paid in full before any part of the \$1,000.00 balance was to be paid. But it fails to mention anything about the Hite land in that deed. Now explain how the matter should have been arranged to agree with the contract, as it was made by the parties in your presence. A. They were to make the first payment out of the Hite land, the deed ought to have shown that. Q. State whether or not you told Reynolds that you would not look to the Hite place for your money at all. A. I did not. That was where I was expecting to get it. Q. In the contract and agreement between you parties, out of what was the [509] \$800.00 note due you to be paid? A. Out of the Hite place. Q. Why did you require a lien on the Reynolds place for your \$800.00? A. That was a small place, the Hite place was, and I wanted to be sure to get my money. . . . I told them that I didn't know anything about the Hite place and would not want to risk that, so I would want a lien on both places. Q. State what was said, if anything else, about the matter. A. I was talking to O'Connor one day and I said wasn't that the agreement, for them to pay that money out of that place on the other, and he said that was the agreement and trade, but it was not on record."

The case turns upon an issue of fact and the question of credibility of witnesses. On the one hand we find five witnesses, Reynolds, Wilson, Hall, Lockhart and Mrs. Fortner, the last three wholly disinterested, testifying that the contract was as claimed by appellees and held by the circuit court. On the other hand, of the few other witnesses whose depositions were taken, only J. W. Hite and E. R. O'Connor testified that the contract was as claimed by them. In addition, the circumstances attending the transactions between the parties to the contract support the testimony of appellees' witnesses. Mrs. Hite, after mortgaging her land to Wilson to secure the \$800.00 note of her husband and son, sold it to Cameron to get the money to pay the note. This she would not have done if she had understood that it was required of Wilson to enforce the lien he held on the Reynolds land in satisfaction of the note, before he would have the right to enforce the mortgage on her land for its payment. Furthermore, it is altogether reasonable that Wilson should have been willing to aid Reynolds to sell his farm, and J. W. Hite and E. R. O'Connor to purchase it, by taking their note for \$800.00, secured by a mortgage on the farm of Mrs. J. E. Hite, in lieu of

the note of Reynolds for a like amount, and yet retain as additional security for the note a lien that he already had on the Reynolds land, to be enforced, however, only in the event he failed to collect the note by enforcing the mortgage on the Hite land; but wholly unreasonable that Reynolds would have consented to such a contract as Hite and O'Connor claim was made, which would not only have allowed the retention by Wilson of the lien on the seventy-two acres of land constituting the only security Reynolds had for the \$1,000.00 of [510] purchase money owing him thereon, but compelled him to exhaust such lien in satisfaction of his \$800.00 note, before enforcing his mortgage on the Hite land to pay it.

It appears from the record that both the Reynolds and Hite lands were sold as directed by the judgment; the former bringing \$1,250.00 and the latter \$725.00. So, if appellant's contention were allowed to prevail, to pay the Wilson debt, now amounting to about \$1,000.00, out of the proceeds of the Reynolds land, would leave but about \$250.00 to be applied on the Reynolds debt, now amounting, approximately, to \$1,200. As the sale resulted under the judgment, the proceeds of the Hite land lacked \$275.00 of paying Wilson's debt, and this \$275.00 must, of course, be paid out of the \$1,250.00 realized for the Reynolds land, which will leave but \$975.00 to be applied on Reynolds' debt of \$1,200.00, thereby causing the latter to sustain a loss of \$225.00. The fact that Mrs. Hite's land was of no greater value than a homestead, and that it was occupied by her as such, gives her no right to complain of the judgment. Although the land could not otherwise be subjected to the payment of the note owing by her husband and adopted son to Wilson, the mortgage made it liable therefor.

Section 2127, Kentucky Statutes, provides: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyances. . . ."

This is an express declaration that the wife's property may be mortgaged by her and her husband to secure the debt of the husband or another, regardless of whether or not it is a homestead. *Miller v. Sanders*, 98 Ky. 535, 33 S. W. 621; *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937; *New York Life Ins. Co. v. Miller*, 56 S. W. 975, 22 Ky. L. Rep. 230.

The case presented is not one requiring the adjustment of equities as between creditors or as between debtors. Equity will not

marshal securities except as against a common debtor, and will never do so where it will work injustice to an innocent third person. *Hughes v. Shannon*, 13 Ky. L. Rep. (abstract) 782. To have compelled Wilson to collect his debt out of the seventy-two-acre tract instead [511] of the Hite land, would have ignored the contract made by the parties and resulted in the very injury to Reynolds he attempted from the beginning to guard against. In selling his land he doubtless had two objects in view, viz.: to obtain its market value, and to be discharged from the debt of \$800.00 he was owing Wilson. To effect the latter object he had first demanded that enough of the \$1,800.00 he was to receive as the consideration for the land, be paid in cash to be used in liquidating the Wilson note. Failing to get the cash, he and Wilson agreed with J. W. Hite and O'Connor that Wilson would accept the joint note of the latter for the \$800.00, secured by a mortgage on the land of Mrs. Hite; and while Wilson also retained as security for this note a lien on the Reynolds land, it was with the distinct understanding between all the parties that in the event of the failure of Hite and O'Connor to pay the \$800.00 note at maturity, Wilson would enforce the mortgage on the Hite land for its payment; and in the event all of the debt was not obtained from the sale of the Hite land, that, for the balance, he would enforce the lien retained on the Reynolds land. That this arrangement was fully understood and agreed to by J. W. Hite, E. R. O'Connor and Mrs. J. E. Hite, the evidence leaves no doubt. Indeed, at the time of the purchase by J. W. Hite and O'Connor of the Reynolds land, they and Mrs. Hite had already contracted a sale of the latter's land to Cameron, and the mortgage was given on the Hite land with the full knowledge and intention on the part of Mrs. Hite, her husband and O'Connor, that it was to be sold and its proceeds applied to the payment of the Wilson note.

Under the contract as thus made, the lien retained by Reynolds on the land he sold J. W. Hite and O'Connor to secure the \$1,000.00 of the purchase money going to him, furnished apparently safe security for the debt, as the lien of Wilson on the same land could only be enforced for what might be left unpaid of his debt after the application thereto of the proceeds arising from the sale of the Hite land. This view of the case is supported by the great weight of the evidence and is, in addition, consonant with reason.

The circuit court by the judgment rendered determined the rights of the parties without reforming the deed. This, in view of the relief sought, it had the right [512] to do. We are, however, satisfied from the evi-

dence that the misleading statement in the deed was caused by a mistake or inadvertence on the part of the draftsman thereof.

Section 472, Kentucky Statutes, provided: "The consideration of any writing, with or without seal, may be impeached or denied by pleading verified by oath."

It has been held that under this statute the true consideration of a deed may be shown, although it contradicts the writing. *Neurenberger v. Lehenhauer*, 66 S. W. 15, 23 Ky. L. Rep. 1753. Here the mistake in the deed is alleged in the petition, and though the petition is not verified, as the want of verification was not objected to, it must be treated as having been waived. Civil Code, Section 138; *Myers v. Douglas*, 99 Ky. 267, 35 S. W. 917.

As in our opinion the rights of the parties were properly determined by the circuit court, the judgment is affirmed.

Whole court sitting. Judge Turner dissenting.

NOTE.

In the reported case a statute providing, substantially, that no part of a married woman's estate shall be subjected to her husband's debts unless that estate shall have been set apart for that purpose by mortgage or other conveyance, is held to be an express declaration that a married woman may mortgage her property in the statutory manner for her husband's debts. For a full discussion of the right of a wife to secure the payment of her husband's debts, see the note to *First Nat. Bank v. Bertoli*, reported ante, this volume, at page 590.

ROYAL ET AL.

v.

SOUTHERLAND ET AL.

North Carolina Supreme Court—March 17, 1915.

168 N. Car. 405; 84 S. E. 708.

Husband and Wife — Contracts of Wife — Suretyship for Husband.

A contract of suretyship being primarily a contract between the surety and creditor, a wife may, under Laws 1911, c. 109, authorizing married women to contract and deal as *femes sole*, become surety for her husband.

[See note at end of this case.]

Same.

Const. art. 10, § 6, declaring that the real and personal property of any woman acquired before marriage shall be and remain her sole and separate property not liable for the debts of her husband, does not inhibit a wife from becoming the surety of her husband; the purpose being merely to protect the estate of the wife from liability for her husband's debts arising by reason of the coverture.

[See note at end of this case.]

Effect of Fraud of Husband — Rights of Creditor.

Where a wife signed a note as surety for her husband, the fact that he induced her through false representations cannot be shown in defense; the note being given for a good consideration and the creditor not being a party to the fraud.

Evidence — Parol to Vary Writing — Scope of Contract of Suretyship.

Where a wife as surety for her husband signed a note and mortgage, she cannot in an action on the note and mortgage testify that she only intended to pledge her land and did not intend to incur further obligation, for that would contradict the terms of the written instrument.

Appeal from Superior Court, Sampson county: DANIELS, Judge.

Action by Alvin Royal et al., plaintiffs, against Mrs. Georgie A. Southerland, et al., defendants. Judgment for plaintiffs. Defendant named appeals. **AFFIRMED.**

[405] Civil action to recover balance due on a note under seal, executed by *feme covert* defendant with her husband, R. B. Southerland, as his surety. The note was given for \$1,000, to secure same a second mortgage on the wife's land was also executed. The land having been sold under decree of foreclosure, the sum of \$757.50 was realized thereon as the portion applicable to the present note, and this sum having been properly entered as a credit, there was recovery against the *feme* defendant for the balance due. Judgment on the verdict for balance due on note, and defendant excepted and appealed, assigning a number of errors.

John D. Kerr for appellant.

B. H. Crumpler for appellees.

[406] HOKE, J.—The statute of 1911, ch. 109, known as the Martin Act, authorizes married women to contract and deal as if they were unmarried except in reference to conveyances of real estate and as to contracts between the husband and the wife, in both of which cases certain formalities are required to make these conveyances and contracts efficient and binding.

It is the obvious intent and meaning of the statute that a *feme covert* may bind herself by her ordinary contracts (Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820), and we see no reason why the privilege or capacity does not extend to contracts of suretyship for her husband when the same are otherwise valid; and the same view has prevailed in other States having laws of similar import. Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; Major v. Holmes, 124 Mass. pp. 108-109; Mayo v. Hutchinson, 57 Me. 547.

This is not primarily a contract between the husband and the wife, but, so far as this statute is concerned, is to be properly considered as one between the husband and wife on the one part and the creditor on the other.

It is urged that to allow recovery on the facts presented would be in contravention of Article X, sec. 6, of our Constitution, which provides that the "real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female and shall not be liable for any debts, obligations, or engagements of her husband," etc.

The purpose of this section was to protect the estate of the wife from liability for her husband's debts arising under the common law by reason of the coverture, but it was not intended by that section to protect the property from her own obligations. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L.R.A. 461; Brinkley v. Balance, 126 N. C. 393, 35 S. E. 631.

By the enactment of the Martin Act, conferring the capacity to contract on married women as if they were *feme sole*, when she signs and delivers a note, though it may be as surety, in reference to the creditor or holder the obligation is hers and not his, and the constitutional provision referred to has no application.

It was further contended that his Honor committed error in excluding testimony tending to show certain representations on the part of the husband to the wife as to the effect of putting her signature on the note, but there is no claim or suggestion that these representations were made known to the payee of the note or that he had any part in them.

[407] The note is under seal and given for valuable consideration, and, under the circumstances appearing, the representations to the wife by the husband may not be allowed to affect the creditor.

Again, it is insisted that error was committed in not allowing the *feme* defendant to testify that in signing the note and mortgage

to secure the same she only intended to pledge her land for the debt, and did not intend to come under any further obligation; but this would be in express contradiction of her written note, and it is well understood that when the entire agreement is in writing and the language is clear and meaning plain, the same may not be contradicted or varied by parol. In such case, and in the language of the Chief Justice in *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510, "The written word abides." *Deering v. Boyles*, 8 Kan. 529, 12 Am. Rep. 480.

There seems to be no question of parties raised in the record, but there is high authority for the position that in conferring on married women the absolute freedom of contract the right carries with it the privilege and liability of suing and being sued alone. *Paterson v. Franklin*, 168 N. C. 75, 84 S. E. 18; *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820; *Worthington v. Cooke*, 52 Md. pp. 297-309.

We find no error in the record, and the judgment in plaintiff's favor is
Affirmed.

NOTE.

The court in the reported case holds that under a general enabling statute a married woman has the power to contract as surety for her husband, such a contract not being one between husband and wife. The court further holds that a constitutional provision to the effect that the wife's property shall not be liable for the husband's debts protects the estate of the wife from the common-law liability of coverture but does not protect her estate from her own obligation insured as surety for her husband. The right of a wife to become surety for her husband is discussed in the note to *First Nat. Bank v. Bertoli*, reported ante, this volume, at page 590.

STATE

v.

BOWEN AND COMPANY, INCORPORATED.

Washington Supreme Court—June 9, 1915.

86 Wash. 23; 149 Pac. 330.

Constitutional Law — Policy or Wisdom of Statute.

Questions of the wisdom, necessity, and policy of law are solely for the legislature, Ann. Cas. 1917B.—40.

and if the legislature proceeds regularly, violating no constitutional restriction, questions as to the necessity and policy of the law are conclusively determined in favor of the statute, if any state of facts could exist which would justify it.

[See 6 R. C. L. tit. *Constitutional Law*, p. 107.]

Commission Merchants — Validity of Regulation.

The rights of liberty and property, guaranteed by Const. U. S. Amend. 14, and the corresponding provisions in the state constitution are not designed to interfere with the police power of the state for the protection of the health, safety, morals, and welfare; hence Rem. & Bal. Code, §§ 7024-7035, known as the Commission Merchants' Law, enacted to protect those consigning property to commission merchants, is a valid exercise of the police power, and does not interfere with the rights of liberty and property, which include the privilege of pursuing an ordinary calling without restriction.

[See note at end of this case.]

Constitutional Law — Presumption in Favor of Statute.

Every presumption is in favor of the validity of a statute, and, until the contrary is shown beyond a reasonable doubt, a statute enacted in the exercise of the police power will not be overturned.

[See 6 R. C. L. tit. *Constitutional Law*, p. 97.]

Commission Merchants — Validity of Regulation.

The Commission Merchants' Law (Rem. & Bal. Code, §§ 7024-7035) is not invalid because requiring a small license fee from such person; the fee not being oppressive.

[See note at end of this case.]

Same.

Nor is it invalid as unreasonable because requiring the giving of a surety bond for \$3,000 before license can be issued.

[See note at end of this case.]

Constitutional Law — Right to Attack Statute — Persons Not Affected.

The defendant cannot attack the validity of the Commission Merchants' Law on constitutional grounds not applicable to their particular situation.

[See 19 Ann. Cas. 175; Ann. Cas. 1915C 57.]

Statutes — Effect of Partial Invalidity.

Where the provisions of the Commission Merchants' Law (Rem. & Bal. Code, §§ 7024-7035) applicable to defendants were valid, the invalidity of other portions which could be separated from the remainder will not defeat the entire act.

[See Ann. Cas. 1916D 9.]

Appeal from Superior Court, King county:
ALBERTSON, Judge.

Criminal action. Bowen and Company convicted of violation of statute and ap-

peals. The facts are stated in the opinion. **AFFIRMED.**

Bogle, Graves, Merritt & Bogle for appellant.

John F. Murphy and *H. B. Butler* for respondent.

[24] *HOLCOMB, J.*—Appellant was prosecuted in the superior court and convicted of a violation of chapter 139, Laws of 1907, p. 266 (Rem. & Bal. Code, §§ 7024-7035), known as the commission merchants' law, in having carried on the business of commission merchant without first having given bond and procured a license as required by said law. Appellant demurred to the information upon the ground that the act in question is invalid, unconstitutional, and void, for the reasons, (1) that it violates articles 4, 5, and 7, and § 1 of art. 14, of the amendments to the constitution of the United States, and §§ 3, 7, 9, 17, and 21 of art. 1 of the constitution of the state of Washington; and (2) that it is an attempt to regulate interstate commerce. The court overruled the demurrer. At the trial appellant admitted all the allegations of fact contained in the information, and also admitted additional facts not alleged, to wit, that, at the time in question, appellant's principal business was to sell farm, dairy, orchard, and garden products on commission, and that the person from whom he received the produce in question was then a resident of the state of Washington.

Appellant concedes the right of the legislature to pass proper laws reasonably tending to regulate such occupations and business as affect the health, safety, comfort, or welfare of the public in general, but insists that the business [25] attempted to be regulated by the law in question is a harmless and ordinary business or calling, and that to justify interference by the state with such occupation at least two conditions must clearly appear: (1) that the interests of the public generally, as distinguished from those of a particular class, require such an interference; and (2) that the regulation attempted is reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Appellant's brief while being very forceful and presenting a painstaking review of the authorities upon the questions involved, follows no set order of presentation, and we shall not attempt to follow any set order.

Great reliance seems to be placed in the holdings of this court in the case of *State v. Smith*, 42 Wash. 237, 7 Ann. Cas. 577, 84 Pac. 851, 114 Am. St. Rep. 114, 5 L.R.A. (N.S.) 674, involving the plumbers' licensing law, and *In re Aubrey*, 36 Wash. 308, 1 Ann. Cas. 927, 78 Pac. 900, 104 Am. St. Rep. 952,

involving the horseshoers' licensing law. Those cases are very illuminating and correctly state the principles of law applying to the regulation of businesses and callings under the police power of the state. The *Richey* case, as was stated by the court, per *Rudkin, J.*, was where the law obviously attempted to place the control of the plumbing business in the hands of a board to be composed of two master plumbers and one journeyman plumber, who were given power to pass upon the qualifications of other persons desiring to follow that business, and there was no other end in view. The court there said:

"We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States."

The same was true of the horseshoers' law, passed upon in the *Aubrey* case. Manifestly there was no relation between [26] the law there in question and the public health, peace, safety, or general welfare. As a general proposition, the questions of the wisdom, necessity, and policy of the law are for the legislature to determine, and if the legislature proceeds regularly, violating no other constitutional restriction or prohibition, the questions of fact as to the wisdom, necessity, and policy of the law are conclusively determined if a state of facts could exist which would justify the legislation in question. *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. ed.) 77; *Home Telephone, etc. Co. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50, 55 U. S. (L. ed.) 176; *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L.R.A. 442; *State v. Pitney*, 79 Wash. 608, Ann. Cas. 1916A, 209, 140 Pac. 918; *Carstens v. DeSelle*, 82 Wash. 643, 144 Pac. 934. Authorities could be multiplied to the same effect, but it is needless.

We may also give assent to the main proposition advanced by appellant, that the enjoyment upon terms of equality with all orders in similar circumstances of the privilege of pursuing an ordinary calling or business and of acquiring, holding, and selling property, subject only to its civil liability for debt or damages and the right to contract in respect thereto, is an essential part of its rights of liberty and property, as guaranteed by the fourteenth amendment to the Federal and the corresponding provisions of our state constitution. But the Federal and state constitutional limitations were not designed to interfere with the exercise of the police power of the state for the protection of health, safety, morals, and welfare, and the prevention of fraud. The power which the legislature has to promote the general welfare is very great, and the discretion which it has

and may exercise in the employment of means to that end is very large. True, it is not all powerful, while both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, to the end that no man may be compelled to hold his life or the means of living or any material [27] right essential to the enjoyment of life, at the mere will of another,

"and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 6 S. Ct. 1064, 30 U. S. (L. ed.) 220.

The precise bounds of the police power have never been prescribed, nor will the courts attempt to define and prescribe its limitations rigidly. *Com. v. Alger*, 7 Cush. (Mass.) 53; *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. Rep. 909; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A. (N.S.) 466; *State v. Sommerville*, 67 Wash. 638, 122 Pac. 324; *State v. Superior Court*, 87 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L.R.A. 1915C 287; *State v. Mountain Timber Co.* 75 Wash. 581, 135 Pac. 645; *State v. Pitney*, 79 Wash. 608, Ann. Cas. 1916A 209, 140 Pac. 918; *Carstens v. DeSellem*, supra.

Every possible presumption is in favor of the validity of the statute until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. *Sinking-Fund Cases*, 99 U. S. 700, 25 U. S. (L. ed.) 496; *Livingston County v. Darlington*, 101 U. S. 407, 25 U. S. (L. ed.) 1015; *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253; *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

As to the exercise of the police power, it suffices in general to say that the courts will arrest the execution of the statute when it manifestly conflicts with the constitution, either state or Federal; but the courts cannot run a race of opinion upon points of right, reason, and expediency with the law-making power. *Cooley, Constitutional Limitations* (7th ed.) 236.

"It is true that equality of rights, privileges, and capacities should be the aim of the law, and if . . . special burdens or restrictions are imposed in any case it must be [28] presumed that the legislature designed to depart as little as possible from fundamental maxims of government." *Cooley, Constitutional Limitations* (7th ed.), 562.

The particular business here sought to be regulated is, of course, a legitimate and, in many respects, a necessary and important

business. The business of producing farm, garden, orchard, and dairy products is one of the most important industries of the state. The producer cannot ordinarily be both producer and marketer. The legislature seems to have found that there exists a class of factors or merchants whose principal business is that of selling such produce on commission, and that certain abuses have grown up in that business; so, to provide regulation and prevent such abuses, the act in question was passed. Such an act, similar in most of the provisions, was sustained in Minnesota, in *State v. Wagener*, supra, and a similar act was also sustained in Illinois, in *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L.R.A. 802. A similar act in Michigan was held bad, in *People v. Berrien Circuit Judge*, 124 Mich. 664, 83 N. W. 594, 83 Am. St. Rep. 352, 50 L.R.A. 493. Bringing to aid the presumptions in favor of the legislative power, and, also, the presumption that a state of facts exists which would warrant the selection of the persons or classes which this law hits, we believe that the reasoning in the Minnesota and Illinois cases is convincing.

"This objection to the law is not valid. The legislature has power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. A discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats." *Lasher v. People*, supra.

[29] See also *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L.R.A. (N.S.) 1207, and cases there cited.

The law appears to be a very stringent and in some respects even drastic one, but the validity of a statute is not subject to objection because of the stringency or difficulty of its requirements. *Dent v. West Virginia*, 129 U. S. 114, 9 S. Ct. 231, 32 U. S. (L. ed.) 623.

"It is not for the court to say that a constitutional law shall not have effect, because it is in the judgment of a court unreasonable." *Barton v. McWhinney*, 85 Ind. 481.

See also *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *Hamilton v. St. Louis County Court*, 15 Mo. 3; *State v. Cary*, 126 Wis. 135, 105 N. W. 792, 11 L.R.A. (N.S.) 174; *Point Roberts Fishing Co. v. George*, etc. Co. 28 Wash. 200, 63 Pac. 438.

Nor does that part of the law requiring a license render the act void.

"The most proper business may be regulated to prevent its becoming offensive to the

public sense of decency or for any other reason injurious or dangerous, and rules for the conduct of the most necessary and common occupations are prescribed when from their nature afford peculiar opportunities for imposition and fraud." Cooley, *Constitutional Limitations* (7th ed.) 886.

See also 8 Cyc. 1067; 25 Cyc. 614.

The fact that this law in the main provides for prevention of fraud upon the customer of the commission merchant, assuming that the legislature found a state of facts requiring such regulations to prevent such fraud, renders the regulation by licensing, among other features, appropriate. The license fee here is small, not in any way oppressive or unreasonable, and for any revocation or threatened revocation of the license by the licensing authority, without just cause, relief is to be afforded by the courts.

Appellant insists that the requirement of the law, in order to obtain a license, that a surety company bond in the sum of \$3,000 be furnished, is an unreasonable and invalid requirement. [30] It insists also that it is impossible of performance. The last contention is undoubtedly merely a conclusion or statement of opinion. We have heretofore held, in the case of *Ferguson-Hendrix Co. v. Fidelity, etc. Co.* 79 Wash. 528, 140 Pac. 700, that the provision of the law requiring such bond in order to obtain a license is a valid exercise of the police power of the state. It is urged, however, that that question was not involved and was not proper to be decided in that case. *State v. Robins*, 71 Ohio St. 273, 2 Ann. Cas. 485, 73 N. E. 470, 69 L.R.A. 427, where a similar statute in Ohio was not sustained, is cited in support of appellant's contention. We cannot give our assent to the reasoning or the conclusion in that case; and while it may be true that the validity of this section of the law was not involved in the *Ferguson-Hendrix* case, supra, yet we adopt the reasoning in that case as supporting this provision of the law.

The appellant urges the unconstitutionality of the other provisions of the law to render the entire act void. We conceive it to be the unquestioned rule that a person cannot invoke a constitutional objection to a part of a statute not applicable to its own particular case. *Southern R. Co. v. King*, 217 U. S. 524, 30 S. Ct. 594, 54 U. S. (L. ed.) 868; *Engel v. O'Malley*, 219 U. S. 128, 31 S. Ct. 190, 55 U. S. (L. ed.) 128; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 U. S. (L. ed.) 1197; *Rosenthal v. New York*, 226 U. S. 260, Ann. Cas. 1914B 71, 33 S. Ct. 27, 57 U. S. (L. ed.) 212; *Darnell v. Indiana*, 226 U. S. 390, 33 S. Ct. 120, 57 U. S. (L. ed.) 267; *Cram v. Chicago, etc. R. Co.* 85 Neb. 586, 19 Ann. Cas. 170, 123 N. W. 1045, 26 L.R.A.(N.S.) 1028; *Wadin v. Czuczka*, 16

Ariz. 371, 146 Pac. 491. Unless a person's rights are directly involved, courts will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue, unless the unconstitutional feature of it, if it exists, is of such a character as to render the entire act void. *New York Cent. etc. R. Co. v. U. S.* 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613; *People v. Huff*, 249 Ill. 164, 94 N. E. 61; *Hammer v. State*, 173 Ind. 199, 21 Ann. Cas. 1034, 89 N. E. 850, 140 Am. St. Rep. 248, 24 L.R.A.(N.S.) 795; *Wadin v. Czuczka*, [31] supra. But that a law may be valid in part and separable and capable of being executed, so that the invalid part may be disregarded, is a well settled principle of statutory construction. *Lewis' Sutherland, Statutory Construction*, 578, 579; Cooley, *Constitutional Limitations* (7th ed.) 246, 247; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464; *Albany County v. Stanley*, 105 U. S. 305, 26 U. S. (L. ed.) 1044.

The provisions in some sections of the act, for imprisonment for debt and for recovery of attorney's fees in suits upon the bonds provided for in the act, are matters not involved in this prosecution, and with which the appellant has no concern. We may well assume that the legislature would have enacted the body of the act providing for licensing and regulation of commission merchants regardless of the provisions for recovery of attorney's fees in civil actions upon the bonds and for prosecution and punishment for violation of any of the sections of the act. We, therefore, hold that, as to those sections, whether they are or are not unconstitutional and void, the provisions, so far as involved in this prosecution, are entirely independent and separable therefrom; and if said sections should be determined to be unconstitutional and void, such determination and the elimination of such provisions would not affect the remainder of the act.

The same reasoning applies to the contention of the appellant that the law contravenes the provisions of the Federal constitution relating to interstate commerce. So far as the present case is concerned, there is no issue involving rights under the interstate commerce clause of the Federal constitution. However, the question whether a statute applies to interstate commerce depends upon the actual operation; and a statute which is void as to interstate commerce may be valid as regards commerce which is carried on wholly within the state. 21 Am. & Eng. Enc. of Law (2d ed.) 792; *State v. Wagener*, supra.

Other matters are discussed by appellant which are not involved in the prosecution and are not, in our opinion, to be [32] passed

upon in this case. We cannot say that the act, so far as it applies to the facts upon which appellant was prosecuted, is palpably in violation of any of the provisions referred to in the Federal or state constitution.

The judgment is therefore affirmed.

Parker, Mount, Main, and Ellis, JJ., concur.

CHADWICK, J. (*dissenting*).—No one can take exception to the abstract propositions stated in the majority opinion. They require no citation of authority. Granting that the Ferguson-Hendrix Co. case was correctly decided, the real question in this case was not even discussed in that opinion. The Ferguson-Hendrix Co. case decided nothing more than that the provision of the commission merchant law requiring a surety bond was constitutional. It did not assume to pass upon other provisions of the law.

The power of the state to pass laws to preserve the peace, to protect the health and safety of the citizen, and promote his welfare is axiomatic. That such laws must be general in their application is admitted. It does not follow that, in the application of its power, the state cannot make classes. But it is equally true that the state cannot make classes or a class within a class, unless the class to which the law is made to apply and the distinction drawn bears some reasonable relation to the evil sought to be cured. In this case the evil sought to be remedied is the impositions practiced upon the producers of farm and dairy products who live at a distance from the market places and who are, perforce of that circumstance, compelled to trust their commodities to those who sell their goods on commission.

Granting that it is within the power, as is held by the majority and as I admit, of the state to provide that all commission merchants must take out a license and must give a bond, and make the report required by the statute and subject their books to the inspection of all who are interested, the real point in this case is not whether that can be [33] done, but whether the legislature can say that it shall be done by some commission merchants and not by others.

Section 16 of the act defines commission merchants. It says that commission merchants within the meaning of this act are those whose *principal* business is dealing in farm and dairy products. Unless we can find some reason for the distinction between those who are doing some of their business with the farmers and dairymen and those who are doing the principal part of their business with farmers and dairymen, the law cannot be sustained. What is the test? A reference to the evil and the proposed remedy. Under the law, a man or firm who is doing a \$100,000 business, \$40,000 being with goods consigned

from farmers and dairymen, and \$60,000 in flouring mill products, commercial food stuffs and fruits from foreign shipments, would clearly be exempt because the principal part of his business is not with farmers and dairymen. On the other hand, if a firm does a business of \$10,000, all or the major part of which is with the farmers and dairymen upon consigned goods, he is subject to the law because it is the principal part of his business. If a grower ships a ton of potatoes to the man who does the \$100,000 business, his farm consignments being the smaller part of the business, and at the same time ships a ton of potatoes to the man who does the \$10,000 business, it being all with the farmers and dairymen, can it be said that there is any reasonable ground upon which to rest the distinction made by the law? Is not the farmer just as liable to imposition from the man who is doing the lesser part of his business in farm and dairy products as he is from the man who is doing the greater part? It follows that no reasonable ground for the distinction can be drawn.

This principle was noticed and adhered to by this court in the Spokane employment agency case, *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 130 Am. St. Rep. 1100, 21 L.R.A. (N.S.) 263. We there said:

[34] "When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition."

We also quoted from the case of *State v. Ramsey County*, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650:

"The classification must be based on some reason suggested by a difference in the situation and the circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar."

We also quoted the principle from the case of *Tugman v. Chicago*, 78 Ill. 405:

"An ordinance which would make the act done by one penal and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained because it would be unjust and unlawful."

Other cases and *McQuillin*, Municipal Ordinances, 193, were cited to sustain our opinion. Under this case and all the elementary rules of law, the distinction made by the statute must be sustained by the *character* of the act and not by the extent of the act, or the *amount* of business done by those against whom the law is directed. Indeed, this case is an aggravated violation of the rule, for the one who does a lesser part of his

business with the farmer and dairyman may in fact be the worst offender.

The Macho case was followed in *Seattle v. Dencker*, 58 Wash. 501, 108 Pac. 1086, 137 Am. St. Rep. 1076, 28 L.R.A. (N.S.) 446, and *State v. W. W. Robinson Co.* 84 Wash. 246, 146 Pac. 628. See also *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. Rep. 909. It is possible that a law providing that all commission merchants having transactions with farmers and dairymen exceeding in amount a certain sum could be sustained as a proper classification, but to hold that the aggregate amount of business done with the farmer and [35] dairyman is a basis of classification cannot be sustained by reason or authority. They might just as well say that dry goods merchants dealing with farmers and dairymen should give a bond as a precaution and remedy against imposition and that hardware merchants should not.

"A much worse discrimination would be a discrimination between citizens of the same class engaged in the same business, where there is no reason suggested by the difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business [amount of business], a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article." *Seattle v. Dencker*, supra.

Neither can it be said that § 16 of the act can be held to be unconstitutional and the rest of the act remain. Section 16 is the very cap-stone of the arch. Without it there could be no law, for the legislature in that section says who are and who are not commission merchants within the meaning of the statute. Following the rule and construction laid down by us in the stock food case, *State v. W. W. Robinson Co.* supra, and by all courts when a similar question has been presented, we must presume that the law would not have been passed unless a section had been included exempting a certain class within a class. Otherwise no reference would have been made to the character and amount of business done. The law would have been complete without it. Answering a similar contention made in the stock food case, we said:

"The Attorney General further argues that, if § 13 (*Id.* § 6022) is void, it may be excluded from the act, and the balance of the act may still remain a valid law. But it is apparent that § 13 (*Id.* § 6022) is a material part of the act. It is more than probable that if this section had not been inserted the act would not have passed. It was inserted for the purpose of excluding cereal and flouring mills from the operation of the act. To say that this section is [36] unconstitutional

and does not affect the remainder of the act is to say that every person, firm or corporation is bound to comply with the terms of the act, when the legislature itself has said that cereal and flouring mills are not bound by the act. In short, to hold this section void and the rest of the act valid is to determine, in face of an express statement of the legislature to the contrary, that the act applies to all persons dealing in concentrated commercial feeding stuffs."

The statutes in Wisconsin, Illinois and Minnesota are not the same as ours. They do not make a class within a class. The statutes in each of those states cover "every," "any" and "all" "persons, firms and corporations" dealing in farm products on commission. Undoubtedly the power to classify all who are so engaged is within the power of the legislature. In *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L.R.A. 442, the court, after finding that a law controlling commission merchants was constitutional, noted some of the abuses calling for the law, and of the sale of farm products, said:

"And, with respect to other agricultural products and farm produce, it is to be observed that they are largely of a perishable nature, and subject to rapid deterioration in transit, or after reaching the consignee. This fact gives to the latter an opportunity to falsify his report of a sale to the distant consignor, and to insist that the article consigned had become more or less unmarketable before sale could be made; and here, as in the case of grain, the latter has little or no opportunity to ascertain the truth. Without wishing to intimate that fraud of this nature had actually become so prevalent as to justify the accusation made, we do say that a majority of the people in this state had become convinced of the truth of these charges, and in great numbers besieged the legislature in behalf of the suppression of the alleged evil practices. This was a matter of common knowledge. It was publicly believed that the business of selling agricultural products and farm produce on commission had become saturated with false and fraudulent methods, to the great injury of a large class of our citizens, who were compelled to deal with commission men, and who were powerless to detect [37] or prevent the wrong, and that the business had thus become sufficiently affected with public interests as to be the proper subject of police regulation."

The principle of the law is right, but it cannot be sustained under an act making the things complained of penal in one class and not in another. It seems to me that a joker was deliberately slipped into the law.

For these reasons, I dissent.

Morris, C.J., Fullerton, and Crow, JJ., concur with Chadwick, J.

NOTE.**Validity of State or Municipal Regulation of Commission Merchants.****General Rule.**

The enactments in various jurisdictions designed to control and regulate the business of commission merchants dealing in farm produce by requiring the payment of a license fee and the execution of a bond for the faithful performance of duty to the consignor as a condition precedent to doing business have generally been held to find support in the police power inherent in the state and not to be void as class legislation. *State v. Mohler*, 98 Kan. 465, 158 Pac. 408; *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L.R.A. 442. And see the reported case, in connection with which should be noted, however, the holding in the more recent decision of *State v. Powles*, 90 Wash. 112, 155 Pac. 774, wherein the act declared to be constitutional in the reported case was held to be void because of the indefiniteness of the term "commission merchant" as used therein. Compare *People v. Berrien* Circuit Judge, 124 Mich. 664, 83 N. W. 594, 83 Am. St. Rep. 352, 50 L.R.A. 493. Thus in *State v. Mohler*, supra, the court said: "The business of commission merchants dealing in farm produce has grown to be one of great volume and much importance. In its development its tendency seems to be to centralize in the larger cities, far removed from the points of origin, and where by no practical possibility can the originators of the traffic, the consignors, keep personal check on the doings of the commission merchants, who are merely the agents of the consignors. Such a situation would seem to warrant a reasonable extension of the state's governmental power over the business. The act does classify commission merchants, but the classification is reasonable. It relates to all who sell farm produce on commission for resale, and this includes 'agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey,' but not timber, floricultural products, tea or coffee. It practically reaches all the important and useful products of farm and truck garden. It specifically exempts matters of little consequence to the Kansas producer. If, as argued, it also exempts live stock, that too is a reasonable exemption, since live stock is almost invariably shipped in carloads and is so valuable as to justify the producer or shipper in the expense of accompanying his shipment to market and personally supervising the fidelity of the commission merchant who makes the sale for him or in making the sale himself. As modern business is now conducted, it is prac-

tically impossible for the ordinary farmer or fruit producer or truck gardener to market his own products without the agency of the commission merchant. Nor do the exactions of the statute seem unduly burdensome. It exacts a license of \$10 per annum. That fee is not onerous. It requires a bond to insure the commission merchant's fidelity and the payment of his obligations. This is in accord with the general tendency of modern business, to relieve it from the uncertainty of fraud or insolvency."

In *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L.R.A. 442, supra, it was said: "The act . . . if sustained at all, must be upon the ground that it is a lawful regulation for the public good—a legitimate exercise of the police power of the state. The design seems to have been to protect a large class of people engaged in agricultural pursuits, and more or less remote from market, from imposition and actual fraud when intrusting their products and produce into the hands of commission men for sale. And it is no argument against the statute to say that commission men are engaged in a legitimate business, and for that reason are not subject to police regulation, if the public good demands it. . . . What evils or supposed evils did the members of the legislature have in mind, and were attempting to remedy, when enacting this law? The fact is that the public generally looked with distrust upon the methods of merchants engaged in selling agricultural products and farm produce upon commission, perhaps without good reason. It had become a matter of common talk among the people that those who handled wheat imposed upon their consignors by reporting sales and accounting for the proceeds at the lowest prices at which that article had been sold within the period of time during which the sale could have been made, and without regard to the prices actually obtained. With prices fluctuating at all times, as is the fact in the wheat market, and rarely remaining stationary for more than a few minutes at a time, the opportunity for fraud seems to be without limit when selling this commodity on commission. In addition to this is the fact that the consignor usually resides at a considerable distance from the commission merchant, and is practically unable to discover whether he has been cheated or not. And, with respect to other agricultural products and farm produce, it is to be observed that they are largely of a perishable nature, and subject to rapid deterioration in transit, or after reaching the consignee. This fact gives to the latter an opportunity to falsify his report of a sale to the distant consignor, and to insist that the article consigned had become more or less unmarketable before sale could be made; and here, as in the case of

grain, the latter has little or no opportunity to ascertain the truth. Without wishing to intimate that fraud of this nature had actually become so prevalent as to justify the accusation made, we do say that a majority of the people in this state had become convinced of the truth of these charges, and in great numbers besieged the legislature in behalf of the suppression of the alleged evil practices.

. . . It was publicly believed that the business of selling agricultural products and farm produce on commission had become saturated with false and fraudulent methods, to the great injury of a large class of our citizens, who were compelled to deal with commission men, and who were powerless to detect or prevent the wrong, and that the business had thus become sufficiently affected with the public interests to be the proper subject of police regulation. We are of opinion that the legislature did not exceed its powers when, under the circumstances, it enacted a measure having relation to, and a tendency to accomplish, the desired end, such as is the law now before us. . . . The class here created consists of those who engaged in the business of receiving agricultural products and farm produce for sale, or receive or solicit the same for sale; in short, those who are engaged in the business of selling the same. The class is as broad as it need be. The peculiar characteristics of the agricultural products and farm produce already referred to, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as to suggest the practical necessity for distinctive legislation on the subject—different from what would be expedient or necessary in the case of other property sold on commission—and to justify the legislature, in its discretion, in putting those who sell such articles on commission in a class by themselves. It was the evils which were thought incident to the sale of agricultural products and farm produce which evoked the law. Here was a class of merchants who . . . had peculiar opportunities to defraud, not common to other merchants, although they might sell on commission, and it was this class that the legislature proposed to put under restraint."

But in *People v. Berrien* Circuit Judge, 124 Mich. 664, 83 N. W. 594, 83 Am. St. Rep. 352, 50 L.R.A. 493, supra, the court in holding a statute to be unconstitutional said: "The act is . . . aimed solely at commission merchants who engage in the business of selling farm produce for producers upon commission. It provides that such a merchant shall pay a fee and execute a bond, as conditions precedent to doing business. The condition of the bond is the honest and faithful performance of his contracts. The business of buying and selling on commission has existed ever since commerce began. There are and always have

been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have been dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee, and execute a bond to pay his debts and do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience, of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or dry-goods carries on his business. The law can find no support in the police power inherent in the state. . . . The legislature of this state is not empowered by the constitution to regulate contracts between its citizens who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them. The constitution guarantees to citizens the right to engage in lawful business, unhampered by the legislative restrictions, where no restrictions are required for the protection of the public. We are compelled to hold this law void, because (1) it is class legislation and (2) it is an unjustifiable interference with the right of citizens to carry on legitimate business."

It would seem that an act regulating the business of commission merchants is not void as an improper interference with interstate commerce. In *State v. Mohler*, 98 Kan. 465, 158 Pac. 408, the court said: "The question concerning this act's interference with interstate commerce might well be left until some specific difficulty concerning such commerce arises, for it is familiar law that no act is ever declared to be unconstitutional except where the party challenging it is directly affected and prejudiced by some specific invasion of his constitutional rights. A commission merchant's business is that of a warehouseman and sales agent. As a warehouseman, his business is subject to state control notwithstanding the goods which he handles may be commodities of interstate commerce. . . . As a sales agent, the commission merchant is subject to state control although the commodities sold by him be of an interstate character. . . . Even if it were held

that the Act of 1915 did not or could not apply to interstate commerce, the state's power over domestic or intrastate commerce is supreme. Certain it is that the federal government may not meddle with purely intrastate business, and it would hardly do to say that where there is a domestic business and an interstate business of the same nature the state may not regulate the domestic business because the federal government does not likewise and similarly regulate the competitive interstate business in the same territory. To admit that would be an end of all state government. . . . Sad indeed would be the situation of a poor truck gardener of the Kaw valley if he might not apply to some state or local official, but only to some bureau in far-off Washington, D. C., to learn whether John Doe was a licensed and trustworthy commission merchant to whom he might intrust his little stock of garlic and radishes for resale."

And in *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L.R.A. 667, it was held that a statute providing for the keeping of records by commission merchants was not void as an interference with interstate commerce. The court therein said: "The law under consideration is assailed upon the ground that it is in violation of the federal constitution, as an interference with interstate commerce.

. . . In the case before us, the consignor resided within the state, but, to our minds, that fact is not significant. The law applies to all shipments, from beyond as well as within the state. The object of the statute is to protect the public in its dealings with commission merchants against an infringement upon the rights of shippers of grain. Indeed, the law might be open to the objection of an unjust discrimination were its benefit conferred only upon the citizens of the state. The question of transportation is not involved. It is immaterial from whence the grain is shipped, over what route or through what states it travels to the point of destination. The provisions involved in this case take no account of the grain as an article of commerce until it has been sold, and, even then, only to require the consignee to make a true report of the transaction within a reasonable time. The subject-matter of the law as applicable to this case no more relates to interstate commerce than the criminal statutes which protect grain from larceny after arrival within the borders of the state. If it be an interference with the prerogative of Congress to require commission merchants to make a true report of their dealings with citizens of Dakota or Wisconsin for their protection, why is it not equally an interference with interstate commerce when our criminal laws are put in force to arrest and punish for the larceny of such grain upon arrival within the borders of our lines? We fancy there is no

crying demand on the part of the citizens of our sister states to be excluded from the benefit of these protective measures."

In *Kansas City v. Grush*, 151 Mo. 128, 52 S. W. 286, it was held that a city having under its charter the power to license, tax and regulate "merchants" could not by ordinance tax produce dealers and exempt other merchants since by so doing a part of a class which could be legally taxed was singled out and thus the uniform taxation provision of the state constitution was violated.

The *New York* legislature has enacted a statute for the regulation and control of commission merchants doing business in farm produce which requires the payment of a license fee and the execution of a bond. (*Agricultural Law*, § 284.) See *Huson v. Brown*, 90 Misc. 175, 154 N. Y. S. 131. In that case it was held that the principal by giving the bond and receiving produce as a licensed commission merchant had effectually waived its right to attack the constitutionality of the act, and that the surety company stood in no better position than its principal.

Application of Rule.

In *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L.R.A. 802, the court sustained the Illinois statute which required the payment of an annual license fee by commission merchants in cities of more than 50,000 population dealing in "butter, eggs, poultry, game, dressed calf, green and deciduous fruits, berries, and other commodities, the product of the farm, with the exception of grains, live stock and dressed meats." The court said: "It is argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock and dressed meats. The claim is, that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats. The state laws for the inspection of grain provide for the protection of shippers in that market, and there is also state inspection of live stock and dressed meats. The law which classifies small commission merchants en-

gaged in the produce commission business rests upon a reasonable ground as a basis for the classification. Such a business may afford great opportunities for swindling, and be productive of great abuses, and the legislature may properly enact a law applying to cities of such size as in the legislative judgment would permit the growth and existence of such abuses."

Statutory provisions requiring commission merchants to keep records of the sales of all consignments, and to account and report promptly to the consignor are valid. *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L.R.A. 802; *State v. Mohler*, 98 Kan. 465, 158 Pac. 408; *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L.R.A. 442; *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L.R.A. 667. Thus in *State v. Mohler*, supra, the court declared to be valid an exactment of the legislature of that jurisdiction providing as follows: "Every commission merchant must keep a complete record of all consignments received and sold by him, with the name of the consignor, date of receipt, kind and quality of the consignment, the price received, name and address of person to whom the goods are sold, and the items of expense, and this record must be forwarded to the consignor within forty-eight hours after the transaction unless otherwise agreed. Such a record shall also be kept by the commission merchant for one year, and shall be open to the inspection of the consignor and the secretary of state, board of agriculture or their agents." It was therein said: "Perhaps this has always been the law, for what is the relation of consignor and commission merchant but that of principal and agent, and what is the statutory requirement to account and report but the common-law duty of faithful and full disclosure to his principal of all the agent's doings? Illustrations are submitted in affidavits showing how onerous, burdensome, and expensive it would be to make a detailed account of the sales of a commission merchant. Thus a barrel of garlic is usually sold in small quantities, the remainder being kept in cold storage until called for. A carload of onions containing 470 crates is disposed of by the commission merchant to perhaps 400 different retail merchants. A barrel of radishes is usually sold in bunches of a few dozen. Many such illustrations are given, and while they do show that a strict compliance with the act will necessitate a good deal of bookkeeping, we cannot but marvel how commission merchants have kept track of all these details hitherto. Probably the legislature was convinced that they did not keep accurate accounts of these innumerable transactions—not through wilful breach of faith—but because it was not

humanly possible for a man's memory to stand such a strain, and hence the legislative determination that the memory method, or whatever method it was, should be superseded by an accurate and detailed system of accounting. If this occasions an added expense to the business, the traffic will have to bear it."

A requirement that the bond given by the commission merchant shall be executed by a surety company, thus denying the right to deposit money or to give personal security, does not render the act unconstitutional. *Ferguson-Hendrix Co. v. Fidelity, etc. Co. of Maryland*, 79 Wash. 528, 140 Pac. 700, where in the court said: "It is well known that lapse of time, fluctuations in values of property, the uncertainty of human life, and the risk of a dishonest surety, often render personal security inadequate when called upon to meet its promised responsibility. This is doubtless one of the reasons which influenced the legislature in requiring that the bond be executed by a surety company authorized to do business in this state."

DICKEY

v.

SOUTHWESTERN SURETY INSURANCE COMPANY.

Arkansas Supreme Court—January 25, 1915.

119 Ark. 12; 173 S. W. 398.

Fraudulent Conveyances — Consideration — Indemnity to Surety.

A surety who guaranteed performance of a contract may, upon furnishing the principal with advances necessary to enable him to carry out his contract, demand security, and other creditors of the principal cannot attack mortgages given or assignments made as in fraud of creditors.

Assignment — What Constitutes — Agreement between Debtor and Creditor.

Where the commissioners of an improvement district agreed to hold up payment until plaintiff's claim was satisfied, and the debtor consented, there is no assignment of the payment; plaintiff not being a party to the agreement.

Foreign Corporations — Authority of Court to Dissolve.

The courts of the forum have no authority to dissolve or wind up a foreign corporation: their powers being limited to taking charge of the property within the jurisdiction of the

court and enforcing the rights of creditors there.

[See note at end of this case.]

Conflict of Laws — Existence of Corporation.

Whether a foreign corporation, doing business in the state and treated as a de facto going concern, has a legal existence, depends upon the laws of the state of its domicil.

Corporations — Forfeiture of Charter — Who May Assert Forfeiture.

Oklahoma statutes requiring corporations to pay a license tax for doing business, and providing that a failure shall work a forfeiture, being chiefly revenue measures, individuals dealing with an Oklahoma corporation cannot question the validity of its existence on the ground that it had not paid its tax.

[See 8 Am. St. Rep. 193.]

Appeal from Crawford Chancery Court: FALCONER, Chancellor.

Action by W. S. Dickey, plaintiff, against Southwestern Surety Insurance Company et al., defendants. Judgment for named defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

L. H. Southmayd, New & Krauthoff and Frederic O. Berge for appellant.

Read & McDonough and G. A. Paul for appellee.

[15] McCULLOCH, C. J.—This case originated in the chancery court of Crawford County as an action instituted by appellant, W. S. Dickey, against the Oklahoma Engineering Company, a corporation domiciled in the State of Oklahoma, to subject assets of that corporation in this State to the payment of a debt owing by said corporation to appellant, and to cancel a mortgage and other securities executed by said Oklahoma Engineering Company to the Southwestern Surety Insurance Company, another foreign corporation. On July 8, 1912, the Oklahoma Engineering Company entered into a contract with an improvement district in the city of Van Buren, Arkansas, for the construction of sewers in that city, and appellee, at the instance of said Oklahoma Engineering Company, entered into obligation with the improvement district to guarantee performance of the contract on the part of the Engineering Company. The Engineering Company proceeded to perform said contract and purchased from appellant material to be used in the work of constructing the sewers. A balance in the sum of \$1,646.69 is still due appellant on the account for the price of said material furnished. On November 27, 1912, the Engineering Company executed to appellee a mortgage on machinery and tools which it owned to secure advances of money which

had already been made to it and to be thereafter made, and further to indemnify appellee company from loss on the aforesaid bond. About the same time, the Engineering Company made an assignment in writing to appellee of the amounts due upon estimates from the improvement district. Appellee was joined as defendant in the suit [16] and the prayer of the complaint was that said mortgage to appellee and the assignment of the amounts due upon estimates from the improvement district be cancelled and set aside as a fraud on the rights of appellant, and that the property be subjected to the payment of appellant's debt. Appellee filed an answer and cross-complaint, in which all the allegations of fraud were denied and a foreclosure of the mortgage was prayed for.

After the proof was taken, and before the submission of the case, appellant offered to file an amended complaint setting up the fact that the Engineering Company had forfeited its charter on June 30, 1912, by failing to pay the corporation tax in the State of its domicile, and asked that the three directors be substituted as defendants and held to account as trustees for the creditors of the corporation pursuant to the statutes of Oklahoma.

The case was heard upon the pleadings and the testimony, and final decree was rendered dismissing appellant's complaint as against the appellee and awarding to appellee a foreclosure of the mortgage and directing payment over of the funds paid into court under the assignment of estimates due from the improvement district.

(1) The evidence supports the finding that when appellee gave the bond to the improvement district to guarantee performance of the contract on the part of the Engineering Company, the latter undertook to indemnify appellee against loss. The contract of the Engineering Company with the improvement district provided for completion of the work on a certain date, and before that date it became apparent that the Engineering Company would not be able to complete performance of its contract. In order to protect itself from loss, appellee agreed to make advances of money to enable the Engineering Company to complete performance of the contract, and the mortgage and the assignments of estimates were executed to secure the amounts so advanced. The testimony is very voluminous and a strenuous effort has been made to show that improper motives prompted these transactions [17] between the Engineering Company and appellee, but we fail to find anything at all in the evidence which would warrant the conclusion that the transactions were in any wise tainted with fraudulent intention, or that the effect thereof was to cheat, hinder or delay the creditors of the

Engineering Company. Appellee was already liable to the improvement district for the performance of the contract, and the agreement to make further advances was prompted alone by that obligation and to protect itself from loss. It certainly had a right to exact security from the Engineering Company, and there is no semblance of fraud in the transaction so far as we are able to discover from the evidence. Certainly, the form of the transaction did not operate as a wrongful interference with the assets of the corporation so as to amount to a hindrance or defeat of its creditors, and there is, as already stated, nothing in the evidence to show that there was any actual fraud intended. We fail to see any principle upon which the transactions could be declared to be fraudulent or that would warrant a court of equity in setting aside the security. The evidence is entirely too voluminous to justify an analysis and discussion in this opinion.

(2-3) It is contended that prior to the assignment, the amount due on one of the estimates was assigned or appropriated to the payment of appellant's debt and that it should not be included within the securities held by appellee. The facts upon which this claim is based are that some time prior to the time the mortgage and the assignment to appellee were executed, appellant, through his representative in Van Buren, insisted upon payment of his account, and the commissioners of the improvement district showed a disposition to hold back payment of an estimate until appellant's account should be paid. The sum of \$500 was paid on the estimate to the agent of Engineering Company and there was an agreement that the balance should be held by the improvement district pending a settlement with appellant. There was no agreement, either express or implied, that the money should be appropriated to the payment of appellant's debt. The most [18] that can be made out of it was that the amount should be held up indefinitely until a settlement be made with appellant. This does not constitute an assignment of the amount in the hands of the improvement district nor an appropriation to the payment of appellant's debt. *Christmas v. Russell*, 14 Wall. 69, 20 U. S. (L. ed.) 762. In the case just cited, the court said: "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise." Now, if the improvement district was being sued, there might be

more force in the contention that the agreement to postpone payment until after settlement with appellant barred the right of the Engineering Company or its assignee to recover until after settlement with appellant; but there being no appropriation of this fund to the payment of appellant's debt, the parties to that agreement, namely, the improvement district and the Engineering Company, could have rescinded it at any moment and paid the money over to the Engineering Company or any one to whom it assigned the debt. It is not contended that appellant had any lien which he could assert against the improvement district, or that the money was held back for the purpose of enabling the improvement district to protect itself against any claim made by appellant. Appellant was not a party to that agreement, if it can be properly held in law to constitute a contract, and is therefore not in position to challenge the right of the Engineering Company or appellee, as its assignee, to collect the amount from the improvement district.

(4) The remaining question to be determined relates to the contention of appellant that the Engineering Company forfeited its right to exist as a corporation under the laws of Oklahoma, the place of its domicile, that the forfeiture resulted *ipso facto* from the failure to comply [19] with the statute with respect to the payment of a license fee, and that its property passed into the hands of the directors as trustees for the benefit of creditors. It is contended, on the other hand, by appellee, that under the Oklahoma statute the legal existence of the corporation could not be questioned collaterally and could only be drawn into question by a suit brought at the instance of the State of Oklahoma. The Engineering Company being a foreign corporation, the courts of this State have no right or authority to dissolve it and wind up its business, the courts of equity of this State being limited to taking charge of the property within the jurisdiction of the court and enforcing the rights of creditors here. *Culver Lumber, etc. Co. v. Culver*, 81 Ark. 102, 99 S. W. 391, 118 Am. St. Rep. 17; *Federal Union Surety Co. v. Flemister*, 95 Ark. 389, 130 S. W. 574. The Engineering Company existed *de facto* when all the transactions under review took place, and both parties to the present controversy dealt with it as a valid corporation and as a going concern, so to speak. Therefore, the question of the legal existence of the corporation depends upon the Oklahoma laws as interpreted by the courts of that State.

The statutes of Oklahoma provide that every corporation organized under the laws of the State and every foreign corporation doing business therein shall "procure an-

mually from the Corporation Commission a license authorizing the transaction of such business in this State," that such corporation shall pay a license fee of fifty cents for each one thousand dollars of authorized capital stock, and that "every domestic corporation subject to the provisions of this act, who shall fail to file the annual statement and to pay the annual fees required by the provisions of this act for sixty days after the time provided therefor, shall forfeit its charter." Another section of the statute provides that in case of forfeiture, the directors of any domestic corporation or any foreign corporation doing business in the State "are deemed to be trustees of the corporation and all the stockholders and members of the corporation whose power or right to do business [20] is forfeited, and as such trustees shall have full power to settle the affairs of the corporation and to maintain or defend any such corporation, or to take such legal proceedings as may be necessary to finally settle the affairs of said corporation." Another section reads as follows: "The due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such, or its rights to exercise corporate powers cannot be inquired into collaterally, in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had, and action brought at the suit of the State, in the manner prescribed in civil procedure."

The Supreme Court of Oklahoma, in the case of Higbee v. Aetna Bldg. etc. Assoc. 26 Okla. 327, 109 Pac. 236, after quoting the statutes above, said that the corporation involved in that controversy was doing business under the laws of that State and that "the regularity of its incorporation could not be inquired into in this proceeding." In a later case, Smith Rolfe Co. v. Wallace, 41 Okla. 643, 139 Pac. 248, the Supreme Court of Oklahoma reviewed the statutes relative to foreign and domestic corporations doing business in the State, and announced the rule that those statutes were designed chiefly for raising revenue and that it was not the intention of the Legislature to invalidate contracts made by delinquent corporations. That interpretation is binding on us here and we are of the opinion that the courts of this State would exceed their power and jurisdiction in declaring the charter of an Oklahoma corporation forfeited contrary to the statutes of that State as interpreted by its highest judicial tribunal.

Judgment affirmed.

NOTE.

The reported case holds that the powers of a state court with respect to a foreign cor-

poration are limited to taking charge of property within its jurisdiction and enforcing the rights of local creditors. It has no power to pass on the question whether such a corporation has forfeited its charter by a failure to comply with a statute of the state of its incorporation. The power of a court over the internal affairs of a foreign corporation is discussed, with a specific treatment of the question of dissolution, in the notes to Babcock v. Farwell, as reported in 19 Ann. Cas. 74, and 137 Am. St. Rep. 284, and Van Dyke v. Railway Mail Assoc. Ann. Cas. 1913E 455.

PHILLIPS

v.

BROWNE.

Illinois Supreme Court—October 27, 1915.

270 Ill. 450; 110 N. E. 601.

Process — Exemption from Service — Member of Legislation.

Const. art. 4, § 14, exempting senators and representatives from arrest during the sessions of the general assembly, did not impliedly deprive the assembly of power to enact Practice Act (Laws 1907, p. 470), § 126, exempting members of the assembly from service of civil process during sessions of the assembly; since the constitution is not a grant of power to the legislature, but a limitation upon its powers.

[See note at end of this case.]

Same.

Practice Act (Laws 1907, p. 470), § 126, exempting members of the general assembly from service of civil process during the sessions of the assembly, violates Const. art. 4, § 22, prohibiting the enactment of local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise, as the constitutional inhibition applies, unless there is a sound basis in reason and principle for regarding the beneficiaries of the act as a distinct and separate class for the purpose of the particular legislation, and the statute is not based upon any actual, substantial difference in circumstances or condition between the members of the general assembly and other public officials of the state who in the performance of their official duties are required to spend a portion of their time in counties in which they do not reside, especially in view of Practice Act, § 66, providing for continuances until after the adjournment of the general assembly upon a showing that any party to any civil or criminal suit or proceeding is a member of either house of the general assembly.

[See note at end of this case.]

Same.

Const. art. 4, § 14, exempting members of the general assembly from arrest, except for treason or felony, during sessions of the assembly, does not exempt them from service of civil process during such sessions.

[See note at end of this case.]

Error to Superior Court, Cook county:
GOODWIN, Judge.

Action by Edward L. Phillips, plaintiff, against Lee O'Neil Browne, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

Shepard, McCormick, Thomason & Patterson for plaintiff in error.

Frank D. Ayers and Samuel Alschuler for defendant in error.

[451] COOKE, J.—Plaintiff in error, Edward L. Phillips, brought his action in trespass in the superior court of Cook county on November 4, 1911, against defendant in error, Lee O'Neil Browne. The declaration consisted of one count and was in the usual form of a declaration in trespass for assault and battery. To this declaration the defendant in error filed a special plea in abatement, in which it was averred that the defendant in error was a resident of LaSalle county; that at the time the said suit was commenced he was a duly elected member of the General Assembly of the State of Illinois; that prior to the commencement of the suit the Governor of Illinois convened a special session of the legislature, which continued until November 14, 1911; that defendant in error, as a member of the General Assembly, was present and took part in the deliberations of said special session; that the summons in this cause was served upon him during said special session and while defendant in error was present in Cook county; that there is in force in the State of Illinois a certain statute, being section 126 of an act in relation to practice and procedure in courts of record, which is as follows: "Any member of the General Assembly shall be exempt from the service of any civil process during the session of the General Assembly;" that by virtue of said statutory provision, and by reason of the fact that at the time of the said service of summons upon him defendant in error was a member of the General Assembly and a session of the same was then in existence, he was not subject to service of process in this cause, and that therefore the superior court of Cook county did not have jurisdiction of the defendant in error. To this plea plaintiff in error interposed a general demurrer, which was overruled. Plaintiff in error having elected to stand by his

demurrer, judgment was entered against him for costs, and this writ of error has been sued out to review that judgment.

[452] It is contended that the section of the statute set out in the plea, being section 126 of an act in relation to practice and procedure in courts of record (Laws of 1907, p. 470), is unconstitutional; and further, that that section has no application to a special session of the legislature. The contention of plaintiff in error is, that said section 126 contravenes section 14 of article 4 of the constitution, which is as follows: "Senators and representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place." The argument advanced in support of this contention is, that when the constitution expressly conferred this immunity it impliedly limited the right of the legislature to extend the exemption further than provided by the constitution itself. This contention cannot be sustained. That our constitution is not a grant of power but is a limitation upon the power of the General Assembly is too well recognized to require the citation of authority. This provision of the constitution constitutes no exception to the general rule.

Said section 126 does, however, contravene section 22 of article 4 of the constitution, which provides that "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Section 126 singles out a particular class of public officials and grants to the individual members of that class special immunity from the service of civil process during the periods when they are actually and theoretically engaged in the performance of their official duties. In *Sanitary Dist. v. Bernstein*, 175 Ill. 215, 51 N. E. 720, we said: "Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights, [453] and it is true that a discrimination between different classes of litigants, which is merely arbitrary in its nature, is a denial of that right and of the equal protection of the law."

The members of the General Assembly constitute but a portion of the public officials chosen to transact the business of the State, and we perceive no good reason why they should be singled out as immune from service of civil process while engaged in the line of their duty any more than the members of any other class of public officials. If the pur-

pose of the provision is to prevent suits being brought against members of the General Assembly in foreign counties into which they may be required to go in the performance of their official duties, then the law applies only to a portion of the public officials of this State who are at times required to leave their home counties to perform their official duties. While for some purposes the members of the General Assembly may be properly considered as in a class by themselves, it needs no extended argument to show that they cannot be regarded as in a class by themselves for all purposes of legislation. Thus, it would hardly be contended that the statute which granted to members of the legislature, as a class, more liberal exemptions from levy and sale under execution than those granted to other citizens of the State, would be valid. That the statute operates uniformly upon all members of a class created as the beneficiaries of the act is not the sole test to be applied, but in order to avoid the constitutional inhibition last above quoted it must also appear that there is a sound basis, in reason and principle, for regarding the class of individuals as a distinct and separate class for the purpose of the particular legislation. In *People v. Adams County*, 185 Ill. 288, 56 N. E. 1044, we said: "A class cannot be created by arbitrary declaration of the law-making power and endowed with special legislative favors. It is essential to the validity of the classification, in such instances, it shall be based on material distinctions in the situation and circumstances of the individuals who are to be embraced [454] therein, and the grounds of distinction and classification must have relation, in reason and principle, to the privileges proposed to be granted to the individuals, as a class, by the proposed legislation." Again, in *Jones v. Chicago*, etc. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313, it was said: "When a law is made applicable only to one class of individuals, however, there must be some actual, substantial difference between the individuals so classified and other individuals in the State or community, when considered with reference to the purposes of the legislation. The class, if the law confers a benefit upon it, must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition marking them as proper objects in whom to vest the specific right granted unto them." To the same effect are *People v. Kewanee Light*, etc. Co. 262 Ill. 255, 104 N. E. 680; *Chicago*, etc. R. Co. v. *Doyle*, 258 Ill. 624, 102 N. E. 260, and numerous other cases decided by this court.

The creation of a class of public officials, consisting solely of members of the General Assembly, upon whom the legislature confers

immunity from the service of civil process while engaged in the performance of official duties is not based upon any actual, substantial difference in circumstances or condition between the members of the General Assembly and other public officials of the State who in the performance of their official duties are required to spend a portion of their time in counties in which they do not reside. It may well be that as statutes exempting firemen and certain others from jury service, and like statutes, are valid, so an act intended to prevent the compulsory attendance of members of the General Assembly upon court during sessions of the legislature would not violate the constitutional provision above quoted, the duties of members of the legislature being so dissimilar from those of any other class of public officials of the State as to warrant legislation preventing their compulsory attendance upon court during sessions [455] of the legislature while not extending the same immunity to other public officials. Such, however, is not the purpose of said section 126, as is clearly apparent from the fact that if a member of the General Assembly should be served with process of summons before the beginning of the session requiring him to appear in court at some fixed time during the session, or if, after having been served with process of summons prior to the session, his case is set for trial during such session, section 126, supra, would furnish no excuse or justification for not appearing in court at the time so fixed. On the contrary, section 66 of the Practice act takes care of this situation by providing that in all suits or proceedings, either civil or criminal, at law or in equity, pending in any court of this State at any time when the General Assembly is in session, it shall be sufficient cause for a continuance if it shall appear to the court by affidavit that any party applying for such continuance is a member of either house of the General Assembly and in actual attendance on its sessions, and on the filing of such affidavit the court shall continue such suit, and when so continued no trial or other proceeding shall be had thereon until ten days after the adjournment of the General Assembly.

Section 126 of the Practice act is not in conflict with said section 14 of article 4, but it is in conflict with said section 22 of that article, and is therefore invalid.

It is urged by defendant in error that even in the absence of said section 126 of the Practice act he is entitled to exemption from the service of process in this case under said section 14 of article 4 of the constitution, for the reason that the exemption from arrest granted by that article of the constitution should also be held to include exemption from service of civil process, and in support

of this contention he cites *Anderson v. Rountree*, 1 Pin. (Wis.) 115; *Doty v. Strong*, 1 Pin. (Wis.) 84; *Miner v. Markham*, 28 Fed. 387; *Bolton v. Martin*, 1 Dall. 298, 1 U. S. (L. ed.) 144; and *Geyer v. Irwin*, 4 Dall. 107, 1 U. S. (L. ed.) 762. These cases hold, in substance, that the [456] words "privileged from arrest," will not be construed in a confined or literal sense, and that the member of a legislative body to whom the privilege is extended is entitled to exemption from service of process although the same is not accompanied with the arrest of his person. The great weight of authority is against this proposition, and we are of the opinion that the cases holding to the contrary are supported by the better reasoning. Among the cases holding that privilege from arrest does not constructively include exemption from the service of civil process, are *Merrick v. Giddings*, *MacArthur & M.* (D. C.) 55; *Johnson v. Offutt*, 4 Metc. (Ky.) 20; *Catlett v. Morton*, 4 Litt. (Ky.) 122; *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L.R.A. 632; *Berlet v. Weary*, 67 Neb. 75, 2 Ann. Cas. 610, 93 N. W. 238, 108 Am. St. Rep. 616, 60 L.R.A. 609; *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L.R.A. 563; *Gentry v. Griffith*, 27 Tex. 461; *McPherson v. Nesmith*, 3 Grat. (Va.) 237; *Kimberly v. Butler*, 16 Pittsb. Leg. J. 11, 1 Chi. Leg. N. 245, 3 Am. L. Rev. 777, 14 Fed. Cas. No. 7,777; *Howard v. Citizens' Bank*, etc. Co. 12 App. Cas. (D. C.) 222. We concur in the holding in those cases that the exemption granted is an exemption from arrest with a view to imprisonment, and nothing else.

It will not be necessary to consider the other point urged.

For the reasons given, the judgment of the superior court is reversed and the cause is remanded to that court, with directions to sustain the demurrer.

Reversed and remanded, with directions.

CRAIG, J. (*dissenting*)—Under the rule for determining the constitutionality of a statute we should hold the statute constitutional unless we are satisfied that it is unconstitutional beyond all reasonable doubt. This rule particularly applies to the statute in question, which affects certain privileges which the General Assembly has seen fit to grant to the members thereof the better to facilitate their work. Section 22 of article 4 of the constitution provides: "The General Assembly shall [457] not pass local or special laws in any of the following enumerated cases: . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." The constitution does not prohibit the granting of a special or exclusive privilege,

immunity or franchise by general law,—the prohibition is against doing so by a local or special law. The constitution, by article 3, expressly divides the powers of the government of the State into three distinct departments,—the legislative, executive and judicial. This, in itself, is a classification by the fundamental law of the State, and places the members of the legislative department, constituting the General Assembly, in a class by themselves, distinct from other State officers. Aside from this the classification is not arbitrary, and there are good reasons for holding the law in question valid and necessary.

In *Munn v. People*, 69 Ill. 80, section 22 of article 4 of the constitution is quoted, and with respect to its meaning it is there said (p. 85): "The inhibition extends only to passing special laws for such purpose. But the law in question is general in its objects, operative throughout the State, and confers no immunity or special exclusive privilege or franchise upon any individual, association or corporation. It deals with an existing business closely associated with the great agricultural interests of the State and seeks to regulate it by law. This is the whole scope of the act."

The point in question is the distinction between "local," "special" and "general" laws. A local law is defined in *People v. Wilcox*, 237 Ill. 421, 86 N. E. 672 (on page 424), as being a law which relates to only a portion of the territory of the State, and it is said the word "special" is more appropriately applied to laws that grant some special right, privilege or immunity to some portion of the people of the State less than all. In *People v. People's Gas Light*, etc. Co. 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244, it was held that the act of 1897, authorizing merger of gas companies in the same city, was not violative of section [458] 22 of article 4 of the constitution, prohibiting special laws granting exclusive privileges to any corporation, association or individual, for the reason that it applied to all gas companies doing business in the same city. On page 494 of the opinion, with respect to whether or not a law is special, it was said: "These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation."

Laws public in their objects may be confined to a particular class of persons if they be general in their application to the class to which they apply, provided the distinc-

tion is not arbitrary but rests upon some reason of public policy growing out of the condition or business of such class. Such distinctions are being constantly made, as in cases of infants, married women, laborers, heads of families, common carriers and the like. For example, it may be public policy to give laborers a lien or other preference for the collection of their wages not given to other creditors, or give a lien to laborers in some one line of employment while it would be neither practicable nor policy to give it to laborers in other employments. Laws which provide that the homestead to the value of \$1000 to the head of a family and \$400 in personal property shall be exempt from forced levy and sale for debt have never been questioned. Section 4 of chapter 78, entitled "Jurors," exempts certain persons and public officers from jury service, and if the act in question is unconstitutional then that act also must be held unconstitutional. So long as a law applies equally to all engaged in that kind of business, treating them all alike, subjecting them to the same restrictions and giving [459] them the same privileges under similar conditions, it is public in its character and not subject to the objection of being partial or unequal legislation, provided, of course, as already stated, the distinction made is based on some reason of policy and is not purely arbitrary. *Potwin v. Johnson*, 108 Ill. 70; *People v. Wright*, 70 Ill. 388; *People v. Martin*, 178 Ill. 611, 53 N. E. 309; *Dawson Soap Co. v. Chicago*, 234 Ill. 314, 14 Ann. Cas. 1131, 84 N. E. 920; *People v. Nellis*, 249 Ill. 12, 94 N. E. 165; *People v. Kaelber*, 253 Ill. 552, 97 N. E. 1068.

Section 126 of the Practice act is not a special law granting an exclusive privilege or immunity to an individual. Every member of the legislature or any individual elected to that office has certain powers and duties, and, it may be said, certain special privileges common and necessary to that office. Among these is the right to a voice and vote in the enactment of laws, the right to receive a salary and certain perquisites, the right to a seat in the branch of the General Assembly to which elected, and to the use of the capital building. Under the constitution every member is privileged from arrest except for certain offenses. Section 66 and 126 merely bestow those privileges which the law-making power has deemed necessary and incidental to properly performing the duties of that office. They cannot be said to be exemptions to an individual who has no public duties to perform. They are exemptions pertaining to the office, bestowed on all those, as a class, who hold such office. The fact that other officers of the State have not been granted such an exemption is no reason why members of the General Assembly should not be
Ann. Cas. 1917B.—41.

allowed that privilege. There is so great a difference between members of the General Assembly and other State officers as to qualifications, tenure, residence and general duties that it would be impossible to place them all in one classification for all purposes. Many of the other State officers are provided with assistants and a considerable office force, so that the business of their respective offices goes on in case of an [460] enforced absence. But this is not true of members of the General Assembly. They must be personally present during the sessions and cannot delegate their votes and the proper performance of their duties to others. Other State officers would be exempt from service during the whole of their terms of office, while members of the General Assembly, —representatives elected for terms of two years and senators for four years,—would not be exempt from the service of process during the whole of their terms of office, but, on the contrary, for only a part of such terms, viz., while legislature is in session. It is undoubtedly the intent of all laws governing the procedure of the legislature that the members should go into session, transact the necessary business of that body and adjourn, and not remain in continuous session. They should not be harassed by lawsuits and compelled to absent themselves from the sessions of the legislature when the actual presence of each member is necessary in order that all the people may have representation.

It is difficult to see how section 126 is contrary to section 22 of article 4 of the constitution unless section 66 is also and for the same reason contrary to the constitution. It cannot be said that a right to a continuance merely because the party to a suit, or his attorney, is a member of the General Assembly is not a privilege or immunity just as much as the exemption of a member of the General Assembly from the service of civil process while the General Assembly is in session. The constitutionality of section 66 has never been questioned. It has frequently been construed by this court, and we have held that it is error to refuse to continue a case on application where the party applying for a continuance has brought himself within the provisions of the section. *St. Louis, etc. R. Co. v. Teters*, 68 Ill. 144; *Chicago Public Stock Exch. v. McClaughry*, 148 Ill. 372, 36 N. E. 88; *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736.

NOTE.

Service of Civil Process upon Members of Legislature.

A full review of the earlier cases on the discussing of the service of civil process on a

member of a state or the national legislature, while the legislature is in session may be found in the notes to *Berlet v. Weary*, 2 Ann. Cas. 610, and *Worth v. Norton*, 76 Am. St. Rep. 524.

The reported case holds that a provision in a state constitution exempting members of the legislature from arrest does not include an exemption from service of civil process; and it further holds that an act of the legislature providing that "any member of the general assembly shall be exempt from the service of any civil process during the session of the general assembly" is unconstitutional and invalid, as being in conflict with the constitutional inhibition against the passing of local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise.

A decision in apparent conflict with the principle enunciated in the reported case was made, however, in the recent case of *Walsh v. Mooney*, 33 Ohio Cir. Ct. Rep. 214, wherein it was held that a statute of Ohio privileging members of the general assembly from answering to certain suits, and staying proceedings in those suits during the sessions of the general assembly, together with a statute exempting members from arrest during a session of the assembly, operated to render members of the general assembly privileged or exempt from service of civil process, during a session of the legislature. In that case the court said: "Our attention is directed to art. 2, sec. 12, of the constitution, to R. S. 5031 (Gen. Code 11278), and to R. S. 5457-5459 (Gen. Code 11754-11756). It is said in behalf of the defendant in error here that the action of the court of common pleas was fully justified by R. S. 5031 (Gen. Code 11278), which reads as follows: 'A member of the senate or house of representatives, or any officer of either branch of the general assembly, shall be privileged from answering to a suit instituted against him in a county other than the one in which he resides, upon a cause of action which accrued ten days before the first day of the session of the general assembly of which he is an officer or member. All proceedings in actions to which such a person is a party shall be stayed during such session, and the time necessarily employed in going thereto and returning therefrom.' Counsel for the plaintiff in error contend that this section amounts to no more than a privilege to a member of the house or of the senate from filing an answer in the case in which he is thus sued; that it does not relieve him from being served with summons and required at a later time to answer, but only suspends the time which he must answer, and our attention in support of this proposition is directed to the sections I have

mentioned, R. S. 5457 (Gen. Code 11754) and incidentally R. S. 5458 and particularly R. S. 5459 (Gen. Code 11756). R. S. 5457 (Gen. Code 11754) is the section of the statute that enumerates the persons who are exempt from arrest. It has seven subdivisions, and the first mentions the members, clerks, sergeants-at-arms, doorkeepers and messengers of the senate and the house during the session of the senate or house and during the time they travel either way in attending the sessions, allowing twenty-five miles per day, etc. The second subdivision mentions electors attending and returning from election, and the third, judges of court while attending court, and the time necessarily employed in going and returning; the fourth, officers of the court, including attorneys, counselors at law, clerks, sheriffs, coroners, constables and criers, and all suitors and jurors and witnesses; the fifth, females and soldiers of the Revolutionary war; sixth, Israelites, and persons observing the last day of the week, etc., and seventh, persons of the militia during the time they are on duty and going and returning therefrom. R. S. 5458 prescribes the places in which arrest shall not be made—the senate and the house and a court in session. R. S. 5459 is the general section that prescribes that none of the foregoing privileges shall apply in certain instances, and says: 'Nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any persons herein specified from being served at any time with a summons or notice to appear; and all arrests, not contrary to the provisions herein contained, made in any place, or in any river or water course within or bounding upon this state, shall be deemed lawful.' The particular part of the section to which our attention is directed is, 'or to privilege any persons herein specified from being served at any time with a summons or notice to appear,' and it is said that unless effect be given to this language and the service in this case sustained by reason of this language in R. S. 5459 (Gen. Code 11756), then the language must be held to have no effect in the statute at all. Our attention has been called to but one case in Ohio which supports the action of the court of common pleas, and counsel on behalf of the plaintiff in error contend that it is not a controlling authority and really of no weight in consideration of the question presented here. This section of the statute, R. S. 5457 (Gen. Code 11754), is the only section of the statute which provides for this privilege from arrest, and it might appear upon a hasty reading of the section that it refers to nothing but arrest; but an examination of the question will show that that is

not the case. [Here the court reviews cases holding a suitor and a lawyer to be privileged from service of process by the statutes in question]. . . . It will be observed that this section, R. S. 5459, follows all the provisions exempting parties from arrest, one of the seven subdivisions of R. S. 5457; and it would look, as I have said, upon first reading, as though while those parties thus enumerated are all exempt from arrest, none of them would in effect be exempt from the service of summons, and no very good reason appears why a suitor or witness or a lawyer or any of the other parties enumerated in these seven subdivisions, with the exception of two, should be exempt from arrest and be exempt from summons if the members of the legislature should not. They are all put on the same ground, and the first persons enumerated as being exempt are the persons mentioned as members of the legislature. They are exempt from arrest and it would seem as if the legislature had made ample provision in those sections which have long been upon the statute book to prevent the arrest or the summoning of a legislator while attending the session or while going or returning from it. But in addition to that we find R. S. 5031 (Gen. Code 11278) specifically provides that they shall be exempt during the session from answering to any cause of action which accrued more than ten days prior to the opening of the session. It seems to us that the sections of the statute which I have mentioned, and taken in connection with the two cases which I have cited, clearly indicate that the legislature did not intend to provide that a member of the senate might be relieved from the duty of answering some petition filed against him in a county other than his residence until the session had closed and he had returned home, and then he must answer; but the section, we think, clearly indicates that during the session, or during the period necessary to travel to and return from the session, and especially when the matter in question is a cause of action which arose more than ten days before the beginning of the session, as mentioned in R. S. 5031, the privilege is that he will not be summoned at all, and that no legal summons can be served upon him, excepting of course in the county of his residence, and therefore we conclude that the action of the court of common pleas must be affirmed in quashing the service."

The principle of the ruling of the reported case is sustained, however, by the case of *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L.R.A. 563, wherein it was held, by a divided court, that the language of the Federal Constitution (art. 1, § 6; 8 Fed. St. Ann. 331) providing that senators and representatives shall "be privileged from arrest during their attendance at the

session of their respective houses" did not extend to a grant of privilege against the service of civil summons and that, even if it did, that privilege would not apply to a member absent with leave from a session of Congress, on private business.

HUTCHINSON ICE CREAM COMPANY ET AL.

v.

STATE OF IOWA.

A. B. CROWL

v.

COMMONWEALTH OF PENNSYLVANIA.

United States Supreme Court—December 4, 1916.

242 U. S. 153; 37 S. Ct. 28.

Food — Validity of Regulation — Percentage of Butter Fat in Ice Cream.

State statutes which prohibit the sale as "ice cream" of a product containing less than a fixed percentage of butter fat do not take property without due process of law nor deny the equal protection of the laws—the particular percentages fixed not being so exacting as to be in themselves unreasonable—although the ice cream of commerce is not iced or frozen cream, but is a frozen confection, varying in composition, and under some formulas may be made without either cream or milk.

[See note at end of this case.]

Error to Iowa Supreme Court.

Criminal action. *Hutchinson Ice Cream Company et al.*, charged with violation of statute. Judgment for defendants in District Court, Polk county. Judgment reversed by Iowa Supreme Court. Defendants bring error. The facts are stated in the opinion. **AFFIRMED.**

Error to Pennsylvania Supreme Court.

Criminal action. *A. B. Crowl* convicted in Court of Quarter Sessions, Erie county, of violation of statute. Judgment affirmed by Pennsylvania Supreme Court. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Walter Jeffreys Carlin for plaintiff in error *A. B. Crowl*.

R. L. Parrish and Walter Jeffreys Carlin for plaintiffs in error Hutchinson Ice Cream Company et al.

George Cosson for defendant in error State of Iowa.

William M. Hargest and Francis Shunk Brown for defendant in error Commonwealth of Pennsylvania.

[156] **BRANDEIS, J.**—These cases were argued together. In each a state statute which prohibits the sale of ice cream containing less than a fixed percentage of butter-fat is assailed as invalid under the Fourteenth Amendment; the Supreme Court of each State having held its statute constitutional. *State v. Hutchinson Ice Cream Co.* 168 Ia. 1, 147 N. W. 195; *Com. v. Crowl*, 245 Pa. St. 554, 91 Atl. 922. Iowa makes 12 per cent. the required minimum; Pennsylvania 8 per cent. The material provisions of the several statutes are copied in the margin.¹

[157] The right of the State under the police power to regulate the sale of products with a view to preventing frauds or protecting the public health is conceded by plaintiffs in

error. And they do not contend that the particular percentages of butter-fat set by Iowa and Pennsylvania are so exacting as to be in themselves unreasonable. Thirteen other States have by similar legislation set 14 per cent as the minimum; five other States 12 per cent; only eight States have fixed a percentage as low as Pennsylvania; and [158] the United States Department of Agriculture has declared 14 per cent to be standard.² The main objection urged is this: To require that ice cream, in order to be legally salable, must contain some butter-fat is a regulation so unreasonable and arbitrary as to be a deprivation of property without due process of law and a denial of the equal protection of the laws. To support this contention the following trade facts are shown:

The ice cream of commerce is not iced or frozen cream. It is a frozen confection—a compound. The ingredients of this compound may vary widely in character, in the number used and in the proportions in which they are used. These variations are dependent upon the ingenuity, skill and judgment of the

¹Iowa: Code Supp. 1913, § 4999-a20:

"No person, firm or corporation, . . . shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Code Supp. 1913, § 4999-a31e:

"For the purpose of this act, an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it does not conform to the standards established by law."

Chap. 175, Acts 34 G. A. (1911) p. 192:

"ICE-CREAM."

"1. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than twelve per cent (12%) by weight of milk fat, and the acidity shall not exceed three tenths (3-10) of one per cent (1%)."

Pennsylvania: P. L. 1909, p. 63, Purden's Dig. vol. 5, p. 5209:

"An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession

with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream: providing penalties for the violation thereof, and providing for the enforcement thereof.

"SECTION 1. *Be it enacted, &c.*, That no person, firm, or corporate body, by himself, herself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"SECTION 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"*First.* If it shall contain boric acid, formaldehyde, saccharine, or any other added substance or compound that is deleterious to health.

"*Second.* If it shall contain salts of copper, iron oxide, ochres, or any coloring substance deleterious to health: *Provided*, That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"*Third.* If it shall contain any deleterious flavoring matter, or flavoring matter not true to name.

"*Fourth.* If it be an imitation of, or offered for sale under, the name of another article.

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

²The requirements of the several States are set forth in U. S. Department of Agriculture (Bureau of Animal Industry) Circular 218, on Legal Standards for Dairy Products.

maker, the relative cost at a particular time or at a particular place of the possible ingredients, and the requirements of the market in respect to taste or selling price. Thus, some Philadelphia Ice Cream is made of only cream, sugar and a vanilla flavor. In making other Philadelphia Ice Cream the whites of eggs are added; and according to some formulas Vanilla Ice Cream may be made without any cream or milk whatsoever; for instance by proper manipulation of the yolks of eggs, the whites of eggs, sugar, syrup and the vanilla bean. All of these different compounds are commonly sold as ice cream; and none of them is necessarily unwholesome.

Plaintiffs in error contend that as ice cream is shown to be a generic term embracing a large number and variety of products and the term as used does not necessarily imply the use of dairy cream in its composition, it is arbitrary and unreasonable to limit the ice cream of commerce to that containing a fixed minimum of butter-fat. But the legislature may well have found in these facts persuasive [159] evidence that the public welfare required the prohibition enacted. The facts show that in the absence of legislative regulation the ordinary purchaser at retail does not and cannot know exactly what he is getting when he purchases ice cream. He presumably believes that cream or at least rich milk is among the important ingredients; and he may make his purchase with a knowledge that butter-fat is the principal food value in cream or milk. Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power. The legislature defines the standard article or fixes some of its characteristics; and it may conclude that fraud or mistake can be effectively prevented only by prohibiting the sale of the article under the usual trade name, if it fails to meet the requirements of the standard set. Laws prohibiting the sale of milk or cream containing less than fixed percentages of butter-fat present a familiar instance of such legislation. Cases in the state courts upholding laws of this character are referred to in the margin.¹ This court has repeatedly sustained the validity of similar prohibitions. *Schmidinger v. Chicago*, 226 U. S. 578, Ann. Cas. 1914B 284, 33 S. Ct. 182, 57 U. S. (L. ed.) 364; *Armour v. North Dakota*, 240 U. S. 510, Ann. Cas. 1916D 548, 36 S. Ct. 440, 60 U. S. (L. ed.) 771.

It is specially urged that the statutes are unconstitutional because they do not merely define the term ice cream; but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name ice cream. The acts appear to us merely to prohibit the sale of such compounds as ice cream. Such is the construction given to the act by the Supreme Court of Iowa. [160] *State v. Hutchinson Ice Cream Co.* 169 Ia. 1, 15, 147 N. W. 195, which is of course binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the Supreme Court of Pennsylvania would construe the law of that State otherwise. The conviction here under review was for selling the "compound" as ice cream, so that we are not called upon to determine whether the State may in the exercise of its police power prohibit the sale even of a wholesome product, if the public welfare appear to require such action—and if, as here, interstate commerce is not involved. See *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 15, 18 S. Ct. 757, 43 U. S. (L. ed.) 49.

In view of the conclusion stated above, it is unnecessary to consider whether the statutes are or are not sustainable as health measures; and upon this we express no opinion.

The judgment in each case is
Affirmed.

NOTE.

State or Municipal Regulation of Ice Cream.

Introductory, 645.

State Regulation, 646.

Municipal Regulation, 647.

Introductory.

Although the cases involving state or municipal regulation of milk and cream are numerous, few cases are to be found on the regulation of ice cream. There have been many statutes enacted in recent years, however, prescribing a standard percentage of butter fat for ice cream. These are substantially similar to the statutes fixing the same kind of standard for milk and cream, which have received frequent judicial interpretation. In *State v. Hutchinson Ice Cream Co.* 168 Ia. 1,

¹ *State v. Schlenker*, 112 Ia. 642, 84 N. W. 698, 84 Am. St. Rep. 360, 51 L.R.A. 347; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489; *State v. Crescent Creamery Co.* 83 Minn. 284, 86 N. W. 107, 85 Am. St. Rep. 464, 54 L.R.A. 466; *State v. Stone*, 46 La. Ann. 147, 15 So. 11; *Deems*

v. Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L.R.A. 541; *Com. v. Wheeler*, 205 Mass. 384, 18 Ann. Cas. 319, 91 N. E. 415, 137 Am. St. Rep. 456; *St. Louis v. Grafeman Dairy Co.* 190 Mo. 507, 89 S. W. 627, 1 L.R.A. (N.S.) 926; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

147 N. W. 195, it appeared in evidence that in 1914 no less than twenty-seven states had enacted regulations prescribing a minimum percentage of butter fat in ice cream sold or offered for sale.

State Regulation.

The legislature may, under its police power, enact laws for the purpose of preventing fraud in the sale of ice cream. Therefore a statute establishing a reasonable standard percentage of butter fat which shall be contained in any article sold as ice cream, the statute not being a health measure to maintain the purity of the product, but being merely an exercise of the police power to prevent fraud and deception, is within the police power of the state and offenses against neither state nor federal constitutions. *State v. Hutchinson Ice Cream Co* 168 Ia. 1, 147 N. W. 195; *Com. v. Crowl*, 245 Pa. St. 554, 91 Atl. 922, *affirming* 52 Pa. Super. Ct. 539. And see the reported case, wherein the United States Supreme Court sustains the two foregoing decisions, and holds that the statutes of Iowa and of Pennsylvania involved therein are constitutional, not taking property without due process of law, and not denying the equal protection of the law.

The case of *State v. Hutchinson Ice Cream Co.* supra, involved the validity of a state statute defining ice cream, fruit ice cream, and nut ice cream, and forbidding the sale of any product as ice cream if it contained less than twelve per cent butter fat, and of any product as fruit or as nut ice cream if it contained less than ten per cent butter fat. It was agreed that the fixing of that standard was not a health regulation, and the only question involved in the case was whether the statute could be supported as a valid police power regulation to prevent fraud in the sale of food. Holding that it was reasonable and a valid regulation, the court, after a full review of the evidence, said: "Notwithstanding these conflicting opinions, it was a question for the legislature to say whether this legislation was called for. The legislature was not compelled to take the view of either those who favor or oppose a standard. Taking one view of it, conditions were such as to clearly sustain the action of the legislature. We are not entirely satisfied that this would not be so if conditions were as claimed by the defendants. We are not to say, and do not, of course, determine that these defendants, or the association appearing in argument, or any particular person is or has been guilty of any fraud or deception. The question is whether, without a standard, dishonest or unscrupulous manufacturers may do so. It is not practicable by any ordinary inspection for the purchaser to distinguish cheaper, low grade

ice cream from the better quality. Because of this, it is apparent from the matters which we have detailed that an opportunity is afforded for deception by selling an inferior quality of ice cream at the price of a better or more expensive grade. This was the case in the sale of oleomargarin. *State v. Armour Packing Co.* 124 Ia. 323, 2 Ann. Cas. 448, 100 N. W. 59. In this respect, it differs from the case of *Frost v. Chicago*, 178 Ill. 250, 52 N. E. 869, 69 Am. St. Rep. 301, 49 L.R.A. 657, where it was held that a person who is ordinarily careful and intelligent could not be deceived by a netting covering for baskets of fruit. In such case, the purchaser could still see and know what he was buying. The purpose of the act in question was to prevent just such deception and fraud as would be possible without a standard, and it seems to us it cannot be seriously claimed that the statute will not accomplish the end sought. It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk, if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream."

In *Com. v. Crowl*, 245 Pa. St. 554, 91 Atl. 922, *affirming* 52 Pa. Super. Ct. 539, it was held that a statute was valid which prescribed that "no ice cream shall be sold within the state containing less than eight per centum of butter fat, except where fruits or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum of butter fat." The court said: "We are only concerned . . . with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition, and all of the authorities to which the learned counsel for the appellant refer show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation, especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and by the practice of unwarranted thrift a prod-

uct can be put on the market having the name and appearance of ice cream but lacking the chief element which gives it value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power. We are not concerned with the wisdom of legislation under this power. Our only inquiry is whether the power exists. . . . It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so courts would become the triers of the expediency of such legislation and the authority which the people committed to the legislature would be transferred by judicial action to the courts. Where a statute is clearly and palpably violative of the constitution it is the duty of the courts to declare it invalid in the respects in which it is repugnant to this supreme law, but the presumptions are all in favor of the validity of legislative enactments and the burden is on him who asserts the contrary to make it clear beyond doubt that the constitutional power has been exceeded. It has been the policy of this state to legislate on the subject of milk and milk products, and statutes have been enacted which made it unlawful for any person to sell milk which contained less than a fixed percentage of butter fat and less than a fixed percentage of milk solids; making it unlawful to sell cream which contained less than a fixed percentage of butter fat; which classified cheese and fixed the percentage of butter fat which the various classes of cheese should contain; and similar legislation has been enacted in other states. *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; *Com. v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344. Legislation of a like character is found in the Act of May 21, 1901, P. L. 275, forbidding the sale of vinegar which contains less than four per cent of absolute acetic acid. If the sale of pure milk containing less than three and one-fourth per cent of butter fat may be prohibited it is not apparent why the same principle does not apply to ice cream. . . . The integrity of the act is not affected by the provision that where fruits and nuts are used for flavoring, six per cent of butter fat shall be required in ice cream.

It is obvious that the addition of fruits and nuts to a given quantity of ice cream would diminish the percentage of butter fat, and it was apparently a consideration of this fact which caused the distinction between ice cream flavored with extracts and that to which nuts or fruits were added. No discrimination is made between individuals or preference given to particular manufacturers by this legislation and no substantial reason is advanced which would make such a regulation destructive of the whole statute."

Municipal Regulation.

The regulation of ice cream as a foodstuff, and of the sale thereof, so far as is necessary for the prevention of adulteration and the presence of impurities or other things likely to affect the health of those using it, is within the police power of a municipality, without a grant by the state of specific authority to make that regulation. Where an ordinance making that manner of regulation is passed without express authority of the legislature, however, the courts may inquire into its reasonableness, and to that end may hear testimony. Therefore, in a prosecution under an ordinance requiring a certain standard in ice cream offered for sale, evidence that ice cream which falls below the required standard is equally wholesome, and just as good, from a sanitary standpoint, as that which complies with the requirement, is admissible on the question of the reasonableness of the regulation. *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991, wherein the court said: "The complaint against the defendant's ice cream was not that it was impure or that it contained deleterious substances, or that it was likely to affect the public health, but that it was not rich enough in butter fats. The defendant, for the purpose of showing the invalidity of the ordinance as a health measure, offered to prove that the presence of this amount of butter fats was not essential to the ice cream's being healthful—that the ice cream he was selling was just as good, from a sanitary standpoint, as ice cream of the character prescribed by the ordinance would be. This evidence was admissible. The rule is that where an ordinance is not passed by express authority of the legislature, the courts may inquire into its reasonableness, and to that end may hear testimony."

A municipal regulation prescribing that ice cream sold or kept for sale must contain at least ten per cent of butter fat for plain ice cream is unreasonable and void, since it is not directed to the wholesomeness of the ice cream, but only to its richness, and absolutely prohibits the sale of a product of less than the prescribed richness, without any reference to whether it is wholesome, and since it does

not merely prohibit the sale of ice cream as ice cream when below the standard, but prohibits its sale entirely under any name or designation. *Righers v. Atlanta*, supra, wherein it was said: "It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than ten per cent, the sale is unlawful, according to the ordinance. Even if the city has the power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all. For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first-class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream it would be illegal for anyone to furnish the grade of ice cream actually suited to the sick man's physical condition. The court is willing to give every encouragement within legitimate bounds to the public authorities in their laudable effort to protect the public not only against unsanitary food products, but also against adulteration, frauds, and impositions in the sale of food products, and where the question is doubtful, the doubt will be solved in favor of the regulation; but to say that in a city the size of Atlanta no one shall under any circumstances, or for any purpose, sell any ice cream containing less than ten per cent butter fats is so unreasonable that the ordinance cannot be upheld, where the city's power to pass it rests solely upon the authority of the general welfare clause of its charter."

In *Syracuse Ice Cream Co. v. Cortland*, 153 App. Div. 456, 138 N. Y. S. 338, there was involved a city ordinance providing as follows: "No person who is the owner, lessee, or occupant of any restaurant, saloon, hotel, boarding house, cafe, ice cream rooms, or of any store or place whatsoever, who shall purchase milk or cream from any person or corporation that has not obtained a license as hereinafter provided, shall use, sell, or dispose of any

milk, cream, or ice cream, unless and until such owner, lessee, or occupant shall first have obtained a license or permission so to do from this board, as hereinafter provided." It was held that the ordinance did not require a license to sell ice cream unless it was made from milk or cream purchased from local dealers, and that it therefore required no license to sell ice cream manufactured in another city. The court said: "The plaintiff manufactures ice cream at Syracuse, and seeks to sell the same in Cortland without a license from the board of health of the city of Cortland. It is the contention of the city authorities that under the provision of the sanitary code cited this cannot be done by a local dealer in the city of Cortland without himself obtaining a license therefor, inasmuch as plaintiff is without a license. As I read the provision of the code cited the case in question is not intended to be included therein. While ice cream is mostly milk or cream, nevertheless it is in fact a manufactured article, with other ingredients, as sugar and flavoring. Section 33 of the sanitary code, above quoted, requires the local dealer to have a license to sell 'milk, cream, or ice cream' only in case he buys 'milk or cream' from some unlicensed dealer. Within the section itself, therefore, would seem to be an indication that the board of health did not consider ice cream as included within the terms 'milk or cream.' From the milk or cream that they should buy they could not make ice cream and sell it unless the persons from whom the milk or cream was furnished were duly licensed to sell. No provision seems to have been made for a license to sell ice cream, except where such ice cream be made from milk or cream purchased by the local dealer. That this was so understood by the board of health itself would seem to be indicated by the fact that of the blanks furnished for obtaining licenses, no blank was furnished appropriate for obtaining a license by an ice cream manufacturer. By section 34 of the sanitary code an application for a license is required to be made upon a blank furnished by the city clerk. It is significant that upon an application to the city clerk the only blank that he had was a blank appropriate to one selling milk and cream only from his own dairy, or purchased from other dairies. If section 33 of the sanitary code were originally intended to require a license from one selling ice cream, appropriate blanks would undoubtedly have been supplied to the city clerk, upon which the application for such license could be made."

**MOUNT VERNON TELEPHONE
COMPANY**

v.

**FRANKLIN FARMERS' CO-OPERATIVE
TELEPHONE COMPANY ET
AL.**

Maine Supreme Judicial Court—February
12, 1915.

113 Me. 46; 92 Atl. 934.

**Telegraphs and Telephones — Cross-
ing Public Highway — Necessity of
Permit.**

Rev. St. c. 55, § 17, providing that corporations or individuals engaged in operating telephones shall not construct lines "upon and along" highways and public roads without permission from the selectmen of towns, etc., forbids the placing of telephone wires across the highways, etc., by persons not so authorized, since the word "across" is synonymous with the words "upon and along."

**Statutes — Construction of Adopted
Statute.**

Where the legislature adopts a provision from the statutes of another state, it must be assumed that it was familiar with its interpretation there and adopted it with the statute.

[See note at end of this case.]

**Nuisance — What Constitutes — Tele-
phone Wires Erected over Highway
without Permission.**

Under Rev. St. c. 55, § 17, providing that telephone lines shall not be constructed upon or along highways or public roads without written permission from the selectmen of towns, etc., specifying the method of locating the wires, and declaring wires so erected to be legal structures, but not declaring those otherwise maintained to be nuisances, the wires of an unauthorized company and of private individuals maintaining lines to connect therewith, running eighteen to twenty-two feet above the ground, and not interfering with public travel, do not constitute a nuisance, and will not be enjoined.

On report from Supreme Judicial Court, Kennebec county.

Action by Mount Vernon Telephone Company, plaintiff, against Franklin Farmers' Co-operative Telephone Company et al., defendants. Case reported to Law Court on agreed statement of facts. The facts are stated in the opinion. **DISMISSED.**

Williamson, Burleigh & McLean for complainants.

W. R. Pattangall for defendants.

[47] **PHILBROOK, J.**—This is a proceeding in equity. Among the defendants named in

113 Me. 46.

the bill is the Kennebec Farm and City Telephone Company, but by agreement of parties the bill has been dismissed without costs as to that company, thus leaving as defendants the Franklin Farmers' Co-Operative Company and certain individuals all of whom are residents of Vienna in the County of Kennebec.

The plaintiff company, admittedly, has conducted and is conducting a telephone business in the towns of Vienna and Mount Vernon, and in other towns in said Kennebec County, and has the right to erect poles and wires, and construct its lines, under written permits from the Selectmen of Vienna, upon, along, over and across the various highways and public roads in said town of Vienna.

The plaintiff avers that neither the defendant company nor the individual defendants, have any lawful authority to erect telephone lines or to set poles, or string wires upon, along, over, under, or across any of the highways and public roads in said town of Vienna, but that notwithstanding such lack of authority the defendants have set poles, strung wires and constructed telephone lines upon, along, over and across the highways and public roads of the said town of Vienna, and intend to further extend said telephone lines upon, along, over and across the highways and public roads of said town of Vienna. The plaintiff avers that the poles and wires thus erected by the defendants are upon private lands, and follow the highways of Vienna for the most part, but say that at certain points these wires are strung from poles on private land on one side of the highway, to poles on private land on the other side, and are thus strung "across" the highways. It is also averred that the wires of the defendants cross those of the plaintiff at certain places and thereby seriously damage and interfere with them.

The defendants do not deny the erection of poles and wires as alleged by the plaintiff but say they are acting within their legal rights, since they are on private land, and further say that they are [48] not inhibited by law from stretching wires "across" a public highway from pole to pole standing on such private lands on opposite sides of the highway.

The plaintiff asks this court by injunction to prevent the defendants from conducting a telephone business over any lines where any part of them "are constructed upon, along, over, under or across any of the highways and public roads of said town of Vienna;" also to prevent the defendants "from erecting any posts, or poles, or stringing any wires, or construing telephone lines upon, along, over, under or across any of the highways and public roads of said town of Vienna."

The case comes to us on report for decision upon the bill, answer, and the following agreed statement of facts:

"It is admitted that A. W. Hall, Frank French, Ernest French, Samuel Gordon, Corry Dunn, R. E. Swift, William Richards, L. L. Riggs, Abbie Hall and Frank Roberts have partially erected and propose to complete and maintain a private telephone line in the town of Vienna connecting their several homes each with the other, the poles being set on private land and the wires running from pole to pole over private land except that at certain points said wires connecting poles across the highways at points from twenty to twenty-three feet above the surface thereof. The above named defendants are also connected by contract with the said Franklin Farmers' Co-Operative Telephone Company and thence with the outside world.

It is agreed that if the erection and maintenance of said wires by the above named defendants in the manner above described is illegal or constitutes a nuisance, this bill shall be sustained against these defendants, nominal damages shall be assessed by the court and an injunction issued against them as prayed for, otherwise the bill to be dismissed as to said above defendants.

It is admitted that the Franklin Farmers' Co-Operative Telephone Company has erected and now maintains and proposes to maintain a telephone line in the town of Vienna, the poles being set on private land and the wires running from pole to pole over private land except that at certain points said wires connecting said poles cross the highways at points from eighteen to twenty-two feet above the surface thereof, and it is agreed that if the erection and maintenance of said wires in the manner above described is illegal and constitutes a nuisance this bill shall be sustained against said Franklin Farmers' [49] Co-Operative Telephone Company nominal damages to be assessed by the court and an injunction issued against them as prayed for, otherwise this bill to be dismissed as to said company.

If the court find the wires as erected and maintained and proposed to be erected and maintained constitute a nuisance, it is agreed that the plaintiff has suffered special damage because of said wires, but if the court find that said wires do not constitute a nuisance the plaintiff makes no claim of special damage."

As a fundamental proposition on which to base this proceeding the plaintiff calls our attention to R. S. Chap. 55, Sec. 17, which forbids not only corporations engaged in the telephone business, but also individuals engaged in such business, from constructing lines "upon and along" highways and public roads without permission in writing from mayor and aldermen, in case of cities, from selectmen, in case of towns, or from county commissioners, in case of plantations and unorgan-

ized townships, specifying the kinds of poles to be used, where and how they are to be located and set, and the height of the wire above the ground. The defendants reply as already suggested that their wires are "across" the highways and public roads, and that the words "upon and along" are not synonymous with or equivalent to the word "across." With reference to the meaning of these terms in this particular statute it is significant to note that we borrowed the same from the statutes of Massachusetts in the year eighteen hundred eighty-five. Only a year before that time the Supreme Court of that State in *Banks v. Highland Street R. Co.* 136 Mass. 485, said "In this statute, the word 'upon' includes crossing a way by the wires." We must assume that our legislature was familiar with this interpretative ruling and adopted it when the statute in question was passed. We also adopt it and declare that in the statute, under consideration the word "upon" includes crossing a way by the wires. This disposes of one contention of the defendants, for we have no hesitation in saying that the erection and maintenance of the defendants' wires across the highways and public ways, in the manner admitted, were contrary to law.

Conceding this illegal erection and maintenance of defendant's wires, can the plaintiff prevail in this cause. In other words has this court jurisdiction in equity upon motion of this plaintiff to enjoin such maintenance or to forbid future action of the same kind.

[50] The plaintiff claims that these wires constitute a nuisance and assigns this claim as the chief ground of equity jurisdiction in its behalf as evidenced by the agreed statement. Wires thus erected and maintained are not declared by statute to be nuisances. Wires and poles erected and maintained in accordance with statute provisions are declared by R. S. Chap. 55, Sec. 17, to be deemed legal structures, and the plaintiff urges that we should hold by inference that those not erected and maintained in accordance with statute provisions are nuisances. But the statute is in derogation of the common law and must be construed strictly; it cannot be enlarged by implication. *Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733, 120 Am. St. Rep. 492, 10 L.R.A. (N.S.) 580. The plaintiff relies upon the last named case in support of its contention as to nuisance but in doing so overlooks the fact that the statute in that case had expressly declared buildings, erected contrary to an ordinance then under consideration, to be nuisances. The application made by the plaintiff to this case, where the wires have not been declared, by law to be nuisances, obviously fails. The case of *Lang v. Merwin*, 99 Me. 487, 50 Atl. 1021, 105 Am. St. Rep. 293, cited by plaintiff, it is also in-

applicable for the same reason. In that case injunction was sought to restrain the use of a gambling machine, a thing declared by statute to be a nuisance. In support of its claim that wires erected and maintained, as in this case, are nuisances, the plaintiff also cites *Banks v. Highland Street R. Co.* supra, claiming that case to hold "that a wire across a street, being erected contra to the provision of a statute similar to ours, was a nuisance;" but a more careful examination shows that an employee was carrying the wire, looped across the street, and the court said "the wire, at least while looped across the street, so that it might be hit by passing carriages, was a nuisance, which any person lawfully traveling on the way, and incommoded by it, might remove." A state of affairs so materially different from the case at bar cannot be said to throw light on this discussion.

The wires of the Franklin Company, one of the defendants, appear to have been in use for eight years, at a height of from eighteen to twenty-two feet from the surface of the ground, and nothing has been introduced in the record to show that they have in any way interfered with or obstructed public travel. The wires erected, and proposed to be erected, by the individual defendants, are from twenty to twenty-three feet from the ground. We cannot say as matter of law that these wires of either the Franklin Company or the individual [51] defendants constitute a nuisance, nor has the plaintiff satisfied us that they have been declared so by any statute, city ordinance or town by-law.

Failing to find that these wires constitute a nuisance, as erected and maintained, we must dismiss the bill in accordance with the stipulation of the parties in the agreed statement. Since the erection and maintenance of the wires across highways and public ways are in violation of law we think the defendants should not recover costs.

Bill dismissed as to all defendants.

NOTE.

Construction of Adopted Statute.

I. Prior Construction in Originating State:

1. Rule Stated, 651.

2. Exceptions to Rule:

- a. Meaning of Statute Clear and Obvious, 654.
- b. Variations between Statutes, 654.
- c. Variations between Constitutions, 654.
- d. Amendment before Adoption, 655.
- e. Doubtful Origin of Statute, 655.

f. Erroneous Construction, 655.

g. Contrary Construction in Other States, 655.

h. Denial of Substantial Right, 655.

i. Construction Contrary to Policy of Adopting State, 655.

II. Subsequent Construction in Originating State, 656.

I. Prior Construction in Originating State.

1. RULE STATED.

While the construction given to an adopted statute in the state of its origin is not conclusive in another jurisdiction (*Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 1 Ann. Cas. 144) it has long been a settled rule of statutory construction that where a statute has been adopted from another state or country, it will be presumed that the legislature of the adopting state intended the adopted statute to receive the same construction which had already been given to it in the state or country from which it was adopted. A large number of recent cases uphold that rule.

United States.—*Interstate Commerce Commission v. Delaware*, etc. R. Co. 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448; *Adkins v. Arnold*, 235 U. S. 417, 35 S. Ct. 118, 59 U. S. (L. ed.) 294; *Iarussi v. Missouri Pac. R. Co.* 155 Fed. 654; *Welsh v. Barber Asphalt Pav. Co.* 167 Fed. 465, 93 C. C. A. 101; *Jennings v. Alaska Treadwell Gold Min. Co.* 170 Fed. 146, 95 C. C. A. 388; *Maki v. Union Pac. Coal Co.* 187 Fed. 389, 109 C. C. A. 221; *Stonebaker v. Hunter*, 215 Fed. 67, 131 C. C. A. 375; *Robinson v. Long Gas Co.* 221 Fed. 398, 136 C. C. A. 642; *Love v. Pavlovich*, 222 Fed. 842, 138 C. C. A. 268; *Mustard v. Elwood*, 223 Fed. 225, 138 C. C. A. 467; *Gates v. Columbia-Knickerbocker Trust Co.* 233 Fed. 359, 147 C. C. A. 295; *Johnson v. Garner*, 233 Fed. 756. See also *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L.R.A. (N.S.) 1153.

Alabama.—*Fuller v. Lavett Bleaching Co.* 186 Ala. 117, 65 So. 61; *Goldberg v. Stone*, 65 So. 454.

Alaska.—See also *Fish v. Hemple*, 2 Alaska 175; *Steel v. Dessmore*, 3 Alaska 392.

Arizona.—*Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906; *Murphy v. Brown*, 12 Ariz. 268, 100 Pac. 801; *Territory v. Copper Queen Consol. Min. Co.* 18 Ariz. 198, 108 Pac. 960; *Brown v. State*, 17 Ariz. 314, 152 Pac. 578.

Arkansas.—*McNutt v. McNutt*, 78 Ark. 346, 95 S. W. 778; *Snellen v. Kansas City S. R. Co.* 82 Ark. 334, 102 S. W. 193; *Knights of Maccabees v. Anderson*, 104 Ark. 417, 148 S. W. 1016; *St. Louis Southwestern R. Co. v. Russell*, 113 Ark. 553, 168 S. W. 1083; *St. Louis, etc. R. Co. v. Freeman*, 179 S. W. 648.

California.—Southern Pac. Co. v. Superior Ct. 150 Pac. 397; Ocean Accident, etc. Co. v. Accident Commission, 159 Pac. 1041.

Colorado.—In re Shapter, 35 Colo. 578, 85 Pac. 688, 117 Am. St. Rep. 216, 6 L.R.A. (N.S.) 757; U. S. Fidelity, etc. Co. v. People, 44 Colo. 557, 98 Pac. 828; Brown v. Douglass County First Nat. Bank, 49 Colo. 393, 113 Pac. 483; Hallett v. Alexander, 50 Colo. 37, Ann. Cas. 1912B 1277, 114 Pac. 490, 34 L.R.A. (N.S.) 328; McCord Mercantile Co. v. McIntyre, 138 Pac. 59.

Delaware.—Slaughter v. Moore, 9 Del. Ch. 350, 82 Atl. 963.

Florida.—Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761.

Idaho.—Merchants' Protective Assoc. v. Jacobson, 22 Idaho 636, 127 Pac. 315.

Illinois.—Rhoads v. Chicago, etc. Co. 227 Ill. 328, 10 Ann. Cas. 111, 81 N. E. 371, 11 L.R.A. (N.S.) 623; People v. Griffith, 245 Ill. 532, 92 N. E. 313; People v. Union Trust Co. 255 Ill. 168, Ann. Cas. 1913D 514, 99 N. E. 377, L.R.A. 1915D 450; People v. Carpenter, 264 Ill. 400, 106 N. E. 302; People v. Kellogg, 268 Ill. 489, 109 N. E. 304; Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979.

Indiana.—Hirth-Krause Co. v. Cohen, 177 Ind. 1, Ann. Cas. 1914C 708, 97 N. E. 1. See also State v. Ensley, 177 Ind. 483, Ann. Cas. 1914D 1306, 97 N. E. 113.

Indian Territory.—Le Bosquet v. Myers, 7 Indian Terr. 75, 103 S. W. 770; J. B. Bostie Co. v. Eggleston, 7 Indian Terr. 134, 104 S. W. 566.

Kansas.—See also State v. Campbell, 73 Kan. 688, 9 Ann. Cas. 1203, 85 Pac. 784, 9 L.R.A. (N.S.) 533; Sutton v. Heinze, 85 Kan. 332, 116 Pac. 614, 34 L.R.A. (N.S.) 239.

Maine.—See the reported case.

Maryland.—Lavender v. Rosenheim, 110 Md. 150, 72 Atl. 669, 132 Am. St. Rep. 420.

Massachusetts.—Woods v. Woburn, 220 Mass. 416, 107 N. E. 985; Gove's case, 223 Mass. 187, 111 N. E. 702.

Michigan.—Preston Nat. Bank v. Wayne Circuit Judge, 142 Mich. 272, 105 N. W. 757; Beaser v. Alpena Circuit Judge, 155 Mich. 631, 119 N. W. 902; Grand Rapids Lumber Co. v. Blair, 157 N. W. 29.

Missouri.—Knight v. Rawlings, 205 Mo. 412, 12 Ann. Cas. 325, 104 S. W. 38, 13 L.R.A. (N.S.) 212; State v. Miles, 210 Mo. 127, 109 S. W. 595; State v. Conway, 241 Mo. 271, 145 S. W. 441; Yost v. Union Pac. R. Co. 245 Mo. 219, 149 S. W. 577; Joplin Supply Co. v. Smith, 182 Mo. App. 212, 167 S. W. 649.

Montana.—In re Wisner, 36 Mont. 298, 92 Pac. 958; State Sav. Bank v. Albertson, 39 Mont. 414, 102 Pac. 692; Deer Lodge County v. U. S. Fidelity, etc. Co. 42 Mont. 315, Ann. Cas. 1912A 1010, 112 Pac. 1060; McDonnell v. Huffine, 44 Mont. 411, 120 Pac. 792; Lerch

v. Missoula Brick, etc. Co. 45 Mont. 314, Ann. Cas. 1914A 346, 123 Pac. 25; Winalow v. Dundorn, 46 Mont. 71, 125 Pac. 136; Miller v. Miller, 47 Mont. 150, 131 Pac. 23; Hamilton v. Hamilton, 51 Mont. 509, 154 Pac. 717.

Nebraska.—Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077; State v. Martin, 87 Neb. 529, Ann. Cas. 1912A 1125, 127 N. W. 896.

Nevada.—Ex p. Boyd, 36 Nev. 162, Ann. Cas. 1915A 1277, 134 Pac. 455.

New Hampshire.—Mann v. Carter, 74 N. H. 345, 68 Atl. 130, 15 L.R.A. (N.S.) 150.

New Jersey.—Rutkowski v. Bozza, 77 N. J. L. 724, 73 Atl. 502; Hopper v. Edwards, 88 N. J. L. 471, 96 Atl. 667; Roberts v. Comptroller, 94 Atl. 576.

New Mexico.—Dow v. Simpson, 17 N. M. 357, 132 Pac. 568; Chetham-Strode v. Blake, 19 N. M. 335, 142 Pac. 1130.

New York.—Lipstein v. Provident Loan Soc. 154 App. Div. 732, 139 N. Y. S. 799; De Filippis v. Falkenburg, 170 App. Div. 153, 155 N. Y. S. 761.

North Dakota.—State v. Blaisdell, 18 N. D. 31, 119 N. W. 360; Severtson v. People, 28 N. D. 372, 148 N. W. 1054.

Oklahoma.—National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 982; Glenn v. Ardmore, 32 Okla. 414, 122 Pac. 658; Steele v. Kelley, 32 Okla. 547, 122 Pac. 934; Western Terra Cotta Co. v. Board of Education, 39 Okla. 716, 136 Pac. 595; Hutchinson v. Krueger, 34 Okla. 23, Ann. Cas. 1914C 98, 124 Pac. 591, 41 L.R.A. (N.S.) 315; State v. Caruthers, 1 Okla. Crim. 428, 98 Pac. 474; Hawkins v. U. S. 3 Okla. Crim. 651, 108 Pac. 561; Ex parte Bowes, 8 Okla. Crim. 201, 127 Pac. 20; St. Louis, etc. R. Co. v. Bouner, 152 Pac. 1103; Amsden v. Johnson, 158 Pac. 1148.

Oregon.—Jamison v. Potts, 55 Ore. 292, 105 Pac. 93, 25 L.R.A. (N.S.) 24; Abraham v. Roseburg, 55 Ore. 359, Ann. Cas. 1912A 597, 105 Pac. 401; State v. Townsend, 60 Ore. 223, 118 Pac. 1020; Hoskins v. Burght, 69 Ore. 558, 139 Pac. 922; Dale v. Marvin, 76 Ore. 528, 148 Pac. 1116, 1151.

Rhode Island.—Rhode Island Hospital Trust Co. v. Dunnell, 34 R. I. 394, Ann. Cas. 1914D 580, 93 Atl. 858.

South Dakota.—Murphy v. Nelson, 19 S. D. 197, 102 N. W. 691; Carlson v. Stuart, 22 S. D. 560, 18 Ann. Cas. 285, 119 N. W. 41; State v. Holter, 32 S. D. 43, Ann. Cas. 1916A 193, 142 N. W. 657, 46 L.R.A. (N.S.) 376; Plowman v. Morden, 33 S. D. 593, 146 N. W. 914.

Tennessee.—Smith v. Dayton Coal, etc. Co. 115 Tenn. 543, 92 S. W. 62, 4 L.R.A. (N.S.) 1180.

Texas.—Tyler v. St. Louis Southwestern R. Co. 99 Tex. 491, 13 Ann. Cas. 911, 91 S. W. 1, 93 S. W. 997; Red River Nat. Bank v. DeBerry, 47 Tex. Civ. App. 96, 105 S. W. 998;

Olbre v. State, 57 Tex. Crim. 520, 123 S. W. 1116; *Robertson v. State*, 63 Tex. Crim. 216, Ann. Cas. 1913C 440, 142 S. W. 533; *Collier v. Smith*, 169 S. W. 1108.

Utah.—In *re Raleigh*, 158 Pac. 705; *Lukeih v. Utah Constr. Co.* 160 Pac. 270.

Virginia.—*Chesapeake, etc. R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35; *News-Register Co. v. Rockingham Pub. Co.* 118 Va. 140, 86 S. E. 874. See also *Bowd v. C. L. Ritter Lumber Co.* 89 S. E. 273.

West Virginia.—*Rose v. Public Service Commission*, 75 W. Va. 1, 83 S. E. 85, L.R.A. 1915B 358.

Wisconsin.—*Manitowoc Clay Product Co. v. Manitowoc, etc. Co.* 135 Wis. 94, 115 N. W. 390; In *re Bullen*, 143 Wis. 512, 128 N. W. 109, 139 Am. St. Rep. 1114; *Koepp v. National Enameling, etc. Co.* 151 Wis. 302, 139 N. W. 179; *Pinoza v. Northern Chair Co.* 162 Wis. 473, 140 N. W. 84.

Wyoming.—*Hilliard v. Douglas Oil Fields*, 20 Wyo. 201, 122 Pac. 626.

Canada.—*Ward v. Serrell*, 3 Alberta L. Rep. 138; *Sawyer-Massey Co. v. Weder*, 5 Alberta L. Rep. 362, 22 West. L. Rep. 150; *B. & R. Co. v. McLeod*, 7 Alberta L. Rep. 349, 28 West. L. Rep. 778; *Cambridge v. Sutherland*, 8 Alberta L. Rep. 25; *Witsoe v. Arnold*, 27 West. L. Rep. (Alberta) 259. See also *Pettit v. Canadian Northern R. Co.* 24 West. L. Rep. (Manitoba) 196.

Thus in *Chesapeake, etc. R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35, the court said: "It is a familiar rule in the interpretation of statutes, that where a foreign statute, which has received the construction of the courts of the state from which it comes, has been incorporated into the statute law of this state, it will be presumed that the legislature likewise adopted the construction placed upon the statute by the courts of the foreign state." And to the same effect, see *State v. Kennedy*, 60 Ore. 232, 118 Pac. 1023, wherein the court said: "The rule is well settled that when a statute of another state has been adopted in Oregon the construction placed upon the act by the court of last resort of the state from which the law was borrowed, made prior to the enactment in this state, controls the interpretation herein."

It has been said that the prior construction in the originating state is binding on the courts of the adopting state. *Le Bosquet v. Myers*, 7 Indian Terr. 75, 103 S. W. 770; *J. B. Bostic Co. v. Eggleston*, 7 Indian Terr. 134, 104 S. W. 566. However, in other jurisdictions, it has been held that while the decisions in the originating state are entitled to great weight, *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99; *Devine v. Healy*, 141 Ill. App. 290; In *re McNicol*, 215 Mass. 497, 102 N. E. 697, L.R.A. 1916A 306; *Clay v. Edwards*, 84 N. J. 221, 86 Atl. 548; *State v. Remmier*, 131

Tenn. 316, 174 S. W. 1134; *Collier v. Smith* (Tex.) 169 S. W. 1108; and are strongly persuasive, *Fish v. Hemple*, 2 Alaska 175; *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99; *Springfield v. Fulk*, 96 Ark. 316, 131 S. W. 694; *Russell v. Jordan*, 58 Colo. 445, Ann. Cas. 1916C 760, 147 Pac. 693; In *re Hunnewell*, 220 Mass. 351, 107 N. E. 934; *Preston Nat. Bank v. Wayne Circuit Judge*, 142 Mich. 272, 105 N. W. 757; *State v. Carter*, 257 Mo. 52, 165 S. W. 773; *Joplin Supply Co. v. Smith*, 182 Mo. App. 212, 167 S. W. 649; *State v. Meath*, 884 Wash. 302, 147 Pac. 11; and ordinarily should be followed, *State v. Martin*, 87 Neb. 529, Ann. Cas. 1912A 1125, 127 N. W. 896; *Rose v. Public Service Commission*, 75 W. Va. 1, 83 S. E. 85, L.R.A. 1915B 358; yet, the courts of the state wherein a foreign statute has been adopted, are not bound to follow the construction placed on the statute by the courts of the originating state or country, *Luken v. Lake Shore, etc. R. Co.* 248 Ill. 377, 21 Ann. Cas. 82, 94 N. E. 175, 140 Am. St. Rep. 220; *State v. Campbell*, 73 Kan. 688, 9 Ann. Cas. 1203, 85 Pac. 784, 6 L.R.A. (N.S.) 533; *Preston Nat. Bank v. Wayne Circuit Judge*, 142 Mich. 272, 105 N. W. 757; *Ex p. Bowes*, 8 Okla. Crim. 201, 127 Pac. 20; In *re McKennan*, 25 S. D. 369, 126 N. W. 611, 33 L.R.A. (N.S.) 606; *Pierson v. Minnehaha County*, 26 S. D. 462, Ann. Cas. 1913B 386, 128 N. W. 616; *State v. Rimmer*, 131 Tenn. 316, 174 S. W. 1134. Thus in the case last cited the court said: "We prefer our interpretation of this statute to that of the Kentucky courts, though it be admitted the act was taken from the Kentucky law, which is not entirely apparent. And conceding that the interpretation by the courts of the state from which our act is taken is entitled to great consideration, there is no binding effect to it." And in *State v. Meath*, 84 Wash. 302, 147 Pac. 11, it was said: "We have treated the question as original or of first instance in this court, fully mindful of the rule that when one state adopted the laws or constitutional provisions of another state, it is generally held that constructions of the adopted law go along with it. This is an accepted rule and is supported by many cases and text writers, but no cases go so far as to hold that such rule is imperative or binding. Such constructions are persuasive but not conclusive."

In *Bliss v. Caille Bros Co.* 149 Mich. 601, 12 Ann. Cas. 513, 113 N. W. 317, it was held that the rule that the adoption of a foreign statute carried with it the prior foreign construction, could not take away from the courts of the adopting state the power to determine a particular rule of common law in force in the adopting state. The court said: "It is true our statute was adopted from the state of New York, and that when adopted

here it had received judicial interpretation by the courts of that state. . . . But the judicial interpretation which can be said to be binding upon the courts of this state extended only to the point of determining that the statute must be aided by the common law. The particular rule of common law adopted and in force in this state is not to be determined authoritatively by courts of another state."

The construction by the courts of the originating state need not necessarily be a pronouncement by the highest court of the originating state. *Clay v. Edwards*, 84 N. J. L. 221, 86 Atl. 548, wherein it appeared that a New York statute relating to collateral inheritance taxation was adopted in New Jersey, and that it had previously been construed by a New York surrogate's court. The court stated the reason for its holding as follows: "Although the decisions referred to are not the pronouncements of the highest court of the state, the fact that surrogates deal largely and exclusively with matter relating to the estates of deceased persons qualifies them with expert knowledge of the subject, and coupled with the further facts that no appeal was taken from either decision, and that the construction placed on the words 'husband of a daughter,' as contained in the Act of 1885, by the surrogates, to the effect that they include the surviving husband of a deceased daughter and that the circumstance that the husband has remarried does not deprive him of this right to the exemption under the act, yet nevertheless the legislature of the state of New York, in view of all this, in enacting the tax law of 1909 made no change in that regard, but left the phrase 'husband of a daughter' undisturbed. The words 'husband of a daughter' having been thus judicially determined, as to their meaning, by the decisions referred to for more than twenty years prior to the passage of the Act of 1909, and so far as it appears (there being no decision to the contrary) acquiesced in by the bench and bar of that state, afford confirmatory and contemporaneous evidence of their meaning."

2. EXCEPTIONS TO RULE.

a. *Meaning of Statute Clear and Obvious.*

The rule that the adoption of a foreign statute carries with it the prior construction in the originating state, has been held to be applicable only where the terms of the statute are of doubtful import, so as to require construction. *Territory v. Chong Chak Lai*, 19 Hawaii 437; *Public Service R. Co. v. Commissioner*, 81 N. J. L. 363, 80 Atl. 27. Thus it has been held that the rule is not applicable where the meaning of the statute is too plain

to make it necessary to seek the meaning placed on the statute by the courts of the originating state. *Torrance v. Edwards* (N. J.) 99 Atl. 136.

b. *Variations between Statutes.*

Where there is a material variance between the original and the adopted statute, the courts of the adopting state will not follow the construction of the courts in the originating state. *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143; *People v. Godding*, 55 Colo. 579, 136 Pac. 1011; *Public Service R. Co. v. Board of Public Utility*, 81 N. J. L. 363, 80 Atl. 27. In the case last cited, the court said: "To adopt the construction given by an extra-territorial court to an act subsequently adopted in another state, so that the construction thus given may be read into the act as part of it, the statute must appear to be the same in its entirety."

However it has been held that it is not essential that the adopted statute shall be a literal copy of the one from the foreign state; but it is necessary to bring it within the rule, only that the substance of a statute or some controlling word had been borrowed from a foreign state. *State v. Miles*, 210 Mo. 127, 109 S. W. 595.

c. *Variations between Constitutions.*

The rule that the adoption of a foreign statute carries with it the prior construction in the originating state is not applicable where the foreign construction is not in harmony with the constitution of the adopting state. *Hutchinson v. Krueger*, 34 Okla. 23, Ann. Cas. 1914C, 98, 124 Pac. 591, 41 L.R.A. (N.S.) 315; *Western Terra Cotta Co. v. Board of Education*, 39 Okla. 716, 136 Pac. 595; *Boyd v. C. L. Ritter Lumber Co. (Va.)* 89 S. E. 273. In the case last cited the court said: "It is insisted here for the defendant in error that when a constitutional provision is ordained, or a statute enacted by another state, and it is ingrafted into the constitution or statutes of this state, and prior thereto such constitutional provision or statute had received judicial construction by the courts of such other state, then it is to be presumed that the lawmaking power of this state intended that the constitutional provision or statute should be given the same construction in this state that it was given in the state from which it was taken. This principle of construction, however, applies only to the construction of constitutional provisions and statutes, and has no relation, as the authorities hold, to the question of whether or not a statute is constitutional and valid. In other words, the legislature, by enacting

a statute which has been held constitutional and valid by the courts of another state, cannot deprive the courts of this state of the right to determine for themselves the question of the constitutionality of such statute."

Likewise when the constitutional reasons which governed the decision in the originating state are lacking in the adopting state, the construction will not be followed. *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143.

d. Amendment before Adoption.

In *Hutchinson v. Krueger*, 34 Okla. 23, Ann. Cas. 1914C 98, 124 Pac. 591, 41 L.R.A. (N.S.) 315, it was held that a prior construction by the courts of the originating state, would not be followed by the courts of the adopting state, where the statute had been materially changed by amendment, after the decisions construing it and before adoption. And in *Slaughter v. Moore*, 9 Del. Ch. 350, 82 Atl. 963, it was held that the rule that if one state adopts a statute theretofore enacted in another state it adopts also the judicial construction put thereon by the courts of the latter state did not apply where, previous to the adoption, the legislature of the originating state had passed a supplemental law which did not show whether it was a change of legislative purpose or an interpretation of that purpose.

e. Doubtful Origin of Statute.

It would seem that the rule that the adoption of a foreign statute carries with it the prior construction in the originating state is not applicable when the origin of the statute is doubtful. See *Torrance v. Edwards* (N. J.) 99 Atl. 136.

f. Erroneous Construction.

A construction of a statute by the courts of the originating state will not be followed by the courts of the adopting state if they are clearly of the opinion that it is erroneous. *State v. Campbell*, 73 Kan. 688, 9 Ann. Cas. 1203, 85 Pac. 784, 9 L.R.A. (N.S.) 533; *Torrance v. Edwards* (N. J.) 99 Atl. 136; *Dow v. Simpson*, 17 N. M. 357, 132 Pac. 568; *Ex parte Baines*, 8 Okla. Crim. 201, 127 Pac. 20; *Pierson v. Minnehaha County*, 26 S. D. 462, Ann. Cas. 1913B 386, 128 N. W. 616; *State v. Meath*, 84 Wash. 302, 147 Pac. 11. See also *Deer Lodge County v. U. S. Fidelity*, etc. Co. 42 Mont. 315, Ann. Cas. 1912A 1010, 112 Pac. 1060. In *Pierson v. Minnehaha County*, *supra*, the court said: "This court should not, under any circumstances, be bound or required to follow what it deems to be an erroneous construction placed upon a

foreign statute by a foreign court, any more than we should be required to follow an erroneous decision of our own court."

g. Contrary Construction in Other States.

The construction placed on an adopted statute by the courts of the state from which it is adopted will not be followed by the courts of the adopting state, where the adopted statute exists in other states and the construction by the courts of the originating state is contrary to the weight of authority in such other states. *People v. Godding*, 55 Colo. 579, 136 Pac. 1011; *Sutton v. Heinze*, 85 Kan. 332, 116 Pac. 614, 34 L.R.A. (N.S.) 239; *Hutchinson v. Krueger*, 34 Okla. 23, Ann. Cas. 1914C 98, 124 Pac. 591, 41 L.R.A. (N.S.) 315; *Western Terra Cotta Co. v. Board of Education*, 39 Okla. 716, 136 Pac. 595; *Ex parte Bowes*, 8 Okla. Crim. 201, 127 Pac. 20. In *Sutton v. Heinze*, *supra*, the court said: "The rule as to the binding effect of a decision rendered prior to the adoption of a statute is not absolute. It does not apply 'where other jurisdictions having the identical or substantially the same provision has given the language a different construction prior to the adoption in question.' . . . This must be especially true where the court of the adopting state itself had already rendered a contrary decision under a statute essentially similar."

h. Denial of Substantial Right.

It would seem that the construction by the courts of the originating state will not be followed by the courts of the adopting state, if the application of the decision would lead to a denial of a substantial right. See *Deer Lodge County v. U. S. Fidelity*, etc. Co. 42 Mont. 315, Ann. Cas. 1912A 1010, 112 Pac. 1060.

i. Construction Contrary to Policy of Adopting State.

The construction placed on an adopted statute by the courts of the state wherein it originated will not be followed when that construction is contrary to the spirit and policy of the jurisprudence of the adopting state. *Penn Bridge Co. v. New Orleans*, 222 Fed. 737, 138 C. C. A. 191; *Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.* 25 Colo. 1, 136 Pac. 553; *Rhoads v. Chicago*, etc. Co. 227 Ill. 328, 10 Ann. Cas. 111, 81 N. E. 371, 11 L.R.A. (N.S.) 623; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *State v. Campbell*, 73 Kan. 688, 9 Ann. Cas. 1203, 85 Pac. 784, 9 L.R.A. (N.S.) 533; *Moore v. O'Leary*, 180 Mich. 261, Ann. Cas. 1916A 373, 146 N. W. 661; *Hutchinson v. Krueger*, 34 Okla. 23, Ann. Cas. 1914C 98, 124 Pac. 591, 41 L.R.A. (N.S.) 315; *Western Terra*

Cotta Co. v. Board of Education, 39 Okla. 716, 136 Pac. 595; Ex parte Bowes, 8 Okla. Crim. 201, 127 Pac. 20; Smith v. Dayton Coal, etc. Co. 115 Tenn. 543, 92 S. W. 62, 4 L.R.A.(N.S.) 1180; State v. Rimmer, 131 Tenn. 316, 174 S. W. 1134. See St. Louis, etc. R. Co. v. Freeman (Ark.) 179 S. W. 648. See also Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979; Clay v. Edwards, 84 N. J. L. 221, 86 Atl. 548. In Smith v. Dayton Coal, etc. Co. 115 Tenn. 543, 92 S. W. 62, 4 L.R.A.(N.S.) 1180, the court said: "It may be stated as a general rule that, when a statute of another state is adopted, the judicial construction and interpretation of that statute in the state of its origin is also imported and written in the statute by the adopting state. This rule, however, is subject to the important qualification that the judicial construction of said statute by the state of its origin does not contravene the well-established policy prevailing on said subject in the adopting state."

II. Subsequent Construction in Originating State.

Where the construction of a statute in the originating state does not take place until after the statute has been adopted in another state, the courts of the adopting state are not bound to follow that construction. Cordova v. Folgueras y Rijos, 227 U. S. 375, 33 S. Ct. 350, 57 U. S. (L. ed.) 556; Poe v. Poe (Ark.) 188 S. W. 1190; Rhoads v. Chicago, etc. Co. 227 Ill. 328, 10 Ann. Cas. 111, 81 N. E. 371, 11 L.R.A.(N.S.) 623; Goodell v. Yezerski, 170 Mich. 578, 136 N. W. 451, 40 L.R.A.(N.S.) 516; Wyoming Coal Min. Co. v. State, 15 Wyo. 106, 87 Pac. 337, 984, 123 Am. St. Rep. 1014. In Goodell v. Yezerski, 170 Mich. 578, 136 N. W. 451, 40 L.R.A.(N.S.) 516, the court said: "It is an established rule of construction that the adoption of a statute of a sister state is presumed to have been had with reference to the previous construction given to such statute by the courts of such state" [citing cases]. This rule is not absolutely imperative. Stellwagen v. Wayne Probate Judge, 130 Mich. 166 (89 N. W. 728). The rule, however, can have no application in the instant case, because the statute under consideration did not receive judicial construction in Massachusetts until long after its adoption by this state. The decision in that state should receive just that consideration as authority to which it would be entitled under ordinary circumstances."

However, it has been said that subsequent decisions are entitled to great consideration, Cordova v. Folgueras y Rijos, 227 U. S. 375, 33 S. Ct. 350, 57 U. S. (L. ed.) 556. See also Lerch v. Missoula Brick, etc. Co. 45 Mont. 314, Ann. Cas. 1914A 346, 123 Pac. 23; and

are very persuasive, Poe v. Poe (Ark.) 188 S. W. 1190; Wyoming Coal Min. Co. v. State, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. Rep. 1014. But see Marx v. Hefner (Okla.) the case reported immediately following, wherein it is held that a subsequent construction in the originating state, in direct conflict with the settled law of the adopting state, is not even persuasive authority.

MARX ET AL.

v.

HEFNER.

Oklahoma Supreme Court—May 18, 1915.

46 Okla. 453; 149 Pac. 207.

Foreign Laws — Pleading and Proof.

Where a contract is made in a foreign state, and the laws of such foreign state are relied upon for a recovery, such laws of the foreign state must be pleaded and proved.

[See 113 Am. St. Rep. 870.]

Conflict of Laws — Legality of Contract.

Where a contract in a foreign state is sought to be enforced in another state, the *lex loci contractus* controls the question of the legality of the contract, unless otherwise provided in the contract, and the laws of the state where the contract was made will be observed, in determining the rights and obligations of the parties, and effect given thereto, unless such foreign laws are irreconcilable with the local laws, or in conflict with the established policy of the enforcing state, provided that such laws of the foreign state are pleaded and proved.

[See 5 R. C. L. tit. *Conflict of Laws*, p. 931.]

Statutes — Construction of Adopted Statute — Construction Subsequent to Adoption.

A decision of the supreme court of Arkansas, rendered since the laws of Arkansas were extended over the Indian Territory, where in direct conflict with the settled law of this state, "is not even persuasive."

[See note at end of this case.]

Foreign Laws — Presumption.

Where a contract, made in a foreign state, is sought to be enforced in this state, unless the laws of the foreign state be pleaded and proved, it will be presumed that the laws governing the rights of the parties under such contract are the same as the laws of this state.

[See 1 Ann. Cas. 459, 113 Am. St. Rep. 880.]

Territories — Effect of Territorial Laws after Statehood — Prior Contracts.

The laws of Arkansas, which were extended over the Indian Territory, are in force in this state as to rights arising under contracts entered into in the Indian Territory prior to statehood, and said laws of Arkansas need not be pleaded or proved.

Infants — Actions — Necessity for Guardian.

Neither under an action upon an express contract, nor upon a quantum meruit, can a recovery be had against a minor in an action at law for an attorney's fee for legal services rendered in behalf of a minor in relation to his property, without the intervention of a legal guardian, as such legal services cannot be classed as a "necessary," under the meaning of section 886, Rev. Laws 1910.

Legal Services as Necessaries.

A petition which seeks a recovery against a minor for legal services rendered in regard to his estate upon an express contract, or upon a quantum meruit, based upon a contract made in a foreign state, which does not plead the *lex loci contractus* of the contract, showing such services are classed as a "necessary," does not state a cause of action.

[See 5 Ann. Cas. 131; Ann. Cas. 1914D 604.]

(Syllabus by court.)

Error to District Court, Carter county: RUSSELL, Judge.

Action by R. A. Hefner, plaintiff, against Moses Marx et al., defendants. Judgment for plaintiff. Defendants bring error. **REVERSED.**

[454] This is an action, brought by defendant in error, hereinafter called "plaintiff," against plaintiffs in error, hereinafter called "defendants," to recover for legal services rendered in securing the enrollment of defendants as minor Mississippi Choctaw Indians. The contract for said services was entered into and the services rendered prior to statehood. This action was instituted August 30, 1910, tried to a jury, resulting in a verdict against each of said minor defendants in the sum of \$1,000. Motion for new trial was filed within the time prescribed by law, overruled, and judgment entered in accordance with said verdict. From this judgment this appeal is prosecuted.

The first amended petition in this case upon which the same was tried, omitted the caption and signatures, is as follows:

"Come now Oswald S. Parker and H. A. Hefner, plaintiffs herein, and complaining of Moses Marx, Mariam Marx, Phillip Aaron Marx, Susan Burton Marx, and Ruby Marx, and Frank McPhail, guardian of Moses Marx, Mariam Marx, Phillip Aaron Marx, Susan Burton Marx, and Ruby Marx, defendants, and for cause of action say:

Ann. Cas. 1917B.—42.

"(1) That the plaintiffs are regularly licensed attorneys at law, and were at all the dates and times hereinafter mentioned engaged in the practice of law before the Commissioner to the Five Civilized Tribes in the Indian Territory, the Department at [455] Washington, D. C., and before various courts of the United States.

"(2) That said defendants and each of them were on the 18th day of July, 1906, and at the dates and times herein mentioned have been and are now, and were born citizens of the United States. That said defendants and each of them were claimants and applicants for enrollment as allottees of certain lands in the Choctaw and Chickasaw Nations, as Mississippi Choctaws, having from one sixteenth to one sixty-fourth degree of Indian blood, under certain acts of the Congress of the United States relative thereto.

"(3) That on the 18th day of July, 1906, the said defendants and each of them executed and delivered to these plaintiffs their certain contracts in writing, whereby they employed the plaintiffs as their attorneys to represent them before the proper tribunals and officers and to secure their enrollment as such Mississippi Choctaws, and enforce their rights as such. That by the terms of said written instrument the said defendants and each of them jointly and severally bound and obligated themselves to pay to these plaintiffs for their services as attorneys, in cash, a sum of money equal to the market value of one-third of the land allotted to them, and each of them, and one-half of the money or other property received or to be received by them and each of them in the event of the successful termination of their application for enrollment as Mississippi Choctaws.

"(4) That pursuant to the terms of said written instrument these plaintiffs represented the said persons and each of them before the said tribunals and officers, and procured the enrollment of each and all of said persons as Mississippi Choctaws, and procured to be allotted to each and every one of said persons an allotment of lands in the Choctaw and Chickasaw Nations of equal governmental appraised value with that of members of the Choctaw and Chickasaw Nations, and that said enrollment carried with it the right of said persons to participate in the division and partition of the unallotted lands of the Choctaw and Chickasaw Nations, and of the monies and other property of said Choctaw and Chickasaw Nations.

"(5) That pursuant to the terms of said written instrument these plaintiffs procured to be allotted to Moses Marx the lands described in Exhibit A; to Mariam Marx, the lands described [456] in Exhibit B; to Phillip Aaron Marx, the lands described in Exhibit D; to Ruby Marx, the lands described in Ex-

hibit E—as their allotted and proportionate share of the lands of the Choctaw and Chickasaw Nations, as enrolled Mississippi Choctaws.

“(6) That each of said persons have refused to make any conveyance of any portion of the lands allotted to them to these plaintiffs, although they, under the law, could do so if they would, and each of them has refused to pay to these plaintiffs the proportion of money received by them that is now due these plaintiffs, and each of them has been duly enrolled and identified as Mississippi Choctaws.

“(7) That the reasonable market value of the lands allotted to each of the said persons is \$5,000, and there is now due and owing to these plaintiffs from each of these persons the sum of \$1,000; the same being one-third of the value of the lands allotted to each of them. That due demands have been made for said sums, and that the persons and each of them have failed and neglected to pay any part thereof, and plaintiffs have performed their portion of the contract in every particular; a copy of the same being attached hereto and marked ‘Exhibit F.’

“(8) That each of said defendants are minors under the age of 14 years and had no legal guardian at the time the service hereinbefore alleged was performed and at the time the agreement was made for said services, but since said time Frank McPhail, of Ardmore, Okla., has been appointed the legal guardian for each of said minors by the honorable probate court of Carter county, Okla.

“(9) That each of said defendants had valuable rights involved as Mississippi Choctaws, and the plaintiffs espoused the cause of each of them and defended their rights to the protection of their property of each of them in said litigation, and as a result of the litigation an estate has been secured to each of them as hereinbefore alleged, and that the compensation provided for as hereinbefore alleged is a just and reasonable fee, and was necessary for the protection of the valuable rights of each of the said defendants; each of them residing at the time in the state of Mississippi and never moved to the Indian Territory, now Oklahoma, until after these plaintiffs had procured, through their efforts, the enrollment of each of them as Mississippi Choctaws, and the services [457] of the said plaintiffs were for the manifest benefit of each of said infants, and, had it not been for the efforts of these plaintiffs, the defendants would never have received the valuable estates that they have received as hereinbefore alleged.

“Wherefore, the plaintiffs pray judgment against each of said defendants in the sum of \$1,000, making a total of \$5,000, or such amount as may be found reasonable and just for the services herein performed under the

said contract, and for their costs, for the appointment of a guardian *ad litem* to represent the said minors, and for such other relief which they may show themselves entitled to, either in law or equity.”

To said petition is attached a copy of the contract sued upon, and the terms stated in said contract support the averments of the petition as to said contract as pleaded. To said petition, the defendants, by their legal guardian, demurred, upon the ground:

“That the statements made in said petition are not sufficient to constitute a cause of action against defendants.”

I. R. Mason for plaintiffs in error.

Samuel W. Hayes, C. B. Kendrick, S. M. Davis and *R. A. Hefner* for defendant in error.

COLLIER, C. (*after stating the facts*).—Motion is made by plaintiff to dismiss this cause, upon the ground:

“That defendants’ brief does not contain an abstract, setting forth the material parts of the pleadings, facts, and documents upon which the case was tried, sufficient to authorize the court to decide this case without reference to the case-made.”

This motion has received at our hands the most careful consideration; but, under the liberal construction as to procedure in this state, we feel that the benefit of any doubt as to the sufficiency of the presentation of the assignments of error should be given to defendant, said motion overruled, and the cause considered upon its merits.

It is averred in the petition that, when the contract sued [458] upon was entered into, plaintiffs were residents of the state of Texas, and that defendants were residents of the state of Mississippi. A copy of the contract, attached to the petition as an exhibit, purports that said contract was executed in Texas, but neither the laws of Mississippi nor the laws of Texas are pleaded in the petition to show that a recovery can be had against a minor for attorney’s fees, for service rendered in behalf of a minor in relation to his property, without the intervention of a guardian. Of course, if the laws of Arkansas, which were extended over the Indian Territory, authorized a recovery against a minor for attorney’s fees for services rendered him in relation to his property, upon a legal contract entered into prior to statehood, it would not be necessary to plead such laws of Arkansas, if the contract sued upon was an Indian Territory contract, as the laws of Arkansas were extended over the Indian Territory.

Section 1 of the Schedule of the Constitution provides that:

“No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government,

but all shall continue as if no change in the forms of government had taken place."

The purpose of this section of the Schedule is to preserve all rights already accrued, either in action, or capable of being enforced by the ordinary remedies provided for this purpose, as effectively as if the Constitution had not been adopted. But we do not find any allegation in the petition authorizing us to hold that the contract sued upon in this action was an Indian Territory contract. However, if the petition in this case does contain any averments from which it could be held that the contract sued upon is an Indian Territory contract, we, after diligent search, have been unable to find any law of Arkansas which was extended over the Indian Territory that classed attorney's fees as necessities, for which a minor child legally contract.

The case of Owens v. Gunther, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130, upon which defendants rely to support their contention [459] that, if this contract is an Indian Territory contract, attorney's fees can be recovered for services rendered a minor in relation to his estate, not having been decided until after the laws of Arkansas were extended over the territory, is not even persuasive that the laws of Arkansas, which were extended over the Indian Territory, authorized a recovery upon a contract, or upon a *quantum meruit*, for services rendered a minor by an attorney, without the intervention of a legal guardian, in relation to his estate. If the written contract averred in the petition alone is counted upon by defendants, the petition averring that said minors were, at the time of the execution of the contract sued upon, under 14 years of age, of course the petition does not state a cause of action; but there may be sufficient allegations in the petition, if the contract sued upon be ignored, to authorize a recovery upon a *quantum meruit*, provided a recovery can be had for the services alleged to have been performed by plaintiff for said minors. As a count upon an express contract and a count upon a *quantum meruit* may be joined in the same action, where the pleader is in doubt as to under which cause of action his relief sought lies, and the action upon the express contract and upon the *quantum meruit*, is stated in one count, there being no motion, as in the case here, to require the said two causes of action to be separately counted upon, such petition is not demurrable. Mellon v. Fulton, 22 Okla. 636, 98 Pac. 911, 19 L.R.A.(N.S.) 960; King v. Stephenson, 29 Okla. 29, 116 Pac. 183; Hawley v. Wilkinson, 18 Minn. 525; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Plummer v. Mold, 22 Minn. 15; Manders v. Craft, 3 Colo. App. 236, 32 Pac. 836. Hence we will consider, for the purpose of

testing said demurrer, that the petition in this case is a good petition upon the express contract, and upon a *quantum meruit*, notwithstanding the better practice would be to count separately upon the express contract and the *quantum meruit*.

The petition fails to state where the contract was made, and fails to plead the laws of the foreign state in which said contract [460] was made; and it will be presumed that the laws of the state in which the contract was made are the same as the laws of the forum, controlling the trial under which the rights of the parties are to be determined.

In the case of Hays v. King, 44 Okla. 180, 143 Pac. 1142, Judge Brewer, speaking for the court, says:

"Where a contract made in a foreign state is sought to be enforced in another state, the *lex loci contractus* controls the construction of the contract, except where it provides otherwise, and the laws of the state where the contract was made will be observed, of course being pleaded when necessary, in determining the rights and obligations of the parties, and effect given thereto, unless such foreign laws are irreconcilable with the local laws, or conflict with the established policy of the enforcing state."

As the petition fails to plead where the contract was made, and the laws of such state, as to the legality of the contract, not having been specially pleaded, in the absence of such special pleas, it will be presumed that the laws of the state in which the contract was made are the same as the laws of the forum, controlling the trial under which the rights of the parties are to be determined. Hoshaw v. Lines, 30 Okla. 67, 120 Pac. 583; Greenville Nat. Bank v. Evans-Snyder-Buel Co. 9 Okla. 353, 60 Pac. 249.

Where a contract, made in a foreign state, is sought to be enforced in another state, it is necessary, in order that the laws of the foreign state may prevail as to the construction of the contract, that the same be pleaded and proved. In the absence of pleading that the contract sued upon was made in a foreign state, and the laws of the foreign state, the laws of the forum must prevail. In other words, the presumption is that the laws of the foreign state are the same as those of the state of Oklahoma.

Under the laws of this state, a recovery cannot be had against a minor for attorney's fees for legal services rendered.

[461] In Grissom v. Beidleman, 35 Okla. 343, 129 Pac. 853, Ann. Cas. 1914D 599, 44 L.R.A.(N.S.) 411, Justice Williams, speaking for the court, said:

"We believe that the rule in New Hampshire, followed in Massachusetts and other states, should prevail here. That is, where the services pertain to the defense of the lib-

erty or person of a minor, or the prosecution of action for an injury thereto, that the same should be classed as a 'necessary,' and an action lie against the minor for a reasonable recovery for attorney's fees; but, where the legal services are rendered in behalf of the . . . legal guardian, no recovery for such services should be had in an action at law."

As a recovery, neither upon the express contract sued upon, nor upon a *quantum meruit*, can be had under the petition in this case against said minor, the petition upon which this cause was tried does not state facts sufficient to constitute a cause of action; and the court committed reversible error in overruling the demurrer directed against said petition.

Inasmuch as the error in overruling said demurrer to the petition must result in reversing and remanding this case, we do not deem it necessary to consider the other questions presented by this appeal.

It follows that this cause should be reversed and remanded.

BY THE COURT.—It is so ordered.

NOTE.

The reported case holds that where a statute is not construed until after it has been adopted in another state, the courts of the adopting state will not consider such a construction even persuasive authority, where it is in direct conflict with the settled law of the adopting state. The construction of a statute in its originating state, subsequent to its adoption in another state, has generally been held to be persuasive authority in the adopting state, as is shown in the note to *Mt. Vernon Telephone Co. v. Franklin Farmers' Co-op. Tel. Co.* reported ante, this volume at page 649, wherein the cases dealing with the construction of an adopted statute are fully discussed.

HANEY

v.

COFRAN ET AL.

Kansas Supreme Court—March 6, 1915.

94 Kan. 332; 146 Pac. 1027.

Policemen — Status as Public Officers.

A policeman holds an office within the meaning of section 2, of art. 15, of the state constitution.

[See note at end of this case.]

Civil Service — Scope — Application to Policemen.

The civil service provisions of section 1238 of the Gen. Stat. of 1909, relating to commission government in cities of the first class, must be restricted to the employment of subordinates and employees, and cannot apply to officers within the contemplation of section 2, of art. 15, of the state constitution.

Policemen — Tenure of Office.

Under chapter 114 of the Laws of 1907, and amendments thereto, in cities governed by the commission form of government, the terms of police officers should be definitely fixed by city ordinance, and the terms of such officers should expire with the term of office of the board appointing them.

Same.

An appointment of a policeman during good behavior under civil service regulations violates the constitutional provision that the legislature shall not create any office the tenure of which shall be longer than four years.

Appeal from District Court, Shawnee county: WHITCOMB, Judge.

Action by O. F. Haney, plaintiff, against R. L. Cofran, Mayor of city of Topeka et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

T. D. Humphreys, Arthur J. Bolinger and A. E. Crane for appellant.

W. C. Ralston and J. J. Schenck for appellees.

Richard J. Higgins, as *amicus curiae*.

[332] DAWSON, J.—The appellant, O. F. Haney, was a policeman of the city of Topeka until the change of administration following the city election in April, 1912, when he was summarily discharged by the mayor and chief of police. Invoking the provisions of the [333] civil-service law relating to cities of the first class, Haney appealed to the civil-service commissioners, who, upon hearing, revoked his discharge and ordered him restored to his position. (Gen. Stat. 1909, § 1238.) The appellees ignored the order of the civil-service commissioners, and appellant applied for and obtained from the district court an alternative writ of mandamus directing his reinstatement. The mayor and chief of police filed a motion to quash the alternative writ, which motion was sustained.

So much of the civil-service act as we need to consider reads:

"The provisions of this section shall apply to all appointive officers and employees of said city, except city attorney, the members of the fire department where they have already adopted the civil-service plan, city

clerk, city treasurer, city auditor, city engineer, superintendent of streets, superintendent of waterworks, secretary of waterworks, chief of police, city physician, judge of police court, superintendent of public parks, city assessor, commissioners of any kind (laborers whose occupation requires no special skill or fitness), election officials and mayor's secretary and assistant attorney, where such officers are appointed. All officers and employees in any such city shall be elected or appointed with reference to their qualifications and fitness and for the good of the public service, and without reference to their political faith or party affiliations. Any violations of the provisions of this section shall be a misdemeanor and be a ground for removal from office." (Gen. Stat. 1909, § 1238, subdiv. f.)

The appellees contend that a policeman is a public officer within the meaning of section 2 of article 15 of the state constitution. That section reads:

"The tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment, but the legislature shall not create any office the tenure of which shall be longer than four years."

[334] Does a policeman hold an office created by law? The legislature has not actually descended into such details, but it has created municipalities and defined their powers, and in general terms has authorized the creation of the position of a policeman in the cities of this state. (Gen. Stat. 1909, § 1238, subdiv. c; Gen. Stat. 1909, § 1304.)

In many respects a policeman is a municipal officer, but in other and important respects the legislature and the courts have raised him out of the class of a mere subordinate or employee like a field man of a local department of health (*Jagger v. Green*, 90 Kan. 153, 133 Pac. 174), or a cell-house man at the penitentiary (*Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1198).

A policeman is a conservator of the peace and exercises many of the functions of sovereignty, and important duties are imposed upon him by the legislature. (See Gen. Stat. 1909, §§ 982, 2832, 2881, 2882, 2894, 3884, 4363, 5077, 5111, 5139 and 5140.)

This court has frequently recognized police officers as exercising the functions of sovereignty; and being clothed with such extensive powers they must be considered public officers. (*State v. Hunter* 38 Kan. 578, 17 Pac. 177; *Peters v. Lindsborg*, 40 Kan. 654, 656, 20 Pac. 490; *Topeka v. Kersch*, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29; *Clafin v. Wyandotte County*, 81 Kan. 57, 19 Ann. Cas. 168, 105 Pac. 19; *Anderson v. Shawnee County*, 91 Kan. 362, 137 Pac. 799.)

There is no end of authority that a policeman is a public officer. (*Jacksonville v. Allen*, 25 Ill. App. 54; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L.R.A. 253; *State v. Schram*, 82 Minn. 420, 85 N. W. 155; *Dempsey v. New York Cent. etc. R. Co.* 146 N. Y. 290, 40 N. E. 867; *State v. Painesville*, 32 Ohio Cir. Ct. Rep. 123; Penal Code, Tex. 1895, art. 243; *Proctor v. Blackburn*, 28 Tex. Civ. App. 351, 67 S. W. 548.)

[335] In *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490, it was said:

"The police officers of a city are not regarded as the servants or agents of the city; their duties are of a public nature; their appointment is made by the city as a convenient mode of exercising a function of government; their duties are to preserve the good order and provide for the safety of the people of the city, and in these duties they act as the public servants of the state under the law, and not as mere agents of the city." (p. 656.)

A diligent search of the authorities discloses only one case under a constitutional provision like our own which is held not to apply to a policeman of a city. That case is *Roth v. State*, 158 Ind. 242, 63 N. E. 460, where one section of the syllabus reads:

"The provisions of sec. 2, art. 15, of the constitution that 'the General Assembly shall not create any office, the tenure of which shall be longer than four years,' does not apply to the office or position held by a policeman of a city."

The opinion of the Indiana supreme court has much to commend it; but we are impelled to a different conclusion by our own decisions distinguishing between officers and employees and the classes of public servants which may properly be placed under civil service (*Jagger v. Green*, 90 Kan. 153, 133 Pac. 174; *Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1198), and those which may not (*Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207). Moreover, we must admit that the weight of authority supports the contention of appellees.

In *Monette v. State*, 91 Miss. 662, 44 So. 989, 124 Am. St. Rep. 715, it was said:

"Constitution 1890, § 20, providing that no person shall be elected or appointed to office in this state for life or good behavior, but the term of all offices shall be for some specified period, applies to municipal as well as to state and county officers and a municipal ordinance purporting to authorize the appointment of policemen during good behavior is unconstitutional and void." (Syl. ¶ 1.)

[336] In *Houston v. Estes*, 35 Tex. Civ. App. 99, 79 S. W. 848, it was said:

"Sections 26 and 26a of the charter of the city of Houston, placing the employees of the police, fire and health departments under civil service regulation and providing that they can only be discharged upon complaint for cause made to a board established for this purpose, appeal lying to the city council, held unconstitutional in so far as they fix the tenure at life upon good behavior. The constitutional term of two years will govern, subject to such regulation." (Syl. ¶ 1.)

Houston v. Estes, *supra*, is specially followed in Houston v. Smith, 36 Tex. Civ. App. 43, 80 S. W. 1144, and Houston v. Mahoney, 36 Tex. Civ. App. 45, 80 S. W. 1142. Earlier Texas supreme court cases: State v. Catlin, 84 Tex. 48, 19 S. W. 302; San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735; Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120.

In Callaghan v. McGown (Tex. 1905) 90 S. W. 319, the Texas court of civil appeals slightly alters its position, and holds that the civil-service law does cover policemen, but only for the term of two years, which is the constitutional maximum term for any office which may be created by law.

The same conclusion is reached by noting particularly one clause of our own constitution in the section under consideration:

"When [the tenure of any office] not so declared such office shall be held during the pleasure of the authority making the appointment."

If a policeman's tenure of office is not fixed by the legislature, and it is not so fixed unless controlled by the civil-service law, then he holds "during the pleasure of the authority making the appointment." There is nothing doubtful about that language. It is clear, imperative and to the point. So a policeman, being a public officer with no term fixed, holds his office at the pleasure of the authority appointing him. We confess our disappointment at the result thus reached, and have [337] sought with care to find a different result. If the legislature had said that police officers should be under civil-service regulations for terms of four years there would be no difficulty. The Texas court of civil appeals, in Callaghan v. McGown, *supra*, have apparently thought it is possible to read the constitutional provision into the Texas civil-service law, thus modifying their earlier interpretations; but it is more in harmony with our view of the subject that the legislature should make its own interpolations.

There is an additional difficulty under our statute in reaching that conclusion. The act relating to commission government of cities of the first class (Laws 1907, ch. 114, and amendments) contains two sections which we cannot ignore:

"Art. V, sec. 27. The board of commissioners . . . shall have power . . .

"Sec. 48. To provide for the removal of any elective or appointive city officer for misconduct in office.

"Art. VII, sec. 90. The board of commissioners shall have power to remove the city attorney, city clerk, city treasurer or city auditor for incompetency, neglect of duty, or malfeasance in office, upon charges preferred, after due notice in writing and opportunity to be heard in their defense. When such charges are sustained, any such officer shall be removed by resolution of the board of commissioners, passed by a vote of at least four of the members of said board, declaring that the charges preferred have been proven and that such office is vacant. But said board may in their discretion, by a majority vote of all the members thereof, remove with or without cause the incumbent of any other appointive city office or employment whatever, and may by ordinance prescribe, limit or change the compensation of such officers and employees, except that the salaries of all appointive officers shall not be increased or diminished during the term for which they are appointed." (Gen. Stat. 1909, §§ 1243, 1264, 1306.)

The civil-service provisions were inserted in this act by the legislature of 1909 (Laws 1909, ch. 74, § 4, Gen. Stat. 1909, § 1238), but they are *in pari materia* and [338] must be considered in harmony with the other statutes dealing with this subject. (Wren v. Nemaha County, 24 Kan. 301.)

"The general rule in the construction of a statute is that force and effect must be given to all sections of a statute, if the same can be done without destroying the effect, intent and object with which it was enacted; and all sections of the same act must be construed in harmony with each other, so that no part shall be held as superfluous." (Wenger v. Taylor, 39 Kan. 754, syl. ¶ 1, 18 Pac. 911.)

In the state of New York, where civil-service has reached its highest development, there is a provision in the New York constitution, adopted in 1894, giving positive sanction to civil-service laws. It reads:

"Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list

from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section." (Constitution of New York, art. 5, § 9.)

It needs no comment to point out the wide difference between the Kansas and New York constitutions on the questions under consideration.

From this it follows that a policeman is an officer, and not within the scope of the civil-service regulations, and as his term is not fixed, he holds, in conformity with the constitution, "during the pleasure of the authority making the appointment."

The judgment is affirmed.

BURCH, J. (*dissenting*).—I am not convinced that an amendment to the constitution of this state is necessary before policemen can be placed under civil-service regulations. Therefore, I dissent.

[339] ON REHEARING.

(May 8, 1915.)

95 Kan. 335; 148 Pac. 640.

DAWSON, J.—We have before us a petition for a rehearing filed by an *amicus curiae* who calls our attention to section 88 of chapter 114 of the Laws of 1907 (Gen. Stat. 1909, § 1304) with the suggestion that this section fixes or provides for the fixing of official terms of police officers. The section reads:

"The board of commissioners may appoint, by a majority vote of all the members thereof, the following officers, to wit: A city attorney, a city clerk, a city treasurer, a city auditor, a city engineer, a superintendent of streets, a superintendent of waterworks, a secretary of waterworks, a fire marshal, a chief of police, a city physician, a judge of the police court, a superintendent of public parks, a city assessor, and such assistants and other officers and servants as they may deem necessary for the best interests of the city; but no such officer shall be appointed until his term and salary shall have been fixed by ordinance. The terms of all appointive officers shall expire with the term of office of the board appointing them, *Provided*, That they shall hold their respective offices until their successors are appointed and qualified; *Provided*, That in case of appointment to fill a vacancy, such appointee shall only serve for the remainder of the term for which his predecessor was appointed."

The clause, "the terms of all appointive officers shall expire with the term of office of the board appointing them," gives another reason for affirming the judgment of the district court; but it does necessitate a modification of what was said in our first opinion

(*Haney v. Cofran*, 94 Kan. 332, 146 Pac. 1027). We must now hold that by city ordinance in cities of the first class governed by the commission act (Laws 1907, ch. 114, and amendments), the terms of police officers [340] are or should be definitely fixed, and the terms of such officers expire with the term of office of the board appointing them. The duration of the official terms of such police officers may not be indefinitely extended under the civil-service act in the same sense and in the same manner that the duration of a city employee's service may be extended, but we see no reason why the civil-service regulations for the determination of the qualifications of police officers should not apply. These observations, however, take nothing from the correctness of the judgment of the district court in refusing mandamus to require the mayor and chief of police to restore the plaintiff to his position as a policeman. The plaintiff's term had expired under the statute (Gen. Stat. 1909, § 1304) and under the ordinance which we are bound to assume was promulgated in compliance with that statute.

NOTE.

Policeman as Public Officer.

Scope of Note, 663.

General Rule, 664.

Application of Rule, 666.

Scope of Note.

It is the purpose in the present note to discuss the cases passing on the question whether a policeman is a public officer. The status of a police officer with respect to whether he is a municipal officer is considered and the authorities thereon are collated in the note to *Lambert v. Barrett*, Ann. Cas. 1914D 1226.

The question of the status of a policeman has most frequently arisen in cases wherein an attempt has been made to hold a municipality liable for his illegal or negligent acts in enforcing its regulations. In those cases, it has generally been held that a police officer of a city, performing the duties with which he is charged, is not acting as an agent or servant of the municipality, but is acting as a peace or public officer appointed by the city on the authority of the legislature, and that, as he is acting for the general public, or in furtherance of the public policy of the state, the city is not liable. See the notes to *Gillmor v. Salt Lake City*, 13 Ann. Cas. 1016, and *Dube v. Montreal*, Ann. Cas. 1913A 468.

General Rule.

It has been held that a policeman occupies a dual position; that he is, strictly speaking, neither a state officer, acting as such, nor an officer acting in a purely local capacity, as the mere servant or employee of a city; that he may be said to be *sui generis*, occupying a unique place of his own; and that in the use of the term "state officer," by the courts, they intend simply to hold that a policeman is a public officer in the sense that he has certain public duties to perform other than those strictly pertaining to the government of the municipality. *State v. Edwards*, 38 Mont. 250, 99 Pac. 940, wherein the court said: "Policemen are certainly not state officers in the same sense that the attorney general or the state treasurer are state officers. The lay mind would rebel at such a conclusion, and no refinement of reasoning could make it logical. We think the courts whose decisions we have just referred to were unfortunate in the use of the term 'state officer,' and that they intended simply to hold that a policeman is a public officer, in the sense that he has certain public duties to perform other than those strictly pertaining to the government of the municipality. With this latter determination we agree. If a policeman is strictly a state officer, the only way in which he could be removed would be by impeachment in accordance with the provisions of section 17 of article V of the constitution, and chapter 1 of title III of the Penal Code. . . . Policemen in this state all hold their places under city or town governments. We find no mention of the office in the constitution. We have no state police as such. Respondent contends that a policeman is strictly a municipal officer, within the meaning of section 6, article XVI, of the constitution, *supra*; or, at any rate, that the office of policeman falls within the provisions of that section. There can be no doubt that a policeman is an 'officer' not only within the ordinary meaning of the term in the street, but strictly and technically speaking also. Being attached to the municipality it is within common knowledge that he has certain local duties to perform under the ordinances of all cities. A reference to any book of city ordinances will disclose the nature of such duties. But, in addition to these purely local duties, he has others, and these others are of a public and general nature pertaining to the observance and enforcement of the general laws of the state, principally the penal and criminal laws. . . . Many other provisions might be cited showing that policemen in this state are charged with general duties under the state laws in addition to their local duties. What, then, is the result? It appears that a policeman occupies a sort

of dual position. He is, strictly speaking, neither a state officer, as such, nor an officer acting in a purely local capacity. He may be said to be *sui generis*, occupying a unique place of his own, and so we are inclined to regard him. . . . Perhaps it is not out of place to notice at this time the argument of the appellant that policemen are mere employees or servants of the city. We cannot agree with this contention. To so hold would strip them as officers of all protection under the laws, and a result so grave should be avoided, if possible."

It has, however, been said in a great number of cases that policemen, or police officers (the terms being used interchangeably), are charged with the exercise of the police power of the state, and therefore are public or state functionaries, as distinguished from corporate, municipal, or private officers, their principal duty being to assist in the preservation of the public peace.

Alabama.—*Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656.

Arkansas.—*Compare Peterson v. Culpepper*, 72 Ark. 230, 2 Ann. Cas. 378, 79 S. W. 783.

Connecticut.—*Farrell v. Bridgeport*, 45 Conn. 191.

Georgia.—*Cook v. Macon*, 54 Ga. 468.

Illinois.—*Chicago v. Bullis*, 138 Ill. App. 297, *reversed* in 235 Ill. 472, 85 N. E. 614, on another point.

Indiana.—*Lafayette v. Timberlake*, 88 Ind. 330; *Vaughtman v. Waterloo*, 14 Ind. App. 649, 43 N. E. 476; *Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127.

Iowa.—*Calwell v. Boone*, 51 Ia. 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas.—*Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Anderson v. Shawnee County*, 91 Kan. 362, 137 Pac. 799. And see the reported case.

Kentucky.—*Pollock v. Louisville*, 13 Bush 221, 26 Am. Rep. 260; *Taylor v. Owensboro*, 98 Ky. 271, 32 S. W. 948, 56 Am. St. Rep. 361. See also *Schmitt v. Dooling*, 145 Ky. 240, Ann. Cas. 1913B 1078, 140 S. W. 197, 36 L.R.A. (N.S.) 881.

Louisiana.—*Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218.

Maine.—*Cobb v. Portland*, 55 Me. 381, 92 Am. Dec. 598.

Massachusetts.—*Buttrick v. Lowell*, 1 Allen 172; *Kimball v. Boston*, 1 Allen 417; *Riopel v. Worcester*, 213 Mass. 15, 99 N. E. 478.

Michigan.—*Ellis v. Lennon*, 86 Mich. 468, 49 N. W. 308; *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681.

Missouri.—*State v. McKee*, 69 Mo. 504; *Cooley Credit Co. v. Townsend*, 132 Mo. App.

390, 111 S. W. 894. See also *State v. Mason*, 153 Mo. 23, 54 S. W. 524.

New Hampshire.—*Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637.

New York.—*People v. Draper*, 15 N. Y. 532; *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1038, reversing 76 Hun 390, 28 N. Y. S. 120; *People v. Foody*, 39 Misc. 142, 79 N. Y. S. 240; *People v. Sing Sing*, 54 App. Div. 555, 66 N. Y. S. 1094; *Grinnell v. Weston*, 95 App. Div. 454, 88 N. Y. S. 781; *Clayman v. New York*, 117 App. Div. 565, 102 N. Y. S. 661. See also *Mangam v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705. Compare *Shanley v. Brooklyn*, 30 Hun 396.

Oklahoma.—*State v. Linn*, 153 Pac. 826.

Pennsylvania.—*Norristown v. Fitzpatrick*, 94 Pa. St. 121, 39 Am. Rep. 771. Compare *Saul v. Scranton*, 9 Pa. Dist. Ct. 156; *Com. v. Stokley*, 4 Pa. Co. Ct. 334; *Russell v. Williamsport*, 9 Pa. Co. Ct. 129.

Rhode Island.—*Kelly v. Cook*, 21 R. I. 29, 41 Atl. 571; *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L.R.A. 330; *Opinion to Governor*, 22 R. I. 654, 49 Atl. 36. See also *Horton v. Newport*, 27 R. I. 283, 8 Ann. Cas. 1097, 61 Atl. 759, 1 L.R.A.(N.S.) 512.

Texas.—*Whitfield v. Paris*, 84 Tex. 431, 19 S. W. 566, 31 Am. St. Rep. 69, 15 L.R.A. 783; *Sanner v. State*, 2 Tex. App. 458; *Givens v. Paris*, 5 Tex. Civ. App. 705, 24 S. W. 974; *Ex p. Preston*, 72 Tex. Crim. 77, 161 S. W. 115; *Ex p. Tracey*, 93 S. W. 538.

Utah.—*Royce v. Salt Lake City*, 15 Utah 401, 49 Pac. 290; *Everill v. Swan*, 17 Utah 514, 55 Pac. 68; *State v. Shores*, 157 Pac. 235. See also *Pratt v. Swan*, 16 Utah 483, 52 Pac. 1092.

Virginia.—*Burch v. Hardwicke*, 30 Grat. 24, 32 Am. Rep. 640; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652, 4 Va. Sup. Ct. Rep. 121.

Washington.—*Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577, 99 Am. St. Rep. 951, 63 L.R.A. 815.

Wisconsin.—See *Little v. Madison*, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793.

Canada.—*Pon Yin v. Edmonton*, 31 West. L. Rep. (Alberta) 402, 8 West. W. Rep. 809. See also *Wishart v. Brandon*, 4 Manitoba 453.

In *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640, the court, after reviewing a number of the authorities to the effect that a policeman is a public or state officer, said: "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are state officers, whether the legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political

society, is interested in the suppression of crime and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, at elections, and at all public places; the protection of citizens, strangers, travelers at railway stations, at steamboat landings; the enforcement of the laws against intemperance, gambling, lotteries, violations of the Sabbath, and, in fine, the suppression of all those disorders which affect the peace and dignity of the state and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected. The whole machinery of civil and criminal justice, says a learned judge, has been so generally confided to local agencies, it is not strange if it has sometimes been considered as of local concern. But there is a clear distinction in principle between what concerns the state and that which does not concern more than one locality."

It has been said that police officers are to be regarded as public officers holding their office as a trust from the state. *Farrell v. Bridgeport*, 45 Conn. 191; *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681. Thus, in the case first cited, the court said: "A policeman of the city of Bridgeport is an arm of the law; he holds an office as a trust from the state; he is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the city by which he is bound to its service; he can lay down his trust at any time according to his pleasure without exposing himself to an action for damages for breach of contract."

Likewise, it has been held that policemen must be considered as public officers where they have been recognized as exercising some of the functions of sovereignty. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L.R.A. 253. And see the reported case.

In a number of cases constitutional and statutory provisions with respect to public offices or officers have been construed as applicable to policemen, thus impliedly treating them as public officers. *Johnson v. State*, 132 Ala. 43, 31 So. 493; *Pennie v. Reis*, 80 Cal. 266, 22 Pac. 176; *Sullivan v. Bridgeport*, 81 Conn. 660, 71 Atl. 906; *Claffin v. Wyandotte County*, 81 Kan. 57, 19 Ann. Cas. 168, 105 Pac. 19; *Monette v. State*, 91 Miss. 662, 44 So. 989, 134 Am. St. Rep. 715; *Healy v. Hillsboro County*, 70 N. H. 588, 49 Atl.

89; *Mangam v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705; *Cleveland v. Payne*, 72 Ohio St. 347, 74 N. E. 177, 70 L.R.A. 841; *State v. Saillard*, 22 Wash. 267, 60 Pac. 651.

In actions brought under the rule that where a public officer has a legal right to his office, this right carries with it, as incident thereto, the salary of the office, the courts have impliedly recognized police officers as public officers. *Larson v. St. Paul*, 83 Minn. 473, 86 N. W. 459; *State v. Wallridge*, 153 Mo. 194, 54 S. W. 447; *People v. French*, 91 N. Y. 265; *Wilkes-Barre v. Meyers*, 113 Pa. St. 395, 6 Atl. 10; *Pratt v. Swan*, 16 Utah 483, 52 Pac. 1092. See also *Reising v. Portland*, Ann. Cas. 1912D 895, and note. And policemen have been referred to in general terms as public officers, in applying the rule that it is against public policy to permit a public officer to recover a reward for doing his duty as such officer. See the notes to *Somerset Bank v. Edmund*, 10 Ann. Cas. 726, and *Buek v. Nance*, Ann. Cas. 1912C 1293.

Application of Rule.

In *Brown v. Russell*, 166 Mass. 17, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L.R.A. 253, it was held that the persons appointed to the elective department of the district police force of Massachusetts, under the statute (Pub. St. c. 103) and amendments thereof, were public officers and not merely employees of the commonwealth. The court said: "They are appointed by the governor for the term of three years, subject to removal by the governor, and they have and exercise throughout the commonwealth all the powers of constables (except the service of civil process), police officers, and watchmen, and may be transferred from one district to another; and the governor may at any time command their services in suppressing riots and in preserving the peace." Pub. Sts. c. 103, § 2. They give bonds to the treasurer of the commonwealth and receive a stated salary from the treasury of the commonwealth. They have and exercise some of the powers of government."

It has been held that the words "police-man" and "patrolman" are used synonymously. *State v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695. And likewise, it has been held that a police captain is a policeman, *State v. Edwards*, 40 Mont. 313, 106 Pac. 703; and that the chief of police occupies the same relation to the public and the city as does an ordinary policeman, *State v. Quinn*, 40 Mont. 472, 107 Pac. 506.

A railroad policeman who is appointed by the governor, who is required to take the constitutional oath, and who is by virtue of his appointment authorized to perform the

duties of a peace officer or policeman in protecting the property of a railroad company and of the general public in the custody of the railroad company, is a police officer by reason of the manner of his appointment and the character of his duties, within a constitutional provision (Const. N. Y. art. 13, § 5) prohibiting a public officer from receiving, for his use or benefit, a free pass from any corporation. *Dempsey v. New York Cent. etc. R. Co.* 146 N. Y. 290, 40 N. E. 687. Compare *Hamlin v. Berk County*, 8 Pa. Co. Ct. 462. The question whether a special policeman employed and paid by a railroad or other corporation, or by a private individual, to protect and preserve the property and maintain order on the premises of the employer, is a public officer, is discussed in the notes to *Sharp v. Erie R. Co.* 6 Ann. Cas. 250; *McKain v. Baltimore*, etc. R. Co. 17 Ann. Cas. 634, and *Buman v. Michigan Cent. R. Co.* Ann. Cas. 1913D 107. See also *Thomas v. Canadian Pac. R. Co.* 8 Ann. Cas. 324. In *Kimball v. Boston*, 1 Allen (Mass.) 417, it was held that a special police officer in the employment of a city was not its servant or agent in any such sense as to take away his right of action for an injury sustained by him by reason of a defective highway.

In *Cullinan v. Furthman*, 187 N. Y. 160, 79 N. E. 989, it was held that a special agent employed to investigate violations of the liquor tax law under the direction of the state commissioner of excise, was, in a sense, a public and official detective as distinguished from a private detective. And in *McDonald v. McCaskill*, 5 Que. Pr. 266, it was held that a chief government detective for the province of Quebec, appointed under an order in council, was a public officer fulfilling a public duty within the meaning of the statutes. (R. S. Q. art. 2594; C. P. art. 88.)

In *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681, it was held that the word "employee" as used in a workman's compensation act did not include policemen.

The police commissioners of a city are state or public agents and officers, engaged in performing public and governmental duties, and are not private agents or servants of the city, nor are they engaged in any matter of corporate or proprietary concern. *Perkins v. New Haven*, 53 Conn. 214, 1 Atl. 825; *Americus v. Perry*, 114 Ga. 871, 40 So. 1004, 57 L.R.A. 230; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *State v. Flower*, 49 La. Ann. 1199, 22 So. 623; *Baltimore v. Howard*, 20 Md. 335; *Altwater v. Baltimore*, 31 Md. 462; *Sinclair v. Baltimore*, 59 Md. 597; *Upshur v. Baltimore*, 94 Md. 752, 51 Atl. 953; *McEvoy v. Baltimore*, 126 Md. 111, 94 Atl. 543; *People v. Mahaney*, 13 Mich. 481; *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128; *Gilbert v. Berlin*, 76 N. H. 470,

84 Atl. 235; *People v. Draper*, 15 N. Y. 532; *Yaple v. Morgan*, 1 Ohio Cir. Dec. 557, 2 Ohio Cir. Ct. 406, *affirmed* 25 Cinc. L. Bul. 336; *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L.R.A. 330; *Opinion to Governor*, 22 R. I. 654, 49 Atl. 36. See also *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L.R.A. 566; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Covington*, 29 Ohio St. 102. In *Perkins v. New Haven*, *supra*, wherein it appeared that the legislature had imposed the duty on the police commissioners, as public agents, of selecting and providing voting places in the city for all but school elections, the court said: "It is difficult to conceive a duty more plainly and exclusively public and governmental than that of regulating state and national elections, and the police commissioners in the discharge of their duty in providing voting places for such elections are public agents, and not the agents of the city, and therefore can create no contract relation between the city and third persons in this respect."

A chief of police has been held to be a public or state officer. *Ellis v. Lennon*, 86 Mich. 468, 49 N. W. 308; *State v. Quinn*, 40 Mont. 472, 107 Pac. 506; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640. In *Ellis v. Lennon*, *supra*, it was held that the chief of police was a public officer, and that his office was one which was properly the subject of a proceeding by an information in the nature of a quo warranto filed under the statute (How. St. 8635) authorizing such a proceeding "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in any corporation created by the authority of this state." The court said: "The incumbent of a municipal office created by the statute, who is elected or appointed in the manner thereby prescribed, having a definite term fixed by statute, and who exercises functions which are derived from the charter in addition to those derived from the by-laws of the municipality, must be deemed a public officer, within the meaning of this statute. Such an officer is a constituent part of the machinery of government, exercising functions prescribed by sovereign authority, and which are independent of local control. The chief of police of West Bay City is a public officer. The office is created by statute, and his powers and duties are prescribed by the charter."

It has been held that it is the duty of the chief of police of a city, who is in a sense a state officer, in addition to his duties under the city ordinances, to enforce the general laws of the state within the city, and in the event of his failure or neglect so to do,

he is subject to removal under the general laws of the state. *State v. Linn* (Okla.) 153 Pac. 826.

However, under a constitutional provision [Const. Ark. 1874, art. 19, § 6] declaring that no person shall hold or perform the duties of more than one office in the same department of the government at the same time, except as expressly directed or permitted by the constitution, it has been held that the provision referred to state officers only, and that the chief of police of a city of the first class was not a state officer, and that there was no incompatibility between that office and the office of sheriff. *Peterson v. Culpepper*, 72 Ark. 230, 2 Ann. Cas. 378, 79 S. W. 783.

PLANTERS FIRE INSURANCE COMPANY OF LITTLE ROCK ET AL.

v.

STEELE ET AL.

Arkansas Supreme Court—July 12, 1915.

119 Ark. 597; 178 S. W. 910.

Fire Insurance — Change in Occupancy — Premises Vacant at Time of Fire.

A fire policy was issued on an application containing a statement that the building was occupied as a private dwelling, and the policy provided that, if the building should become vacant or unoccupied, or any change should take place in the title, occupancy, or possession, it should become null and void. After issuance of the policy insured ceased to occupy the premises as a private dwelling, and leased them to tenants. It is held that there was such a change in the occupancy as to avoid the policy, notwithstanding that at the time of a fire the premises were vacant, and insured was intending to reoccupy them within a few days.

Vacancy Clause — Leased Premises — Period between Successive Occupancies.

A fire policy contained a stipulation that, if the building should become vacant or unoccupied, it should be null and void. The policy was issued on an application stating that the premises were used as a private dwelling, but after issuance the owner began to rent them. Upon the tenant removing from the dwelling the owner secured a vacancy permit, and about the time of its expiration the tenant returned. After expiration of the vacancy permit the tenant again removed from the premises, though he left a stove and a few other articles which the owner intended to appropriate for rent. Before the premises were reoccupied by the

owner they were burned. It is held that, though the owner intended and would have in less than a week reoccupied the premises, no recovery could be had on the policy; this not being a case of a policy issued upon rented property, where short vacancies are to be anticipated.

[See note at end of this case.]

Appeal from Circuit Court, Nevada county: HAYNIE, Judge.

Action by L. C. Steele et al., plaintiffs, against Planters Fire Insurance Company of Little Rock et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **REVERSED.**

J. W. & J. W. House, Jr., for appellants.
C. C. Hamby for appellees.

[600] McCULLOCH, C. J.—This is an action on a fire insurance policy issued by appellant company on a house owned by appellee Steele in Prescott, Arkansas. The policy was issued on November 8, 1912, and covered a period of three years. The fire occurred on July 15, 1914. The application was taken by a soliciting agent and contained a statement that the building was occupied as a private dwelling, and the answers in the application were warranted to be true. The applicant did in fact occupy the premises as a private dwelling house, but thereafter removed from the place and rented it to a tenant. The first tenant moved out and subsequently it was rented to another tenant named Taylor. Taylor vacated the premises in April, 1914, and the house remained vacant for three weeks or a month, when Taylor rented it again from Steele, the owner, and reoccupied it. He remained in the house until July 11, when he again moved out, and it was not again occupied by any one.

The proof shows that Mr. Steele, the assured, intended to move into the house on July 16, and reoccupy it as his dwelling. He was making preparations to move when the fire occurred. There is also testimony to the effect that when Taylor moved out he left a cooking stove and a table, and that the owner claimed the property as compensation for balance of rent which Taylor owed him. After Taylor moved out in April, the assured applied to the company for a vacancy permit, and the permit was issued to him for a period of thirty days from date. There is some controversy in the testimony as to the precise dates when Taylor moved out of the house and moved back into it, and also as to the date of the permit. Mr. Steele, the owner, testified that Taylor moved out in April and moved back in May, and that the permit was dated in April, and that the period of the permit had expired [601] when Taylor moved

back into the house. A copy of the permit was introduced in evidence by the company, and showed that it was dated May 8, and was for a period of thirty days. The conflict with respect to those matters is not material, for it is undisputed that the vacancy permit had expired before Taylor moved out of the house the last time. The policy contains a stipulation that "if said building . . . shall become vacant or unoccupied, . . . or any change takes place in the title, occupancy or possession thereof whatever, then and in every such case this contract shall be absolutely null and void." Appellant pleaded, among other defenses, that there was a violation of each of those conditions of the policy.

The case was submitted to a jury, and a verdict was rendered in favor of appellees for the sum of \$500, the amount of the policy. The sureties on the bond of the company were joined as defendants, and they have appealed, as well as the company itself. A receiver has been appointed for the company and has been substituted here as appellant.

(1) We are of the opinion that according to the undisputed testimony in the case, the verdict was without evidence to support it, and that the judgment for that reason must be reversed. This conclusion rests on two grounds, namely, that the house was unoccupied within the meaning of that term mentioned in the policy, and also that there was such a change in the occupancy as invalidated the policy. Upon the last point the case is ruled by *Planters' Mut. Ins. Assoc. v. Dewberry*, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195. The policy in that case contained a clause identical with the one in question, and we held that where the house was occupied by the applicant as a dwelling at the time of the issuance of the policy, and that a subsequent change was made by the owner's removal and a tenant taking possession, that operated as a change of occupancy within the meaning of the policy. The only difference between the two cases is that in the *Dewberry* case the house was occupied by a tenant at the time the fire occurred, whereas in the present case the tenant had moved out three days before the fire occurred. [602] That difference, however, is not controlling, for it is the change of occupancy which operated as a breach of the conditions of the policy; and even if it were held that the return of the owner to the property reinstated the status so as to come within the terms of the policy, that would not occur until there had been an actual reoccupancy by the owner. In this case the premises had not been occupied by the owner for a considerable length of time. There was, according to the proof, an intention on the part of the owner to reoccupy the premises, but he had not actually done so.

We are therefore of the opinion that the policy was rendered void, and that there can be no recovery thereon. The policy is void also by reason of the fact that the premises were vacant and unoccupied at the time of the fire. There is some discussion in the authorities as to the distinction between the terms "vacant" and "unoccupied," and "vacant and unoccupied," and "vacant or unoccupied," but a discussion of that distinction is without importance here, for the language here is that the policy shall be void if the premises become "vacant or unoccupied." *Limburg v. German F. Ins. Co.* 90 Ia. 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L.R.A. 99.

The court, over objections of appellant, gave the following instruction, which we think was erroneous: "If the jury believe that Taylor went out on Saturday, and that plaintiff immediately began preparation to move in, and if the fire had not occurred, he would have moved in on Thursday morning, then the policy would not be void if the jury believe from Saturday till Thursday would be a reasonable length of time for plaintiff to get ready to move."

(2-3) There are authorities to the effect that where the insured property is occupied by a tenant, it is impliedly contemplated by the parties to the contract of insurance that "any temporary vacancy caused by or incident to such change is not within the purview of the vacancy clause." 2 Cooley's Briefs on Insurance, 1675. That principle does not apply, however, in this case for the reason that the property was occupied as a dwelling, and it was contrary to the terms of the policy to change [603] the character of the occupancy. *Planters' Mut. Ins. Assoc. v. Dewberry*, supra. Therefore, there could be no presumption that a temporary vacancy or period of unoccupancy was within the contemplation of the parties. That point is emphasized in the case of *Barry v. Prescott Ins. Co.* 35 Hun (N. Y.) 601. The facts of that case are quite similar to the facts of this case, except that the period of unoccupancy was longer. The stipulation of the present policy was unconditionally to the effect that if the building become "vacant or unoccupied," the policy should be void, and it cannot be said that there was any period of time contemplated at all for unoccupancy, for the reason that the policy also provides that any change of occupancy should also operate as an avoidance of the policy. No presumption could be indulged in the face of that express stipulation. The fact that Taylor left a stove and table, which the assured expected to appropriate as compensation for balance of rent due, does not prevent this clause attaching. In order that such state of facts may constitute an occupancy, there must be

a substantial quantity of furniture, evincing an actual and personal occupancy. 2 Cooley's Briefs on Insurance, 1659, 1667; *Weidert v. State Ins. Co.* 19 Ore. 261, 24 Pac. 242, 20 Am. St. Rep. 809; *Corrigan v. Connecticut F. Ins. Co.* 122 Mass. 299; *Cook v. Continental Ins. Co.* 70 Mo. 610, 35 Am. Rep. 438; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 19 Am. St. Rep. 77, 9 L.R.A. 81; *Feshe v. Council Bluffs Ins. Co.* 74 Ia. 676, 39 N. W. 87.

The policy is therefore void on both the grounds stated.

Reversed and remanded for a new trial.

NOTE.

Construction of Vacancy Clause in Fire Insurance Policy Issued upon Rented Property.

The purpose of the present note is to review the few recent cases which have passed on the question whether, under a clause in the policy providing for forfeiture in case the premises are vacated, a contract of fire insurance is avoided by a temporary vacancy of the premises caused by the outgoing of a tenant. The earlier cases on this subject are collated in the notes to *Ohio Farmers Ins. Co. v. Vogel*, 9 Ann. Cas. 91, and *Moore v. Phoenix Ins. Co.* 10 Am. St. Rep. 384.

The reported case holds that the rule that where the insured property is occupied by a tenant, it is impliedly contemplated by the parties to the contract of insurance that any temporary vacancy caused by or incident to a change of tenants is not within the purview of the vacancy clause, is not applicable where the premises at the time the policy is issued are occupied by the owner thereof as a dwelling.

That rule is applicable, however, in case the premises are occupied by a tenant at the time the policy is issued. *Farmers' Mut. Equity Ins. Soc. v. Smith*, 158 Ky. 459, 165 S. W. 675, L.R.A.1915B 844; *Tracy v. Queen City F. Ins. Co.* 132 La. 610, Ann. Cas. 1914D 1145, 61 So. 687. See also *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013. Thus in *Farmers' Mut. Equity Ins. Soc. v. Smith*, supra, the court said: "Where the property is occupied by a tenant, it must necessarily be within the contemplation of the parties to the contract that occasionally it will be vacant for a short and reasonable interval of time between the outgoing of one tenant and the incoming of another." And in *Athens Mut. Ins. Co. v. Toney*, supra, it was said: "Another reason why we do not think that the company intended that a vacancy existing for a reasonable time beyond the ten days should work a forfeiture of the insurance is found in the custom of the country.

The house was insured as a house occupied by a tenant. The custom of tenants in the country changing their homes at the end of the year must have been well known; indeed we think that the company was chargeable with notice of such custom; and the condition in the policy should be construed, therefore, on the question of vacancy, so as to allow reasonable intervals between the outgoing and incoming of tenants. That the word 'vacancy' in such contracts should be so construed has been frequently ruled. Mr. Cooley, in his Briefs on the Law of Insurance, citing many authorities, says: 'It is a well-settled rule that when the premises are described in a policy as occupied by a tenant, change of tenants was contemplated by the parties, and therefore any temporary vacancy caused by or incident to such change is not within the purview of the vacancy clause.' See also Tracy v. Queen City F. Ins. Co. 132 La. 610, Ann. Cas. 1914D 1145, 61 So. 687, wherein the court said obiter: "Where buildings intended for rental are insured, the insurer must be aware that an occasional vacancy will be necessary incident to such use." But in Payson v. Equity F. Ins. Co. 38 N. Bruns. 436, it was held that where rented property is insured, there is no vacancy within the meaning of the policy, where one tenant moves out and another promptly moves in, since there must be time to make the change, but that where the tenant moves out and there is no other tenant to come in, the building is vacant within the meaning of the policy, and it matters not if the vacancy is only for a few days, if it is within the knowledge of the insured, since he must, under the conditions, give notice to the insurer, so that the insurer may decide whether to cancel the policy.

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**WESTERN UNION TELEGRAPH
COMPANY OF ILLINOIS**

v.

**LOUISVILLE AND NASHVILLE
RAILROAD COMPANY ET AL.**

Illinois Supreme Court—October 27, 1915

270 Ill. 399; 110 N. E. 583.

Eminent Domain — Nature of Right.

"Eminent domain" is a right inherent in all sovereignties; it is the right of a nation or the state, or of those to whom the power has been fully delegated, to condemn private property for public use and to appropriate the ownership or possession of such property

for such use upon paying due compensation to be ascertained according to law.

[See 102 Am. St. Rep. 811.]

Rights of Telegraph Company — Condemnation of Railroad Right of Way.

A petition for condemnation filed by a telegraph company to condemn an easement for its lines along the right of way of a railway company under Hurd's Rev. St. 1913, c. 134, §§ 1-3 (Rev. St. 1874, c. 134, §§ 1-3), conferring the right of eminent domain upon telegraph companies, is not in violation of Const. U. S. Amend. 14, § 1 (9 Fed. St. Ann. 416), and amendment 5 (9 Fed. St. Ann. 305), or to Const. art. 2, § 2, prohibiting the taking or damaging of private property without just compensation, since the object of the condemnation proceedings was to ascertain legally the compensation to which the railroad company would be entitled.

[See note at end of this case.]

Same.

A telegraph company lawfully organized within the state is not prevented from condemning an easement for its lines over a right of way of a railroad company organized within the state, leased to another railroad company engaged in interstate commerce, by Const. U. S. art. 1, § 8 (8 Fed. St. Ann. 363), giving Congress power to regulate commerce among the states.

[See note at end of this case.]

Same.

Act Cong. July 24, 1866, c. 230, §§ 1, 4, 14 Stat. 221 (7 Fed. St. Ann. 205), giving telegraph companies a right to construct lines over the public domain and across navigable streams upon filing their written acceptance of the act with the postmaster general, does not constitute such an assumption by Congress of all power over telegraph lines engaged in interstate commerce as to prevent condemnation under state law by a telegraph company of an easement for its lines over the right of way of a railroad company.

[See note at end of this case.]

States — River as Boundary.

By Act Cong. April 18, 1818, c. 67, 3 Stat. 428, making the Wabash river part of the boundary line between the states of Indiana and Illinois, the middle of the current becomes the boundary line, and the condemnation of a right of way for a telegraph company to the boundary line is subject to the control of the United States over the Wabash river.

[See generally 16 Ann. Cas. 1115; Ann. Cas. 1914D 190.]

Same.

The phrases "middle of the river" and "middle of the main channel" are equivalent expressions, and both mean the main line of the channel or the middle thread of the current.

Eminent Domain — Condemnation by Telegraph Company — Sufficiency of Petition.

A telegraph company's petition to condemn an easement for its lines over a railway right

of way is sufficient although each pole is not located by individual description.

Failure to Agree on Compensation — Showing Sufficient.

In a proceeding by a telegraph company to condemn an easement for its lines over a railway right of way, an offer by the telegraph company for the use of the right of way and its refusal by the railway company was a sufficient showing of the failure to agree on the compensation.

Right to Condemn — De Facto Corporation.

That a telegraph company has been organized in an unlawful manner or for an unlawful purpose cannot be considered in a proceeding by it to condemn land for a right of way.

[See 9 Ann. Cas. 594; Ann. Cas. 1913C 271.]

Condemnation by Telegraph Company — Taking Railroad Right of Way.

In a proceeding by a telegraph company to condemn an easement for its lines over a railway right of way, the evidence is held not to show that the construction and operation of the telegraph lines would interfere with the public use of the railroad.

[See note at end of this case.]

Rights of Telegraph Company under Lease.

In a proceeding by a telegraph company to condemn an easement for its lines over the right of way of a railway company after the termination of a lease therefor, a finding that one of the wires strung during the life of the lease was the property of the railway company, and that therefore the railway operated a line in the identical place sought to be condemned, was erroneous, where under a contract between the telegraph company and the railway company the former strung the wire and the latter paid a certain price for its use.

Eminent Domain — Conflicting Locations — Priority.

In condemnation proceedings where a telegraph company and a railway company sought to locate a line over the same ground, the one who first located the line had the preference.

Amendment of Petition.

A petition by a telegraph company for the condemnation of an easement for its lines over the right of way of a railway company may properly be amended by a stipulation that the telegraph company will not incommode the railway company in the operation of its line.

Property Subject to Condemnation — Prior Public Use.

In a proceeding by a telegraph company to condemn an easement for its lines along the right of way of a railroad company, under Hurd's Rev. St. 1913, c. 134, conferring the right of eminent domain upon telegraph companies, the railroad company cannot contend that petitioner is seeking to condemn property already occupied and subjected to the same use, where the only prior use for tele-

graph purposes consisted of a single wire strung on poles not owned by the railroad company and supplied by current not furnished by it; the space occupied by the wire not being involved.

Appeal from County Court, St. Clair county: DEWEY, Judge.

Action by Western Union Telegraph Company of Illinois, plaintiff, against Louisville and Nashville Railroad Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

West & Eckhart and Percy B. Eckhart for appellant.

H. L. Stone, J. M. Hamill and C. P. Hamill for appellees.

[400] CRAIG, J.—This is an appeal by the Western Union Telegraph Company of Illinois, an Illinois corporation, from an order of the county court of St. Clair county dismissing a petition for condemnation filed by the appellant on February 3, 1912, seeking to condemn an easement in the right of way of the [401] Southeast and St. Louis Railway Company, leased to the Louisville and Nashville Railroad Company.

The condemnation petition, as finally amended, sets up, in substance, that the petitioner is a corporation duly organized as a telegraph company under the laws of the State of Illinois for the purpose of owning, constructing, maintaining and operating lines of telegraph in the State of Illinois; that under and by virtue of the laws of the State of Illinois it is empowered to exercise the right of eminent domain and to construct lines of telegraph along and upon any railroad within the State in such manner and at such points as not to incommode the public use of said railroad; that the Southeast and St. Louis Railway Company, one of the defendants, is a corporation organized and existing under the laws of the State of Illinois, and is the owner of a railroad having a right of way varying from twenty-five feet to two hundred feet in width, extending easterly out of the city of East St. Louis through a portion of the counties of St. Clair, Clinton, Washington, Jefferson, Hamilton and White, to the center thread of the permanent stream of the Wabash river, in said White county, and that said railroad company is also the owner of two certain branches of railroad also located within the State of Illinois; that said railroad and its said two branches extend in all a distance of about 179 miles; that the Southeast and St. Louis Railway Company, on January 27, 1881, leased to the Louisville and Nashville Railroad Company,

would constitute a joint line of poles and wires, which would result in constant conflict of authority and responsibility, and the court has no authority to impose a joint arrangement upon the defendants. The objections sustained by the court were: That the petitioner cannot acquire a right of way by a stipulation not agreed to by the railroad companies; that petitioner has no power to bind a railroad as to how it shall use its own right of way; that the defendant the Louisville and Nashville Railroad Company is entitled to use its right of way free from interference, joint possession, ownership or partnership of a pole line with the petitioner; that petitioner cannot gain the benefits and advantages of the stipulation without a written contract, and defendants decline to enter into a written contract with petitioner; that the right of the Louisville and Nashville Railroad Company to maintain and operate an existing telegraph line owned by it and devoted to public service, and to erect and maintain additional telegraph and telephone wires, is necessary to efficiently carry on its railroad business, and its right to enjoy the free and separate use and possession of said property independently of other control or ownership is of great value, of which it cannot be deprived in the proceedings without violating the fourteenth amendment of the Federal constitution, or interfering with the transaction of its interstate and intrastate business, in violation of the act of Congress approved July 24, 1866.

From the order sustaining these objections and dismissing the petition the petitioner prayed an appeal to this court, and assigns as error the action of the county court in sustaining the objections and dismissing the petition to condemn. Appellees have assigned as cross-errors the action [408] of the county court in overruling the other objections to the petition.

It was assumed by the court and the parties that the objections and the motion to dismiss the petition put in issue the sufficiency of the petition and the petitioner's right to condemn, and upon this issue evidence was taken, without objection, by both parties as to the status of the parties to the suit, their previous business relations and dealings, and other matters leading up to the filing of the petition to condemn. These facts, so far as material, are as follows:

On June 18, 1884, the Louisville and Nashville Railroad Company and the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, entered into a written contract whereby the railroad company granted to the telegraph company for a term of twenty-five years from July 1, 1884, the exclusive right to construct and maintain telegraph lines upon

the rights of way owned or controlled by the railroad company during the existence of the contract. It was further provided that after the expiration of twenty-five years the contract should continue in force until the expiration of one year after written notice should be given by one of the parties to the other of an intention to terminate the same. The telegraph company, among other things, agreed to set apart one wire for the preferential use of the railroad company, and further agreed that if the railroad company should at any time require greater wire facilities on any portion of its road the telegraph company would furnish an additional wire for the railroad company at the cost price thereof upon its poles, or the railroad company might at its own cost string such additional wire upon the telegraph company's poles in such manner and position as the telegraph company might direct. In 1901 the telegraph company, at the request of the railroad company, strung an additional wire for the railroad company upon its poles, and the cost thereof, amounting to \$3,820.61, was paid by the [409] railroad company. This wire has ever since remained upon the poles of the telegraph company and has been used exclusively by the railroad company. In 1902 the Western Union rebuilt its system along the railroad company's right of way and placed the poles in new places on the south side of the right of way and about five feet laterally from the old poles. The wires used by the railroad company were moved to other places on the cross-arms and poles selected by the telegraph company, and the telegraph company continued to maintain, repair and furnish current for these wires so used by the railroad company to the date of filing this petition. On August 17, 1911, the telegraph company served notice upon the railroad company that it would on August 17, 1912, terminate the contract above mentioned. On October 5, 1911, the Western Union Telegraph Company of Illinois was organized under the laws of this State with a capital stock of \$25,000, for the purpose of owning, constructing, maintaining and operating lines of magnetic telegraph in the State of Illinois. The subscribers to the capital stock were all officers or employees of the Western Union Telegraph Company of New York and their subscriptions to the capital stock were paid by the Western Union Telegraph Company of New York. The directors and officers of the Illinois corporation were elected from among the stockholders. It also appears that the organization of the Illinois corporation was brought about by the Western Union Telegraph Company of New York for the purpose of condemning the right of way sought in the petition subsequently filed. In November, 1911, the charter of the Louisville and Nashville Railroad Com-

pany was amended, and the railroad company, in addition to the powers conferred upon it by its original charter, was thereby authorized to construct and operate telegraph and telephone lines, not only for use in operating its railroad, but also for the purpose of serving the public as a common carrier of messages. On January 12, 1912, the president of [410] the Western Union Telegraph Company of Illinois directed the district foreman of the Western Union Telegraph Company of New York to locate a telegraph-pole line for the Western Union Telegraph Company of Illinois along the right of way of the Louisville and Nashville Railroad Company in Illinois, and to locate such line practically on the same line then occupied by the poles and wires of the Western Union Telegraph Company of New York. These instructions were carried out, and the line was located on the south side of the railroad right of way and followed the line then occupied by the poles and wires of the Western Union Telegraph Company of New York. On January 31, 1912, the Western Union Telegraph Company of Illinois made a formal offer to the railroad company of five dollars per mile for an easement for a pole line upon the railroad right of way. This offer was refused, and the railroad company refused to submit a counter-offer or state what it was willing to do. On February 3, 1912, the petitioner filed its original petition to condemn the right of way described in said petition, in the county court of St. Clair county. On February 9, 1912, the board of directors of the petitioning company, by resolution, determined to accept, and did by appropriate action accept, the obligations and restrictions of the act of Congress approved July 24, 1866. On February 12, 1912, the Post-master General of the United States acknowledged the receipt and filing in the post-office department at Washington of said acceptance of the act of Congress. On the 27th day of February, 1912, employees of the Louisville and Nashville Railroad Company, acting under oral instructions from its chief engineer, laid out and located a proposed telegraph-pole line for said railroad company upon the southerly side of its right of way in Illinois, selecting practically the same location as that described by petitioner in its letter of January 12, 1912, and in its original and amended condemnation petitions filed on February 3 and February 16, 1912, respectively, and practically [411] identical with the proposed pole line theretofore located by employees of the petitioning company on the railroad company's right of way in Illinois between the 16th and 22d days of January, 1912. Instructions for this work were given February 1 and afterwards commenced on the line of the road in Tennessee, but the locating was not commenced in Illinois, as shown by the

evidence, until February 27, 1912. On August 5, 1912, the railroad company gave written notice to the Western Union Telegraph Company of New York requiring the latter to commence immediately after August 17, 1912, to remove from the railroad right of way and premises all the poles, wires, batteries, instruments, appliances and other fixtures comprising the telegraph line, and to complete such removal previous to December 1, 1912. The telegraph company was further notified that in default of its compliance with such requirement of removal previous to the prescribed date, the railroad company would take possession of, appropriate and use, after that date, all the telegraph company's poles, cross-arms, wires, batteries, instruments, appliances and other fixtures remaining at that time on the railroad company's right of way or premises, and would hold or otherwise dispose of the same as its own property and refuse to longer permit the telegraph company to use the same for any purpose. The railroad company further gave notice that it would be compelled to make use of the telegraph company's poles and wires for telegraph business in conducting the railroad's business until the removal of the telegraph company's lines, because of the inability of the railroad company meanwhile to erect its own telegraph or telephone poles. On October 14, 1912, the Western Union Telegraph Company of New York filed its bill of complaint in the district court of the United States for the western district of Kentucky to enjoin the threatened action by the railroad company until the termination of various condemnation proceedings pending in the various States, among others by petitioner in Illinois. [412] Thereafter an injunction issued and the *status quo* of the property has since been thereby preserved, the order of the court issuing the injunction having been affirmed by the circuit court of appeals for the sixth circuit. (Louisville, etc. R. Co. v. Western Union Tel. Co. 207 Fed. 1, 124 C. C. A. 573.) On the 14th of November, 1912, the board of directors of the Louisville and Nashville Railroad Company adopted a resolution which recited that in October, 1912, the president had given instructions to the fourth and first vice-presidents to proceed to assemble the materials and to construct a pole line in Illinois for carrying telephone wires thereon, and in locating the poles to consult the signal engineer so as to facilitate the attachment of electric automatic block signals, and it was resolved that the acts of the first and fourth vice-presidents, and the location and selection of the company's right of way by the engineer's department (in Illinois on February 27, 1912), be ratified, approved and confirmed. On the 18th day of November, 1912, the Western Union Telegraph Company of New York entered into

a written agreement with the Western Union Telegraph Company of Illinois, petitioner herein, whereby the Western Union Telegraph Company of New York agreed to sell and convey to the former all the telegraph lines and telegraph property belonging to it and theretofore used by it in connection with the operation of its lines of telegraph along the line of the Louisville and Nashville Railroad Company within the State of Illinois. The conveyance was to be made upon the acquisition by the petitioner, the Western Union Telegraph Company of Illinois, of the right to construct, maintain and operate lines of telegraph along the right of way of the Louisville and Nashville Railroad Company within the State of Illinois and upon the payment of \$25,000.

The main question to be determined at the present stage of the litigation between the parties hereto is the right of the appellant company to bring the condemnation suit in [413] question under the Eminent Domain law of this State. All the reasons urged against the right of appellant to maintain its action, as embraced in the objections filed to the petition, may be divided into two general classes: (1) Those going to the validity of the law under which the suit is brought, as to one of the defendants; (2) those concerning the effect the condemnation would have on the public use of the railroad whose right of way is sought.

As to the first contention, the law allowing telegraph companies to exercise the right of eminent domain was enacted in 1874. (Hurd's Stat. 1913, p. 2419.) The first three sections of the law are as follows:

"Sec. 1. That every company heretofore incorporated under any general or special law, or which may be incorporated under any general law of this State for the construction or operation of any telegraph line through or in this State, shall possess the powers and privileges and be subject to the duties, restrictions and liabilities prescribed in this act.

"Sec. 2. Every such company may enter upon any lands for the purpose of making surveys and examinations with a view to the erection of any telegraph line, and take and damage private property for the erection and maintenance of such lines, and may, subject to the provisions contained in this act, construct lines of telegraph along and upon any railroad, road, highway, street or alley, along or across any of the waters or lands within this State, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad, highway, street or alley, or interrupt the navigation of such waters.

"Sec. 3. When it shall be necessary, for the construction, alteration or repair of any line

of telegraph, to take or damage any property, the same may be done and the compensation therefor ascertained and made in the manner [414] which may be at that time provided by law for the exercise of the right of eminent domain."

It is not pointed out in the able and exhaustive brief of counsel for appellees in what respect this law is contrary to the constitution of this State. The law has been in force many years and has received the consideration of this court. (St. Louis, etc. R. Co. v. Postal Tel. Co. 173 Ill. 508, 51 N. E. 382.) Similar laws have been enacted by several States of the Union, and these laws have been construed and passed upon many times, not only by the courts of last resort of those States but by the Federal courts, and the right of the law-making power of a sovereign State to enact such laws cannot be questioned. As recognized by all authorities, eminent domain is a right inherent in all sovereignties, and is defined as the right of the nation or the State, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership or possession of such property for such use upon paying the owner due compensation, to be ascertained according to law. (15 Cyc. 557.) It would seem that the above law was enacted in view of the commercial necessities of the times. The telegraph is a very important aid to business and to the welfare of the people generally. In enacting the law the legislature recognized the fact that telegraph lines would ordinarily follow the shortest routes between the centers of population,—the towns and cities,—and that such routes as were most available were at that time, and would be in the future, to some extent occupied by public roads and by railroads, and for that reason it included the provisions of the second section of the act, which permits telegraph companies to construct lines along and upon any railroad, road, highway, street, etc., in such manner and at such points as not to incommode the public use of such railroad, highway or street. Since the enactment of the law of 1874 telephones have been invented and come into general use. In 1903 the law [415] was amended so as to apply to telephone lines and exchanges. We must decline to consider the constitutionality of this law at this time. The State, in its exercise of the powers of sovereignty, having full right to enact such laws, the only possible constitutional objection that could be urged would be that in regard to taking or damaging private property for public use without just compensation, and that is not sought to be done by the petition in question. On the contrary, the object of the proceeding is to ascertain, by means of a court and jury, in the manner provided by law, the compensation to which the defendants to the petition

shall be entitled by reason of the occupancy of the railroad right of way, and we think that this sufficiently disposes of the objection made by appellees that the proceeding is contrary to the fifth amendment and to section 1 of the fourteenth amendment to the constitution of the United States and to section 2 of article 2 of the constitution of Illinois, which constitutional enactments prohibit the taking or damaging of private property without just compensation.

It is also urged that one of the defendant companies, the Louisville and Nashville Railroad Company, is an interstate carrier engaged in the operation of a railroad in interstate commerce, and is not subject, because of section 8 of article 1 of the constitution of the United States (giving Congress power to regulate commerce among the States), and laws enacted by Congress in pursuance of such constitutional provision, to condemnation proceedings in a State court. The petition for condemnation avers, and the evidence sufficiently shows, that the owner of the fee in the right of way sought to be condemned is the Southeast and St. Louis Railway Company, which is an Illinois corporation. The proceeding, therefore, is one by the Western Union Telegraph Company of Illinois, an Illinois corporation, against the Southeast and St. Louis Railway Company, also an Illinois corporation, as owner of the right of way, and the Louisville and Nashville Railroad Company, [416] as lessee thereof. No Federal law has been cited, and we are aware of none, which specifically prevents the exercise of the right of eminent domain under the sovereign powers of a State by a corporation lawfully organized and doing business under the laws of that State, against the property within that State of another corporation also organized and doing business under the laws of that State, leased to a corporation engaged in interstate commerce. If the contention of appellees in this respect is correct, then it would be impossible for a railroad or telegraph line, or any other corporation which would otherwise have the right of eminent domain, to condemn a right of way over or across the right of way of another railroad which might be engaged in interstate commerce. As there is hardly any railroad at the present day but that is engaged, to a greater or lesser extent, in interstate commerce, the State law of eminent domain would be a nullity. The right to so condemn in such a case has been upheld by this court in many cases and has never been questioned, so far as we are advised. Neither the Interstate Commerce law nor any other law which has been enacted by Congress pursuant to section 8 of article 1 of the constitution of the United States, which authorizes Congress to regulate commerce among the different States, has ever

been held to give Congress the exclusive jurisdiction in such matters nor to deprive the State of the power to enact suitable legislation in regard to intrastate commerce on railroads, even though such railroads may also be engaged in interstate commerce. In the *Minnesota Rate Cases*, 230 U. S. 352, Ann. Cas. 1916A 18, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151, known as the *Minnesota Rate cases*, it held by the Supreme Court of the United States that the States continue to possess the right to prescribe reasonable regulations for the exclusively internal traffic on interstate carriers after the passage of the Interstate Commerce act of 1887 (3 Fed. St. Ann. 816) and the amendment of June 29, 1906 (Fed. St. Ann. 1909 Supp. p. 254) although it may be that by reason of [417] the interblending of the interstate and intrastate operations of such carriers adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, and, as stated in the opinion in the *Simpson case*, quoting from *Escanaba, etc. Transp. Co. v. Chicago*, 107 U. S. 678, 2 S. Ct. 185, 27 U. S. (L. ed.) 442: "But the States have full power to regulate, within their limits, matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. . . . When its [the State's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction, . . . but until Congress acts on the subject the power of the State over bridges across its navigable streams is plenary."

It is claimed, however, that by the passage of the Federal law of July 24, 1886, Congress has assumed all power over telegraph lines engaged in interstate commerce. The first and fourth sections of said act (U. S. Rev. Stat. 1901, sec. 3964) are as follows:

"Sec. 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of

such streams and waters or interfere with the ordinary travel on such military or post-roads. [418] And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Post-master General, of the restrictions and obligations required by this act." (7 Fed. St. Ann. 205, 212.)

Counsel for appellees cite the case of *Western Union Tel. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 49 U. S. (L. ed.) 312, 1 Ann. Cas. 533, as sustaining the contention that under the Federal law above set out the petitioner cannot condemn a right of way for its telegraph line. But such is not the holding in that case. On the contrary, the decision in that case seems to hold that such right, if exercised at all, must be under a State statute. The main holding in that case is, that under the congressional enactment of July 24, 1866, a telegraph company does not possess, by virtue of that law, alone, the power to condemn a right of way for its telegraph line on the right of way of a railroad. In the opinion the earlier case of *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1, 24 U. S. (L. ed.) 708, is referred to and explained. In the latter case it was held that a telegraph company organized under the laws of the State of Florida and having by its charter the exclusive right to construct and operate a telegraph line in certain counties in that State, could not prevent, by injunction, an interstate telegraph company from erecting and maintaining its line along the line of a railroad running through the [419] counties in question when the interstate telegraph company had by private agreement been granted that right by the railroad company. The holding was, in brief, that the law of 1866 in effect amounts to prohibiting all State monopolies in commercial intercourse by telegraph. In the *Pennsylvania Railroad* case, which arose in the United States circuit court for the district of New Jersey, the Supreme Court, in deciding, as aforesaid, that the telegraph company had no right, under the Federal law, to exercise the right of eminent domain expressly commented upon the fact that the statute of New Jersey did not

make the railroad right of way public property, so as to subject it to occupation by the telegraph company under the provisions of the Federal law of 1866, and further commented upon the fact that the statute of New Jersey did not confer the right of eminent domain upon the telegraph company. In the opinion of the court occurs the following language: "In *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, and *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787, there were views expressed favorable to the contentions made in the case at bar by the telegraph company, but the judgments in both cases were ultimately rested upon the local statutes,—Idaho and Montana,—which granted the right of eminent domain to telegraph companies. We may also observe that the first case went to the circuit court of appeals of the ninth circuit. That court sustained the judgment of the circuit court upon the statute of Idaho and upon general legal principles. It did not refer to the act of 1866. (49 C. C. A. 663; 111 Fed. 843.) In *Postal Tel.-Cable Co. v. Southern R. Co.* 89 Fed. 190, and *Postal Tel.-Cable Co. v. Cleveland, etc. R. Co.* 94 Fed. 234, the act of 1866 was more directly passed on. Both cases were proceedings in eminent domain,—one brought in the courts of North Carolina and removed to the circuit court of the [420] United States, the other brought in the circuit court of the United States for the northern district of Ohio. In passing on the sufficiency of the petition in the first case, Judge Simonton said that the right of petitioner to construct its lines along the right of way of post-roads of the United States was given under the act of Congress of 1866, but, he observed, the mode or method of exercising the right conferred was fixed by the laws of the several States, and it was exclusive in its character in ascertaining the amount of compensation to be allowed. The right of the telegraph company was therefore considered and adjudged under the North Carolina statutes. In the second case a motion was made to dismiss on the ground that the power of eminent domain was not conferred by any law of the United States or the State of Ohio. The motion was sustained." In the same case (*Western Union Tel. Co. v. Pennsylvania R. Co.*) there was a dissenting opinion by Mr. Justice Harlan, in which he holds that the telegraph company has, by implication, the right to exercise the right of eminent domain under the congressional enactment of 1866, but it is nowhere intimated, either in the opinion of the court or in the dissenting opinion, that such companies do not have the right to exercise the right of eminent domain under State laws granting that right. On the contrary, as the excerpt from the opinion which we have set out above shows, such

right seems to be fully recognized and acquiesced in. A review of the decisions in other Federal cases cited in the opinion will show that such rights have been recognized and passed on by such courts under the eminent domain laws of the States of Idaho, Montana, North Carolina and Ohio, and similar State statutes involving the right of a telegraph company to condemn a railroad right of way under eminent domain have been involved in the following cases, and in each case, although the railroad opposed the right of the telegraph company to condemn, the telegraph company was successful and in none of them was [421] the question of the unconstitutionality of the State law intimated: *St. Louis, etc. R. Co. v. Postal Tel. Co. supra*; *Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Savannah, etc. R. Co. v. Postal Tel.-Cable Co.* 112 Ga. 941, 38 S. E. 353; *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 120 Ala. 21, 24 So. 408; *Mobile, etc. R. Co. v. Tel. Co.* 101 Tenn. 62, 46 S. W. 571; *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 76 Miss. 731, 26 So. 370, 45 L.R.A. 223; *Postal Tel.-Cable Co. v. Morgan's Louisiana, etc. R. etc. Co.* 49 La. Ann. 58, 21 So. 183; *Postal Tel.-Cable Co. v. Louisiana Western R. Co.* 49 La. Ann. 1270, 22 So. 219; *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Postal Tel.-Cable Co. v. Southern R. Co. supra*; *Postal Tel.-Cable Co. v. Oregon Short Line R. Co. supra*; *Postal Tel.-Cable Co. v. Oregon Short Line R. Co. supra*; *Postal Tel.-Cable Co. v. Cleveland, etc. R. Co. supra*.

In the recent case of *Louisville, etc. R. Co. v. Western Union Tel. Co. supra*, decided by the United States circuit court of appeals of the sixth circuit, which was a suit to enjoin a condemnation suit instituted by the Western Union Telegraph Company of New York against the Louisville and Nashville Railroad Company under a statute of the State of Kentucky which allows foreign telegraph companies to exercise the right of eminent domain, the court expressly held that the Kentucky statute was not invalid as attempting to regulate interstate commerce. The Illinois statute, when properly enforced in such cases, would not conflict with the Interstate Commerce law, as the right of telegraph companies to condemn is subject to the provision that such condemnation shall not incommode the public use of the railroad, and when the condemnation is made in such manner the railroad will not be incommoded in its public use as an interstate carrier [422] or otherwise. In *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A. (N.S.) 225, the Supreme Court of Georgia held that a telegraph line so constructed and maintained as not to in-

terfere with the transportation of passengers and goods beyond the State is not a burden on interstate commerce.

There is another point that remains to be considered in connection with the possible conflict that may arise between State and Federal jurisdiction by permitting the petitioner to condemn the right of way to the center thread of the permanent stream of the Wabash river. By the act of Congress of April 18, 1818, enabling the People of Illinois to form a constitution and State government and fixing the boundaries of the State, the southeastern boundary was fixed as beginning at the mouth of the Wabash river, thence up the same, etc. It was further provided in that act that the State of Illinois should have concurrent jurisdiction with the State of Indiana on the Wabash river so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river with any State or States to be formed west thereof, so far as said river shall form a common boundary to both. The constitutions of Illinois of 1818, 1848 and 1870 have followed the enabling act of Congress in establishing these boundaries, and it has been held that when the middle of a navigable river becomes the boundary line between two States, the middle of the current or channel of commerce will be regarded as the boundary line. (*Keokuk, etc. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482; *Iowa v. Illinois*, 147 U. S. 1, 13 S. Ct. 239, 37 U. S. (L. ed.) 55.) The phrases "middle of the river" and "middle of the main channel" are equivalent expressions and both mean the main line of the channel, or, as it is frequently expressed, the middle thread of the current. (*Buttenth v. St. Louis Bridge Co.* 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.) There is no doubt that the Wabash river is a navigable river, and as such it is under the control of the United States, and [423] it is not within the power of a State to interfere with such control or navigability. The congressional enactment of 1866 regarding telegraph lines, which we have heretofore set out, expressly gives telegraph lines the right to cross navigable rivers in the United States in such way as shall not interfere with the navigability thereof, and it appears from the evidence in this case that the petitioning telegraph company has accepted the provisions of that act and such acceptance has been approved by the Post-master General of the United States. Petitioner only seeks to construct the proposed telegraph line across any lands or waters within this State in accordance with the laws of this State and in such manner as will not interrupt the navigation of such waters. All that petitioner seeks to do by its petition is to condemn a right of way within the regular boundaries of the State of Illinois, which

it has full right to do if it has any right to condemn at all, and if granted that right by the courts of this State it will only be such right as the State could give, and would be no protection to the petitioner in anything it might do which would involve conflict with the authority of the Federal government over the Wabash river. For these reasons we do not think the objection well taken.

There were other objections which are the subject of cross-errors of the appellee companies, as to the sufficiency of the petition, the description of the portion of the right of way sought to be condemned, and the failure to agree on compensation. These questions have received the consideration of this court in the case of *St. Louis, etc. R. Co. v. Postal Tel. Co.* supra, in which it was held that the petition there considered, which was very similar to the petition in the case at bar, was sufficient. As is stated in the opinion: "To locate each pole by an individual description, so as to designate by metes and bounds the exact spot of earth occupied by each, would require the insertion in the petition of 4500 separate descriptions. The [424] very statement of such a proposition shows its unreasonableness." It was also held in that case that it was not necessary to file a plat of the location of the proposed line of telegraph. The court further held that where an offer has been made by the telegraph company for the use of the right of way, and the owner, as was shown by the petition in this case, refuses to sell, there is sufficient showing of a failure to agree on the compensation.

It is further objected that the petitioning company is neither a *de jure* nor *de facto* corporation, and that it is acting collusively and fraudulently with the Western Union Telegraph Company of New York. The incorporation proceedings are regular on their face and the petitioner is regularly organized and in a position to transact the business and exercise the powers for which it was organized. If it has been organized in an unlawful manner or for an unlawful purpose, even if there were evidence to that effect, it could not be considered in a collateral proceeding. *Brown v. Calumet River R. Co.* 125 Ill. 600, 18 N. E. 283, and cases cited.

It remains to consider the second series of objections to the petition which were sustained by the court below, that the construction and operation of the telegraph line would incommode the public use of the railroad, that appellees had the preferential right to the construction of a telegraph line in the interest of the public, and that property already devoted to public use cannot be condemned for another public use.

The appellees introduced a large amount of evidence as tending to show that a telegraph line along the right of way of a railroad com-

pany is a serious detriment to the operation of the railroad, and there was a large amount of evidence offered on behalf of appellant to the effect that a telegraph line would not interfere with or incommode the public use of the railroad. It appears from the notice served upon the Western Union Telegraph Company of [425] New York by appellee the Louisville and Nashville Railroad Company to remove the poles and wires already there, that the railroad company attempted to reserve the right to use such poles for its own telegraph signal purposes until it could erect its own line of poles on the right of way. We can only infer from the evidence that a telegraph system built in substantially the same manner as the system proposed to be erected by appellant has been and is now, and will be for many years, in use on the right of way in question. In fact, it appears from the evidence that a telegraph line has been on the right of way for some forty years, and it is in keeping with our common observation and knowledge of such matters that a telegraph line is necessary to the proper operation of any railroad system and that such telegraph line on the right of way does not incommode the public use of a railroad. In *St. Louis, etc. R. Co. v. Postal Tel. Co.* supra, it was held that two telegraph lines would not incommode the public use of a railroad with a right of way similar to the one in this case. At the present time the Western Union Telegraph Company of New York has strung on its poles and has devoted to the use of the railroad company two wires, which are apparently sufficient for its needs. By an amendment to its petition the petitioning company has offered as follows: "That petitioner does not seek hereby to acquire the space occupied, at the time of the filing of the petition herein, by any wire or wires on the said railroad right of way which the said defendant railroad company at such time may have owned or operated; and petitioner represents, offers, stipulates and agrees that it will accommodate, carry and support upon petitioner's said proposed telegraph-pole line such wire or wires as the said railroad company, at the time of the filing of the petition herein, owned or operated upon said railroad right of way and such additional telegraph or telephone wires as may thereafter be needed by said railroad company in the conduct of [426] its business, and afford to said railroad company like benefits and advantages, in respect to position and operation of all of said wires, as said railroad company enjoyed at the time of the filing of the petition herein." The petitioner had a right to amend its petition and thereby limit the character of the easement sought to be condemned. The reason for making the amendment was, that it developed on the trial that the Louisville and Nashville

Railroad Company had, by permission or license from the Western Union Telegraph Company of New York, strung a telephone wire and some signal wires for short distances at certain places on the poles of the telegraph company, which were in use in operating the road. The court below had also announced its finding that one of the wires of the Western Union system was the property of the railroad company, and it was therefore considered that the telegraph line was jointly owned and operated by both the railroad and telegraph companies, and the railroad company had in use and operation a telegraph line necessary for its own use along the right of way in the identical place sought to be condemned by the petitioner. We think the holding of the trial court as to the ownership of the wire in question was erroneous. It appears from the evidence that in 1884 the Western Union Telegraph Company of New York had installed and was the owner of a complete telegraph system along the line of the Louisville and Nashville railroad. That year a contract was made whereby the Western Union set apart one of the wires of the system so installed and owned by it, for the use of the railroad company. It was provided in the contract "that if the railroad company shall at any time require greater wire facilities on any portion of its road than herein provided, the telegraph company will furnish an additional wire at the cost price thereof upon its poles, or the railroad company may at its own cost string said additional wire upon the telegraph company's poles in such manner and position as it may direct." The contract [427] further provided that the telegraph lines and wires covered by the contract shall form part of the general system of the telegraph company. Had the railroad company exercised its right, under the contract, to "at its own cost string such additional wire upon the telegraph company's poles in such manner and position as it may direct," there would be some reason for holding that such wire belonged to the railroad company. The evidence shows that when the railroad company desired another wire it requested the telegraph company to furnish and string the wire. Such wire was only a part of the accommodation furnished. The telegraph company furnished with it support from its poles and cross-arms, electric current from its batteries and the necessary connections, and other things which made the wire part of the entire system and which were much greater than the cost of the wire when placed on the company's poles. The effect of the contract and the transaction consummated pursuant thereto was, that the telegraph company added an additional wire to its system and the railroad company paid a certain price for its use. At the time of filing the

suit the contract between the Western Union Telegraph Company of New York and the Louisville and Nashville Railroad Company had been terminated by notice duly given as provided, and subsequently the railroad company gave the Western Union notice to remove all its poles, wires and other property from the railroad right of way, and they have only been kept there since by the injunction of the United States district court. It is doubtless true that the railroad company has a right to construct a telegraph line as a necessary part of the equipment with which to operate its road. It is also true that if the railroad company had constructed such line the petitioner could not, by condemnation, take the identical location occupied by the railroad company, to the injury of the latter. This it is not seeking to do. The statute gives the petitioner the right to condemn along and upon the right of way of the appellees. [428] There is a difference between damaging the railroad and incommoding the public use of the road. The statute giving the right to condemn assumes that there will be damage suffered by the railroad company whose property is taken, and provides how such damage may be ascertained and compensation allowed by a jury. The only difference between railroads and public roads and other premises in condemnation proceedings is, that the telegraph company shall erect its poles, posts, etc., "in such manner and at such points as not to incommode the public use of the railroad, highway, street," etc. The petition sufficiently avers that the proposed system shall be constructed in such manner as not to incommode the public use of the railroad. The public use of the railroad means the ordinary use to which the railroad is put, as a common carrier, in transporting passengers and freight. Such use requires two lines of telegraph wire along the road and some few telephone and signal wires at some points. The petitioning company agrees to so install and construct its system that all these appliances necessary for the railroad in its public use shall not be interfered with, or, in other words, in such manner that the railroad shall not be incommoded in its public use. With the wisdom of the law which gives telegraph companies the right to condemn we have nothing to do. It is only within the power of the courts to say whether or not the petitioner has brought itself within the law so that it is entitled to condemn. *South Park Com'rs v. Ward*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910; *Chicago Rock Island, etc. R. Co. v. Lake*, 71 Ill. 333.

So far as the railroad company seeks to retain the present location of the telegraph line for its own telegraph line for commercial purposes it cannot claim a preferential right. In such case it is the same as any other com-

pany and can claim no preferential right, and the preference is to be given, in condemnation proceedings, to the one who first locates the line which is in dispute. (Golconda Northern [429] Ry. v. Gulf Lines Connecting R. Co. 265 Ill. 194, Ann. Cas. 1916A 833, 106 N. E. 818, and cases there cited.) The evidence in this case shows that the line of the petitioning company was located January 12, 1912. The same line was not located by the railroad company until February 27, 1912. Under the circumstances, therefore, if the railroad company refuses to accept such stipulation or opposes the condemnation on the terms offered by the petitioner, which it has full right to do, it will be in no position to complain that it is incommoded in the business use of its road, where such incommoding is caused by its own acts. By the petition as amended the petitioner offers, as a condition to being granted the right to condemn, to do certain things. If these things are done the road will not be incommoded in its public use. The amendment to the petition was more than an offer or stipulation that had to be accepted by the appellees to become of binding force and effect. It limited the character and nature of the easement sought. It is the same as if a railroad company sought to condemn a right of way over the right of way of another railroad. If a petitioning company offered to construct an overhead or an underground crossing so as not to interfere with the operation of another road, it would be so limited in the judgment of the court and damages would be recoverable on that basis. It would not be allowed a judgment for a grade crossing. In *St. Louis, etc. R. Co. v. Postal Tel. Co. supra*, this court held that allegations in the petition as to the offer of the petitioning company to move its poles in case the railroad company should in the future lay down another track or erect certain structures on the right of way were valid and binding, citing *Chicago, etc. R. Co. v. Joliet, etc. R. Co.* 105 Ill. 388, 44 Am. Rep. 799, and *Peoria, etc. Union R. Co. v. Peoria, etc. R. Co.* 105 Ill. 110. In *Eldorado, etc. R. Co. v. Sims*, 228 Ill. 9, 81 N. E. 782, this court said: "It is not uncommon, in condemnation [430] proceedings to acquire property for right of way purposes, to permit the party seeking to condemn, to stipulate as to the manner in which the land shall be used, or that the party seeking to condemn will perform certain things connected with or upon the land, such as fencing the right of way, erecting crossings, putting in culverts, underground passageways, etc. We think the right to make stipulations upon the part of the condemning party which do not affect the rights of the public by rendering the right of way sought to be acquired unsafe to the traveling public for use for railroad right

of way purposes, and which tend to lessen the damages to the land owner, is in conflict with no rule of public policy." It is the nature of the easement which is sought to be condemned that distinguishes the case at bar from the case of *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A.(N.S.) 225, relied upon by appellees. In that case the Western Union Telegraph Company operated its telegraph system on two lines of poles,—one line on each side of the track of the railroad company. The telegraph company was operating its lines under a contract with the railroad company, which was apparently the same contract heretofore referred to, dated June 18, 1884, and which ran from July 1, 1884, and was to continue for twenty-five years, and thereafter until one year after notice by either party to terminate the contract. The telegraph company served notice on the railroad company of its intention to terminate the contract, and commenced proceedings, under the statute, to condemn a right of way for its line along the right of way of the railroad company on both sides of the railroad track and along the same location on one side of the track claimed by the railroad company as necessary to maintain a telegraph line for the operation of its road. The railroad company had at its own expense strung certain wires on the poles of the telegraph company for its exclusive use in operating its railroad and was using said wires at the time of the condemnation [431] proceeding. There was no limitation in the character of the easement sought to be condemned, as in the case at bar, and had the petition to condemn been granted, the railroad company would have been deprived of its telegraph lines as they were located and compelled to construct a telegraph system necessary to operate its road on some other part of its right of way and subject to the prior location of the telegraph company. Under these circumstances the court said in the opinion in that case: "These conflicting claims must be solved by the rule that property dedicated to one public use cannot be subjected to another public use except in cases where the latter use does not materially interfere with the former." The court further held that while the railroad company has a preferential selection of the portion of the right of way upon which to construct and operate its own telegraph line necessary for the proper operation of said road, a telegraph company may condemn a right of way on and along the right of way of a railroad company when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad. In that case the court also held that a rail-

road company cannot defeat the exercise of the right of eminent domain by a telegraph company in constructing a line of telegraph on a portion of its right of way, by the construction and maintenance of a line on both sides of its track when a line on one side of its track is ample to furnish it with necessary telegraph service. It was further held in that case that a telegraph company will not be permitted to condemn the right of way of a railroad company for the construction and maintenance of its line of telegraph in such a manner as to materially interfere with the railroad company in the operation of its trains and in the transportation of passengers and goods.

Another contention of appellees is that appellant is seeking to condemn for its purposes property already occupied [432] and subjected to the same use, and that it has a preferential right to construct a telegraph system where the present system of the Western Union Telegraph Company of New York is now located. In the case at bar the most that appellees claim in the way of property subject to another use for telegraph purposes is one wire strung on poles not owned by appellees and supplied by an electric current not furnished by appellees. The space occupied by this wire, without the poles, cross-arms, insulators and other accessories of the Western Union Telegraph Company of New York, is all that can be claimed by appellees that will be taken, and that has been eliminated by the amendment to the petition to condemn. In all prior cases which have arisen in which was involved a condemnation of property already subjected to another public use, there has been some tangible, appreciable property involved. A condemnation proceeding under the Eminent Domain act is for the purpose of taking property. In this case appellees own no telegraph line or property of that nature that will be taken. It is necessary to keep in mind that the only questions in this case arise from the fact that appellant is a telegraph company seeking to condemn a portion of the right of way of appellees, which are railroad companies. It is true that the portion of the right of way sought to be condemned is occupied by the Western Union Telegraph Company of New York. That company is not a party to the suit, nor can it be said to be acting in collusion with appellant when appellant is doing exactly what the law authorizes it to do and the only thing it can do. There has been no attempt to conceal the facts or the relations between appellant and the Western Union Telegraph Company of New York. The fact that appellant has made an arrangement with the Western Union Telegraph Company of New York to buy its poles and wires, etc., furnishes no reason for saying that such acts are unlaw-

ful or in any way improper, nor can appellees truthfully claim that they have been in any way [433] hampered or prevented from exercising any rights which they may have exercised in the premises by reason of their contract with the Western Union Telegraph Company of New York. It is very plain from the record that from the time notice was first given to cancel the contract existing between the Western Union Telegraph Company of New York and appellees, the latter, with full knowledge of all the facts and circumstances, have had full opportunity to take such action as their officers saw fit, and they did take all steps that they considered necessary. While it is true the petition to condemn was originally filed prior to the termination of the contract and after notice was given to terminate such contract, appellant has gained no advantage thereby. The injunction obtained from the Federal court by the Western Union Telegraph Company of New York, restraining appellees from removing the poles and wires of the New York company from the right of way of appellees, was not issued until November, 1912, while the contract was terminated pursuant to notice the preceding August.

For the reasons given, we think the case should have gone to a jury on the petition, as finally amended, to fix the damages.

The judgment of the county court of St. Clair county is affirmed in so far as it overruled the objections to the petition and amended petition and is reversed in so far as it sustained the objections to the petition and amended petition, and the cause will be remanded to that court, with directions to overrule all objections sustained, and for further proceedings in accordance with the views herein expressed.

Reversed in part and remanded, with directions.

COOKE, J., FARMER, C. J., and DUNN, J. (dissenting).—In order to make our position clear we will restate the facts, so far as we consider them material to a decision of the case, as follows: In 1884 the Louisville and Nashville Railroad Company and the Western Union Telegraph [434] Company, a corporation organized under the laws of the State of New York, entered into a written contract whereby the railroad company granted to the telegraph company for a term of twenty-five years the exclusive right to construct and maintain telegraph lines upon the rights of way owned or controlled by the railroad company during the existence of the contract. It was further provided that after the expiration of twenty-five years the contract should continue in force until the expiration of one year after written notice should be given by one of the parties to the other of

an intention to terminate the same. The telegraph company, among other things, agreed to set apart one wire for the preferential use of the railroad company, and further agreed that if the railroad company should at any time require greater wire facilities on any portion of its road the telegraph company would furnish an additional wire for the railroad company at the cost price thereof upon its poles, or the railroad company might at its own cost string such additional wire upon the telegraph company's poles in such manner and position as the telegraph company might direct. In 1901 the telegraph company, at the request of the railroad company, strung an additional wire for the railroad company upon its poles, and the cost thereof, amounting to \$3,820.61, was paid by the railroad company. This wire has ever since remained upon the poles of the telegraph company and has been used exclusively by the railroad company.

On August 17, 1911, the telegraph company served notice upon the railroad company that it would on August 17, 1912, terminate the contract above mentioned. On October 5, 1911, the Western Union Telegraph Company of Illinois was organized under the laws of this State with a capital stock of \$25,000, for the purpose of owning, constructing, maintaining and operating lines of magnetic telegraph in the State of Illinois. The subscribers to the capital stock were all officers or employees of the Western [435] Union Telegraph Company of New York, and their subscriptions to the capital stock were paid by the Western Union Telegraph Company of New York. These nominal stockholders of the Illinois corporation elected themselves directors, and chose one of their number, who was then superintendent and is now general manager in Chicago of the Western Union Telegraph Company of New York, as president of the new company. The post-office address of the business office of the new corporation was fixed at 111 West Jackson boulevard, in the city of Chicago, which is the Chicago address of the Western Union Telegraph Company of New York. It also appears from the record in this case that on October 11, 1911, the executive committee of the board of directors of the Western Union Telegraph Company of New York adopted the following resolution:

"Whereas, the executive committee has heretofore authorized the termination of our contract with the Louisville and Nashville Railroad Company and has authorized the condemnation of rights of way over the railway lines of the Louisville and Nashville railroad system; and whereas, in order to effect this object it may be desirable to acquire interests in the capital stock of other corporations organized for telegraph purposes; and

whereas, under authority of the president \$25,000 has been heretofore expended for that purpose in Illinois:

"Resolved, that such expenditures so made by authority of the president is hereby approved; and further, that the president is hereby authorized and empowered to make such other and further expenditures as in his judgment, from time to time, may be necessary in order to effect such condemnation of rights of way as aforesaid."

Thereafter, on December 13, 1911, the following proceedings were taken by the board of directors of the Western Union Telegraph Company of New York, as shown by the minutes of a meeting of the board: "President authorized to make such expenditures as in his judgment, from time to time, may be necessary to effect condemnation of rights of way along the Louisville and Nashville [436] system, including an initial expenditure of \$25,000 for that purpose in Illinois."

In November, 1911, the charter of the Louisville and Nashville Railroad Company was amended, and the railroad company, in addition to the powers conferred upon it by its original charter, was thereby authorized to construct and operate telegraph and telephone lines, not only for use in operating its railroad, but also for the purpose of serving the public as a common carrier of messages.

On January 12, 1912, the president of the Western Union Telegraph Company of Illinois, who was also the general superintendent in Chicago of the Western Union Telegraph Company of New York, directed the district foreman of the Western Union Telegraph Company of New York to locate a telegraph-pole line for the Western Union Telegraph Company of Illinois along the right of way of the Louisville and Nashville Railroad Company in Illinois, and to locate such line practically on the same line then occupied by the poles and wires of the Western Union Telegraph Company of New York. These instructions were carried out and the line was located on the south side of the railroad right of way and followed the line then occupied by the poles and wires of the Western Union Telegraph Company of New York. On January 31, 1912, the Western Union Telegraph Company of Illinois made a formal offer to the railroad company of five dollars per mile for an easement for a pole line upon the railroad right of way. This offer was refused. On February 1, 1912, the railroad company began the location of proposed telegraph-pole lines along the rights of way embraced in its railroad system. This system extends through thirteen States and includes about 5000 miles of rights of way, of which only 179 miles are within this State. The work of locating the telegraph lines was begun at Union, Tennessee, and was continued;

without interruption, until and including February 27, 1912, on which date the location of the line upon [437] the right of way in Illinois was completed. In the meantime, on February 3, 1912, the Western Union Telegraph Company of Illinois filed its petition in the county court of St. Clair county, as hereinbefore stated, to condemn a right of way for a telegraph-pole line upon and along all the right of way of the railroad company in this State. The petition, as finally amended, alleged that the petitioner had located its proposed telegraph line upon the right of way of the railroad company; that the line would be constructed of the best material and upon the most approved plans, on the southerly side of the railroad right of way, not less than seven feet from the nearest rail of the main line of the railroad, and that the poles would be so erected and the line so constructed and maintained as not to obstruct or interfere with the business or use of the railroad. It was further alleged that the petitioner does not seek to acquire the space occupied, at the time of the filing of the petition, by any wire or wires on the right of way which the railroad company at such time may have owned or operated, and the petitioner offered to accommodate, carry and support upon the proposed poles such wire or wires and such additional telegraph or telephone wires as might thereafter be needed by the railroad company in the conduct of its business. It also appeared upon the hearing below that the pole line now on the railroad right of way is located at the extreme outer edge of the right of way and as far from the railroad tracks as it is possible to construct a line on the right of way. The width of the right of way varies from 25 feet to 250 feet, the average width being a little less than 100 feet.

On August 5, 1912, the railroad company notified the Western Union Telegraph Company of New York that on and after August 17, 1912 (that being the date fixed by the notice from the telegraph company to the railroad company for the termination of the contract under which the telegraph company maintained its telegraph line upon the [438] railroad right of way) the use and occupation of the railroad right of way by the telegraph company would be without the permission or consent of the railroad company, and that unless the poles, wires and other property of the telegraph company were removed by December 1, 1912, the railroad company would take possession of all such property and use or dispose of the same as its own property. Thereupon the Western Union Telegraph Company of New York obtained an injunction in the District Court of the United States for the Western District of Kentucky restraining the railroad company from taking

action in accordance with its said notice until the termination of the condemnation proceedings then pending in various States, including Illinois. The evidence further discloses that on November 18, 1912, a contract was made between the Western Union Telegraph Company of New York and the Western Union Telegraph Company of Illinois whereby the former company agreed to convey, transfer, assign and set over to the latter company all the telegraph lines and property belonging to it along and upon the right of way of the Louisville and Nashville Railroad Company within the State of Illinois, upon the acquisition by the Illinois corporation of the right to construct, maintain and operate telegraph lines along such right of way and upon the payment of \$25,000 to the Western Union Telegraph Company of New York.

As we view the case it is necessary to consider but two of the grounds relied upon by appellees in support of the judgment in the county court: First, that the railroad company has a preferential right to locate a telegraph line upon and along its right of way; and second, that appellant is seeking to condemn property for a telegraph-pole line which is already devoted to the same public use.

The authority of a telegraph company to condemn a right of way for a telegraph line upon and along a railroad right of way is conferred upon domestic corporations [439] by an act entitled "An act to revise the law in relation to telegraph companies," approved March 24, 1874, in force July 1, 1874. (Rev. Stat. 1874, chap. 134.) This statute does not confer upon a telegraph company the unlimited power to condemn a right of way for a telegraph line upon and along a railroad right of way, but it is only when the construction and maintenance of the proposed telegraph line will not "incommode the public use of the railroad" that such right of way can be obtained by condemnation. The statute thus clearly recognizes that the railroad company has a preferential right to the use of its right of way for railroad purposes, and only confers upon telegraph companies power to take a portion of the railroad right of way for the construction of a telegraph line when there is no reasonable necessity for the use of such portion by the railroad company in the operation of its railroad. The evidence in this case shows, and it is a matter of common knowledge, that a telegraph or telephone line is essential to the safe and proper operation of a railroad. The railroad company therefore has a right to use such portion of its right of way as may be necessary or suitable for the construction and maintenance of a telegraph or telephone line, and that it may construct its own pole line and refuse to accept an offer to string its wires upon the

poles of another company is in our opinion too clear to admit of argument.

The only description in the petition of the right of way sought to be condemned is, that it is located on the southerly side of the railroad right of way and not less than seven feet from the nearest rail of the main line of the railroad. There is a further allegation in the petition that the time will be constructed "upon the most approved plans," and evidence was introduced by appellant tending to show that the words quoted are well understood in telegraph line construction as meaning, among other things, that the line is to be constructed as far as possible from [440] the nearest rail of the main line of the railroad. Such location would be the same as that now occupied by the line of the Western Union Telegraph Company of New York, and it is conceded by appellant that the portion of the railroad right of way which it seeks to condemn in this proceeding is practically identical with that upon which the line of the Western Union Telegraph Company of New York is now located. The railroad company has also located the line which it proposes to construct, when the poles and wires of the Western Union Telegraph Company of New York shall be removed, upon the same line. Appellant filed its petition for condemnation before the railroad company actually located its proposed line upon the right of way in controversy, and contends that it therefore has the prior right to take this portion of the railroad right of way for the construction of its telegraph line. The railroad company, however, had long prior to the filing of the petition herein acquired its right of way by contract with the Southeast and St. Louis Railway Company, and had a right, when the occasion arose, to construct and maintain a telegraph-pole line upon that right of way. Instead of exercising that right itself, it in 1884 contracted with the Western Union Telegraph Company of New York to construct and maintain telegraph-pole lines upon its rights of way and to furnish it the telegraph service then considered necessary to operate the railroad, and by this contract obtained the further right, in case it should become necessary, to string an additional wire of its own upon the poles of the telegraph company. This arrangement obviated the necessity of the railroad company constructing its own pole line upon its right of way during the existence of this contract. On August 17, 1911, the telegraph company, in accordance with a provision of the contract, served notice upon the railroad company that the contract under which it was maintaining the telegraph line upon the railroad right of way and furnishing telegraph service to the railroad [441] company for the operation of its railroad would be terminated on August 17, 1912. Un-

til the date fixed by the telegraph company for the termination of the contract no occasion would arise for the construction of a telegraph or telephone line by the railroad company upon its right of way or for the erection of poles to support its wires which were strung upon the poles of the telegraph company. Upon the termination of the contract the railroad company had a preferential right to the use of any particular portion of its right of way for a telegraph line, provided there was a *bona fide* intention on its part to construct such a line upon that particular portion of its right of way upon the termination of the contract or within a reasonable time thereafter. Appellant did not wait until the termination of the contract before filing its petition to condemn, but more than six months before the railroad company was under any obligation to begin the construction of its own line in order to preserve its preferential right to the use of that portion of its right of way for such purpose appellant sought to condemn that portion of the right of way which was most available for a telegraph-pole line and which was then being used by the Western Union Telegraph Company of New York and the railroad company, jointly, for a telegraph line. The evidence clearly shows that it was the *bona fide* intent of the railroad company to construct its own line upon this particular portion of its right of way when the poles of the Western Union Telegraph Company of New York should be removed.

The fact that appellant located its line and filed its petition for condemnation before the railroad company actually located the line upon which it proposed to construct its own telegraph line upon the termination of the contract with the Western Union Telegraph Company of New York does not give appellant the prior right to take that portion of the right of way which it seeks to condemn for a telegraph line. The mere filing of the petition by a company [442] seeking to condemn property for a public use does not give it priority over another corporation which has previously obtained by contract the same property for the same use. In *Atlanta, etc. R. Co. v. Southern R. Co.* 131 Fed. 657, 66 C. C. A. 601, it was said: "The only right which can be said to result from mere priority of time in the institution of such a proceeding is an equitable right of priority over a later effort to acquire the same property for a like purpose, whether by a like proceeding or contract with notice, actual or constructive. . . . Mere priority of right accorded to one petitioner over another upon the ground of priority in time should not have any retrospective operation, so as to give precedence over an earlier acquisition of the same right of way by contract."

In *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A. (N.S.) 225, the Supreme Court of Georgia, in considering the relative rights of the railroad company and the telegraph company where the latter had been occupying a portion of the railroad right of way under contract but had terminated the contract and was seeking to condemn a portion of the railroad right of way for telegraph lines, said: "The railroad company contends that it should have the right of prior selection in the location of a line of telegraph for railroad use, and that it intends to erect poles upon substantially the same location as at present occupied by those of the telegraph company. On the other hand, the telegraph company denies that the railroad company has any such right, but asserts that it has the right to select a route over the railroad company's right of way at any point which does not materially interfere with the railroad company in the conduct of its business. These conflicting claims must be solved by the application of the rule that property dedicated to one public use cannot be subjected to another public use, except in cases where the later use does not materially interfere with [443] the former. If the railroad company owned the existing line of telegraph and it was necessary to maintain and have it for the safe and convenient handling of its trains and cars, no one would seriously contend that the telegraph company could deprive the railroad company of its use by virtue of the exercise of the right of eminent domain. Assuming, of course, the necessity of a line of telegraph as auxiliary to the operation of a railroad company, the railroad company would have the same right in locating its telegraph lines as it would have in locating its railroad track or its depot and its warehouses on its own right of way. If a railroad company was originally constructing its track, could it be said that a telegraph company could arbitrarily select sites for its poles, so as to force the railroad company to build its tracks on a less desirable place on its right of way? Surely not. The fundamental basis of the principle of subjecting one public use to a second public use is that the first use must not be materially interfered with. It would, indeed, be a most unfair demand to make of the owner of property charged with the discharge of a public duty that he must make his property subservient to the convenience of the demandant, who desires it for another public use. The railroad company is held off, by its contract, from constructing its line of telegraph on that portion of its right of way which it prefers, and which it has selected, until the contract expires, and the telegraph company should not be given a preference because it is not fettered by the same contract in proceeding

to condemn the same portions of the railroad right of way." This case is almost identical with the case at bar, and the reasoning of the Georgia court seems to us, upon legal principles, to be unanswerable. We do not agree with the majority that this case can be distinguished from the case at bar.

In our judgment the authorities upon this subject, as well as reason, support the contention that the railroad company in the case at bar has a preferential right to construct [444] its telegraph line upon that portion of its right of way which appellant seeks to condemn.

Another insuperable obstacle to granting the prayer of the petition for condemnation is, that at the time the petition was filed the property sought to be taken was devoted to the same public use for which appellant seeks to condemn it. This court has frequently held that property devoted to a public use cannot be condemned by another for the same public use. (*Lake Shore, etc. R. Co. v. Chicago, etc. R. Co.* 97 Ill. 506; *St. Louis, etc. R. Co. v. Belleville City R. Co.* 158 Ill. 390, 41 N. E. 916; *Suburban R. Co. v. Metropolitan West Side El. R. Co.* 193 Ill. 217, 61 N. E. 1090.) As a result of the conclusion reached by the majority, appellant will obtain a judgment permitting it to enter upon the right of way, upon the payment of the compensation to be awarded the railroad company, and erect its poles at the identical places where the poles of the present line are located and string its wires in the same spaces that the present wires are strung. In fact, it appears to be the purpose of appellant to take over the poles, wires and fixtures of the Western Union Telegraph Company of New York on the railroad right of way instead of constructing a new line. It is true that the Western Union Telegraph Company of New York is not asserting its right, by reason of prior occupancy, to this portion of the railroad right of way until the termination of its contract, in opposition to appellant's petition to condemn. The reason why that company is not only not resisting the petition to condemn but has by contract since the filing of the petition herein shown its willingness to surrender its right of way to appellant is obvious. Appellant was organized by the Western Union Telegraph Company of New York for the express purpose of obtaining a right of way for a telegraph line upon the railroad right of way by condemnation, a foreign corporation having no power to obtain such right [445] of way by condemnation, and the Western Union Telegraph Company of New York is the beneficial owner of all of appellant's capital stock. The Western Union Telegraph Company of New York was not, however, at the time of the filing of the petition, the only party interested in the telegraph line located

on the railroad right of way. The railroad company was also interested to the extent that it was, under its contract with the Western Union Telegraph Company of New York, entitled to demand that that company maintain its line of poles and wires on the railroad right of way until the termination of the contract, in order that it might be able to perform the duties and obligations owing by it to the railroad company under the terms of that contract. The Western Union Telegraph Company of New York should not be permitted to relieve itself from the performance of those duties and obligations nor deprive the railroad company of its preferential right to construct its own telegraph line upon the most desirable portion of its right of way upon the termination of the contract by consenting to the condemnation of the property upon which its line is located or by failing to object to such condemnation. Under such circumstances the railroad company has such an interest in the existing telegraph line as entitles it to urge as an objection to appellant's petition that the property sought to be taken was at the time of filing the petition, and is now, devoted to the same public use for which it is sought to be taken.

The majority opinion holds that the amendment to the petition merely limited the character of the easement sought to be condemned. This we consider to be manifestly erroneous. The evidence disclosed that the railroad company, at the time of the filing of the condemnation petition, was using the identical portion of the right of way for the same purpose for which it was sought to be condemned. That was fatal to appellant's petition, and in an attempt to obviate this objection it proposes the joint use of that portion [446] of the right of way by the railroad company and the telegraph company for the pole line; and the majority opinion holds that the railroad company must either accept this offer or remove its wires from that portion of its own right of way. In support of the proposition that this amendment was more than an offer or stipulation, in that it limited the character and nature of the easement sought, the majority opinion uses as an illustration the case of a railroad company seeking to condemn a right of way over the right of way of another railroad, and assumes a case in which the petitioning company offers to construct an overhead or underground crossing. This offer could only be for the purpose of reducing the amount of damages. An illustration more apt would be one where a railroad company should attempt to condemn the right of way of another railroad, and in order to obviate the objection that the property was already devoted to the same public use, would, in its petition, offer to permit the old company to use the right of way with

it, jointly. It must be manifest that an offer of this kind would not entitle the petitioner to condemn. It should also be noted in this connection that the offer by the telegraph company does not state upon what terms it will permit the use of its poles, etc., by the railroad company. The only purpose that can be accomplished in any case by limiting the character of the easement sought to be condemned is to reduce the amount of the damages, and in no case can any such offer or provision in the petition operate to confer upon the petitioner a right to condemn which it otherwise would not have.

There is no basis for the statement in the majority opinion that this amendment was made because it had developed on the trial that the railroad company had, by permission of license from the telegraph company, strung a telephone wire and some signal wires for short distances at certain places on the poles of the telegraph company. We are unable to find any basis in the record for this statement, and [447] this is not the explanation given by the telegraph company of the reason for filing the amendment. It states in its brief and argument: "It may be argued that, regardless of the fact that the defendants had never located either a pole line of their own or any wire upon a pole line" of the telegraph company, "yet the mere fact that there existed one wire of the defendant carried on the poles of the New York Telegraph Company precludes any telegraph company

from condemning a right of way on the same side of the track or within a certain but undefined distance of that wire. *It was to meet and overcome such an objection* that petitioner added the amendment of January 12, 1914, to its condemnation petition."

The majority opinion also states in support of the conclusion that the wire claimed by the railroad company in fact belongs to the telegraph company, that this wire was only a part of the accommodation furnished; that the telegraph company furnished with it support for its poles and cross-arms, electric current from its batteries and necessary connections and other things which made the wire part of the entire system and which were much greater than the cost of the wire when placed on the company's poles. What is "much greater" the opinion does not point out. It does appear, however, from the record that the estimated cost of the wire, alone, and labor to put it up, was \$2615.92. It also appears that in addition to stringing that wire the railroad company ordered that it be "cut into" certain stations and offices along the line, and that the final bill paid by the railroad company for "material used and labor, freight and other expenses," was \$3820.61. It therefore appears that the railroad company paid all the cost connected

with the installation of the wire ready for service; and so far as support of this wire by the poles and cross-arms of the telegraph company is concerned, that was part of the consideration for the use of the right of way by the telegraph company under its contract. The statement in the majority [448] opinion that "the effect of the contract, and the transaction consummated pursuant thereto, was that the telegraph company added an additional wire to its system and the railroad company paid a certain price for its use," is therefore not supported by the evidence.

The majority opinion also states: "At the time of filing the suit the contract between the Western Union Telegraph Company of New York and the Louisville and Nashville Railroad Company had been terminated by notice duly given as provided." This is not an accurate statement and to us seems to be misleading. The contract was still in force when this suit was filed and the railroad company was still fettered by its contract with the New York Telegraph Company, the latter company having the right to continue the maintenance of its pole line on the railroad right of way to the exclusion of any such lines constructed by the railroad company. The petition herein was filed February 3, 1912, while the contract did not terminate until August 17, 1912, and for that reason the railroad company had had no opportunity to construct or begin the construction of its own line when the petition was filed. The majority opinion continues: "And subsequently the railroad company gave to the Western Union notice to remove all its poles, wires and other property from the railroad right of way." This notice was given on August 5,—twelve days before the time fixed by the telegraph company for terminating the contract,—and notified the telegraph company to begin such removal immediately after August 17. As between the railroad company and the New York Telegraph Company it was the duty of the latter company to comply with this notice.

The majority opinion assumes that the railroad company is bound to accept the offer of the telegraph company to permit it to string its wires on the poles of the telegraph company, and if it refuses to accept the offer it must construct its lines on some other part of its right of way, and [449] ignores the fact that the railroad company had, before the petition was filed, obtained by contract its right of way for a telegraph line. The case of *Golconda Northern Ry. v. Gulf Lines Connecting R. Co.* 265 Ill. 194, Ann. Cas. 1916A 833, 106 N. E. 818, is cited in the majority opinion as authority for the proposition that "preference is to be given in condemnation proceedings to the one who first locates the line which is in dispute." That is undoubtedly true where some third person owns the line
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over which the right of way is located and condemnation proceedings are brought to secure this right of way. That case, however, was not a condemnation proceeding but was a bill in equity by one railroad company against another for an injunction to restrain the latter from interfering with, obstructing or hindering the plaintiff in the construction of its railroad through a certain narrow pass. The defendant was a grantee of another railroad company which had obtained deeds for its right of way through this pass from the owners of the land, such deeds containing conditions subsequent requiring the road to be constructed by a certain time. The complainant had subsequently obtained deeds from the same land owners for the same right of way through the pass, and claimed, among other things, that the former grants had become forfeited by the failure to construct the road within the time limits of the deeds, and therefore it held title to the right of way by virtue of subsequent deeds. The decision was against complainant, it being held that only the owners of the land, their heirs and devisees, could take advantage of a breach of a condition subsequent. Instead of being an authority in favor of the proposition announced in the majority opinion, it seems to us that this case recognizes the doctrine for which we contend, that one company may by deed or contract obtain the preferential right over another company seeking thereafter to obtain a right of way over the same premises for the same purpose. Moreover, there is a statute which applies to the location of rights of way by railroads [450] which requires a railroad company to file a plat showing the location of its railroad in the office of the recorder of deeds within six months after the railroad is located. (Hurd's Stat. 1913, chap. 109, sec. 9.)

The judgment of the county court should be affirmed.

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The majority opinion holds that the amendment to the petition merely limited the character of the easement sought to be condemned. This we consider to be manifestly erroneous. The evidence disclosed that the railroad company, at the time of the filing of the condemnation petition, was using the identical portion of the right of way for the same purpose for which it was sought to be condemned. That was fatal to appellant's petition, and in an attempt to obviate this objection it proposes the joint use of that portion [446] of the right of way by the railroad company and the telegraph company for the pole line; and the majority opinion holds that the railroad company must either accept this offer or remove its wires from that portion of its own right of way. In support of the proposition that this amendment was more than an offer or stipulation, in that it limited the character and nature of the easement sought, the majority opinion uses as an illustration the case of a railroad company seeking to condemn a right of way over the right of way of another railroad, and assumes a case in which the petitioning company offers to construct an overhead or underground crossing. This offer could only be for the purpose of reducing the amount of damages. An illustration more apt would be one where a railroad company should attempt to condemn the right of way of another railroad, and in order to obviate the objection that the property was already devoted to the same public use, would, in its petition, offer to permit the old company to use the right of way with

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which is of superior rank in respect to public necessity or which may be exercised consistently with the use first attaching. See 10 R. C. L. tit. *Eminent Domain*, pp. 182, 198. It is likewise settled that the construction of a telegraph or telephone line on a railroad right of way imposes an additional burden for which compensation must be made. See the notes to *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* 1 Ann. Cas. 734, and *Canadian Pac. R. Co. v. Moosehead Telephone Co.* 20 Ann. Cas. 721. See also 10 R. C. L. tit. *Eminent Domain*, p. 152. And since the use of land by a telegraph or telephone company is not superior in point of public utility to its use by a railroad company it is essential to the condemnation of the use of a right of way that it shall appear that the superimposed use will not interfere materially with that to which the property was previously devoted. *Mobile, etc. R. Co. v. Postal Tel. Co.* 120 Ala. 21, 24 So. 408; *Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Western Union Tel. Co. v. Louisville, etc. R. Co.* 183 Ind. 258, 108 N. E. 951; *Postal Tel. etc. Co. v. Chicago, etc. R. Co.* 30 Ind. App. 654, 66 N. E. 919; *American Telephone, etc. Co. v. St. Louis, etc. R. Co.* 202 Mo. 656, 101 S. W. 576. Whether such an interference will result is a question of fact, *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A.(N.S.) 225; as to which every case must be determined on its own facts, *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported in full, post, this volume, at page 705. And the burden is on the telegraph company to show that its occupancy of the property is consistent with the proper performance by the railroad of its duties as a common carrier. *Cleveland, etc. R. Co. v. Ohio Postal Tel. Co.* 68 Ohio St. 306, 67 N. E. 890, 62 L.R.A. 941. It is, however, generally held that the presence of telegraph poles and wires on a railroad right of way does not materially interfere with the operation of the railroad. Thus in *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 120 Ala. 21, 24 So. 408, it was said: "It is proposed to so construct the line that it will not produce any material interference with the free exercise of the franchise of the railroad company, nor extend to that part of its right of way which is in actual use. Common knowledge teaches that there is ample space on the 100 feet of the railroad's right of way, for two or more telegraph lines, without obstructing the free and ample use for railroad purposes." So in *Postal Tel. Co. v. Chicago, etc. R. Co.* 30 Ind. App. 654, 66 N. E. 919, the court said: "Under the general grant of authority to condemn, given to telegraph companies, such as is given in this state, the telegraph company may show the nature of the two uses, together

with any facts which show that the two uses may coexist—the latter use without materially interfering with or impairing the first use—and if the court, upon all the facts, finds that the two uses can coexist, it is the duty of the court to hold that the condemnation may be had under the general grant for the purpose. And while we are not prepared to say that the court should take judicial knowledge of the fact, as a matter of common and general information, that the construction of a telegraph line upon the right of way of a railway company is not an interference or injury to the use to which the property is already devoted, yet, it is true that in most instances where the question has reached the courts it has been held that the two uses were not inconsistent, and the telegraph companies have been permitted to condemn and acquire an easement on and over the right of way of the railway company." In *Union Pac. R. Co. v. Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, it was said: "The legislature has vested corporations of the character of petitioner with discretion in locating their telegraph lines. Ordinarily, the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided. In re New York, etc. R. Co. 46 N. Y. 546; *California Cent. R. Co. v. Hooper*, 76 Cal. 404; *Chicago, etc. R. Co. v. Wiltse*, 116 Ill. 449; *Chicago, etc. R. Co. v. Dunbar*, 100 Ill. 110. There was no showing of this character on the part of the respondent. True, it did introduce evidence to the effect that the erection of a telegraph line along its right of way would cause some inconvenience, and might possibly increase the hazard of railroading, but in no greater degree in this particular instance than other railroads must suffer from the erection of telegraph lines adjacent to their railroad tracks—a condition which exists almost without exception along every line of railroad in the United States." So in *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705, it was said: "It is contended by appellant that the respondent had no power to locate its telegraph line longitudinally upon appellant's right of way, because, when the lands have been once taken, by virtue of the power of eminent domain or otherwise, and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use, unless such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies

when the second public use, by reason of its nature or character necessarily supersedes or destroys the former use. Where, as in this case, the construction of the telegraph line will not materially interfere with the use of appellant's land for railroad purposes, it is clear that the rule does not apply."

In but two cases, based on the same state of facts, has it been held that the condemnation of a right of way by a telegraph company works a material interference with the operation of a railroad. See *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported in full, post, this volume, at page 705, followed in *Louisville, etc. R. Co. v. Western Union Tel. Co. (Ind.)* 111 N. E. 802, reversing on rehearing 110 N. E. 70 (see also 114 N. E. 406). In *North Western Telephone Exch. Co. v. Chicago, etc. R. Co.* 76 Minn. 334, 79 N. W. 315, it was held that no necessity existed to warrant the condemnation by a telephone company of the right to run its line over a railroad right of way, it appearing that by a slightly more circuitous course the encroachment on the right of way could be avoided. In *Louisville, etc. R. Co. v. Western Union Tel. Co.* reported in full, post, this volume, at page 696, it was held, disapproving the decision to the contrary in *Western Union Tel. Co. v. South, etc. Alabama R. Co.* 184 Ala. 66, 62 So. 788, that actual necessity must exist to warrant the condemnation for telegraph purpose of an unused portion of a railroad right of way. On the other hand in *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705, it was said: "It is also argued that no necessity has been shown to exist for the taking of the right of way. But it is shown that the respondent made a bona fide effort to agree with the appellant upon terms for the taking of the land sought, and that the latter refused to consider respondent's proposition or to negotiate with it at all. The necessity, therefore, exists for the taking. It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work. The necessity is shown to exist when it appears that it is necessary to take the land by condemnation proceedings in order to effectuate the purposes of the corporation." See also *Oregon Short Line R. Co. v. Postal Tel. Cable Co.* 111 Fed. 843, 49 C. C. A. 663, affirming 104 Fed. 623. While the question of necessity is usually considered in connection with that of the compatibility of the two uses, the cases holding that there is no incompatibility proceed on the theory stated in the case last quoted.

A contract between a telegraph company and a railroad company whereby the former is given exclusive rights on the right of way

of the latter is void as against public policy, and presents no obstacle to the condemnation by another company of the use of the right of way. *Western Union Tel. Co. v. American Union Tel. Co.* 9 Biss. 72, 19 Amer. Law Reg. (N. S.) 173, 29 Fed. Cas. No. 17,444; *Mercantile Trust Co. v. Atlantic, etc. R. Co.* 63 Fed. 513; *Georgia R. etc. Co. v. Atlantic Postal Tel. Co.* 152 Fed. 991; *Western Union Tel. Co. v. Postal Tel. Co.* 217 Fed. 533, 133 C. C. A. 385; *New Orleans, etc. R. Co. v. Southern, etc. Tel. Co.* 53 Ala. 211; *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 76 Miss. 731, 26 So. 370, 45 L.R.A.(N.S.) 223; *Union Trust Co. v. Atchison, etc. R. Co.* 8 N. M. 327, 43 Pac. 701. And see *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1, 24 U. S. (L. ed.) 708; *U. S. v. Union Pac. R. Co.* 160 U. S. 1, 16 S. Ct. 190, 40 U. S. (L. ed.) 319. Compare *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* 7 Biss. 367, 29 Fed. Cas. No. 17,445. In *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160, 38 Am. Rep. 781, it was said: "It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the rapid communication of intelligence is almost incalculable; in peace, it is scarcely less so. Shall the means, then, by which it is transmitted, be monopolized by a contract between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple and prevent competition, and that they thereby enable the plaintiff in error to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade. Code, § 2750; 40 Ga. 583; *Oregon Nav. Co. v. Winsor*, 20 Wall. 66, 68 [22 U. S. (L. ed.) 315]; *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* 5 Nev. 103."

In like manner the fact that one telegraph company operates a line along a railroad right of way does not show that there is no necessity for the construction of another line. *Union Pac. R. Co. v. Colorado Postal*

Tel.-Cable Co. 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Western Union Tel. Co. v. American Union Tel. Co. 65 Ga. 160, 38 Am. Rep. 781; Baltimore, etc. Tel. Co. v. Morgan's Louisiana, etc. R. etc. Co. 37 La. Ann. 883.

Grant of Right to Condemn.

IN GENERAL.

It is the policy of some of the jurisdictions to deny to foreign corporations the power to exercise the right of eminent domain. See the note to Northwestern Electric Co. v. Zimmerman, Ann. Cas. 1915C 927. In a jurisdiction wherein that doctrine prevails a foreign telegraph company cannot of course condemn land on a railroad right of way. Postal Tel.-Cable Co. v. Cleveland, etc. R. Co. 94 Fed. 234 (Ohio statute); Cumberland, etc. Telephone, etc. Co. v. Yazoo, etc. R. Co. 90 Miss. 686, 44 So. 166, 169. But the fact that a domestic corporation seeking to exercise the right is subsidiary to a foreign corporation is immaterial. Oregon Short Line R. Co. v. Postal Tel. Cable Co. 111 Fed. 842, 49 C. C. A. 663, *affirming* 104 Fed. 623; Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co. 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Alabama, etc. R. Co. v. Cumberland Telephone, etc. Co. 88 Miss. 438, 41 So. 258; Postal Tel. Cable Co. v. Oregon Short Line R. Co. 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705. In Alabama, etc. R. Co. v. Cumberland Telephone, etc. Co. *supra*, it was said: "The sole objection to the exercise of that right by the Mississippi Telegraph Company set up in the pleadings is that it was but a dummy for the Cumberland Telephone & Telegraph Company, had no capital stock, and was organized for the mere purpose of enabling the Cumberland Telephone & Telegraph Company to do indirectly what it could not directly do, and that its organization and incorporation were consequently unlawful; but whether the Mississippi Telegraph Company is a properly organized company under the laws of this state is a question between it and the state, not to be inquired into in this proceeding by the appellant."

By the weight of authority a *de facto* corporate existence is sufficient to warrant the exercise of the right of eminent domain (see the note to Chicago, etc. R. Co. v. Heidenreich, Ann. Cas. 1913C 266) and that rule has been applied to a telegraph company seeking to condemn the right to use a railroad right of way. Oregon Short Line R. Co. v. Postal Tel. Cable Co. 114 Fed. 787.

A statute conferring on telegraph companies the right to condemn a right of way over railroad property is applicable to a telephone company. North Western Telephone Exch. Co. v. Chicago, etc. R. Co. 76 Minn. 334, 79

N. W. 315; State v. Central New Jersey Telephone Co. 53 N. J. L. 341, 21 Atl. 460, 11 L.R.A. 664; Doty v. American Telephone etc. Co. 123 Tenn. 329, Ann. Cas. 1912C 167, 130 S. W. 1053; San Antonio, etc. R. Co. v. Southwestern Tel. etc. Co. 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L.R.A. 459; Gulf, etc. R. Co. v. Southwestern Tel. etc. Co. 18 Tex. Civ. App. 500, 45 S. W. 151; Gulf, etc. R. Co. v. Southwestern Tel. etc. Co. 25 Tex. Civ. App. 488, 61 S. W. 406; Southwestern Tel. Co. v. Gulf, etc. R. Co. (Tex.) 52 S. W. 106. *Compare* Alabama, etc. R. Co. v. Cumberland Telephone Co. 88 Miss. 438, 41 So. 258. In North Western Telephone Exch. Co. v. Chicago, etc. R. Co. *supra*, it was said: "The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph, unless express statutory provisions govern the case. So the courts have almost universally held that telephone companies are engaged in public business, have the same public duty of serving the community, and may, when establishing their lines, exercise the right of eminent domain under the constitution and the laws." The Act of Congress of July 24, 1866 (7 Fed. St. Ann. 205) discussed in the following subdivision of this note does not, however, apply to telephone companies. Richmond v. Southern Bell Telephone, etc. Co. 174 U. S. 761, 19 S. Ct. 778, 43 U. S. (L. ed.) 1162; Cumberland Telephone Co. v. Evansville, 127 Fed. 188; Wichita v. Old Colony Trust Co. 132 Fed. 657, 66 C. C. A. 19; Sunset Telephone Co. v. Pomona, 164 Fed. 561.

VALIDITY OF GRANT.

In the main the validity of a state statute granting to a telegraph or telephone company the power to condemn a right of way over railroad property follows as a natural consequence of the undoubted propositions that a telegraph or telephone line is a public use (see 10 R. C. L. tit. *Eminent Domain*, p. 52) and that property already in public use can be condemned for an additional public use not inconsistent with that of the first taker. (See 10 R. C. L. tit. *Eminent Domain*, p. 198.)

But since most telegraph companies are instrumentalities of interstate commerce (see 5 R. C. L. tit. *Commerce*, p. 742) the states cannot encroach on a field which has been covered by an act of Congress. By the Act of Congress of July 24, 1866 (Rev. St. § 5263, 7 Fed. St. Ann. 205), it is provided that a telegraph company has the right to construct lines over and along any of the military or post roads of the United States. It is, however, held that the foregoing act is in no sense an eminent domain statute and gives no right to establish lines by compulsory pro-

ceedings. See the note to *Western Union Tel. Co. v. Pennsylvania R. Co.* 1 Ann. Cas. 517. Accordingly it is held that the right of a telegraph company to occupy railroad lands must be acquired either by agreement or under a state statute, and the state statutes giving the right of eminent domain in such cases in no way conflict with the federal control over interstate commerce or with the exercise of the Congressional authority by the act heretofore referred to. See the reported case. And see, generally, the federal cases cited throughout this note. Thus in *Postal Tel. Cable Co. v. Southern R. Co.* 89 Fed. 190, it was said: "The mode or method of exercising this right of eminent domain is fixed by the laws of the several states. Such mode or method is exclusive in its character in ascertaining the amount of the just compensation to be allowed. . . . This being the case, we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands or right of way—for the conduct of the procedure, and for the steps by which the just compensation is reached. It is true that the purposes of the petitioner are greatly for the public benefit, that it is an important factor in interstate commerce, one of the agencies—and a most valuable agent—in interstate commerce, and that it is of most essential service to the citizen in time of peace and to the government in time of war. But the underlying proposition in our civilization and in Anglo-Saxon liberty is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property against his will, for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain." In *Western Union Tel. Co. v. South, etc. R. Co.* 184 Ala. 66, 62 So. 788, the court said: "The federal Congress has not conferred jurisdiction upon federal courts to exercise, under a federal statute of eminent domain, the right of eminent domain in cases like the present, and there is nothing prohibiting states from doing so under statutes similar to our own. Under our statute, there can be no condemnation of any part of a right of way of a railroad company when such condemnation will result in material interference with the proper and orderly conduct by such railroad company of the business which, as a servant of the public, it has the right, under its charter, to perform. As this is true, no condemnation of any part of the right of way of a railroad company which is legally had under our constitution and statutes can in any way affect interstate commerce or a post road of the United States. *Western Union Tel. Co. v. Louisville, etc. Co.*

201 Fed. 932. The *Western Union Telegraph Company* and the *Louisville & Nashville Railway Company* and its subsidiary lines are useful servants of the people of the state, and neither corporation can, through the courts of this state, be permitted by condemnation proceedings to materially interfere with the business of the other. Both are equally under the protection of the laws of the state; and, as we have already said, the language and purpose of the statute under which this condemnation proceeding was instituted are in perfect accord with the policy and the laws of the federal government touching the subject of interstate commerce and post roads." In *Western Union Tel. Co. v. Nashville, etc. R. Co.* 133 Tenn. 691, 182 S. W. 254, the court said: "The next assignment of error for consideration in logical order is that, since both the railway and the telegraph company are subject to the act of Congress regulating post roads, there is no power on the part of the state to authorize the condemnation sought in this case, for that it would be an invasion of the exclusive control by the federal government over the subject-matter. It is admitted, as it must be, that the act of Congress of 1866 (R. S. § 5263) does not confer upon the telegraph company the right to condemn an easement over a railway right of way. The purpose of that act was to deny to the states the power to prevent an occupation and use of such a right of way for telegraph purposes, and the power to condemn remains within state jurisdiction. *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 32 S. Ct. 449, 56 U. S. (L. ed.) 710; *Western Union Tel. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 25 S. Ct. 133, 49 U. S. (L. ed.) 312, 1 Ann. Cas. 517; *Louisville, etc. R. Co. v. Western Union Tel. Co.* 207 Fed. 1, 124 C. C. A. 573; *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A. (N.S.) 225 and note. No jurisdiction, therefore, is attempted to be asserted by the Congress, if it were competent for it to do so, over the particular matter of the power or mode of acquiring title that could be or become exclusive. The result of the railway's contention, if sustained, would be that there could be no condemnation by a telegraph company at all. There is no merit in the assignment of error." In *Louisville, etc. R. Co. v. Postal Tel.-Cable Co.* 143 Ga. 331, 85 S. E. 110, it was said: "The act of Congress approved July 24, 1866 (Rev. Stat. § 5263 et seq.) giving telegraph companies the right to construct and operate their lines through, along, and over the public domain, military or post roads, and navigable waters of the United States, was first up for consideration and construction by the Supreme Court of the United States in *Pensacola Tel. Co. v. Western Union Tel. Co.* 96

U. S. 1, 24 U. S. (L. ed.) 708. It was there held that the act did not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant them the right of eminent domain. The opinion was by Chief Justice Waite, who, after adverting to the absence, in the act, of any attempt by Congress to provide for the appropriation of private property to the uses of the telegraph, said: "The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with the owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted." This construction of the statute has been steadfastly adhered to. *Western Union Tel. Co. v. Ann. Arbor R. Co.* 178 U. S. 239, 20 S. Ct. 867, 44 U. S. (L. ed.) 1052; *Western Union Tel. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 25 S. Ct. 133, 49 U. S. (L. ed.) 312, 1 Ann. Cas. 517; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 32 S. Ct. 449, 56 U. S. (L. ed.) 710; *Williams v. Talladega*, 226 U. S. 404, 33 S. Ct. 116, 57 U. S. (L. ed.) 275. In the *City of Richmond* case, *supra*, it was said that the act of Congress made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own; but except in this negative sense the statute is only permissive, and not a source of positive rights. The condemnation statute of this state is in aid of a telegraph company acquiring an easement upon a railroad right of way, not inconsistent with the railroad company's use of its own right of way in the discharge of its proper functions and duties, where the telegraph company is unable to obtain such easement by contract. The state's right of eminent domain extends to property already dedicated to a public use, with the restriction that it cannot be subjected to an additional public use, if the second use either destroys or seriously impairs the first use. *Atlanta, etc. R. Co. v. Atlanta, etc. R. Co.* 124 Ga. 125, 52 S. E. 320. It follows, as Congress has not attempted by the Act of 1866 to interfere with the state's sovereignty or the exercise of the state's right of eminent domain, that the requested instruction was properly denied."

A telegraph company cannot without leave of the federal court institute proceedings under a state law to condemn a right of way over the lands of a railroad company which is in the possession of a receiver appointed by a federal court. *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* 7 Biss. 367, 29 Fed. Cas. No. 17,445, wherein the court said: "The

property to be affected by these proceedings was in the possession of this court through its officers, the receivers, and that being so, no action could take place in the state court affecting it without the consent first obtained of this court. An application should have been made to the receivers, and they should have come to this court, or the application might have been made directly to this court by the Atlantic & Pacific Telegraph Company for leave to proceed in the state court, and it would then have been a question whether it was proper to grant that leave. No rights therefore have been acquired by the institution of these proceedings in the state court. They must be considered as invalid, the rule being well established in the federal courts that when property is in its possession through its receivers, all proceedings in the state court affecting it, without the authority of the federal court, are invalid."

SUFFICIENCY OF GRANT.

Express Statute.

In some jurisdictions the statutes conferring the power of eminent domain authorize in express terms the condemnation by a telegraph or telephone company of a right of way on railroad property. *St. Louis, etc. R. Co. v. Southwestern Telephone, etc. Co.* 121 Fed. 276, 58 C. C. A. 198 (Arkansas statute); *Northern Pac. R. Co. v. Northern American Tel. Co.* 230 Fed. 347, 144 C. C. A. 489 (Minnesota statute); *Savannah, etc. R. Co. v. Postal Tel.-Cable Co.* 112 Ga. 941, 38 S. E. 353; *Savannah, etc. R. Co. v. Postal Tel.-Cable Co.* 113 Ga. 916, 39 S. E. 399; *Savannah, etc. R. Co. v. Postal Tel.-Cable Co.* 115 Ga. 554, 42 S. E. 1; *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* 120 Ga. 268, 1 Ann. Cas. 734, 48 S. E. 15; *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A.(N.S.) 225; *Louisville, etc. R. Co. v. Lang*, 160 Ky. 702, 170 S. W. 2; *South Carolina, etc. R. Co. v. American Telephone, etc. Co.* 65 S. C. 459, 43 S. E. 970; *Doty v. American Telephone, etc. Co.* 123 Tenn. 329, Ann. Cas. 1912C 167, 130 S. W. 1053. And see *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 101 Tenn. 62, 46 S. W. 571, 41 L.R.A. 403.

Such a power is, it has been held, conferred by a statute authorizing the condemnation of land "along" a railroad, *New Orleans, etc. R. Co. v. Southern, etc. Tel. Co.* 53 Ala. 211; or "along and across" railroad tracks, *Cumberland Telephone, etc. Co. v. Yazoo, etc. R. Co.* 90 Miss. 686, 44 So. 166, 169.

So the power is held to result from authority to take land "along and upon" a railroad. *St. Louis, etc. R. Co. v. Postal Tel. Co.* 173 Ill. 508, 51 N. E. 382; *Canadian Pac. R. Co. v. Moosehead Telephone Co.* 106 Me. 363,

20 Ann. Cas. 721, 76 Atl. 885, 29 L.R.A. (N.S.) 703. In the case first cited it was said: "The telegraph line may be built 'along and upon' the railroad. The word 'along' indicates that the construction is to be lengthwise, and the very fact that a construction upon the track cannot have been contemplated by the legislature, would lead to the conclusion that the construction is intended to be upon the right of way and along the same. Where the language of the statute is plain and free from ambiguity, and expresses a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey."

Similarly a grant of the power to condemn a location "along and parallel to" a railroad is sufficient to authorize the condemnation of a location on a railroad right of way. *Southwestern Telephone Co. v. Kansas City, etc. R. Co.* 109 La. 892, 33 So. 910; *Postal Tel.-Cable Co. v. Morgan's Louisiana, etc. R. Co.* 49 La. Ann. 58, 21 So. 183; *Postal Tel.-Cable Co. v. Farmville, etc. R. Co.* 96 Va. 661, 32 S. E. 468 (*overruling* 88 Va. 920, 14 S. E. 803). In the case last cited it was said: "It is claimed that this intention is to be found in the phrase 'along and parallel to,' and that by the use of the words 'parallel to,' the legislature intended to restrict the meaning theretofore and thereafter given to the word 'along,' and to confine the telegraph company to a line following the length of the railway's right of way, but never encroaching upon it. Or, in the language of the court in *Postal Tel.-Cable Co. v. Norfolk, etc. R. Co.* 88 Va. 920, 927, it is to run in the direction of the railroad line, 'alongside of and equidistant from it throughout all its parts, so that neither shall meet or touch; not in nor upon the railroad strip.' We are wholly unable to perceive, if this be the true construction, why the legislature found it necessary to say anything about the railroad. The right which a telegraph company is authorized to acquire would be a matter of indifference to railroad companies if the construction heretofore given by this court were correct, and the mention of them in the statute would be utterly irrelevant; but railroads are mentioned in the statute, and it is to be presumed for a necessary purpose, and we must find and give effect to the legislative intent by considering, not a part, but all of the language used, and are justified in rejecting any part of the statute as unnecessary and irrelevant only in the last resort when it has been found impossible to give effect to all the language used, and reach a rational conclusion. It is impossible to read the three sections under consideration without at once concluding that the regulation of the rights of telegraph companies in their relation to railroad companies in the

matter of the construction, maintenance, and operation of their lines was one of the essential objects of the original statute, and the sections into which it has been divided as they now appear in the code. 'Parallel' as used in sec. 1287, does not have its primary and scientific meaning 'as lines extended in the same direction and in all parts equally distant.' That definition can in no case be applied to a line of railway, for no railway line is, we believe, mathematically straight. The legislature merely intended to say that the telegraph line should be 'along and parallel to,' in the sense of 'conforming to,' 'having the same direction of, tendency with' the railroad, in order to guard against any undue interference with or hinderance of the railroad company in the enjoyment of its property."

General Statute.

By the weight of authority a statute authorizing the exercise of the right of eminent domain by telegraph or telephone companies without express mention of lands in use for a railroad right of way gives the power to condemn such lands. *Oregon Short Line R. Co. v. Postal Tel.-Cable Co.* 111 Fed. 843, 49 C. A. 663, *affirming* 104 Fed. 623; *Postal Tel. Co. v. Oregon Short Line R. Co.* 114 Fed. 787; *Pacific Postal Tel.-Cable Co. v. Oregon, etc. R. Co.* 163 Fed. 967; *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 120 Ala. 21, 24 So. 408; *Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Western Union Tel. Co. v. Louisville, etc. R. Co.* 183 Ind. 258, 108 N. E. 951; *Postal Tel.-Cable Co. v. Chicago, etc. R. Co.* 30 Ind. App. 654, 66 N. E. 919; *American Telephone, etc. Co. v. St. Louis, etc. R. Co.* 202 Mo. 656, 101 S. W. 576; *San Antonio, etc. R. Co. v. Southwestern Tel. etc. Co.* 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L.R.A. 459; *Southwestern Tel. etc. Co. v. Gulf, etc. R. Co. (Tex.)* 52 S. W. 106; *Ft. Worth, etc. R. Co. v. Southwestern Tel. etc. Co.* 96 Tex. 160, 71 S. W. 270, 60 L.R.A. 145; *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705. And see *Northwestern Telephone Exch. Co. v. Chicago, etc. R. Co.* 76 Minn. 334, 79 N. W. 315 (condemnation denied for want of necessity). Compare *Canadian Pac. R. Co. v. Moosehead Telephone Co.* 106 Me. 363, 20 Ann. Cas. 721, 76 Atl. 885, 29 L.R.A. (N.S.) 703; *New York, etc. R. Co. v. Central Union Tel. Co.* 21 Hun 261 (allowing construction along "public roads"). In *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787, it was said: "The state government, by a general law, has granted the power to exercise its eminent domain to certain corporations—among them, to telegraph companies. In this

on the railroad right of way. The railroad company was also interested to the extent that it was, under its contract with the Western Union Telegraph Company of New York, entitled to demand that that company maintain its line of poles and wires on the railroad right of way until the termination of the contract, in order that it might be able to perform the duties and obligations owing by it to the railroad company under the terms of that contract. The Western Union Telegraph Company of New York should not be permitted to relieve itself from the performance of those duties and obligations nor deprive the railroad company of its preferential right to construct its own telegraph line upon the most desirable portion of its right of way upon the termination of the contract by consenting to the condemnation of the property upon which its line is located or by failing to object to such condemnation. Under such circumstances the railroad company has such an interest in the existing telegraph line as entitles it to urge as an objection to appellant's petition that the property sought to be taken was at the time of filing the petition, and is now, devoted to the same public use for which it is sought to be taken.

The majority opinion holds that the amendment to the petition merely limited the character of the easement sought to be condemned. This we consider to be manifestly erroneous. The evidence disclosed that the railroad company, at the time of the filing of the condemnation petition, was using the identical portion of the right of way for the same purpose for which it was sought to be condemned. That was fatal to appellant's petition, and in an attempt to obviate this objection it proposes the joint use of that portion [446] of the right of way by the railroad company and the telegraph company for the pole line; and the majority opinion holds that the railroad company must either accept this offer or remove its wires from that portion of its own right of way. In support of the proposition that this amendment was more than an offer or stipulation, in that it limited the character and nature of the easement sought, the majority opinion uses an as illustration the case of a railroad company seeking to condemn a right of way over the right of way of another railroad, and assumes a case in which the petitioning company offers to construct an overhead or underground crossing. This offer could only be for the purpose of reducing the amount of damages. An illustration more apt would be one where a railroad company should attempt to condemn the right of way of another railroad, and in order to obviate the objection that the property was already devoted to the same public use, would, in its petition, offer to permit the old company to use the right of way with

it, jointly. It must be manifest that an offer of this kind would not entitle the petitioner to condemn. It should also be noted in this connection that the offer by the telegraph company does not state upon what terms it will permit the use of its poles, etc., by the railroad company. The only purpose that can be accomplished in any case by limiting the character of the easement sought to be condemned is to reduce the amount of the damages, and in no case can any such offer or provision in the petition operate to confer upon the petitioner a right to condemn which it otherwise would not have.

There is no basis for the statement in the majority opinion that this amendment was made because it had developed on the trial that the railroad company had, by permission of license from the telegraph company, strung a telephone wire and some signal wires for short distances at certain places on the poles of the telegraph company. We are unable to find any basis in the record for this statement, and [447] this is not the explanation given by the telegraph company of the reason for filing the amendment. It states in its brief and argument: "It may be argued that, regardless of the fact that the defendants had never located either a pole line of their own or any wire upon a pole line" of the telegraph company, "yet the mere fact that there existed one wire of the defendant carried on the poles of the New York Telegraph Company precludes any telegraph company

from condemning a right of way on the same side of the track or within a certain but undefined distance of that wire. *It was to meet and overcome such an objection* that petitioner added the amendment of January 12, 1914, to its condemnation petition."

The majority opinion also states in support of the conclusion that the wire claimed by the railroad company in fact belongs to the telegraph company, that this wire was only a part of the accommodation furnished; that the telegraph company furnished with it support for its poles and cross-arms, electric current from its batteries and necessary connections and other things which made the wire part of the entire system and which were much greater than the cost of the wire when placed on the company's poles. What is "much greater" the opinion does not point out. It does appear, however, from the record that the estimated cost of the wire, alone, and labor to put it up, was \$2615.92. It also appears that in addition to stringing that wire the railroad company ordered that it be "cut into" certain stations and offices along the line, and that the final bill paid by the railroad company for "material used and labor, freight and other expenses," was \$3820.61. It therefore appears that the railroad company paid all the cost connected

with the installation of the wire ready for service; and so far as support of this wire by the poles and cross-arms of the telegraph company is concerned, that was part of the consideration for the use of the right of way by the telegraph company under its contract. The statement in the majority [448] opinion that "the effect of the contract, and the transaction consummated pursuant thereto, was that the telegraph company added an additional wire to its system and the railroad company paid a certain price for its use," is therefore not supported by the evidence.

The majority opinion also states: "At the time of filing the suit the contract between the Western Union Telegraph Company of New York and the Louisville and Nashville Railroad Company had been terminated by notice duly given as provided." This is not an accurate statement and to us seems to be misleading. The contract was still in force when this suit was filed and the railroad company was still fettered by its contract with the New York Telegraph Company, the latter company having the right to continue the maintenance of its pole line on the railroad right of way to the exclusion of any such lines constructed by the railroad company. The petition herein was filed February 3, 1912, while the contract did not terminate until August 17, 1912, and for that reason the railroad company had had no opportunity to construct or begin the construction of its own line when the petition was filed. The majority opinion continues: "And subsequently the railroad company gave to the Western Union notice to remove all its poles, wires and other property from the railroad right of way." This notice was given on August 5,—twelve days before the time fixed by the telegraph company for terminating the contract,—and notified the telegraph company to begin such removal immediately after August 17. As between the railroad company and the New York Telegraph Company it was the duty of the latter company to comply with this notice.

The majority opinion assumes that the railroad company is bound to accept the offer of the telegraph company to permit it to string its wires on the poles of the telegraph company, and if it refuses to accept the offer it must construct its lines on some other part of its right of way, and [449] ignores the fact that the railroad company had, before the petition was filed, obtained by contract its right of way for a telegraph line. The case of *Golconda Northern Ry. v. Gulf Lines Connecting R. Co.* 265 Ill. 194, Ann. Cas. 1916A 833, 106 N. E. 818, is cited in the majority opinion as authority for the proposition that "preference is to be given in condemnation proceedings to the one who first locates the line which is in dispute." That is undoubtedly true where some third person owns the line

Ann. Cas. 1917B.—44.

over which the right of way is located and condemnation proceedings are brought to secure this right of way. That case, however, was not a condemnation proceeding but was a bill in equity by one railroad company against another for an injunction to restrain the latter from interfering with, obstructing or hindering the plaintiff in the construction of its railroad through a certain narrow pass. The defendant was a grantee of another railroad company which had obtained deeds for its right of way through this pass from the owners of the land, such deeds containing conditions subsequent requiring the road to be constructed by a certain time. The complainant had subsequently obtained deeds from the same land owners for the same right of way through the pass, and claimed, among other things, that the former grants had become forfeited by the failure to construct the road within the time limits of the deeds, and therefore it held title to the right of way by virtue of subsequent deeds. The decision was against complainant, it being held that only the owners of the land, their heirs and devisees, could take advantage of a breach of a condition subsequent. Instead of being an authority in favor of the proposition announced in the majority opinion, it seems to us that this case recognizes the doctrine for which we contend, that one company may by deed or contract obtain the preferential right over another company seeking thereafter to obtain a right of way over the same premises for the same purpose. Moreover, there is a statute which applies to the location of rights of way by railroads [450] which requires a railroad company to file a plat showing the location of its railroad in the office of the recorder of deeds within six months after the railroad is located. (Hurd's Stat. 1913, chap. 109, sec. 9.)

The judgment of the county court should be affirmed.

Rehearing denied December 17, 1915.

NOTE.

Power of Telegraph or Telephone Company to Condemn Railroad Right of Way under State Statute.

In General, 689.

Grant of Right to Condemn:

In General, 692.

Validity of Grant, 692.

Sufficiency of Grant:

Express Statute, 694.

General Statute, 695.

In General.

It is well settled that property devoted to one public use may be condemned for another

which is of superior rank in respect to public necessity or which may be exercised consistently with the use first attaching. See 10 R. C. L. tit. *Eminent Domain*, pp. 182, 198. It is likewise settled that the construction of a telegraph or telephone line on a railroad right of way imposes an additional burden for which compensation must be made. See the notes to *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* 1 Ann. Cas. 734, and *Canadian Pac. R. Co. v. Moosehead Telephone Co.* 20 Ann. Cas. 721. See also 10 R. C. L. tit. *Eminent Domain*, p. 152. And since the use of land by a telegraph or telephone company is not superior in point of public utility to its use by a railroad company it is essential to the condemnation of the use of a right of way that it shall appear that the superimposed use will not interfere materially with that to which the property was previously devoted. *Mobile, etc. R. Co. v. Postal Tel. Co.* 120 Ala. 21, 24 So. 408; *Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Western Union Tel. Co. v. Louisville, etc. R. Co.* 183 Ind. 258, 108 N. E. 951; *Postal Tel. etc. Co. v. Chicago, etc. R. Co.* 30 Ind. App. 654, 66 N. E. 919; *American Telephone, etc. Co. v. St. Louis, etc. R. Co.* 202 Mo. 656, 101 S. W. 576. Whether such an interference will result is a question of fact, *Western, etc. R. Co. v. Western Union Tel. Co.* 138 Ga. 420, 75 S. E. 471, 42 L.R.A.(N.S.) 225; as to which every case must be determined on its own facts, *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported in full, post, this volume, at page 705. And the burden is on the telegraph company to show that its occupancy of the property is consistent with the proper performance by the railroad of its duties as a common carrier. *Cleveland, etc. R. Co. v. Ohio Postal Tel. Co.* 68 Ohio St. 306, 67 N. E. 890, 62 L.R.A. 941. It is, however, generally held that the presence of telegraph poles and wires on a railroad right of way does not materially interfere with the operation of the railroad. Thus in *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 120 Ala. 21, 24 So. 408, it was said: "It is proposed to so construct the line that it will not produce any material interference with the free exercise of the franchise of the railroad company, nor extend to that part of its right of way which is in actual use. Common knowledge teaches that there is ample space on the 100 feet of the railroad's right of way, for two or more telegraph lines, without obstructing the free and ample use for railroad purposes." So in *Postal Tel. Co. v. Chicago, etc. R. Co.* 30 Ind. App. 654, 66 N. E. 919, the court said: "Under the general grant of authority to condemn, given to telegraph companies, such as is given in this state, the telegraph company may show the nature of the two uses, together

with any facts which show that the two uses may coexist—the latter use without materially interfering with or impairing the first use—and if the court, upon all the facts, finds that the two uses can coexist, it is the duty of the court to hold that the condemnation may be had under the general grant for the purpose. And while we are not prepared to say that the court should take judicial knowledge of the fact, as a matter of common and general information, that the construction of a telegraph line upon the right of way of a railway company is not an interference or injury to the use to which the property is already devoted, yet, it is true that in most instances where the question has reached the courts it has been held that the two uses were not inconsistent, and the telegraph companies have been permitted to condemn and acquire an easement on and over the right of way of the railway company." In *Union Pac. R. Co. v. Postal Tel.-Cable Co.* 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, it was said: "The legislature has vested corporations of the character of petitioner with discretion in locating their telegraph lines. Ordinarily, the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided. In re New York, etc. R. Co. 46 N. Y. 546; *California Cent. R. Co. v. Hooper*, 76 Cal. 404; *Chicago, etc. R. Co. v. Wiltse*, 116 Ill. 449; *Chicago, etc. R. Co. v. Dunbar*, 100 Ill. 110. There was no showing of this character on the part of the respondent. True, it did introduce evidence to the effect that the erection of a telegraph line along its right of way would cause some inconvenience, and might possibly increase the hazard of railroading, but in no greater degree in this particular instance than other railroads must suffer from the erection of telegraph lines adjacent to their railroad tracks—a condition which exists almost without exception along every line of railroad in the United States." So in *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705, it was said: "It is contended by appellant that the respondent had no power to locate its telegraph line longitudinally upon appellant's right of way, because, when the lands have been once taken, by virtue of the power of eminent domain or otherwise, and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use, unless such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies

when the second public use, by reason of its nature or character necessarily supersedes or destroys the former use. Where, as in this case, the construction of the telegraph line will not materially interfere with the use of appellant's land for railroad purposes, it is clear that the rule does not apply."

In but two cases, based on the same state of facts, has it been held that the condemnation of a right of way by a telegraph company works a material interference with the operation of a railroad. See *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported in full, post, this volume, at page 705, *followed* in *Louisville, etc. R. Co. v. Western Union Tel. Co.* (Ind.) 111 N. E. 802, *reversing on rehearing* 110 N. E. 70 (see also 114 N. E. 406). In *North Western Telephone Exch. Co. v. Chicago, etc. R. Co.* 76 Minn. 334, 79 N. W. 315, it was held that no necessity existed to warrant the condemnation by a telephone company of the right to run its line over a railroad right of way, it appearing that by a slightly more circuitous course the encroachment on the right of way could be avoided. In *Louisville, etc. R. Co. v. Western Union Tel. Co.* reported in full, post, this volume, at page 696, it was held, disapproving the decision to the contrary in *Western Union Tel. Co. v. South, etc. Alabama R. Co.* 184 Ala. 66, 62 So. 788, that actual necessity must exist to warrant the condemnation for telegraph purpose of an unused portion of a railroad right of way. On the other hand in *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705, it was said: "It is also argued that no necessity has been shown to exist for the taking of the right of way. But it is shown that the respondent made a bona fide effort to agree with the appellant upon terms for the taking of the land sought, and that the latter refused to consider respondent's proposition or to negotiate with it at all. The necessity, therefore, exists for the taking. It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work. The necessity is shown to exist when it appears that it is necessary to take the land by condemnation proceedings in order to effectuate the purposes of the corporation." See also *Oregon Short Line R. Co. v. Postal Tel. Cable Co.* 111 Fed. 843, 49 C. C. A. 663, *affirming* 104 Fed. 623. While the question of necessity is usually considered in connection with that of the compatibility of the two uses, the cases holding that there is no incompatibility proceed on the theory stated in the case last quoted.

A contract between a telegraph company and a railroad company whereby the former is given exclusive rights on the right of way

of the latter is void as against public policy, and presents no obstacle to the condemnation by another company of the use of the right of way. *Western Union Tel. Co. v. American Union Tel. Co.* 9 Biss. 72, 19 Amer. Law Reg. (N. S.) 173, 29 Fed. Cas. No. 17,444; *Mercantile Trust Co. v. Atlantic, etc. R. Co.* 63 Fed. 513; *Georgia R. etc. Co. v. Atlantic Postal Tel. Co.* 152 Fed. 991; *Western Union Tel. Co. v. Postal Tel. Co.* 217 Fed. 533, 133 C. C. A. 385; *New Orleans, etc. R. Co. v. Southern, etc. Tel. Co.* 53 Ala. 211; *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Mobile, etc. R. Co. v. Postal Tel.-Cable Co.* 76 Miss. 731, 26 So. 370, 45 L.R.A. (N.S.) 223; *Union Trust Co. v. Atchison, etc. R. Co.* 8 N. M. 327, 43 Pac. 701. And see *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1, 24 U. S. (L. ed.) 708; *U. S. v. Union Pac. R. Co.* 160 U. S. 1, 16 S. Ct. 190, 40 U. S. (L. ed.) 319. Compare *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* 7 Biss. 367, 29 Fed. Cas. No. 17,445. In *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160, 38 Am. Rep. 781, it was said: "It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the rapid communication of intelligence is almost incalculable; in peace, it is scarcely less so. Shall the means, then, by which it is transmitted, be monopolized by a contract between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple and prevent competition, and that they thereby enable the plaintiff in error to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade. Code, § 2750; 40 Ga. 583; *Oregon Nav. Co. v. Winsor*, 20 Wall. 66, 68 [22 U. S. (L. ed.) 315]; *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* 5 Nev. 103."

In like manner the fact that one telegraph company operates a line along a railroad right of way does not show that there is no necessity for the construction of another line. *Union Pac. R. Co. v. Colorado Postal*

that is, property belonging to a certain class, such as that impressed with a public use, within the judgment of the lawmaking body, for reasons of policy should not be interfered with except upon certain conditions. We are clear to the opinion that the Legislature was acting within its rightful discretion in making such exceptions. 10 Am. & Eng. Enc. of Law (2d ed.) 1099.

The cases of *Mobile, etc. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, 6 So. 404, and *Anniston, etc. R. Co. v. Jacksonville, etc. R. Co.* 82 Ala. 297, 2 So. 710, which find frequent citation and reference in our former decision in this case, involved the condemnation by one railway of the right of way of another. In neither of these decisions, however, was there used language so definite and emphatic as that now found in section 3867 of our present Code. The strongest expression there used, in this connection, was that there should be a reasonable necessity for the taking of such right of way. The decisions recognize [132] the difficulty of laying down any specific rule, as to the measure of necessity of sufficient scope to include all cases.

In the case of *Mobile, etc. R. Co. v. Alabama Midland R. Co.* supra, the rule of strict construction of statutes granting the right of eminent domain is fully recognized, as shown by the following quotation: "Statutes delegating the paramount right of eminent domain must be strictly construed, and the authority strictly pursued in the manner prescribed. They are not to be extended by implication further than is necessary to accomplish their general purpose; but not so literally construed as to defeat the manifest objects of the Legislature."

In the opinion in that case it is further said: "The settled rule is that the legislative intent to grant authority to one railroad to take and condemn a franchise of another must appear in express terms, or must arise from necessary implication, founded on an existing and particular need. No room for doubt or uncertainty must be left. Should the General Assembly empower a company to construct a railroad between designated and fixed terminal points, and, to accomplish this object, it becomes necessary to take the franchises, or any part, of another corporation, power to do so arises from necessary implication; the presumption being that the Legislature deemed the later use the more important, and of greater public benefit. The implication rests on the general rule that the grant of power to do a particular thing of a public nature carries with it implied authority to do all that is necessary to accomplish the principal and general purpose."

It is seen, from a reading of the cases, that much stress is laid upon the rule that where the Legislature has granted power to a rail-

road company to build a railway between two terminal points, and to accomplish this object it becomes necessary to condemn a portion of the right of way of another road, the power to so condemn is necessarily implied from the corporate authority originally given, and that the question of practicality is considered of great importance, as well as that of avoiding interference with the operation of the road, the right of way of which is sought to be condemned. Reasoning along these lines, the rule as to reasonable necessity was stated, in the former opinion in this case, as follows: "When a right of way is essential to a public service corporation, and there are two [133] possible routes, one upon unused lands previously acquired by some other public service corporation for a public use, and the other upon private lands, then (the rights of the public being in equipoise) when the cost of the right of way over such private lands and the labor and expense of putting such right of way in proper shape to be used by such second public service corporation are not disproportionate to the benefit likely to accrue therefrom, then the right of way over the private lands is practicable, and a right of way over the unused portion of the lands previously set apart to the first public use should be denied. When, however, the cost of acquiring and constructing the right of way, with its attendant circumstances, over the private lands is so much greater than would be the cost of constructing such right of way over the unused portion of lands previously acquired by the first public service corporation for public use as to clearly outweigh and sensibly exceed the injury which would proximately result to such first public service corporation, then, under such circumstances, so much of the unused portion of the lands belonging to such first public service corporation as is necessary to the actual occupancy and use of the second public service corporation may be condemned for its purposes, but not more."

Upon the former hearing this court held that it was largely a question of practicality, as measured by the further questions of convenience and expense, of comparative advantage and injury "having regard always to the interests of the public, for whose benefit the general authority is given and the particular taking proposed."

In the case of *South, etc. R. Co. v. Highland Ave. etc. R. Co.* 119 Ala. 105, 24 So. 114, this court called attention to the rule which required only a reasonable necessity for such condemnation in the following language: "It also had a right to take a portion of the right of way of the defendant, upon showing a reasonable necessity therefor, and that such taking would not destroy the usefulness of the right of way as a franchise, or so im-

pair the capacity of the easement as to render it unsafe; and both of these rights could have been enforced by statutory proceedings provided for this purpose" (citing *Mobile etc. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, 6 So. 404, and *Anniston, etc. R. Co. v. Jacksonville, etc. R. Co.* 82 Ala. 297, 2 So. 710).

[134] Whether in the two cases cited in the South, etc. *R. Co. v. Highland Ave. etc. R. Co. Case*, there existed in fact an actual necessity for the specific land, or portion thereof, sought to be condemned, within the meaning of section 3867 of our present Code, we need not stop to inquire. Both dealt with the right of condemnation granted to a railroad empowered by law to construct a road between two terminal points. The *Anniston, etc. Case*, had to deal with the condemnation of a right of way through a narrow gap in the mountains. In the building of railroads, as is a matter of common knowledge, the question of grades is an essential factor. In their construction the general topography of the country may, under certain circumstances, render absolutely necessary the use by a second road of a portion of the right of way of another. But such factors would not ordinarily create such imperative necessity in the erection of telegraph lines, and therefore what might be considered an indispensable necessity as a right of way for one would not be so considered for the other. The idea was expressed in *Western Union Tel. Co. v. Pennsylvania R. Co.* 120 Fed. 362, in the following language: "In railroad location, as we have noted above, grade is an essential factor: in telegraph construction it is, at most, a mere convenience. In railroad construction, the narrowness of defiles, the opening of gorges, the location of streams, the general topography of the country, or the lack of curve space may, under certain circumstances, render it imperatively necessary that the second road should intrench upon a primary location. None of these factors ordinarily create imperative necessity in the case of telegraph lines. With them grades may be ignored, gorges avoided, hills or mountains crossed. In other words, there is no necessity, in the nature of things, that ordinarily requires a telegraph line to be placed on a railroad right of way. Its location there is obviously a matter of convenience and economy."

No language so emphatic as that employed in the last sentence of section 3 of the act of October 1, 1903, which is now codified as section 3867 of the Code of 1907, is found in any of our decisions, and it was new to our statutory system at that time. The act of which this provision was a part purported to amend many of the sections of our Code relating to the power of eminent domain. The language of the statute now under review

is therefore radically different from that of the statutes at that [135] time. Research fails to disclose more than one case where there has been longitudinal condemnation of the right of way of a railroad for telegraph purposes for any great length (*Mobile, etc. R. Co. v. Postal Tel. Cable Co. supra*); and, as we have heretofore stated, this decision was rested upon the express terms of the statute then in existence. The Legislature, in revising the various sections of the Code relating to the power of eminent domain, and making material changes therein, will therefore be presumed to have intended some change in the law with respect thereto.

"It will be presumed that the Legislature, adopting the amendment, intended to make some change in the existing law; and therefore the courts will endeavor to give some effect to the amendment." 36 Cyc. 1165.

"When the Legislature employs different language in a subsequent statute in the same connection, the courts will presume a change of the law is intended. The Legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and, if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended, and after a consideration of the spirit and letter of the statute, will give effect to its terms according to their proper signification." *Lehman v. Robinson*, 59 Ala. 219.

That some material change was intended by the Legislature in the enactment of what is not section 3867 of the Code is strengthened by the fact that they declined to repeal this section when the effort to that end was made. Referring to the Senate Journal of the Legislature of 1907 (*Henderson v. State*, 94 Ala. 95, 10 So. 332), it is noted that Senate bill No. 81 was introduced, seeking to amend section 3 of an act, entitled "An act to amend sections 1713, 1714, 1717, 1718, 1719, and 1720 of the Code, approved October 1, 1903," and was referred to the committee on revision of laws. See Senate Journal 1907, p. 143. On page 744 of the said journal it appears that motion was made to take said bill No. 81 from the adverse calendar, which motion was continued until Wednesday, November 14, 1907; and on page 849 it appears that on the latter date, upon a consideration of the same by the Senate, the motion was laid on [136] the table by a vote of 25 to 5; the Senate thus refusing to take said bill from the adverse calendar and place it on a second reading. Bills of this character—such as are referred to, and adversely reported by, a standing committee—are required, under the provisions of section 911, Code of 1907, to be preserved, and said Senate bill 81 is therefore

before us, and properly so, for consideration. It reads as follows: . . . That section 3 of an act entitled 'An act to amend sections 1713, 1714, 1717, 1718, 1719, and 1720 of the Code, approved October 1, 1903,' be and the same is hereby amended so as to read as follows:

"Section 3. Be it further enacted, that section 1717 of the Code be amended so as to read as follows:

"1717 (3211) *Allegations, Objections and Proof to Be Heard*—On the day appointed or any other day to which the hearing may be continued, the court must hear the allegations of the application and any objections which may be filed to the granting thereof, and any legal evidence touching the same, and shall make an order granting or refusing the application.

"Provided: that if there are several distinct tracts of lands owned by different persons embraced in the application, the owners of each tract may have a separate hearing as to the right to condemn their lands, and the court may, if it finds the application should be granted as to some and not as to other of the owners, make and enter its decree accordingly.

"The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law."

On the back of the bill is the following indorsement: "This bill was considered by the committee on revision of laws in session and received adverse report. Oscar O. Bayles, Chairman, January 31, 1907."

A reading of the bill readily discloses that its sole purpose was to repeal the last sentence of section 3 of the act of 1903, above referred to, which is now section 3867 of the Code of 1907, and place the law back as it was before the passage of said act in so far as it concerns the matter here under consideration. The bill, as is noted, is but a copy of said section 3 of the above-mentioned act, with the exception that the last sentence thereof is omitted, and which sentence now constitutes section 3867 of our Code. It was therefore a direct effort to repeal this section. The refusal of the Legislature, or at least, of an important [137] branch of that body, to repeal said section is not without significance, and lends color to the theory that the law-making body considered the change proposed thereby as material and important and not to be disregarded.

The introduction of the bill, with its history, was not called to the attention of this court, on former appeal, and therefore did not enter into consideration of the cause at that time. That it is a matter to be considered by this court would seem quite clear.

To summarize the situation, we find that section 1244 and 1246 of the Code of 1896,

which expressly authorized such condemnation of the right of way of a railroad, were repealed by the adoption of the Code of 1907, with these sections omitted. In addition to this, the Legislature of 1903 amended the statutory provision in reference to condemnation proceedings and, in section 3 of the act of October 1, 1903, incorporated the language now found in the Code or section 3867, requiring the existence of an "actual necessity for the land or specific portion thereof" before that which has already been devoted to a public use may be subjected to condemnation. In the Legislature of 1907, effort was made to repeal that portion of section 3 of the act above referred to, and which is now section 3867 of the Code, but the bill for this purpose was defeated.

(5) We are persuaded that the Legislature intended a material change of the law in the use of the language, "actual necessity for the specific land, or portion thereof, or interest therein," and that such could not be rested upon the mere questions of economy or convenience to the telegraph company. What would be such actual necessity is difficult of definition so as to lay down a specific rule which would embrace all cases, and would best be left for determination according to the circumstances of the particular case. The cause preceded to final judgment upon the theory of petitioner that it had the right to condemn the railroad right of way because it needed a right of way and this was to it the most convenient and economical, and such additional use would work no material interference with respondent railway. A necessity that springs merely from the choice or desire of the petitioner is insufficient. As stated in the former opinion, the word "actual" is used here as a word of emphasis, meaning "real as distinguished from apparent, constructive or [138] imputed." Under the language of the statute, therefore, there must be first a real necessity for the specific land or portion thereof sought to be condemned. The word "specific" finds definition in the former opinion as "tending to specify, or to make particular, definite, limited or precise, as a specific statement." The language there used is strong, emphatic, and definite and without ambiguity or uncertainty.

(6) Speaking to the question of the construction of legislative or constitutional provisions, this court, in *State v. McGough*, 118 Ala. 166, 24 So. 397, said: "There are other rules of interpretation that may override all others, as: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature (or framers of a Constitution) should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is

plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.' Cooley on Const. Lim. 69, 70. The framers of the Constitution 'must be understood to have employed words in their natural sense, and to have intended what they said.' Id. 73; *Gibbons v. Ogden*, 9 Wheat. 188, 6 U. S. (L. ed.) 23; *Ex p. Mayor*, 78 Ala. 423. 'We can only learn what they intended from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for an imaginary purpose.' *Lehman v. Robinson*, 59 Ala. 241."

This statute cannot be so construed as to mean merely such necessity as springs from economical reasons or matters of convenience for this would be but substituting the word "reasonable" for the word "actual." The necessity is defined by the act as "actual," meaning "real," and we are of the opinion that by such language is meant such actual necessity as arises from either physical or overpowering economical conditions, the question of practicability to be, of course, kept constantly in view. No effort was made by the petitioner to prove such actual necessity within the meaning of the language of our statute as now construed by us. For aught that appears, no difficulty exists as an obstacle to the condemnation and use of a right of way. The testimony of the witness for petitioner shows, of course, additional cost for the erection of the telegraph line outside of the [139] railroad right of way, but this is purely an economical consideration, and one which appears to be by no means overpowering. As before noted, the erecting of telegraph line and the laying of a railroad are entirely different propositions, and what would constitute actual necessity for the one, within the meaning of our statute, might not be at all such to the other. Indeed, from the very nature of things, it is difficult to conceive of an actual necessity, as here construed, for the condemnation by a telegraph company of the longitudinal right of way of a railroad for any considerable distance. It may, of course, exist for short distances on account of peculiar Conditions; but these are matters to be determined when the particular case arises.

(7) Much was said in the former opinion in reference to the public good; it using the language "public interest is the lodestar of every statute conferring the right of eminent domain." The question here under consideration was one resting within the discretion of the Legislature. The right of way of a railroad, acquired by condemnation proceedings, is permitted by law to extend far beyond the actual roadbed, the usual width being 100 feet. Obviously the authority to condemn a

way of that width is given the railroad to be exercised, and upon the assumption, at least, that such width is reasonably needful for its purposes. If one telegraph line is permitted to use a part of this right of way, then, under the language of the former decision in this case, other such lines, such as telephone and power transmission lines, would be entitled to use it, and so, by gradual encroachment, ultimately deprive the railroad of its entire right of way, except that portion actually occupied by the railroad. The mere fact that this petitioner agrees to remove its poles, from time to time, from the margin of the right of way, as occasion may require the use of the space by the railroad (conceding that such averments in the petition are binding and effective), would not alter the situation; for it clearly appears that the telegraph company is seeking a permanent location on the right of way, although agreeing to shift the line from place to place. At the time of the passage of the act of 1903, previously referred to, there had been a longitudinal condemnation of a railroad right of way for telegraph purposes, rested upon sections 1244-1246 of the Code of 1896, and a decision by this court (*Mobile, etc. R. Co. v. Postal Tel. Cable Co.* supra), in which it was held that in such proceedings a railroad company is entitled [140] to only nominal damages. It was therefore the law of this state at that time that a telegraph company could, through condemnation proceedings, acquire the use of the right of way of a railroad without the payment of any substantial damages, and could thus acquire a most valuable right practically free of cost. It therefore clearly appears that the right of way of a railroad, already cleared and so kept by the railroad company, was a most inviting field for the erection of telegraph lines, and it did not seem unlikely that in the future development of the state advantage would be taken of the situation. It may be that considerations like those above noted actuated the Legislature in enacting into law what is now section 3867 of the Code, and thus declaring that it is not the public policy of the state to condemn, for another use, property already devoted to a public use, unless an actual necessity therefor exists. The lawmaking body has spoken in emphatic terms in declaring the public policy, and it is not for us to "wander into the maze of conjecture or to search for imaginary purposes." Indeed, we are unable to see that the public good requires that the petitioner be permitted to locate its line upon the right of way of this railroad, but on the contrary, we think that the public interest is in equipoise. Petitioner went upon this right of way under contract, which contract, as we understand was conceded by counsel in argument, was terminated by the voluntary act of the petition-

er. No reasons, except those of economy and convenience, appear why petitioner may not erect its lines elsewhere than on this railway. If, upon petitioner's failure to acquire this right of way, and before it acquired a right of way elsewhere, the railroad company should begin at once a destruction of petitioner's telegraph line, it may be that a court of equity, on account of, and for the conservation of, public interests might enjoin such act of destruction pending the acquirement of a right of way elsewhere within a reasonable time. This, of course, need not be determined here. But the situation thus presented, brought on by the voluntary act of petitioner, clearly can afford no foundation for the argument that an actual necessity existed for the condemnation of the railroad right of way.

We have dealt with the one question which we deem of vital importance on this appeal and as conclusive of the result thereof. It is therefore unnecessary to enter into a consideration of [141] whether or not the condemnation here sought was upon the margin of the right of way, or whether, if judgment of condemnation were entered, more than nominal damages should have been assessed. These were questions of secondary consideration, and are unnecessary to be here determined.

This cause was tried, in so far as the evidence of the petitioner is concerned, in conformity with the former opinion in this case. The trial judge, although entertaining a contrary view as to the law, followed in his rulings upon this question the holding of this court on the former hearing, which of course was entirely proper. While the record before us, under the view we now entertain of the case, would justify a final disposition of the cause on this appeal, yet, in view of this situation, we have concluded to remand the cause.

The former opinion was not decided by the full court, the then Chief Justice being absent and Mr. Justice Sayre dissenting. The writer of this opinion and Mr. Justice Thomas were not then members of this court. As presently constituted, the court has reached the conclusion that the former holding was erroneous.

We are fully mindful of the importance of this holding, both to the parties and to the public; but it is our sole duty to declare the law as we find it. The case of *Western Union Tel. Co. v. South, etc. R. Co. supra*, is therefore overruled, and the judgment of the court below will be reversed, and the cause remanded.

Reversed and remanded.

Mayfield, Sayre, and Thomas, JJ., concur. Anderson, C. J., and McClellan and Somerville, JJ., dissent.

SAYRE, J. (*concurring*).—I am not prepared to say that the action of the Legislature, or its lack of action, in reference to the bill to amend section 3 of the act to amend certain sections of the Code of 1896, should have any influence in the decision of this case. I place my concurrence upon the other considerations stated in the opinion. In this Mr. Justice Thomas also agrees.

ON APPLICATION FOR REHEARING.

(February 15, 1916.)

GARDNER, J.—(1) Upon this application for rehearing counsel for appellee, for the first time during this litigation, it [142] would seem, insist that the proceeding brought against the appellant was not for the purpose of acquiring an easement in the right of way, but was merely to ascertain the amount of compensation which should be paid therefor. This theory rests upon the assumption, on their part, that the appellee already owned perpetual easement on the right of way by virtue of the contract of 1884. By what is here said we do not intend to indicate that such theory would support a condemnation proceeding. That might be conceded, for the sake of argument and for that purpose only, but we pass that question by as unnecessary to be determined. There is no intimation in the entire record that such a theory was even hinted at on the former trials of this cause, and the former opinion in the case discloses no such intimation upon the first appeal. This court, so far as cases of this character are concerned, is a court of review only, and is expected to pass only upon questions arising in the court below.

(9) The petition filed in this cause, seeking a condemnation of the right of way, conceded that the appellee went upon and occupied the right of way under a contract, soon to expire and is disclosed by the following quotation from section 1 thereof: "Your petitioner has for many years, to wit, 20 years, occupied the right of way of the Louisville & Nashville Railroad Company, with its lines of telegraph, consisting of poles, wires, appurtenances and fixtures, under a contract with the said railroad company, which will expire on or about the 17th day of August, 1912; and your petitioner desires to continue to occupy said right of way and maintain and operate its said lines of telegraph where they are now placed and located," etc.

But notwithstanding this question is presented now for the first time, in view of the carefully prepared briefs of the able and diligent counsel for appellee, we have deemed it proper to give it consideration.

This record shows, indeed the petition itself discloses, that appellee went upon the

right of way of appellant under contract of 1884. The opinion in this cause recited that it was conceded by counsel in argument that the contract was terminated by the act of the petitioner. This was in accordance with the very terms of the contract, which provided a continuation of the same for a period of 25 years, and that at the expiration of said period [143] either party thereto might terminate the contract on giving one year's notice. There is nothing in the contract giving a perpetual easement to the appellee, and nothing that would lead thereto by necessary implication. No such insistence was made by counsel in their former brief, but on this appeal, in one of their briefs, they referred to the contract in the following language: "We then have left a working agreement which, by its terms, implies a permissive occupation of the property for telegraph purposes, possibly something in the nature of a tenancy at will."

It is thus seen that there was no contention that by the contract a perpetual easement was granted. Section 3 of the petition avers the ownership by the railroad of the easement sought to be condemned.

But we need not pursue the subject further. The contract was terminated according to its terms, and terminated in its entirety. No effort seems to have been made—and we do not see how it could have been made—to terminate that part of the contract which is burdensome and retain that which is beneficial.

As an exhibit to the last brief filed by appellee, there is attached the opinion of the United States District Court for the Southern District of Georgia, recently delivered in the case of Western Union Tel. Co. v. Georgia R. etc. Co. 227 Fed. 276, and counsel seem to be impressed with the idea that that decision lends color to the theory now advanced. The statement of facts, as well as the opinion itself show, however, that the telegraph company in this instance had acquired by contract a perpetual easement in the right of way. We quote from the opinion as follows: "A reading of these two contracts discloses beyond question that the predecessors of the Western Union Telegraph Company were granted perpetual easement in and upon the rights of way of the said railroads for the construction, maintenance, and operation of telegraph lines on same, and that such grants became irrevocable and assignable upon the construction of said telegraph lines as long as same should be kept in operation."

A reading of the case therefore discloses that it is easily differentiated from the one here under consideration. We are therefore not at all impressed with this last theory of
Ann. Cas. 1917B.—45.

counsel for appellee, and the application for rehearing will be overruled.

Mayfield, Sayre, and Thomas, JJ., concur.

NOTE.

Contrary to the general current of authority, it is held in the reported case that to warrant the condemnation by a telegraph company of the right to erect its line on a railroad right of way an actual necessity for the taking must exist, i. e., the condemnor must be unable to acquire a suitable right of way over private lands. For a discussion of the power of a telegraph or telephone company under a state statute to condemn a railroad right of way, see the note to Western Union Tel. Co. v. Louisville, etc. R. Co. reported ante, this volume, at page 670.

WESTERN UNION TELEGRAPH COMPANY

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

Indiana Supreme Court—May 25, 1915.

183 Ind. 258; 108 N. E. 951.

Eminent Domain — Condemnation by Telegraph Company — Taking of Railroad Right of Way — Inconsistency of Use.

Under Burns' Ann. St. 1914, § 929, regulating the matters of entry, survey, effort to purchase, and title taken in the exercise of the power of eminent domain, and section 5770 providing that telegraph companies may acquire such rights of way as may be necessary for their purposes under the writ of assessment of damages, the right of a telegraph company to condemn by writ of assessment a right of way for poles and wires along defendant railroad's right of way depends upon the degree of interference which such poles and wires will cause in the railroad use, since, although lands once condemned to public use cannot be subsequently condemned for a second public use inconsistent with the former, which would destroy it, unless there is a statute expressly conferring such right, nevertheless, under a right to condemn conferred by general statute, a second appropriation of land already devoted to public use may be had where the subsequent use will not be too inconsistent with the former, so that the interference therewith may be compensated in damages.

[See note at end of this case.]

Appeal and Error — Review of Facts.

In reviewing evidence on appeal from denial of a motion for new trial, the appellate court can consider only the evidence most favorable to the appellee.

Same.

Where an ultimate material fact is to be inferred from other facts, it is for the trier of the facts to draw the inference, and, when the facts upon which the inference is based are such that reasonable minds may draw opposite inferences therefrom, the appellate court cannot say that the fact found, as a result of the inference drawn, is not sustained by evidence, unless the facts are undisputed, and the verdict or finding is opposed to the only reasonable inference therefrom.

Appeal from Circuit Court, Vanderburgh county: GIVENS, Judge.

Action by Western Union Telegraph Company, plaintiff, against Louisville and Nashville Railroad Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

J. E. Williamson, Pickens, Moores, Davidson & Pickens and Geo. H. Fearons for appellant.

Philip W. Frey and G. R. DeBruler for appellees.

[259] LAIRY, J.—This action was brought by appellant company to condemn and appropriate a right of way for its telegraph poles and wires longitudinally upon the right of way of appellee, South, East and St. Louis Railway Company operated by the Louisville and Nashville Railroad Company. The action was filed in the Vanderburgh Circuit [260] Court and affects that portion of the right of way which lies within Vanderburgh County. Appellees filed a number of objections; and, after hearing the evidence the court sustained the third, fifth, sixth, eleventh and thirteenth specifications of objection, and refused to appoint appraisers. The right of appellant to condemn the land described in its complaint for the purpose designated was thus denied. Appellant filed a motion for a new trial which was overruled.

The several alleged errors assigned and relied on for reversal present in different forms only a single question, and that is the right of appellant, under the pleadings and the proof to condemn the real estate described in the complaint.

By the statutes of this State, a telegraph company has a right to avail itself of the writ of assessment of damages for the purpose of acquiring land for the location and maintenance of its necessary poles and lines.

§§ 5770, 929 Burns 1914, § 4166 R. S. 1881, Acts 1905 p. 59. It is well settled that where land has been once appropriated to an important public use, the power of eminent domain can not be invoked for the purpose of taking it for a second public use which is wholly inconsistent with the former and which would entirely supersede and destroy the use to which the land is already devoted, unless there is a statute expressly conferring such right, or from which such right arises by necessary inference. *Ft. Wayne v. Lake Shore, etc. R. Co.* (1892) 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L.R.A. 367; *City of Valparaiso v. Chicago, etc. R. Co.* (1890) 123 Ind. 467, 24 N. E. 249; *Gold v. Pittsburgh, etc. R. Co.* (1899) 153 Ind. 232, 53 N. E. 285. It seems to be equally well settled that a right to condemn conferred by a general statute authorizes, by implication, the second or subsequent appropriation of land already devoted to a public use in cases where such subsequent use is not inconsistent with [261] the former and where such subsequent use is of such a character that it will not interfere with the use to which such land is already devoted. *Cincinnati, etc. R. Co. v. Anderson* (1894) 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285; *Postal Tel.-Cable Co. v. Chicago, etc. R. Co.* (1903) 30 Ind. App. 654, 66 N. E. 919; *Baltimore, etc. R. Co. v. Jackson County* (1901) 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

The interference of a proposed subsequent use may be so complete and absolute as to entirely destroy and supersede such former use, or it may be so slight as to be merely nominal, occasioning no inconvenience whatever. In either case there is no doubt as to the law with respect to a subsequent condemnation. In the first instance, the right to condemn does not exist unless it is conferred by statute, either expressly or by necessary implication; and, in the second instance, the right to condemn is inferred from a statute giving general authority to condemn. Between a slight and inconsiderable interference on the one hand and an interference which is so complete and absolute as to entirely destroy and supersede a former use on the other, cases may be found presenting all shades and degrees of interference and inconvenience. In cases where the subsequent use for which the appropriation is sought is not of such a character as to destroy the former use but is of such a character as to interfere with it to a greater or less extent, the rule is not so apparent. Under the authorities it seems that a slight or inconsiderable interference with a former use may be compensated in damages and the appropriation allowed; and, that where the interference and inconvenience which would result

are material and substantial, damages cannot be awarded and the right to condemn does not exist; but our investigation has not disclosed any case in which a court has attempted to fix a standard by which the degree of interference or inconvenience can be measured so as to determine with accuracy when the degree of interference and inconvenience passes the stage where it can be [262] compensated in damages and becomes so substantial and material as to preclude the right of a second appropriation. For the reason stated each case must depend largely on the particular facts involved, and little assistance can be gained from an examination of text books or decided cases.

By the refusal of the trial court to appoint appraisers in this case, it decided from the evidence admitted under the objections filed that the construction and maintenance of a line of poles and telegraph wires over that part of the railroad right of way sought to be condemned, would constitute a substantial and material interference with the use of such right of way for railroad purposes. The issue is fairly presented by the fifth and eleventh objections filed and the finding of the trial court must be sustained on appeal if there is some evidence to support it. As this court has no power to weigh conflicting evidence, it can consider only the evidence most favorable to appellee in passing upon the question thus presented.

The right of way over which appellant seeks to acquire the right to construct and maintain its telegraph line extends from the city of Evansville to a point near Howell where there is a Y. From this dividing point one part of the right of way extends down the Ohio River on the north side to a bridge where it crosses to Henderson, Kentucky. From this Y another part of the right of way extends in a westerly direction through Posey County to and beyond the Wabash River. The evidence shows that this right of way varies in width from over 100 feet at the widest places to from 50 to 75 feet at the narrowest. From Evansville to Howell there is a double track and on the other parts of the right of way there is a single track and the tracks are located near the center of the right of way. At the time of the trial there was a line of poles and wires located on the right of way which had been operated by the Western Union Telegraph Company [263] of New York under a contract which had expired or which was about to expire, and it was the purpose of appellant by this proceeding to acquire the right to construct and maintain its pole line in practically the same location on the right of way as that occupied by the existing pole line. There is evidence to show that the

proper operation of trains upon the railway requires that telegraph or telephone lines should be constructed and maintained by the company operating the railroad and that the operating company contemplated in the near future the installing and maintaining of an automatic electric signal system. The evidence relating to the inconvenience which an additional line of poles would occasion, and the extent to which such a line of poles and wires would interfere with the successful operation of the railroad by injuring and impairing the efficiency of the system of signals and by otherwise impeding the operation of trains and rendering the service less safe and convenient, is conflicting; but the evidence most favorable to appellee shows a state of facts from which the trial court was justified in drawing the inference that the construction and maintenance of such a line of poles and wires would constitute a material and substantial interference with the public use to which the right of way in question was already devoted. Where an ultimate material fact is to be inferred from other facts proved it is the province of the court or jury trying the facts to draw the inference and thus to find the ultimate fact. When the facts upon which the inference is based are of such a nature that reasonable minds might rightly draw opposite inferences therefrom, this court cannot say that the fact found as a result of such inference is not sustained by evidence. That can be done only in cases where the facts are undisputed and where the verdict of the jury or the finding of the trial court is opposed to the only inference that can be rightly and reasonably drawn from such facts. [264] *Speck v. Kenoyer* (1905) 164 Ind. 431, 73 N. E. 896; *Louisville, etc. R. Co. v. Berry* (1894) 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646. In view of the conclusion we have reached, other questions presented need not be considered.

Judgment affirmed.

NOTE.

The reported case holds that under the peculiar facts presented by that case the occupation of a railroad right of way by the poles and wires of a telegraph company is so substantial an interference with the use of the property by the railroad that the telegraph company is not entitled to condemn the right so to occupy it. The cases relating to the power of a telegraph or telephone company to condemn a railroad right of way under a state statute are reviewed in the note to *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported ante, this volume, at page 670.

Appeal and Error — Review of Facts.

In reviewing evidence on appeal from denial of a motion for new trial, the appellate court can consider only the evidence most favorable to the appellee.

Same.

Where an ultimate material fact is to be inferred from other facts, it is for the trier of the facts to draw the inference, and, when the facts upon which the inference is based are such that reasonable minds may draw opposite inferences therefrom, the appellate court cannot say that the fact found, as a result of the inference drawn, is not sustained by evidence, unless the facts are undisputed, and the verdict or finding is opposed to the only reasonable inference therefrom.

Appeal from Circuit Court, Vanderburgh county: GIVENS, Judge.

Action by Western Union Telegraph Company, plaintiff, against Louisville and Nashville Railroad Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFIRMED.**

J. E. Williamson, Pickens, Moores, Davidson & Pickens and *Geo. H. Fearons* for appellant.

Philip W. Frey and *G. R. DeBruler* for appellees.

[259] LAIRY, J.—This action was brought by appellant company to condemn and appropriate a right of way for its telegraph poles and wires longitudinally upon the right of way of appellee, South, East and St. Louis Railway Company operated by the Louisville and Nashville Railroad Company. The action was filed in the Vanderburgh Circuit [260] Court and affects that portion of the right of way which lies within Vanderburgh County. Appellees filed a number of objections; and, after hearing the evidence the court sustained the third, fifth, sixth, eleventh and thirteenth specifications of objection, and refused to appoint appraisers. The right of appellant to condemn the land described in its complaint for the purpose designated was thus denied. Appellant filed a motion for a new trial which was overruled.

The several alleged errors assigned and relied on for reversal present in different forms only a single question, and that is the right of appellant, under the pleadings and the proof to condemn the real estate described in the complaint.

By the statutes of this State, a telegraph company has a right to avail itself of the writ of assessment of damages for the purpose of acquiring land for the location and maintenance of its necessary poles and lines.

§§ 5770, 929 Burns 1914, § 4166 R. S. 1881, Acts 1906 p. 59. It is well settled that where land has been once appropriated to an important public use, the power of eminent domain can not be invoked for the purpose of taking it for a second public use which is wholly inconsistent with the former and which would entirely supersede and destroy the use to which the land is already devoted, unless there is a statute expressly conferring such right, or from which such right arises by necessary inference. *Ft. Wayne v. Lake Shore, etc. R. Co.* (1892) 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L.R.A. 367; *City of Valparaiso v. Chicago, etc. R. Co.* (1890) 123 Ind. 467, 24 N. E. 249; *Gold v. Pittsburgh, etc. R. Co.* (1899) 153 Ind. 232, 53 N. E. 285. It seems to be equally well settled that a right to condemn conferred by a general statute authorizes, by implication, the second or subsequent appropriation of land already devoted to a public use in cases where such subsequent use is not inconsistent with [261] the former and where such subsequent use is of such a character that it will not interfere with the use to which such land is already devoted. *Cincinnati, etc. R. Co. v. Anderson* (1894) 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285; *Postal Tel.-Cable Co. v. Chicago, etc. R. Co.* (1903) 30 Ind. App. 654, 66 N. E. 919; *Baltimore, etc. R. Co. v. Jackson County* (1901) 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

The interference of a proposed subsequent use may be so complete and absolute as to entirely destroy and supersede such former use, or it may be so slight as to be merely nominal, occasioning no inconvenience whatever. In either case there is no doubt as to the law with respect to a subsequent condemnation. In the first instance, the right to condemn does not exist unless it is conferred by statute, either expressly or by necessary implication; and, in the second instance, the right to condemn is inferred from a statute giving general authority to condemn. Between a slight and inconsiderable interference on the one hand and an interference which is so complete and absolute as to entirely destroy and supersede a former use on the other, cases may be found presenting all shades and degrees of interference and inconvenience. In cases where the subsequent use for which the appropriation is sought is not of such a character as to destroy the former use but is of such a character as to interfere with it to a greater or less extent, the rule is not so apparent. Under the authorities it seems that a slight or inconsiderable interference with a former use may be compensated in damages and the appropriation allowed; and, that where the interference and inconvenience which would result

are material and substantial, damages cannot be awarded and the right to condemn does not exist; but our investigation has not disclosed any case in which a court has attempted to fix a standard by which the degree of interference or inconvenience can be measured so as to determine with accuracy when the degree of interference and inconvenience passes the stage where it can be [262] compensated in damages and becomes so substantial and material as to preclude the right of a second appropriation. For the reason stated each case must depend largely on the particular facts involved, and little assistance can be gained from an examination of text books or decided cases.

By the refusal of the trial court to appoint appraisers in this case, it decided from the evidence admitted under the objections filed that the construction and maintenance of a line of poles and telegraph wires over that part of the railroad right of way sought to be condemned, would constitute a substantial and material interference with the use of such right of way for railroad purposes. The issue is fairly presented by the fifth and eleventh objections filed and the finding of the trial court must be sustained on appeal if there is some evidence to support it. As this court has no power to weigh conflicting evidence, it can consider only the evidence most favorable to appellee in passing upon the question thus presented.

The right of way over which appellant seeks to acquire the right to construct and maintain its telegraph line extends from the city of Evansville to a point near Howell where there is a Y. From this dividing point one part of the right of way extends down the Ohio River on the north side to a bridge where it crosses to Henderson, Kentucky. From this Y another part of the right of way extends in a westerly direction through Posey County to and beyond the Wabash River. The evidence shows that this right of way varies in width from over 100 feet at the widest places to from 50 to 75 feet at the narrowest. From Evansville to Howell there is a double track and on the other parts of the right of way there is a single track and the tracks are located near the center of the right of way. At the time of the trial there was a line of poles and wires located on the right of way which had been operated by the Western Union Telegraph Company [263] of New York under a contract which had expired or which was about to expire, and it was the purpose of appellant by this proceeding to acquire the right to construct and maintain its pole line in practically the same location on the right of way as that occupied by the existing pole line. There is evidence to show that the

proper operation of trains upon the railway requires that telegraph or telephone lines should be constructed and maintained by the company operating the railroad and that the operating company contemplated in the near future the installing and maintaining of an automatic electric signal system. The evidence relating to the inconvenience which an additional line of poles would occasion, and the extent to which such a line of poles and wires would interfere with the successful operation of the railroad by injuring and impairing the efficiency of the system of signals and by otherwise impeding the operation of trains and rendering the service less safe and convenient, is conflicting; but the evidence most favorable to appellee shows a state of facts from which the trial court was justified in drawing the inference that the construction and maintenance of such a line of poles and wires would constitute a material and substantial interference with the public use to which the right of way in question was already devoted. Where an ultimate material fact is to be inferred from other facts proved it is the province of the court or jury trying the facts to draw the inference and thus to find the ultimate fact. When the facts upon which the inference is based are of such a nature that reasonable minds might rightly draw opposite inferences therefrom, this court cannot say that the fact found as a result of such inference is not sustained by evidence. That can be done only in cases where the facts are undisputed and where the verdict of the jury or the finding of the trial court is opposed to the only inference that can be rightly and reasonably drawn from such facts. [264] *Speck v. Kenoyer* (1905) 164 Ind. 431, 73 N. E. 896; *Louisville, etc. R. Co. v. Berry* (1894) 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

In view of the conclusion we have reached, other questions presented need not be considered.

Judgment affirmed.

NOTE.

The reported case holds that under the peculiar facts presented by that case the occupation of a railroad right of way by the poles and wires of a telegraph company is so substantial an interference with the use of the property by the railroad that the telegraph company is not entitled to condemn the right so to occupy it. The cases relating to the power of a telegraph or telephone company to condemn a railroad right of way under a state statute are reviewed in the note to *Western Union Tel. Co. v. Louisville, etc. R. Co.* reported ante, this volume, at page 670.

of the sale. To reduce appellants' liability for the value thus found, the trial judge ordered the proceeds of the sale to be paid to respondent. To this order, the appellants can take no exception, as it was beneficial to them. Appellants, however, contend that the proper measure of damages is the difference between the price obtained and that which could have been obtained by a sale under respondent's execution. We think the trial court adopted the correct rule. 35 Cyc. 1698.

The judgment is affirmed.

Morris, C. J., Chadwick, and Parker, JJ., concur.

NOTE.

Rights of Parties on Sale under Junior Attachment or Execution.

Introductory, 710.

Rights as to Proceeds of Sale, 710.

Liability of Sheriff, 712.

Title of Purchaser, 712.

Introductory.

The decisions are not in harmony as to the rights of the parties interested where property against which two or more attachments or executions have been issued is sold under the junior writ. It is agreed that the purchaser takes title by the sale, and also that the selling officer may under some circumstances be liable in damages to the holder of the senior writ. There is of course no dispute as to the proposition that the lien acquired under the senior writ is in no way divested. But while the prevailing rule seems to be that the holder of the senior writ is entitled to priority of payment out of the proceeds of the sale, some courts adhere to the doctrine that the proceeds should be applied first to the claim of the holder of the junior writ, leaving the senior lien holder to pursue his remedy against the land or against the selling officer.

The present discussion is confined to a review of cases wherein the junior writ is inferior in right at the time of the sale thereunder, excluding from consideration the effect of a waiver or loss of the priority of the senior writ.

Rights as to Proceeds of Sale.

The rule that on the sale of property under a junior attachment or execution the holder thereof is first entitled to the satisfaction of his claim out of the proceeds of the sale obtains in a few jurisdictions. *Love v. Williams*, 4 Fla. 126; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 208; *Reynolds v. Ingersoll*, 11

Smedes & M. (Miss.) 249, 49 Am. Dec. 57. See also *Mushback v. Ryerson*, 11 N. J. L. 346; *Sandford v. Roosa*, 12 Johns. (N. Y.) 162. In *Hanauer v. Casey*, 28 Ark. 352, it was said that the rule resulted from the fact that the senior attachment still bound real estate after a sale under the junior attachment or execution. The court pointed out, however, that this rule did not obtain as to personal property because on the sale of such property the liens thereon were released. In *Woods v. Kellerman*, 3 Cal. App. 422, 89 Pac. 358, the court said: "The second point made by the appellant seems to be based upon the propositions: That where there are several executions against the same property in the hands of the sheriff, any sale made by the sheriff, though under a junior execution, is, in effect, a sale upon all the executions; and that the money is to be credited on the several liens in the order of their priority. This, from the authorities cited, seems to be the law in some states; but, according to the better opinion, 'in the majority, the senior liens, whether existing by judgment or otherwise, are not impaired by the sale.' And even in those states where a different rule obtains, it is said: 'If it be understood and agreed between the parties in interest and the purchaser that he will take the property subject to prior incumbrances, this agreement will be enforced, the judgment creditor making the sale will be entitled to the proceeds, and the prior lien-holders will retain their liens against the property.' (Freeman on Executions, sec. 338.) The majority rule, we think, obtains in this state; but, if otherwise, the case would clearly come within the exception stated. For here the sale seems to have been made by an arrangement to which all the parties to the immediate transaction assented; and we do not doubt as to them the sales were valid as made. The defendant redeemed with full notice of this arrangement and did not by his redemption acquire any additional rights."

The more general view is, however, that on the sale of property under a junior execution or attachment the holder of the senior writ is entitled to priority of payment out of the proceeds of the sale. *Speelman v. Chaffee*, 5 Colo. 247; *People v. Smith*, 29 Ill. App. 577; *Rogers v. Edmunds*, 6 N. H. 70; *Green v. Johnson*, 9 N. C. 309, 11 Am. Dec. 763; *Schuylkill County's Appeal*, 30 Pa. St. 358 (both levies being made); *Landis v. Evans*, 113 Pa. St. 332, 6 Atl. 908; *Platt-Barber Co. v. Groves*, 193 Pa. St. 475; *Furman v. Christie*, 3 Rich. L. (S. C.) 1; *Arnold v. McKellar*, 9 S. C. 335; *Lemmond v. Short*, 3 Strob. L. (S. C.) 313; *Blair v. Horseby*, Dud. L. (S. C.) 357; *Jackson v. Heiskell*, 1 Leigh (Va.) 257; *Rowe v. Jarvis*, 13 U. C. C. P. 495. See also the reported

case. And see *Vance v. Red*, 2 Speer's L. (S. C.) 90; *Garner v. Cutler*, 28 Tex. 175. Compare *McClelland v. Slingluff*, 7 Watts & S. (Pa.) 134, 42 Am. Dec. 224. In *Beck v. Brady*, 7 La. Ann. 1, the court said: "The code of practice, however, gives the following effect to a writ of attachment: The sheriff must seize and detain so much of the debtor's property, as may be equal in value to the amount claimed in the suit. Art. 256. He must take charge and keep possession of all the goods and effects which he may have attached (art. 257); and the plaintiff may, after other proper steps, proceed to obtain judgment, and, on execution of the same, have so much of the property attached sold, as will suffice to satisfy his judgment. Art. 265. The preceding article, 264, is equally explicit to the same effect. Now, all his diligence in ascertaining and establishing the grounds for his attachment; in searching out and, as in this case, by an expensive suit, attended with some risk, subjecting property fraudulently covered from creditors by a fictitious sale; in going through a tedious and expensive suit to establish his claim and obtain judgment, would be nugatory, if another creditor, during the delay, might step in and take the property attached by an execution, and obtain payment by privilege, without any other cause of preference than the seizure. The law never intended such an absurdity. In this case the plaintiffs, though they sued and attached first, would have to give up the property and go to New York to sue, after all their expense and trouble, which would inure to the benefit of those who sued and attached last, instead of subjecting the last to the necessity of seeking their claim abroad. The sense of right implanted in every bosom would repudiate such injustice. The true principle is this: That the creditor who is most diligent and uses the process of law to secure his rights cannot be deprived of the beneficial effects of that process, by one less diligent in using it. One who has no better right at the time, that is no privilege, mortgage or lien, cannot subsequently acquire either, so as to defeat the process of law in his favor. He does not claim a privilege strictly so as to defeat the process of law in his favor. He does not claim a privilege strictly so called, but that the beneficial effects of the process of law in his favor should not be rendered nugatory by process subsequently issued in favor of another ordinary creditor; or, which is the same thing, by a privilege subsequently acquired by mere process of law. The principle may be illustrated by reference to another provision of our code. Payment to the prejudice of an attachment cannot be made. Now, the creditor by execution and seizure

acquires the rights of his debtor upon the property seized, and no more. But the debtor could not dispose of the property for payment, to the prejudice of the attachment, and therefore his creditor cannot by seizing and selling it take the proceeds to the prejudice of the attachment." And in *Speelman v. Chaffee*, 5 Colo. 247, it was said: "It is insisted by counsel that, even allowing the sale to have been made under a junior lien, yet the title passed thereby to the appellant as purchaser. It is doubtless true, under the authorities, that when the same officer holds more than one writ, differing in priority, he may sell under a junior writ; and if he does this, the property cannot, merely under the senior writ, be taken from the purchaser. In such case, however, the proceeds of the sale must be applied to the writ having the prior lien. *Freeman on Executions*, sec. 196; *Rogers v. Dickey*, 1 Gilman (Ill.) 643. But in order to pass title to the purchaser in such case, the sale must be fully consummated, the money paid and the property delivered to the purchaser. Unless he fully complies with his bid and the terms which such bid imposes, or offers so to do, he acquires no right to the property, and can maintain no action or proceeding in relation thereto. See *Freeman on Executions*, sec. 300, and cases cited. To this rule is the exception, that if the officer surrenders the property to the purchaser, or otherwise treats the sale as consummated, the officer becomes responsible to the plaintiff for the amount of the bid."

In *Caperton v. McCorkle*, 5 Grat. (Va.) 177, wherein it appeared that during the pendency of an appeal from an order quashing the senior execution the sheriff sold under the junior one, it was held that on reversal of the judgment quashing the senior writ, the proceeds of the sale were first subject to the satisfaction of the senior writ, and could be recovered from the holder of the later execution.

But it has been held that a junior execution creditor may sell and obtain satisfaction from the proceeds notwithstanding the existence of a senior execution, the holder of which prevented the sheriff from selling thereunder. *Williams v. Chambers*, 140 Ga. 859, 80 S. E. 273. In the case of *In re J. R. Richardson Co.* 3 Boyce (Del.) 336, 83 Atl. 1034, wherein it appeared that the holder of a senior execution sought to claim the proceeds of a sale under a junior execution, it was held that the senior execution not having been levied although placed in the officer's hand before the second execution, the validity of the sale under the second execution could not be impeached and that the holder of the junior writ was entitled to the

proceeds of the sale. To the same effect see *McClelland v. Slingluff*, 7 Watts & S. (Pa.) 134, 42 Am. Dec. 224.

Liability of Sheriff.

The action of a sheriff in selling under a junior attachment or execution when the circumstances impose the duty on him of selling under the senior writ, entitles the senior incumbrancer to sue the sheriff for damages. *Love v. Williams*, 4 Fla. 126; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 208; *Rogers v. Dickey*, 1 Gilman (Ill.) 636, 41 Am. Dec. 204; *Grabenheimer v. Budd*, 40 La. Ann. 107, 3 So. 724; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461; *McKey v. Garth*, 2 Rob. (Va.) 33, 40 Am. Dec. 726. See also *Sandford v. Roosa*, 12 Johns. (N. Y.) 162. And see the reported case. In *Stroudsburg Bank's Appeal*, 126 Pa. St. 523, 12 Atl. 868, it appeared that the holder of a senior writ of execution placed it in the hands of a sheriff who negligently failed to make a timely levy thus precluding the holder from satisfying the amount of his claim out of the proceeds of the property which was sold under a junior execution. It was held that the sheriff was liable to the holder of the senior execution. The court said: "The property levied upon and sold consisted wholly of that which had been set aside under a previous writ issued by the bank on their judgment: there were no other judgments, and it does not appear that there were, in fact, any labor claims; there was therefore no motive for any fraudulent action or collusion. The execution of D. H. Wilson & Co. having been first issued would ordinarily, therefore, be first entitled; but, unfortunately, there was no levy made upon that writ. The levy was made upon the writ of the bank only, and upon that writ the personal property was sold. In *McClelland v. Slingluff*, 7 Watts & S. (Pa.) 134, it was held that in such case the sheriff must apply the money to the writ upon which the levy and sale were made, and not to the first writ, upon which no levy was indorsed or attached. The money made when this is the case, says Mr. Justice Rogers, belongs to the second execution creditor on whose writ the goods were levied and sold, leaving the first execution creditor to an action against the sheriff for redress. To the same effect is *Schuykill County's Appeal*, 30 Pa. St. 358."

In *Smallcomb v. Cross*, 1 Ld. Raym. (Eng.) 251, 1 Salk. 320, in speaking of the liability of a sheriff who sells under a junior execution, in preference to the senior one, the court said: "By the same reason, if two writs of fieri facias come to the sheriff in one day, he ought to execute that writ first which came to hand first, for he has no election; and in this case there is a prius

and a posterius in the same day. In consequence the sheriff makes himself liable for executing the writ first that came last, and must answer it to the party that brought the first writ, who may bring an action against him; but the execution shall stand good."

Title of Purchaser.

It is a general rule that title passes to the purchaser on a sale under a junior attachment or execution. *Smallcomb v. Cross*, 1 Ld. Raym. (Eng.) 251, 1 Salk. 320; *Speelman v. Chaffee*, 5 Colo. 247; *In re J. R. Richardson Co.* 3 Boyce (Del.) 336, 83 Atl. 1034; *Love v. Williams*, 4 Fla. 126; *Rogers v. Dickey*, 1 Gilman (Ill.) 636, 41 Am. Dec. 204; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 208; *McKey v. Garth*, 2 Rob. (Va.) 33, 40 Am. Dec. 725. See also *Sandford v. Roosa*, 12 Johns. (N. Y.) 162. And see the reported cases. Thus in *March v. Lawrence*, 4 Cow. (N. Y.) 461, it was declared that a sale under a junior execution vested the purchaser with an indefeasible title, and this even though the senior and junior executions were in hands of different officers. The court said: "If the executions are in the hands of different officers, then the liability of the sheriff to whom the first execution was delivered, would depend on the question, whether he had been guilty of negligence in not having made a levy before the sale under the second execution. If there be no negligence, I apprehend the party would be without redress, unless the money produced by the sale under the second execution happened to remain in the hands of the sheriff, when an application was made to the court for a rule directing to whom it should be paid over. This was done in *Lambert v. Paulding*, 18 Johns. 311. If, however, it should appear that the money actually raised on the second execution had been paid over to the plaintiff in that execution, this remedy would fail; and, consequently, the lien arising by the first delivery would become ineffectual. Whatever might be the result of an application against an officer of the court, directing him to pay over money, the execution of this summary jurisdiction would not be used to enforce such an application against an officer of another court, over whom this court has no control. But if otherwise, it does not affect the present question, which is between the sheriff and the purchaser under the second execution. The general principle, it appears to me, goes the whole length of upholding the title of the purchaser under the second execution, provided the levy and sale were perfected, before a levy on the first. The fact that one execution issued from this court, or

the common pleas, and the other from justice's court, cannot change the principle which governs." And in *Love v. Williams*, 4 Fla. 126, it was said: "It is true that all the authorities lay down the proposition that, as between different plaintiffs, if two writs of execution are delivered to the sheriff on the same or different days, he ought to execute that first which was first delivered, unless it be fraudulent or dormant; but if he executes, that is, levies and sells, by virtue of the writ last delivered, the property of the goods is bound by the sale, and the party cannot seize them by virtue of the writ first delivered."

In *Berg v. Baer*, 104 Ga. 587, 30 S. E. 744, a sale under a junior execution under circumstances leading the purchaser to believe that the property would be sold free of the senior lien was held to vest in the purchaser an unencumbered title.

BRUSHABER

v.

UNION PACIFIC RAILROAD COMPANY.

United States Supreme Court—January 24, 1916.

240 U. S. 1; 36 S. Ct. 236.

Taxation — Enjoining Payment — Rights of Corporate Stockholder.

The maintenance by a stockholder of a suit to restrain a corporation from voluntarily complying with the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), upon the grounds of the repugnancy of the statute to the Federal Constitution, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress, which will result if the corporation pays the tax and complies with the act in other respects without protest, as it is alleged it is its intention to do, is not forbidden by the prohibition of U. S. Rev. Stat. § 3224, 3 Fed. St. Ann. 689, against enjoining the enforcement of taxes.

Income Tax — Validity of Federal Act.

The whole purpose of U. S. Const. 16th Amend. giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," is

to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes.

[See note at end of this case.]

Same.

The retroactive effect of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 135), which fix the preceding March 1st as the time from which the taxed income for the first ten months is to be computed, does not render the tax repugnant to the due process of law clause of U. S. Const. 5th Amend. (9 Fed. St. Ann. 288), nor inconsistent with the 16th Amendment itself, since the date of retroactivity did not extend beyond the time when the latter amendment became operative.

[See note at end of this case.]

Same.

Power to exclude from taxation some income of designated persons and classes, and to exempt entirely certain enumerated organizations or corporations, such as labor, agricultural, or horticultural organizations, mutual savings banks, etc., is not by implication forbidden to Congress by the provisions of U. S. Const. 16th Amend. that Congress may lay and collect taxes on incomes "from whatever source derived"

[See note at end of this case.]

Same.

Labor, agricultural, or horticultural organizations, mutual savings banks, etc., can be excepted from the operation of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), without rendering the tax repugnant to the Federal Constitution.

[See note at end of this case.]

Uniformity of Tax — Limitations on Federal Power.

A geographical uniformity alone is what is exacted by the provisions of U. S. Const. art. 1, § 8 (8 Fed. St. Ann. 347), that "all duties, imposts, and excises shall be uniform throughout the United States."

Same.

The due process of law clause of U. S. Const. 5th Amend. (9 Fed. St. Ann. 288), is not a limitation upon the taxing power conferred upon Congress by the Federal Constitution unless, under a seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion.

Validity of Federal Income Tax Act.

The progressive rate feature of the income tax imposed by the Act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), does not cause such tax to transcend the conception of all taxation, and to be a mere arbitrary abuse

of power which must be treated as wanting in due process of law.

[See note at end of this case.]

Same.

The methods of collection at the source, prescribed by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), are not wanting in due process of law because of the cost to which corporations the subjected by the duty of collection cast upon them, nor because of the resulting discrimination between corporations indebted upon coupon and registered bonds and those not so indebted, nor because of the discrimination against corporations which have assumed the payment of taxes on their bonds which results from the fact that some or all of their bondholders may be exempt from the income tax, nor because of the discrimination against owners of corporate bonds in favor of individuals none of whose income is derived from such property, nor because the law does not release corporate bondholders from the payment of a tax on their bonds, even after such taxes have been deducted by the corporation, if, after the deduction, the corporation should fail, nor because the payment of the tax by the corporation does not relieve the owners of bonds, the taxes on which have been assumed by the corporation, from their duty to include the income from such bonds in making a return of all income.

[See note at end of this case.]

Same.

Limiting the amount of interest which may be deducted from gross income of a corporation for the purpose of fixing the taxable income to interest on indebtedness not exceeding one-half the sum of bonded indebtedness and paid-up capital stock, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), is not wanting in due process of law because discriminating between different classes of corporations and individuals.

[See note at end of this case.]

Same.

Allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), does not render the tax wanting in due process of law.

[See note at end of this case.]

Same.

The allowance of a deduction of \$3,000 or \$4,000 to those who pay the normal tax, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), is not wanting in due process of law because those whose incomes are greater than \$20,000 are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the \$3,000 or \$4,000

which they have already enjoyed, nor because, for the purpose of the additional tax, no second right to deduct dividends received from corporations is permitted.

[See note at end of this case.]

Same.

The allowance of a deduction of stated amounts for the purpose of ascertaining the taxable income, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), does not render the tax wanting in due process of law because of the discrimination between married and single people, and between husbands and wives who are living together and those who are not.

[See note at end of this case.]

Same.

No unconstitutional discrimination and want of due process of law results because the owners of houses in which they live are not compelled by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), to estimate the rental value in making up their incomes, while those who live in rented houses are not allowed, in making up their taxable income, to deduct the rent which they have paid, nor because of the fact that although family expenses are not, as a rule, permitted to be deducted from gross income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year.

[See note at end of this case.]

Same.

An unwarrantable delegation of legislative authority is not made by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Fed. St. Ann. 1914 Supp. p. 185), because certain administrative powers to enforce the act are conferred by it upon the Secretary of the Treasury.

[See note at end of this case.]

Appeal from United States District Court, Southern District of New York.

Action by Frank R. Brushaber, plaintiff, against Union Pacific Railroad Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Julien T. Davies, Brainard Tolles, Gorrard Glenn and Martin A. Schenck for appellant.
Henry W. Clark for appellee.

Solicitor General Davis, Assistant Attorney General Wallace and Attorney General Gregory for United States.

[9] WHITE, C. J.—As a stockholder of the Union Pacific Railroad Company the appellant filed his bill to enjoin the corporation

from complying with the Income Tax provisions of the Tariff Act of October 3, 1913 (§ II, ch. 16, 38 Stat. 166; Fed. St. Ann. 1914 Supp. p. 185). Because of constitutional questions duly arising the case is here on direct appeal from a decree sustaining a motion to dismiss because no ground for relief was stated.

The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong and multiplicity [10] of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in *Pollock v. Farmers' Loan, etc. Co.* 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of § 3224, Rev. Stat. against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes referred to is without merit. Before coming to dispose of the case on the merits, however, we observe that the defendant corporation having called the attention of the Government to the pendency of the cause and the nature of the controversy and its unwillingness to voluntarily refuse to comply with the act assailed, the United States as *amicus curiae* has at bar been heard both orally and by brief for the purpose of sustaining the decree.

Aside from averments as to citizenship and residence, recitals as to the provisions of the statute and statements as to the business of the corporation contained in the first ten paragraphs of the bill advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that in a wide sense they all charge a repugnancy of the statute to the Sixteenth Amendment under the more immediate sanction of which the statute was adopted.

The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, however, [11]

that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is, a power to levy an income tax which although direct should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes "from whatever source derived," the exclusion from taxation of some income of designated persons and classes is not authorized and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax "incomes from whatever source derived" for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and pre-existing provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because so far as the retroactive period is concerned, it is governed by the pre-existing constitutional requirement as to apportionment.

But it clearly results that the proposition and the contentions [12] under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one State or States than was levied in another State

or States. This result instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.

But let us by a demonstration of the error of the fundamental proposition as to the significance of the Amendment dispel the confusion necessarily arising from the arguments deduced from it. Before coming, however, to the text of the Amendment, to the end that its significance may be determined in the light of the previous legislative and judicial history of the subject with which the Amendment is concerned and with a knowledge of the conditions which presumptively led up to its adoption and hence of the purpose it was intended to accomplish, we make a brief statement on those subjects.

That the authority conferred upon Congress by § 8 of Article I (8 Fed. St. Ann. 347) "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never [13] been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of Art. I, § 8, cl. 1 (8 Fed. St. Ann. 347) that "all duties, imposts and excises shall be uniform throughout the United States," and to the limitations of Art. I, § 2, cl. 3 (8 Fed. St. Ann. 303), that "direct taxes shall be apportioned among the several States" and of Art. I, § 9, cl. 4 (8 Fed. St. Ann. 702), that "no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." In fact the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in *Pollock v. Farmers' Loan, etc. Co.* supra, at page 557: "In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises." It is to be observed, however, as

long ago pointed out in *Veazie Bank v. Fenko*, 8 Wall. 533, 541, 19 U. S. (L. ed.) 482, that the requirement of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the Government down to the time of the adoption of the Sixteenth Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced [14] by neither, no question has been anywhere made as to the correctness of these propositions. At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. Without pausing to state at length the basis of these differences and the consequences which arose from them, as the whole subject was elaborately reviewed in *Pollock v. Farmers' Loan, etc. Co.* 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, 158 U. S. 601, 15 S. Ct. 912, 39 U. S. (L. ed.) 1108, we make a condensed statement which is in substance taken from what was said in that case. Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages "for the conveyance of persons," and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. (*Hylton v. U. S.* 3 Dall. 171, 1 U. S. (L. ed.) 556.) It was held that the tax came within the class of excises, duties and imposts and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment because it was not levied directly on property because of its ownership but rather on its use and was therefore an excise, duty or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership. Putting out of view the difference of reasoning which led to the concurrent conclusion in the *Hylton* case, it is undoubted that it came to pass in legislative practice that the line of demarcation between the two great classes of direct taxes on the one

hand and excises, duties and [15] imposts on the other which was exemplified by the ruling in that case, was accepted and acted upon. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while no instance of apportionment as to any other kind of tax is afforded. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861 and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws were classed under the head of excises, duties and imposts because it was assumed that they were of that character inasmuch as although putting a tax burden on income of every kind, including that derived from property real or personal, they were not taxes directly on property because of its ownership. And this practical construction came in theory to be the accepted one since it was adopted without dissent by the most eminent of the textwriters. 1 Kent. Com. 254, 256; 1 Story Const. § 955; Cooley Const. Lim. (5th ed.) *480; Miller on the Constitution, 237; Pomeroy's Constitutional Law, § 281; Hare, Const. Law, Vol. 1, 249, 250; Burroughs on Taxation, 502; Ordronaux, Constitutional Legislation, 225.

Upon the lapsing of a considerable period after the repeal of the income tax laws referred to, in 1894 an act was passed laying a tax on incomes from all classes of property and other sources of revenue which was not apportioned, and which therefore was of course assumed to come within the classification of excises, duties and imposts which were subject to the rule of uniformity but not to the rule of apportionment. The constitutional validity of this law was challenged on the ground that it did not fall within the class of excises, duties and imposts, [16] but was direct in the constitutional sense and was therefore void for want of apportionment, and that question came to this court and was passed upon in *Pollock v. Farmers' Loan, etc. Co.* 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, 158 U. S. 601, 15 S. Ct. 912, 39 U. S. (L. ed.) 1108. The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of ren-

dering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover in addition the conclusion reached in the *Pollock* case did not in any degree involve holding that income taxes generically and necessarily came within the class [17] of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the *Pollock* case in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from "professions, trades, employments, or vocations" (158 U. S. 637) its validity was recognized; indeed it was expressly declared that no dispute was made upon that subject and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. 158 U. S. 635. The whole law was however declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would re-

main, in substance, a tax on occupations and labor" (158 U. S. 637), a result which it was held could not have been contemplated by Congress.

This is the text of the Amendment:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—[18] or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the Pollock case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, [19] forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class

of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class. This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the Hylton case because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the Pollock case that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes.

[20] We come then to ascertain the merits of the many contentions made in the light of the Constitution as it now stands, that is to say, including within its terms the provisions of the Sixteenth Amendment as correctly interpreted. We first dispose of two propositions assailing the validity of the statute on the one hand because of its repugnancy to the Constitution in other respects, and especially because its enactment was not authorized by the Sixteenth Amendment.

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the Fifth Amendment

and as inconsistent with the Sixteenth Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 331, 22 U. S. (L. ed.) 348, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

"The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

[21] The statute provides that the tax should not apply to enumerated organizations or corporations, such as labor, agricultural or horticultural organizations, mutual savings banks, etc., and the argument is that as the Amendment authorized a tax on incomes "from whatever source derived," by implication it excluded the power to make these exemptions. But this is only a form of expressing the erroneous contention as to the meaning of the Amendment, which we have already disposed of. And so far as this alleged illegality is based on other provisions of the Constitution, the contention is also not open, since it was expressly considered and disposed of in *Flint v. Stone Tracy Co.* 220 U. S. 108, 173, Ann. Cas. 1912B 1312, 31 S. Ct. 342, 55 U. S. (L. ed.) 389.

Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.

1. The statute levies one tax called a normal tax on all incomes of individuals up to \$20,000 and from that amount up by gradations, a progressively increasing tax called an additional tax, is imposed. No tax, however, is levied upon incomes of unmarried individuals amounting to \$3,000 or less nor upon incomes of married persons amounting to \$4,000 or less. The progressive tax and the exempted amounts, it is said, are based on wealth alone and the tax is therefore repugnant to the due process clause of the Fifth Amendment.

2. The act provides for collecting the tax at the source, that is, makes it the duty of

corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation, and we recapitulate various contentions as to discrimination against corporations and against individuals [22] predicated on provisions of the act dealing with the subject:

(a) Corporations indebted upon coupon and registered bonds are discriminated against, since corporations not so indebted are relieved of any labor or expense involved in deducting and paying the taxes of individuals on the income derived from bonds.

(b) Of the class of corporations indebted as above stated, the law further discriminates against those which have assumed the payment of taxes on their bonds, since although some or all of their bondholders may be exempt from taxation, the corporations have no means of ascertaining such fact, and it would therefore result that taxes would often be paid by such corporations when no taxes were owing by the individuals to the Government.

(c) The law discriminates against owners of corporate bonds in favor of individuals none of whose income is derived from such property, since bondholders are, during the interval between the deducting and the paying of the tax on their bonds, deprived of the use of the money so withheld.

(d) Again corporate bondholders are discriminated against because the law does not release them from payment of taxes on their bonds even after the taxes have been deducted by the corporation, and therefore if after deduction the corporation should fail, the bondholders would be compelled to pay the tax a second time.

(e) Owners of bonds the taxes on which have been assumed by the corporation are discriminated against because the payment of the taxes by the corporation does not relieve the bondholders of their duty to include the income from such bonds in making a return of all income, the result being a double payment of the taxes, labor and expense in applying for a refund, and a deprivation of the use of the sum of the taxes during the interval which elapses before they are refunded.

[23] 3. The provision limiting the amount of interest paid which may be deducted from gross income of corporations for the purpose of fixing the taxable income to interest on indebtedness not exceeding one-half the sum of bounded indebtedness and paid-up capital stock, is also charged to be wanting in due process because discriminating between dif-

ferent classes of corporations and individuals.

4. It is urged that want of due process results from the provision allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed and not giving such right of deduction to corporations.

5. Want of due process is also asserted to result from the fact that the act allows a deduction of \$3,000 or \$4,000 to those who pay the normal tax, that is, whose incomes are \$20,000 or less, and does not allow the deduction to those whose incomes are greater than \$20,000; that is, such persons are not allowed for the purpose of the additional or progressive tax a second right to deduct the \$3,000 or \$4,000 which they have already enjoyed. And a further violation of due process is based on the fact that for the purpose of the additional tax no second right to deduct dividends received from corporations is permitted.

6. In various forms of statement, want of due process, it is moreover insisted, arises from the provisions of the act allowing a deduction for the purpose of ascertaining the taxable income of stated amounts on the ground that the provisions discriminate between married and single people and discriminate between husbands and wives who are living together and those who are not.

7. Discrimination and want of due process results, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay rent are not allowed, in making up their taxable income, to deduct rent which they have [24] paid, and that want of due process also results from the fact that although family expenses are not as a rule permitted to be deducted from gross, to arrive at taxable, income, farmers are permitted to omit from their income return, certain products of the farm which are susceptible of use by them for sustaining their families during the year.

So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747, 44 U. S. (L. ed.) 969; *Patton v. Brady*, 184 U. S. 608, 622, 22 S. Ct. 493, 46 U. S. (L. ed.) 713; *Flint v. Stone Tracy Co.* 220 U. S. 107, 158, Ann. Cas. 1912B 1312, 31 S. Ct. 342, 55 U. S. (L. ed.) 389; *Billings v. U. S.* 232 U. S. 261, 34 S. Ct. 421, 58 U. S. (L. ed.) 608, 622.

So far as the due process clause of the Fifth Amendment (9 Fed. St. Ann. 288) is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U. S. 264, 21 S. Ct. 611, 45 U. S. (L. ed.) 853; *Patton v. Brady*, 184 U. S. 608, 22 S. Ct. 493, 46 U. S. (L. ed.) 713; *McCrary v. U. S.* 195 U. S. 27, 61, 1 Ann. Cas. 561, 24 S. Ct. 769, 49 U. S. (L. ed.) 78; *Flint v. Stone Tracy Co.* supra; *Billings v. U. S.* 232 U. S. 261, 282, 34 S. Ct. 421, 58 U. S. (L. ed.) 596. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking [25] of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions. It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton v. Moore*, supra, and the right to urge it was necessarily foreclosed by the ruling in that case made. In this situation it is of course superfluous to say that arguments as to the expediency of levying such taxes or of the economic mistake or wrong involved in their imposition are beyond judicial cognizance. Besides this demonstration of the want of merit in the contention based upon the progressive feature of the tax, the error in the others is equally well established either by prior decisions or by the adequate bases for classification which are apparent on the face

of the assailed provisions, that is, the distinction between individuals and corporations, the difference between various kinds of corporations, etc., etc. Knowlton v. Moore, *supra*; Flint v. Stone Tracy Co. *supra*; Billings v. U. S. *supra*; National Bank v. Kentucky, 9 Wall. 353, 19 U. S. (L. ed.) 701; National Safe Deposit Co. v. Stead, 232 U. S. 58, 70, 34 S. Ct. 209, 58 U. S. (L. ed.) 504. In fact, comprehensively surveying all the contentions [26] relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing.

We have not referred to a contention that because certain administrative powers to enforce the act were conferred by the statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it. Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294; Buttfield v. Stranahan, 192 U. S. 470, 496, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013.

Affirmed.

NOTE.

The reported case, which is followed and applied in several other cases decided at the same term, sustains the validity of the Federal Income Tax Law of October 3, 1913 (Fed. St. Ann. 1914 Supp. p. 185). Premising that the Sixteenth Amendment was not a grant of a taxing power, but merely removed certain limitations from a power inherent in Congress, the court holds to be unfounded various objections based on the retrospective operation of the law, and on its classification of persons and property subject to taxation, objections to which the court refers as "numerous and minute, not to say in many cases hypercritical."

It is specifically held that the provision for collecting income at its source is not

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invalid as to corporations on whom it imposes the labor and expense of deducting and paying the taxes of individuals on income derived from corporate securities.

The action by which the decision was invoked was brought by a corporate stockholder to enjoin the payment of the tax by the corporation, and respecting his right to sue the court follows the decision in Pollock v. Farmers' Loan, etc. Co. 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, that such an action does not violate the prohibition of the statute (Rev. St. § 3224, 3 Fed. St. Ann. 689) against enjoining the enforcement of a tax.

The validity of a statute levying an income tax is discussed in the notes to Alderman v. Wells, 21 Ann. Cas. 193, and State v. Frear, Ann. Cas. 1913A 1147. The construction of such a statute as to the personal income taxable thereunder is considered in the notes to Hawaiian Com. etc. Co. v. Tax Assessor, Ann. Cas. 1913C 980, and Com. v. Werth, Ann. Cas. 1916D 1263. As to the effect on an income tax law of the invalidity of a provision therein, see the note to State v. Duncan, Ann. Cas. 1916D 1, at page 89. And as to the meaning of the term "plant" as used in the English income tax law see the note to White v. Solvay Process Co. Ann. Cas. 1917A 314, at page 322.

THE KING

v.

BOARD OF ASSESSORS, FREDERICTON.

New Brunswick Supreme Court—February 21, 1913.

41 N. Bruns. 564.

Taxation — Income Tax — Place of Taxation — Residence.

A high sheriff who is by law required to be a resident of the shire town of his county, and who in fact spends the greater portion of his time there in the discharge of his duties, boarding at the jail, is a resident of that town and as such subject to a local income tax, though his wife and family continue to reside at his former home.

[See note at end of this case.]

Exemption from Income Tax — Government or County Officer.

A sheriff is not a person employed in a "government" office nor is he a county officer "whose duties are necessarily performed in" the shire town of his county, within the meaning of exempting clauses in an act im-

posing an income tax on residents of that town.

[564] On October 19, 1912, Barry, J., granted an order absolute for certiorari to remove and an order nisi to quash an assessment of the city of Fredericton for the year 1912 against William T. Howe, high sheriff of York county. The assessment was levied upon the sheriff as a resident on income of \$1,000 less exemption of \$300.00, and a poll tax of \$5.00, amounting in all to \$15.85.

[565] The writ was issued upon the following grounds:

1. Section 72 of "The City of Fredericton Assessment Act, 1907," providing that a statement must be filed otherwise no appeal is allowed from assessment, does not apply in this case. The contention is, not that the applicant is over assessed, but that he is not liable to any assessment in Fredericton.

2. William T. Howe, the applicant, is not an inhabitant nor a resident of the city of Fredericton within the meaning of "The City of Fredericton Assessment Act, 1907." He is an inhabitant of the parish of Stanley and has been such for some forty years now last past, and had been in each year and is in this present year 1912 assessed for parish and county rates, road tax and district school taxes as an inhabitant of Stanley, and has paid all such taxes.

3. Section 34 of said Assessment Act does not apply to members of the Executive government of the Province or to Government or county officers. See Exemptions, Section 3, sub-section 11.

4. Sheriff Howe is a county official whose duties are necessarily performed in Fredericton. His actual residence is in Stanley. The fact that as sheriff he keeps an official office in the county court house building in Fredericton, does not render him liable to taxation in Fredericton as an inhabitant.

The sheriff, in the affidavit upon which the writ was granted, stated that for upwards of forty years last past, he had been a resident and inhabitant of the parish of Stanley engaged in farming, on his own land, and had always been rated and assessed in that parish for poll tax and on his real and personal property for parish and county rates and for road and district school taxes. He also swore "that I never was at any time and am not now a resident nor inhabitant of the city of Fredericton and that I never was and am not now domiciled within the said City within the meaning of [566] 'The City of Fredericton Assessment Act, 1907,' or otherwise and that I do not own any real estate in the said city." He states further that he was assessed as a resident in Fredericton in 1910 and also in 1911 and paid the taxes so assessed, being ignorant of his legal status; that it is neces-

sary for him to have an office in Fredericton, and he has there the office provided by the county in the county court house building, and in discharge of his duties as sheriff is in Fredericton a considerable portion of his time and while in Fredericton boards at the county gaol, paying for such board for such days only as he is actually there, and continues: "I have not become and do not intend to become a resident or inhabitant of Fredericton, and I never intended to change and have not changed my domicile and residence from the said parish of Stanley where my home has been for upwards of forty years now last past, and now is, and where my wife and family reside with me." He states further that he spent some days in each week and generally Sundays at his home in Stanley, where all his personal property was situate, and that he has no occupation in Fredericton other than as high sheriff.

An appeal was made to the Board of Assessors of Fredericton against the sheriff's taxation for 1912 but the Board refused to make any change. An appeal was also taken to the City Council and on recommendation of the committee on appeals was refused by the City Council.

J. W. McCready for City of Fredericton.

F. St. J. Bliss in support of the order nisi,

[568] BARKER, C. J.—The applicant is high sheriff of the county of York, having been appointed to that office in April, 1901. At that time he resided with his family on his farm in the parish of Stanley and his wife and family still reside there as their home. He has been assessed for the year 1912 in the city of Fredericton for city taxes amounting to \$15.85. Of this \$5.00 is a poll tax and the balance is on an income of \$1,000 less \$300 exempted under section 3 of "The City of Fredericton Assessment Act, 1907," to which I shall refer later on. The applicant denies his liability to be taxed in Fredericton on any amount and the assessment has been removed here with a view to its being quashed. The liability depends upon the construction to be placed on "The City of Fredericton Assessment Act, 1907." The poll tax is assessed by virtue of section 28 of the Act which imposes a poll tax of \$5.00 upon all male inhabitants of the city. Section 34 is as follows: "For the purposes of assessment, any person carrying on business or having any office or place of business or any occupation, employment or profession within the City of Fredericton, shall be deemed and taken to be and is hereby declared to be an inhabitant and resident of the said city and shall be assessed accordingly, provided that any person whose actual domicile is out of the city, shall not be assessed on a poll tax within the

city." And section 3, which relates to "exemptions," provides in sub-section 10 as follows: "The income of all male inhabitants of the city of Fredericton, including those under the age of twenty-one years, and the incomes of females shall be exempt from taxation, excepting on incomes exceeding \$300 per annum, and in any such case the parties above named shall be taxable on all excess of income over and above \$300 per annum. The provisions of this section shall not apply to the incomes of non-residents, persons or corporations doing business in the city, not paying poll tax." That is to say, if I read those sections correctly, all persons who are actually non-residents, though liable to be assessed on income because of their carrying on business or having an office in [569] the city, do not pay any poll tax, but they do not get the benefit of the exemption clause, s. 3 (10), but are assessed on the full income. The present assessment has been made on the basis of actual residence, the poll tax added and the exemption of \$300 allowed. It is claimed that if this proved wrong the applicant though a non-resident, is by virtue of his having an office at Fredericton, liable under section 34 for the total income but not for the poll tax. As the tax rate is \$1.55 on the hundred, this would reduce the applicant's taxes from \$15.85 to \$15.50, a difference of thirty-five cents. It does not seem necessary for a determination of this case to go into any prolonged discussion as to the precise meaning of the word "inhabitant" as used in this and other similar acts. Parker, J., devoted some time to the subject, in his judgment in *Rex v. Board of Assessors, Fredericton*; *Reg. v. Assessors of Fredericton* (1864) 11 N. Bruns. 1, but seems to have arrived at no more satisfactory conclusion than that the word must be construed with reference to the context and that, in itself, it has no definite meaning. Ritchie, C. J., in *Ex p. Smith* (1874) 15 N. Bruns. 147, also discussed the same question, but did not make it the basis of his judgment. In *Hatheway v. Cumming* (1864) 11 N. Bruns. 161, the plaintiff who was then a member of the provincial government and chief commissioner of public works, was claiming exemption from taxation in Fredericton on his official salary. This was before members of the executive government were exempt from taxation as they are now. This court held that he was not an inhabitant of the city and was not liable, as a nonresident carrying on business in Fredericton, to be rated on income. The chief commissioner in that case seems to have divided his time between Fredericton so long as was necessary for the discharge of his public duties there and his residence in St. Mary's in much the same way as the present applicant divides his time between Fredericton and his family residence at Stanley.

The question in *Jones v. St. John* (1899) 30 Can. Sup. Ct. 122, involved a question of domicile, and although the two [570] questions of domicile and residence are in many respects alike there are distinctions. There must be a change of residence to establish a change of domicile but there may be a change of residence without involving any change of domicile. There is no question of domicile involved in this application; it is merely a question of inhabitancy or residence, for I think the true view of the Act is that the two words are used interchangeably. So far as I have examined the Act the word "domicile" only occurs once. In section 34 provision is made for taxing persons who carry on business in Fredericton and for the purpose of assessment such persons are deemed to be inhabitants and residents. Then follows this proviso. "That any person whose actual domicile is out of the City shall not be assessed on a poll tax within the city." These words "actual domicile" can have no other meaning than "actual residence" as distinguished from the constructive residence created by the section for the purposes of assessment. Put in simple language the provision is that a non-resident pays no poll tax though he is liable to the general assessment if he carries on business, or has an office, etc., within the city. Again by section 64 provision is made for correction of errors and omissions in the assessment roll and among the list is this "if any person takes up his residence in the said City of Fredericton within three months after filing of the assessment roll." The simple question then is, has the applicant taken up his residence in Fredericton, for if he has, the omission of his name from the assessment roll would be an error which the assessors are authorized to correct. The question is one of fact to be settled by the acts of the sheriff viewed in the light of the attendant circumstances. Were I to act solely on the sheriff's affidavit on which this application is based the question of residence would be easily disposed of, because he has made the following statement, "That I never was at any time and am not now a resident nor inhabitant of the city of Fredericton, and that I never was and am not now domiciled within the said city within the meaning of The City of Fredericton [571] Assessment Act, 1907 nor otherwise." Later on I shall refer to this affidavit, but for the present I shall deal with some facts as to which the sheriff was competent to speak. It seems that in April, 1909, he was appointed sheriff of the county of York. He accepted the position and has continued to occupy it ever since, having been re-appointed in the years 1910, 1911, and 1912. At the time of his appointment in 1909 he was living with his family on his farm in the parish of Stanley in the county

of York. In his affidavit he makes the following statement: "That since my appointment as high sheriff of York county, in the ordinary and regular discharge of my duties as such it is necessary and expedient for me to keep an office in Fredericton, which office is provided by the municipality of the county of York in the county court house building, and it is necessary for me in the discharge of my duties as such sheriff, to be in Fredericton a considerable portion of the time, and while in Fredericton I board at the county gaol, paying for such board for such days only as I am actually there, but I have not become and do not intend to become a resident or inhabitant of Fredericton and I never intended to change and have not changed my domicile and residence from the said parish of Stanley, where my home has been for upwards of forty years now last past, and now is, and where my wife and family reside with me. That since my appointment as sheriff I have continued my occupation as farmer as I theretofore had done, spending some days in each week and generally Sundays at my home in Stanley aforesaid."

The sheriff is by law compelled to reside at Fredericton. There seems to be no question that he knew this when he was appointed and that he accepted the office with full knowledge of that fact. It seems that the city authorities acting on the assumption that the sheriff had become a resident of the city, assessed him under this same act for the years 1910 and 1911 on his income, and these taxes he paid without objection although he is now seeking to have the money returned on the ground that when he paid them he was "ignorant of his legal status in regard thereto."

[572] The question of residence, as distinct from the question of domicile, depends mainly, perhaps altogether, upon the acts of the party. If what the sheriff has done and has been doing for the last three years, and is doing now, constitute a residence in Fredericton so as to render him liable to assessment on his income, any intention to avoid any such result will not exempt him. Actual facts must always win in competition with mere expressed intention. If, however, the question of residence involved a question of intention, I should think we were taking at least a defensible course if we referred the defendant's actions to an intention to discharge the obligation as to residence subject to which he accepted the office, rather than to a deliberate intention on his part to ignore the obligation apparently for the sole purpose of escaping the small tax for which residence would make him liable. What are the facts? In April, 1901, now nearly four years ago, the applicant accepted the important and responsible office of sheriff of York county from the govern-

ment. He did so with full knowledge that by law, as such sheriff, unless otherwise permitted by the government, he was compelled to reside at Fredericton, and to keep an office there for the purposes of his official work. He was re-appointed in 1910, again in 1911 and a third time in 1912, and on each of these occasions by accepting the office, he manifested in an unmistakable manner his preference for the office with residence at Fredericton to a residence at Stanley without the office. He knew in 1901 by information, what he learned by actual experience in the following years, that the duties of his office and his work in connection with it must occupy a large portion of his time and might occupy the whole of it. He might have applied to the government for permission to reside out of Fredericton, but nothing of that kind was done. He secured a room and board and lodging with his deputy, the gaoler of the county, where he lived and still lives while in Fredericton. So with reference to the voluntary payment of the taxes for 1910 and 1911. What is the applicant's misapprehension of his legal status which he now alleges as [573] the reason for paying them? He knew all the facts then as well as he does now. He knew that he was taxed on income as a resident of Fredericton and he knew then as well as he knows now whether he was actually residing there as he had undertaken to do, or not, and he knew what his intentions were, whatever they were worth, as well as he does now. And yet with this knowledge he paid the taxes for two years—without objection. He may have been mistaken as to the exact ground of his liability, but that did not alter the fact as to residence. He knew that he was taxed as a resident on income and he must have known then as well as now whether he had done what the law required of him as to residences for the Assessment Act gives no statutory meaning to the word resident. Acts like this do not of course conclude the question but when a public officer is under a statutory obligation to reside at Fredericton and is taxed there as a resident on income, and with full knowledge of these facts, voluntarily pays the tax it is a strong reason for saying that he had in fact become a resident of Fredericton and so considered himself.

In *Doucet v. Geoghegan* [1878] 9 Ch. D. 441, the question involved was whether the testator, who was a native of France had acquired an English domicile. Among the facts relied on as supporting the alleged change were these: He was a Roman Catholic but he had married two wives in England, both of whom were Protestants, and the marriages took place in a Protestant church. He did not take any of the steps required by French law to render these marriages legal in

France. He made a will describing himself as of St. John's Wood and of Regent street, in which he appointed a testamentary guardian to his children and disposed of his property, notwithstanding he had children, "in a way," to quote Sir George Jessell, "every Frenchman knows is repugnant to French law." James, L. J., in expressing his opinion in favor of the English domicile, says, at p. 457: "Both his marriages were acts of unmitigated [574] scoundrelism if he was not a domiciled Englishman," and, at p. 458; "I wish to add that I am disposed to think that when the testator entered the English church and declared that he knew of no impediment to his lawful marriage, he must be taken to have made a solemn declaration that he had an English domicile."

I shall refer to one more circumstance. At my request the Assistant Registrar has made a search of the records of this Court for the years 1910, 1911 and 1912, in order to ascertain the number of writs filed during that period which had been personally served by Sheriff Howe. He has reported to the Court that there are only nine. The small number is due, I suppose, to the fact that such services are generally made by a deputy. These affidavits are dated as follows: September 21, 1910; November 18, 1911; December 5, 1911; May 7, 1912; May 15, 1912; May 25, 1912; May 15, 1912; August 26, 1912; and October 28, 1912. In all of these affidavits the sheriff describes himself as "of the City of Fredericton in the County of York." The last affidavit, sworn to on October 28, 1912, is nine days after Barry, J., made the order for the return of these proceedings based on the sheriff's affidavit, sworn to on the 15th day of October, 1912, in which he describes himself as of Stanley.

Allusion has very properly been made to the fact that Mrs. Howe, with her family, though there is no evidence as to the extent of the family, continues to live at Stanley. If it were necessary in order for the sheriff to acquire a residence or to take up his residence, to use the words of the statute, in Fredericton that his wife and family should go with him, it is clear that she has not gone. Under what circumstances she has remained we do not know. Neither do I think it important, for there can be no doubt a man can take up a separate residence and the exigencies of one's business or occupation often render it necessary. The question here is whether the sheriff has done so, so as to render him liable to the taxation. In my opinion he has. I am at a loss to see what additional act or what omission [575] on his part can be suggested as necessary under the circumstances to make him a resident.

If I should be wrong in the view I have expressed, I think the applicant would be

liable to be assessed on his entire income as a non-resident under section 34, and would be free of a poll tax. The necessity for his keeping an office at Fredericton and the fact that he does keep it are admitted, but it is contended that he is within the exemption mentioned in section 3, (11), which enacts that "incomes of non-residents, being members of the executive government of the province, or nonresidents, employed in the city of Fredericton in government or county offices whose duties are necessarily performed in Fredericton, shall be exempt from taxation under this act." Sheriffs are appointed by the government, so are the justices of the peace. And in that sense both are government officers. The office of sheriff is one of the important offices of the Crown connected with the administration of justice. Sheriffs are, however not working for the government in the sense that a clerk in the Crown Land Office is. Neither are sheriffs county officers, though their jurisdiction is limited as to area. The municipality does not control or direct them in the discharge of their duties, unless they arise out of some contract, nor is it in any way responsible for their acts. They are not doing the work of the county, as the county treasurer or auditor does who may properly be classed as county officers: C. S. 1903, c. 165, s. 60. Neither are the duties of sheriffs necessarily performed in Fredericton. It is very probable that a fair percentage of them are discharged without the city limits. It is, I think, clear that this provision of the Act was intended to meet the cases of members of the Government not residing in Fredericton and non-residents employed in the Government offices there and a similar class of county officials. The sheriff of the county is not in any opinion, in either class.

This application must I think be refused with costs as provided in section 80 of the Assessment Act.

[576] Before closing my remarks I deem it my duty to call attention to the careless, or at all events, the thoughtless, manner in which the applicant's affidavit has been drawn and for which the solicitor under whose supervision it was prepared must be held responsible, although I cannot acquit the applicant himself of all blame. In an affidavit specially prepared for the purposes of this application, involving as will be seen some nice questions as to the construction of a statute and the applicant's liability, he is made to swear without any reservation, and without any necessity, so far as I can see, that he never was at any time and was not then a resident or inhabitant of the city of Fredericton and that he never had been and was not then domiciled within that city within the meaning of "The City of Fredericton Assessment Act, 1907," or otherwise, that he had not

changed his domicile and residence and that he had not become and did not intend to become a resident or inhabitant of Fredericton. This wholesale method of disposing of questions of law or of law and fact in an affidavit is so palpably improper that it carries its condemnation on its face. In addition to this, affidavits prepared and sworn to with so little care or consideration by those who ought to know better, are apt to be subjected to criticisms as to their reliability in reference to mere questions of fact, which under other circumstances no one would think of making.

The motion to quash the assessment will be refused, with costs as provided in § 80, to be paid by the said William T. Howe and for the recovery of the same the Registrar will deliver the bond filed with him on obtaining the rule to the City Treasurer on request.

Order nisi to quash assessment discharged with costs.

NOTE.

What Constitutes "Residence" in Jurisdiction within Personal Property or Inheritance Tax Statute.

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I. Introductory.

The present note is intended to collate and review the cases involving the question what constitutes a "residence," "domicil," or the like, within personal property, inheritance, transfer, or legacy tax statutes. Cases concerning the residence of corporations and partnership associations are not included.

No effort has been made to treat separately the cases involving domicil as a branch of international jurisprudence or those concerned with residence within one or another subdivision of a national jurisdiction, since, in spite of technical distinctions between the principles governing the two classes of cases, it appears that as far as taxation statutes are concerned the principles are practically the same. Similarly cases dealing with residence, domicil, inhabitancy, etc., are considered as being on an equal footing within the scope of this note.

The first part of the note concerns itself with a treatment of the general rules governing residence within tax statutes, while in the latter part, under subdivision V. *Application to Facts*, an effort is made to show rather fully what the facts, in individual cases, were, on which the decision as to residence was based.

The discussion of general principles necessarily proceeds on broad lines, but no cases are cited in respect thereto except those involving the application of those principles to the question of the place of taxation.

II. General Principles.

Although there are some technical distinctions in significance between the words "residence," "abode," "domicil," and kindred terms, they have been held in most jurisdictions to be synonymous when used in tax statutes. See the note to *Raymond v. Lersman*, Ann. Cas. 1915C 780, passim, and at page 791.

The residence of a person for the purpose of taxation is the true, fixed place from which he has no present intention of moving. *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Stockton v. Staples*, 66 Me. 197; *Sharp v. Casper*, 36 N. J. L. 367. In general terms it may be designated as the principal seat of residence, of business pursuits, connections, attachments, and of political and municipal relations. *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650.

Actual physical presence in a place is one circumstance in determining the domicil, or the fact of being a resident; but it is far from conclusive, and the question depends on many other considerations than physical presence. *Sears v. Boston*, 1 Metc. (Mass.) 250.

The place of one's birth is his domicile of origin. The residence which he may select for himself after arriving at his majority is termed his domicile of choice. *Boyd v. Com.* 149 Ky. 766, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580.

It has been held that domicile of origin or birth is different from that of choice in that it is more enduring, and that its hold is stronger and less easily shaken off. *Winans v. Atty.-Gen.* [1904] A. C. (Eng.) 287, 73 L. J. K. B. 613, 90 L. T. N. S. 721, 20 Times L. Rep. 510.

The domicile of origin adheres until a new one is acquired. *Littlefield v. Brooks*, 50 Me. 475; *Bangs v. Brewster*, 111 Mass. 382; *Moore v. Wilkins*, 10 N. H. 452.

And so, throughout life, the old residence continues to adhere until the acquirement of a new residence; while in transitu the old residence remains. *Atty.-Gen. v. Dunn*, 6 M. & W. (Eng.) 511; *Culbertson v. Floyd County*, 52 Ind. 361; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580; *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51; *Littlefield v. Brooks*, 50 Me. 475; *Thorndike v. Boston*, 1 Metc. (Mass.) 242; *Otis v. Boston*, 12 Cush. (Mass.) 44; *Bulkley v. Williamstown*, 3 Gray (Mass.) 493; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424; *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827; *Guggenheim v. Long Branch*, 80 N. J. L. 246, 76 Atl. 338; *Paddock v. Lewis*, 179 N. Y. 591, 72 N. E. 1146, *affirming* judgment 59 App. Div. 430, 69 N. Y. S. 1; *Kellogg v. Winnebago County*, 42 Wis. 97. The one exception to the foregoing rule seems to be that where a person, intending to acquire a new domicile in another state, departs from the state of his old domicile and journeys to the place of his new domicile, his domicile for purposes of taxation in the old state ceases as soon as he crosses the state line and does not adhere to him while in transitu without the jurisdiction of the old state. *Biggs v. Rochester*, 16 Gray (Mass.) 337; *Colton v. Longmeadow*, 12 Allen (Mass.) 598. In the case first cited, the court said: "This plaintiff did not reside or dwell in Rochester on the 1st of May 1858, nor had he then a home there. He left the town, removed out of the state, and abandoned his home, with an intention never to resume it, but with an intention, which he soon carried into effect, to make a new home in the state of New York. And certainly there is no good reason, if the statute does not peremptorily so require, that he should be taxed in this state for expenses incurred in support of its institutions, after he left it, and ceased to receive benefit from them, either by participating in

the actual enjoyment of them, or by deriving, through their instrumentality, protection to his property or his person."

It is a general rule in construing tax statutes that a person must have a domicile in some place. *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A.(N.S.) 986; *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528; *Helm v. Com.* 135 Ky. 392, 122 S. W. 196; *Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580; *Church v. Rowell*, 49 Me. 387; *Littlefield v. Brooks*, 50 Me. 475; *Thorndike v. Boston*, 1 Metc. (Mass.) 242; *Otis v. Boston*, 12 Cush. (Mass.) 44; *Bulkley v. Williamstown*, 3 Gray (Mass.) 493; *Kirkland v. Whately*, 4 Allen (Mass.) 462; *Beecher v. Detroit*, 114 Mich. 228, 77 N. W. 206, 4 Detroit L. N. 579; *Kellogg v. Winnebago County*, 42 Wis. 97.

A person cannot have more than one legal domicile at the same time, for purposes of taxation. *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A.(N.S.) 986; *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528; *Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580; *Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323; *Judkins v. Reed*, 48 Me. 386; *Thorndike v. Boston*, 1 Metc. (Mass.) 242; *Otis v. Boston*, 12 Cush. (Mass.) 44; *Bulkley v. Williamstown*, 3 Gray (Mass.) 493; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650; *Gardiner v. Brookline*, 181 Mass. 162, 63 N. E. 397. See also *Culbertson v. Floyd County*, 52 Ind. 361.

Where a person has two actual physical residences, he has a right to choose or designate which of those two shall be his legal residence for purposes of taxation unless the facts and circumstances are sufficient to overcome the expressed intention and choice. *Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323; *Gardiner v. Brookline*, 181 Mass. 162, 63 N. E. 397.

The question of residence or of change of residence is one of fact for the jury. *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528; *Judkins v. Reed*, 48 Me. 386; *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650; *Gardiner v. Brookline*, 181 Mass. 162, 63 N. E. 397.

Whether a new residence has been acquired cannot be made to depend on one fact or combination of circumstances but must depend on all the facts and circumstances. *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51; *Judkins v. Reed*, 48 Me. 386; *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; *Thayer v. Boston*, 124 Mass. 132,

26 Am. Rep. 650; Crittenden v. Mt. Clemens, 86 Mich. 220, 49 N. W. 144.

The presumption of continuance applies to residence. When a residence is once proved or established as being in one place, it is presumed to continue in that place and the burden of proof is on the party claiming that this residence has been changed. *Winans v. Atty.-Gen.* [1904] A. C. (Eng.) 287, 73 L. J. K. B. 613, 90 L. T. N. S. 721, 20 Times L. Rep. 510; *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Nugent v. Bates*, 51 Ia. 77, 50 N. W. 76, 33 Am. Rep. 117; *Cover v. Hatten*, 136 Ia. 63, 113 N. W. 470; *Glottfelty v. Brown*, 148 Ia. 124, 126 N. W. 797; *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A.(N.S.) 986; *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Matter of Martin*, 173 App. Div. 1, 158 N. Y. S. 915.

Intention is an important factor in establishing the residence of a person, and the determination of the question of residence practically always involves the question of intent. *Montgomery v. Lebanon*, 111 Ky. 646, 64 S. W. 509, 54 L.R.A. 914; *Helm v. Com.* 135 Ky. 392, 122 S. W. 196; *Gardiner v. Brookline*, 181 Mass. 162, 63 N. E. 397; *State v. Shepherd*, 218 Mo. 656, 117 S. W. 1169, 131 Am. St. Rep. 568; *People v. Crowley*, 21 App. Div. 304, 47 N. Y. S. 457.

Intent is to be inferred from declarations and from conduct. *Culbertson v. Floyd County*, 52 Ind. 361; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Montgomery v. Lebanon*, 111 Ky. 646, 64 S. W. 509, 54 L.R.A. 914.

The declarations of intention of a person are, therefore, admissible in evidence, if a part of the *res gestae*, as bearing on the question what his legal residence is. *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205. See also *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293. In *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827, it was held that such declarations were inadmissible unless a part of the *res gestae*, where they were introduced in favor of the declarant.

Evidence of expressed intent, however, has no controlling weight if such an intent is inconsistent with the acts and general conduct of the person. Acts showing intent will, in such a case, outweigh expressions of intent. *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323; *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51; *Thorndike v. Boston*, 1 Metc. (Mass.) 242; *Thayer v. Boston*, 124 Mass.

132, 26 Am. Rep. 650; *Gourlay v. Gourlay*, 15 R. I. 572, 10 Atl. 592. See also the reported case. And see generally the note to *Holt v. Hendee*, 21 Ann. Cas. 202.

But when the expression of an intention to select a permanent residence at a designated place harmonizes with the facts and circumstances which serve to illustrate that intention, it is controlling. *Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323.

The acceptance of deeds describing the grantee as of a certain place is evidence of legal domicile in that place, within tax laws. *Babcock v. Slater*, 212 Mass. 434, 99 N. E. 173. The payment of a personal tax in one place is evidence of domicile in that place. *Babcock v. Slater*, 212 Mass. 434, 99 N. E. 173. And a showing that the person whose domicile is in question accepted and served in public office, such as that of surveyor of highways, is evidence of conduct showing intent to make the place wherein he so served his legal residence. *Cole v. Cheshire*, 1 Gray (Mass.) 441; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199.

To acquire or to effect a change of residence there must not only be an intention to change but the change must actually be made. *Factum et animus* must concur.

Illinois.—*People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205.

Indiana.—*Culbertson v. Floyd County*, 52 Ind. 361; *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524.

Iowa.—*Shirk v. Monmouth Tp. Board of Review*, 137 Ia. 230, 114 N. W. 884; *Glottfelty v. Brown*, 148 Ia. 124, 126 N. W. 797; *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A.(N.S.) 986.

Kentucky.—*Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580; *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51.

Maine.—*Parsons v. Bangor*, 61 Me. 457; *Stockton v. Staples*, 66 Me. 197.

Maryland.—*Stoddert v. Ward*, 31 Md. 562, 100 Am. Dec. 83.

Massachusetts.—*Lyman v. Fiske*, 17 Pick. 231, 28 Am. Dec. 293; *Bulkley v. Williamstown*, 3 Gray 493; *Kirkland v. Whately*, 4 Allen 462; *Bangs v. Brewster*, 111 Mass. 382; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650; *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827; *Barron v. Boston*, 187 Mass. 168, 72 N. E. 951; *Babcock v. Slater*, 212 Mass. 434, 99 N. E. 173.

Michigan.—*Beicher v. Detroit*, 114 Mich. 228, 72 N. W. 206.

New York.—*People v. O'Rourke*, 32 App. Div. 66, 52 N. Y. S. 1057; *Matter of Grant*, 83 Misc. 257, 144 N. Y. S. 567; *Matter of Rutherford*, 88 Misc. 414, 150 N. Y. S. 734.

Vermont.—*Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926.

Wisconsin.—*Kellogg v. Winnebago County*, 42 Wis. 97.

Canada.—See the reported case.

An actual change of physical residence, unaccompanied by an intention to effect a change, does not constitute a change of legal residence. An intent to change must be shown. *Winans v. Atty.-Gen.* [1904] A. C. (Eng.) 287, 73 L. J. K. B. 613, 90 L. T. N. S. 721, 20 Times L. Rep. 510; *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205; *Glotsfelty v. Brown*, 148 Ia. 124, 126 N. W. 797; *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A. (N.S.) 986; *Helm v. Com.* 135 Ky. 392, 122 S. W. 196; *Bartlett v. New Boston*, reported in full, post, this volume, at page 777.

The intent which will control the question of residence is intent to reside, or intent with respect to continuing to reside, not any intent as to the legal consequence of that residing. So if a person lives in a place, with the intent to continue so to live, that place will be his legal residence, in spite of the fact that he intends to have the advantages of legal residence elsewhere. *Dickinson v. Brookline*, 181 Mass. 195, 63 N. E. 331, 92 Am. St. Rep. 407, wherein it appeared that the plaintiff had left his home in Cohasset and was actually dwelling in Brookline, with the purpose of dwelling there permanently, but that he continued to vote in Cohasset and intended that to be his legal residence. Holding that Brookline was, nevertheless, his residence, the court said: "Of course the argument for the plaintiff is that his domicile is presumed to continue until it is proved to have been changed, that it could be changed only by his intent and overt act, and that he expressly denied the intent. The ambiguity is in the last proposition. The plaintiff did not deny that he intended to keep on living as he had lived for the last few years, and if the jury saw fit to find, as no doubt they did, that he did intend to do so, then he did intend the facts necessary to constitute a change of domicile, and what he did not intend was simply that these facts should have their inevitable legal consequence. If a person is present with his family in a house in Brookline and intends to make his actual headquarters there for the rest of his life, and to live no more in the place of his former domicile, he cannot retain the old domicile by the simple means of intending, subject to his actual change, to retain advantages inconsistent with it. The proposition hardly needs illustration. When you intend the facts to which the law attaches a consequence, you must abide the consequence whether you intend it or not."

The only way in which a person can elect to be taxed in one place rather than another is to live in that place and make it his prin-

cipal residence. *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827.

Provided the intention and the fact of change of residence concur, the motive influencing the change is of no legal consequence. *People v. Caldwell*, 142 Ill. 434, 32 N. E. 691; *Draper v. Hatfield*, 124 Mass. 53. It is, therefore, settled that a person may change his legal residence from one municipality to another, for the mere purpose of diminishing the amount of his taxes. *Draper v. Hatfield*, 124 Mass. 53.

But if it is established that a property owner has his legal residence in one county, the fact that on being assessed in that county he pays taxes on his personalty in another county for the purpose of securing the lower tax rate of that county, will not affect his liability for taxes in the county of his residence. *Mahany v. People*, 138 Ill. 311, 27 N. E. 918, wherein it was said: "In respect to the point that appellant was assessed and paid personal property taxes for 1889 in West Jersey, it may be said that the evidence tends strongly to show that after he had knowledge that an assessment on his moneys and credits was about to be made in Toulon, he procured an assessment to be made in West Jersey, and for the reason that the taxes on an assessment in West Jersey would amount to only about one-third of what they would be on a like assessment in Toulon. If he was legally assessable in Toulon, then his mailing a schedule to the assessor of West Jersey was in fraud of his liability to pay taxes in Toulon, and he can take nothing by his payment of personal property taxes in West Jersey."

A temporary removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time does not constitute a change of residence. *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528; *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51; *Porterfield v. Augusta*, 67 Me. 556; *Sears v. Boston*, 1 Metc. (Mass.) 250; *Briggs v. Rochester*, 16 Gray (Mass.) 337; *Bartlett v. New Boston*, 77 N. H. 476, 93 Atl. 796; *State v. Leuch*, reported in full post, this volume, at page 778.

If a removal, however, is with the intention not to return, and to remain in the place of residence for an indefinite time, a change of residence is effected thereby. *Mead v. Boxborough*, 11 Cush. (Mass.) 362; *In re Marshall*, 248 Pa. St. 579, 94 Atl. 243.

Where there has been an actual removal, unless it is shown by or inferred from the circumstances that it was for some particular purpose expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, a change of domicile is effected. *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51.

And it has been said that one may acquire a domicile by a residence of a day, if to the fact of residence he superadds the requisite intention. *Stockton v. Staples*, 66 Me. 197.

Under a statute of *Louisiana* (Act of March, 1816, B. & C. Digest, § 3) voluntary absence from the state for two years forfeits residence in that state. *State v. Poydras*, 9 La. Ann. 165.

Under a *Mississippi* statute (Code 1892, § 3749) taxes on personal property are assessed in the municipality in which the taxpayer is actually residing at the time, although his legal domicile, for purposes of permanent residence, business, or political affiliation, may be elsewhere. *Millsaps v. Jackson*, 88 Miss. 504, 42 So. 234.

A former statute of *New York* (Laws 1850, c. 92, p. 142), not now in force, provided that when a person actually resided in two or more places within the state, his residence for purposes of taxation should be deemed to be in the town, county, or ward in which his principal business was transacted. *Bell v. Pierce*, 51 N. Y. 12, *affirming* 48 Barb. 51; *Paddack v. Lewis*, 179 N. Y. 591, 72 N. E. 1146, *affirming* 59 App. Div. 430, 69 N. Y. S. 1; *People v. Moore*, 52 Hun 13, 4 N. Y. S. 778; *Bowe v. Jenkins*, 69 Hun 458, 23 N. Y. S. 548; *Bartlett v. New York*, 5 Sandf. (N. Y.) 44; *Douglas v. New York*, 2 Duer (N. Y.) 110.

Under a statute of *Rhode Island* (Gen. Laws, c. 45, § 9) the residence for taxation of personal property is fixed as being the place wherein the owner shall have had his actual place of abode for the larger portion of the twelve months next preceding the first day of April in each year. *Greene v. Gardiner*, 6 R. I. 242; *Tripp v. Brown*, 9 R. I. 240; *Clarke v. Addeman*, 26 R. I. 168, 58 Atl. 623. "The evil designed to be remedied by the clause of the Tax Act of 1857, upon which this case turns, is well understood. Persons having a double residence, in town and country, would not unfrequently select the latter as their domicile, though they spent only the summer months there, for the purpose of escaping, so far as their personal property was concerned, the higher rate of town taxation, whilst they enjoyed, during the greater portion of the year in town, all the comforts and conveniences secured by it. Instead, therefore, of the old rule, the Act of 1857, which went into effect on the 31st day of March of that year, provided, that 'all ratable personal property shall be taxed in the town where the owner shall have had his actual place of abode for the larger portion of the twelve months next preceding the 1st day of April in each year.' (Rev. Stats. c. 38, § 10.)" *Greene v. Gardiner*, *supra*. The statute of *Rhode Island* has no application to one who has not been in the state

longer than six months. *Ailman v. Griswold*, 12 R. I. 339. And under that statute the place of abode of a person is the town in which he has his home and family, not that in which he spends time sporadically for business purposes. *Arnold v. Davis*, 8 R. I. 341, wherein the court said: "The tax is assessed at a later period in the year; but the plaintiff relies, in behalf of the town of Warwick, upon the ground that the defendant had his domicile, his residence and his place of abode in that town until November preceding the first day of April, that is, more than half of the twelve months next preceding the first day of April. The answer to that is two-fold. First. That the defendant, though he had his home and place of residence of his family—his homestead—in the town of Warwick, until the month of November, yet, still, according to his testimony, he was in the habit of leaving, every morning at eight o'clock, to pass the day at his place of business, in Providence, and returning at half-past seven in the evening. He also had a factory in Uxbridge, in an adjoining state, where he frequently went and tarried several days. We do not find any difficulty in concluding that such presence and occupation in Providence and Uxbridge do not give him an 'actual place of abode' in Providence or in any place other than that where he had his home and his family, to which he returned after such absence and occupation."

The *St. John (New Brunswick)* Act of 1882 (45 Vic. c. 59) provides that "for the purposes of assessment, any person carrying on business, or having any office or place of business, or any corporation, employment or profession within the city of *St. John*, etc., is hereby declared to be an inhabitant and resident of the said city." *Ex p. Tucker*, 23 N. Bruns. 311; *Jones v. St. John*, 30 Can. Sup. Ct. 122. Under that act one is not "carrying on a business" in *St. John* who is there merely as the agent of another, nor is he "having an office" within the meaning of the act, if he is working in the office of another, but under such circumstances he is a person "having an employment," in *St. John*, and hence, liable to assessment. *Ex p. Tucker*, 23 N. Bruns. 311, wherein the court said: "The question in this case is, whether the applicant who is president of the *Eastern Insurance Company*—a company doing marine insurance, and having an office in the city of *St. John*—is liable to be assessed as an inhabitant of the city under 'The *St. John City Assessment Act of 1882*' (45 Vic. c. 59). Mr. Tucker resided in *Portland*, and usually attended the office of the company—a distance of about three miles from his dwelling house in *Portland*—each day, for a short time, to do such business as the company assigned to its president, which was, prin-

cipally, signing policies. There was no salary attached to the office for his services, but at the end of the year the company gave him, by vote, the sum of five hundred dollars. It is clear he was not an inhabitant of St. John; and he can only be liable to assessment because he is made an inhabitant by the act. . . . We think it clear Mr. Tucker was not a person 'carrying on business' in St. John, as that must mean carrying on business for himself, and not as a mere clerk or agent of another; nor has he any office or place of business there: the office was not his, it was the company's; and they, and not he, should be taxed for that. But we think he had an occupation or employment. The fact that there was no agreement to pay him does not affect this question; it would make no difference if one clerk in an establishment was employed to do certain services, and was paid a salary, and another undertook to do and did the same work for nothing: each would have been employed in doing the work. To say that a man who accepts an office which makes it his duty to attend daily at another person's office, and sign policies, or do other work, and who does such work, has not been employed there, would be going directly against the plain words of the statute, which we do not think we are at liberty to do, even if we thought the statute operated harshly on the applicant. These terms, 'occupation,' and 'employment,' in the section may bear, we think, different meanings. The first means where a person does some business for himself; and 'employment' means the doing of some business for another, implying not only the doing of the business, but the employment to do it; one of the definitions of which is, to intrust with the management of it. Mr. Tucker was intrusted with the management of the business he did for this insurance company in their office in St. John, therefore he was employed to do it, and he did it in pursuance of such employment, and the doing it was therefore an employment—such business was not an isolated act, but continues through the year. We therefore think he had an 'employment' within the city of St. John, within the meaning of the words of the statute; and that this rule ought to be discharged."

III. Infants and Non Compotes.

An infant has no power to change his domicile of origin, so as to render himself taxable elsewhere though it may be changed for him by his parent or guardian. *Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A.(N.S.) 580. And the residence of an infant is fixed by that of the parents or surviving parent. *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524. And

see generally the notes to *Nunn v. Robertson*, Ann. Cas. 1913E 1197, and *Churchill v. Jackson*, Ann. Cas. 1913E 1203. Where an infant is without parents, the intent of the legal guardian, not that of the infant, is material in determining what the residence of the infant is. *Kirkland v. Whately*, 4 Allen (Mass.) 462.

Similarly the residence of one non compos mentis, though he has attained his majority, is fixed for the purpose of taxation by the residence of his parents or surviving parent, since the law treats non compotes as infants and as not being emancipated by age. *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524. And as a general rule the power of a guardian or committee of a lunatic over the person of his ward is practically the same as that of the parent, and he may, therefore, control the residence of the ward to the same extent. *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524. See also *New York v. Brinckerhoff*, 63 Misc. 445, 118 N. Y. S. 449. It follows that, since a lunatic is incapable of forming an intention, his guardian may change for him his legal residence, for taxation purposes. *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524; *Mason v. Thurber*, 1 R. I. 481. In the case last cited it appeared that the guardian of the plaintiff, a lunatic, had changed the residence of the plaintiff to Providence, and the question was raised whether he was capable of so changing it for purposes of taxation. The court said: "In the case before us there is the fact, and the jury have found the intent. The objection is, that it is the intent of the guardians, and not of the plaintiff. But, if the intent of the guardians be competent to fix the permanent home and domicile of the lunatic ward, should not such a domicile draw after it the usual consequences of domicile, to wit, the right of taxation? The parties interested in this question are the plaintiff and the two corporations that claim the right of taxation, and with reference to all of them, we think it just the plaintiff should pay his tax in the town where he has his domicile. In general protection and taxation are reciprocal. We think it just with reference to the lunatic ward that he should pay his tax in the town in which he has his home, because he enjoys the benefits of the government of that town. And with reference to the corporation which claims the right to tax, it is just that North Providence should tax, because that corporation renders the equivalent for taxation, whereas the city of Providence renders no equivalent."

IV. Husband and Wife.

Although the domicile of a wife, in law, follows that of her husband, as a general rule, and is determined by his, she can acquire

a separate domicile or residence of her own for the purpose of taxation by a voluntary separation. *Matter of Crosby*, 85 Misc. 679, 148 N. Y. S. 1045, wherein the court said: "In the matter under consideration there is no proof of an agreement to separate, but there is proof of the fact of actual separation. There is proof that from the time when the decedent left her husband's home in Montana until the date of her death he never visited at her residence except once, and that was upon the occasion of their daughter's marriage. No mere agreement of separation could be more effective in keeping them apart than the voluntary arrangement or understanding which resulted in their maintaining separate homes and paying their individual expenses from their individual property for a period of about twenty-six years. Whatever the clause of the disagreement which resulted in the actual separation, the latter seems to have been as effective as if it were evidenced by a judicial decree. If such a decree had been entered there would be no question under the authorities in this state of the right of the wife to acquire an independent domicile. It would seem to be subordinating substance to mere form to hold that a separation which lasted twenty-six years, although not evidenced by a judicial decree, should be less effective in affording the wife the right to acquire an independent domicile than if such agreement had been incorporated in a formal written instrument. The publicity incident to a judicial separation might well induce a woman of delicacy and refinement to refrain from applying for it, but when the separation is as effectual as if a judicial decree had directed it, she should not be deprived of the right to acquire an independent domicile merely because she refrained from applying for a judicial decree of separation. I will, therefore, find that decedent prior to her death acquired a domicile separate and apart from that of her husband, and that she was not at the time of her death domiciled in the state of New York."

The legal domicile of the husband is not affected by the acts or by the intentions of the wife. *Parsons v. Bangor*, 61 Me. 457, wherein the court said: "The question is, whose will determines the domicile or residence? Cannot the husband by his will and acts change his domicile against and contrary to the will and wishes of his wife, such being his intention? In other words, whose will and intention are to govern. If the husband's are to control, then it matters not, his will and acts controlling, that he is married or not. Suppose the wife remained six or sixty days in Bangor, with or without his consent, how can that affect the residence of the husband if he has abandoned his residence here with the intention of not returning, and has

gone to and is in New York with the intention of there being and remaining. Suppose the wife declined to leave Bangor and remained there permanently, refusing to go to New York and live with her husband; does that make him an inhabitant of Bangor against his will, when he is absent therefrom with no intention of returning, and is in fact being and residing elsewhere with the intention of there so remaining?"

V. Application to Facts.

1. IN GENERAL.

A departure from the place of one's residence with the purpose of residing abroad temporarily but of returning to the original residence at some indefinite time in the future does not constitute a change of residence. *Culbertson v. Floyd County*, 52 Ind. 361.

But it seems that living abroad through a period of years, accompanied by marriage and the purchase of an estate, constitutes the place of foreign abode the legal residence, in contemplation of tax laws, in spite of declared intentions to return, but in the absence of an actual return, *State v. Poydras*, 9 La. Ann. 165, for the facts of and decision in which case, see *infra*, the subdivision, *Personal Property Tax*.

Where a person leaves his old place of residence, intending to take up a new residence elsewhere, but taking an extended voyage before taking up the new residence, his old residence continues until the new one is actually taken up, although the intention to change comes earlier. *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A. (N.S.) 986; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424.

As a general rule the place where a married man's family resides is to be deemed his domicile. *Nugent v. Bates*, 51 Ia. 77, 50 N. W. 76, 33 Am. Rep. 117; *Bangs v. Brewster*, 111 Mass. 382. See also *Wade v. Matheson*, 4 Lana. 158, *affirmed* in 47 N. Y. 658. Compare the reported case. But this presumption may be controlled by proof that it is intended only as a temporary establishment for his family, or for transient purposes. *Nugent v. Bates*, 51 Ia. 77, 50 N. W. 76, 33 Am. Rep. 117.

A new residence is acquired when one moves from his old residence to a new place of residence, with no intention of returning to the old, although he may have a floating intention to go elsewhere when he finds a more suitable place. *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51.

Where a dwelling house is partly in one county or town, and partly in another, the line running through it, the legal residence is in that county or town in which lies the

most necessary and indispensable part of the house, that part in which the occupant mainly and substantially performs those acts and offices which characterize his home, such as sleeping, eating, sitting, and receiving visitors. *Judkins v. Reed*, 48 Me. 386 [Sembler]; *Chenery v. Waltham*, 8 Cush. (Mass.) 327. See also *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650. If, however, the line so divides the house as to render it impossible to determine in which jurisdiction the occupant mainly and substantially performs the acts and offices heretofore referred to, then the occupant will have a right of election and his election is binding on both jurisdictions. *Chenery v. Waltham*, 8 Cush. (Mass.) 327. See also *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650.

2. IN PARTICULAR.

a. *Inheritance, Transfer, or Legacy Tax.*

(1) England.

In *Atty. Gen. v. Dunn*, 6 M. & W. 511, the following facts appeared: "A British subject, domiciled and having real and personal estate in England, went abroad and purchased, in 1828, the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March, 1832, he sent to R. several cases of plate, books, and wearing apparel. In September, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.: he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent town, till October, 1833, when he went to Rome, and there lived in furnished lodgings until his death in February, 1834." On these facts, it was held that the testator had not lost his English domicile, and that the legacy duty was, therefore, payable on the bequests contained in his will. The court said: "We are all agreed that there is not sufficient evidence to establish any domicile after Mr. Boone quitted England. We have considered it very much, and with some anxiety. My impression at first was, that there might be; but I now think, that if I were on

a jury, I could not find that fact, unless I were prepared to find that an intention is the same thing as an act. I cannot find that the testator is remaining in any one place; and with respect to Rasina, the evidence does not enable us to say that he was there for a week at a time, or that his house was furnished; and when he was there, he did not live in the house, but in towns adjacent, and in ready-furnished lodgings. It does not appear, on the facts of this case, that at any one time he was there for more than a short period. He had an intention, probably, of making that his permanent residence, after he had completed certain improvements; but in the meantime he was wandering about in the towns in Italy. There is no more reason for saying he was resident in the Papal States, than that he was resident at Florence: he appears to have been some time in each place, but in ready-furnished lodgings, and in all of them it was as a man passing from place to place. A man may travel about the continent for four or five years, amusing himself at the bathing places, or visiting galleries of works of art; yet however long he may remain, it does not constitute a domicile in any of those places, more especially if he has had a domicile, which he never loses until he has acquired another. I think that in this case there is not sufficient to enable us to determine that in fact Mr. Boone was domiciled either at Rasina, or at any other place abroad; in that case it is admitted that he retained his English domicile: and if he did, it is equally admitted that the legacy duties are payable."

In the case of *In re Tootal*, 23 Ch. D. 532, 52 L. J. Ch. 664, 48 L. T. N. S. 816, 31 W. R. 653, it was held that the difference between the religion, laws, manners, and customs of the Chinese and the English is such that an Englishman cannot acquire a legal domicile in China so as to exempt his personal estate, after his death, from the legacy duties. The court said, stating the facts: "After some previous changes of residence, which it is unnecessary to trace, the testator in 1862 went to reside at Shanghai in the Empire of China, and, with the exception of some visits to England in 1864 and 1873 for health and business, he continued to reside at Shanghai till his death, which occurred in 1878. During his residence there he very extensively engaged in business in connection with newspapers, being the manager and part proprietor of the North China Herald and the North China Daily News and other publications and periodicals, all of which were published at Shanghai, and he was also a partner in a printing business there. Evidence has been adduced on the part of the petitioners showing that for some years before his death he had determined to reside permanently at

Shanghai and had relinquished all intention of ever returning to England, and that he had in fact on several occasions expressed his intention of not returning to England. This evidence remains uncontradicted on the part of the Crown. In his will he describes himself as of Shanghai in the Empire of China. In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicile was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile." It was further held that there is no such thing in the law as an Anglo-Chinese domicile after the analogy of the Anglo-Indian domicile.

In *Winans v. Atty-Gen.* [1904] A. C. 287, 73 L. J. K. B. 613, 90 L. T. N. S. 721, 20 Times L. Rep. 510, the question involved was whether the deceased Mr. Winans was domiciled in England, and, hence, whether a legacy left by him was subject to the English legacy tax. The court stated the principal events of Mr. Winans' life as follows: "He was born in the United States in 1823. He lived there till 1850, residing in Baltimore with his father, a railway contractor, and employed in his father's business. Mr. Winans' eldest son, Walter, who was examined in this case, says that when he spoke of Baltimore he always called it 'home.' In 1850 Mr. Winans went to Russia. He was employed by the Russian Government, as his father had been, in equipping railways there on the American system. During the Crimean War he rendered assistance to the Russian Government in the construction and the equipment of gunboats to be used against the enemy—England and England's ally. In Russia he married a Guernsey lady, the daughter of a gentleman also employed by the Russian Government. He had two sons by her. In 1859 his health broke down. There were symptoms of consumption, and he was warned by his doctor that another winter in Russia would probably be fatal. He was advised to winter in Brighton in England. Very reluctantly, under medical orders, he left St. Petersburg and spent the winter in a hotel at Brighton, returning to Russia when the winter was over. In 1860 he took a furnished house in Brighton, No. 2 Chichester Terrace, for a term of five years, determinable at the end of any year. He also took the next house, No. 1, for a term of twenty-one years, determinable at the fifth, seventh, or fourteenth year. He connected the two houses structurally. He held both these houses at the time of his death—the furnished house, No. 2, as tenant from year to year, and No. 1 on a tenancy similar to that on which it was originally taken. From

1860 down to 1870 or 1871 he used to spend the winter at Brighton and about eight months of the year in Russia. In 1870 he gave up his house in St. Petersburg, and took a lease of some shooting in Scotland, apparently for the sake of his sons, for he shot very little himself. From 1871 to 1883 he spent about two months in Russia, two or three months in Kissingen in Germany, and the rest of the year in Brighton, Scotland, or London. In 1883 he ceased to visit Russia, thenceforward dividing his time between Kissingen, Brighton, London, and Scotland. This mode of life continued until 1893. After that date he spent the whole of the year in England—in London, Brighton, and the country. He never bought an estate in England for himself or for either of his sons. As far as he was concerned 'he preferred living in furnished houses or hotels'—so his son says." It further appeared that the most cherished desire in life of the deceased was the furtherance of a project for the perfecting of an invention of his spindle or cigar-shaped boats, in the perfection of which he had spent millions of dollars, and which invention he believed would render America immune from European attack. Another of his projects was the purchase of property on the water front of Baltimore, Md., for the service of the cigar-shaped boats. The court said, per Lord Macnaghten: "Of course, to us these schemes of Mr. Winans appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept them steadily in view. And one was anti-English and the other wholly American. . . . The only other circumstance to be mentioned is that in his will dated February 4, 1897, Mr. Winans describes himself as a 'citizen of the United States of America.' It was argued on behalf of the Crown that, although Mr. Winans may have been prevented by the state of his health from returning to America when he left Russia, and although he could not have safely attempted the voyage in the latter years of his life, yet there was a time in which he might have ventured to cross the Atlantic in an ordinary liner. The obvious answer is that at that time, when divided counsels and family disagreements prevented the development of the Ferry Bar property, he had no object in going to Baltimore. Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time is of course a very important element in questions of domicile. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case

of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died. On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by Wickens, V.-C., "if the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt Mr. Winans, who was, as his son says, 'entirely American in all his ideas and sympathies,' would have answered it in favor of America."

(2) Illinois.

In *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205, the following facts appeared, as set forth by the reporter: "The deceased had resided in Oquawka, in Henderson county, for many years, where he owned his residence and was engaged in the business of banking, merchandising, loaning money and farming, and where he had accumulated a large fortune. His wife died in September, 1901. For some time prior to her death he had contemplated leaving Oquawka. He talked of going to California, and finally determined to go to Burlington, Iowa, where a married daughter, the wife of George Tracy, an attorney of that city, resided, and with whom he expected to make his home. On Saturday, December 7, 1901, said daughter was at her father's home in Oquawka. That afternoon Mr. Tracy came to Oquawka with the intention of remaining over Sunday. In the afternoon of that day Dr. Fleming, of Burlington, was called by telephone to Oquawka to see Mr. Moir, who was somewhat indisposed. On his arrival he held a consultation at the residence of Mr. Moir with Dr. Hanson, Mr. Moir's family physician, who resided at Oquawka. It was found that the deceased was suffering from an ulcerated tooth, and it was suggested that he go to Burlington, where the same could be satisfactorily treated. That evening Mr. and Mrs. Tracy and Dr. Fleming returned to Burlington, accompanied by Mr. Moir. On their arrival at the Tracy home a dentist, Dr. Cochran, was called. Dr. Fleming, in company with Dr. J. W. Holiday, treated Mr. Moir until December 19, 1901, when he died at the home of Mr. Tracy. The remains were taken to Oquawka for inter-

ment. The funeral was held at and the burial took place from the Moir residence, in which no change had been made during the twelve days intervening between the time Mr. Moir went to Burlington and his death." Holding that the residence of the deceased, for the purpose of the inheritance tax, had not been changed from Oquawka, the court said: "The record is voluminous, and to set out in this opinion the declarations of Mr. Moir testified to by the numerous witnesses who testified upon that subject would serve no useful purpose. Suffice it to say, it is clear therefrom that the deceased had made up his mind to go to Burlington and make his home with his daughter at that place at some time in the future not far remote from the time when he actually went to Burlington. The evidence of all the witnesses on that point, with one or two exceptions, agrees, however, that at the several times upon which he spoke upon the subject he said he would go to Burlington when the business with which he was then connected was closed up. The business of himself and sons at Oquawka, during the fall of 1901, was in progress of settlement preparatory to the contemplated change. No new goods were being bought for the store which they were carrying on at that place, and the depositors in the bank were being paid off preparatory to transferring the assets of the bank to a national bank which was being organized at Oquawka to take on its business. The business was not, however, closed up at the time the deceased went to Burlington, and it is admitted that the various enterprises in which Mr. Moir was engaged continued to be carried on by his sons until some weeks after the death of Mr. Moir. The time, therefore, when the deceased had determined to change his residence had not arrived at the time he went to Burlington. To bring about a change of residence it is necessary that there be not only an intention to change the residence, but the change must actually be made, which can only be effected by abandoning the old and permanently locating in the new place of residence. We are strongly impressed that the deceased intended to make the change so soon as his business was closed up, but are equally clear that such intention was never executed by a permanent abandonment of the old and the selection of a new place of residence by Mr. Moir. . . . It is plain that Mr. Tracy and wife did not return to Burlington in company with Mr. Moir by reason of the fact that after Dr. Fleming and Dr. Hanson arrived at the home of the deceased it was then agreed the time had come when the contemplated change of residence should be made, but that they returned to their home and took the deceased with them in order that the deceased might readily receive the medical attention which it

was thought he needed. To have effected a change of residence at that time it was necessary that Mr. Moir should have gone to Burlington with the fixed intention of changing his residence—that is, with the intention of abandoning his old residence and taking up a new residence in Burlington. The clear inference to be drawn from the evidence is, that the deceased went to Burlington for the purpose of receiving medical treatment, and not with the intention of effecting a change of residence. His business not having been closed up, he left his home, and all that was in it, as it had existed for years, his unmarried daughter, who was his housekeeper, and his servants, remaining. After his death his remains were taken back to the old home and a funeral was there held. All the facts show that he went to Burlington for a temporary purpose, and not with the intention of making said city his permanent future residence.”

(3) Missouri.

In *State v. Bunce*, 187 Mo. App. 607, 173 S. W. 101, it appeared that Thomas F. Bunce, then a resident of the present state of New Mexico, and having resided there for about eighteen years next before his death, being in bad health, was brought from his home there to Knox county, in Missouri, where, about three days after his arrival, he died. Holding that he was not at the time of his death a resident of Missouri, for the purposes of the inheritance tax, the court said: “We think it is very clear that Thomas F. Bunce at the time of his death cannot be held to have been a resident of this state. Beyond question, he had been a resident of the territory or state of New Mexico for eighteen years next before his death, save for the last three or four days of his life; he made his will there, in which he described himself as of ‘East Las Vegas, New Mexico.’ It is dated there the 27th of April, 1910, and he died in this state on or about May 25, 1910. While he was brought here only three or four days before his death, there is nothing to show that he anticipated immediate death, or that he had in mind taking up a residence in this state. In point of fact, there is no testimony whatever covered by the agreed statement of facts in this case to show any intent whatever on the part of Thomas F. Bunce to change his domicile or place of residence. That far, therefore, we agree with the conclusion arrived at by the learned circuit judge, and we hold that at the time of his death Thomas F. Bunce was not a resident of this state, as the term ‘resident’ has been defined.”

(4) New York.

In *Matter of Martin*, 173 App. Div. 1, 158 N. Y. S. 915, the following facts appeared, as

stated in the opinion: “Frederick Townsend Martin was born in Albany in 1849, and remained there until 1885, when he removed to New York city and rented a house there. Some time previous to 1890 he gave up this house, and thereafter when in New York he visited his sister or lived at the Murray Hill Hotel, and from 1907 on he occupied a suite of rooms at the Plaza. He always had the same rooms, and kept a few belongings there, but only paid for the suite during actual occupancy. Up to February, 1913, Mr. Martin always spent the winter, with the exception of an occasional trip to Palm Beach, in New York city. During the summer he went abroad, stopping in London hotels, and while in Paris living at an apartment which appears to have been furnished and maintained by Mr. Martin and his intimate friend, Mr. Sands. In February, 1913, while Mr. Martin was in New York city, his brother, Bradley Martin, died in London, and Mr. Martin went over, returned to New York in April, but went back to England again in July, and remained there until his death in London in March, 1914. In December, 1913, his friend, Mr. Sands, died, leaving Mr. Martin his personal effects and twenty-five thousand dollars cash. Mr. Martin immediately gave up the Paris suite and purchased a house in England, to which he removed Mr. Sands’ and his own furniture, and which he proceeded to fit up as a residence.” On these, and further facts which appear in the opinion, the court held that the deceased had not lost his New York residence, and that his estate was, therefore, subject to the transfer tax. The court said: “It is clear that Mr. Martin’s domicile up to the purchase of this London house was New York, and the burden of proof rests on the party desiring to show a different one. . . . The only fact tending to show another is the purchase of the London house, and there are a number of circumstances to explain or offset the significance of this fact. In the first place, Mr. Martin seemed to consider himself under a duty to provide a home for Mr. Sands’ collection, and in his letter of December 19, 1913, he refers to the London house as purchased solely for that purpose. The unfinished letter written just before his death to Mrs. Dewey is very significant as to his attitude toward his London house. It reads in part as follows: ‘You will understand so well that it was a frightful disappointment to me to be forced by illness to give up my winter in my beloved land. I have bought the lease of a house in London for eight years, as Mr. Sands, who was my dear, devoted friend from boyhood, died in Paris last November quite suddenly, and left me a legacy to buy the lease of a house where I could keep all the furniture and pretty things that we had bought during the long years of our friend-

ship. I look upon it only as a storehouse to keep these things in, as nothing would induce me to live in Paris after his death. My home is in New York, where I am happier than in any other city in the world. Just think of it, that I, an American, should have brought out a book that was the book of the year in England.' Then, on another occasion, he wrote: 'I think it is better for you to enter 6 Great Cumberland place as my permanent address as trustee to Lord Craven'—thus indicating that he considered it his permanent house only for a limited purpose. Mr. Martin did nothing to transfer any of his business interests, etc., to London, and he allowed to stand his will previously made, which gave his residence as New York. On the whole, the evidence seems definitely to show that Mr. Martin still considered New York city as his domicile, and, taking into consideration Mr. Martin's wealth and habits of life, the purchase of a private residence in a city where he was accustomed to spend a considerable portion of his time does not have the significance that would attach to a like action by a person of a less cosmopolitan character."

In the case of *In re Mesa y Hernandez*, 172 App. Div. 467, 159 N. Y. S. 59, the court held that the estate of the decedent was not liable for the New York transfer tax. The court said: "Tirso Mesa y Hernandez was born in Cuba on January 28, 1847, and resided continuously there until his marriage on February 24, 1881, to Josefina Garcia Pola, also a native of Cuba. They went to live immediately after their marriage at his sugar plantation, 'La Vega,' at Manguito, Cuba, which remained their sole family home until 1904, when he purchased a town house, No. 2 San Lazaro, Havana, Cuba. He resided in Cuba uninterruptedly from his marriage until the time of his death, save for the years 1895 and 1899, which he spent in Europe because of the Cuban insurrection, and for periods of the other years between 1888 and 1908 when he spent his summers in Europe, with short stays in New York on his way there and on his return. There being no direct passenger service between Cuba and Europe, he was obliged to come to New York to obtain transportation across the ocean. On these trips his wife accompanied him, as well as other members of his family at times, and when in New York they stopped at hotels, never leasing a house or apartment there. Their longest stay in this country was after they reached Porto Rico on their way to Cuba, when they learned (in 1896) that during their European trip their home had been burned down in the course of the war, whereupon they toured this country as far west as Colorado and then went to Europe, returning to Cuba finally in February, 1900, upon the rebuilding and refurbishing of their home.

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Decedent's stays in New York annually thereafter lasted from one to five weeks, averaging two weeks. He died on November 29, 1908, at another of his plantations, 'Colonia Violet,' Aguade de Pasejeros, Cuba, leaving him surviving his widow and three children. He was buried from his city home, and the interment took place in his mortuary chapel in the Christobal Colon cemetery at Havana, he having given instructions that he should be buried there, no matter where he died. He left realty and personalty in Cuba and personalty in the hands of his bankers in New York. His business interests were entirely in Cuba, save for investments of his funds made by his bankers in New York. He belonged to clubs in Havana only, and his sugar plantations, the source of his wealth, were all in Cuba. His children were educated in England, and returned to Cuba upon completing their studies. His only given address was in Cuba. There could not have been a clearer case of definite and settled residence than that presented by these and numerous other facts and circumstances set forth in the affidavits in the proceeding, and not in any way contradicted."

In *Matter of Morgan*, 95 Misc. 451, 159 N. Y. S. 105, the court held that the deceased at her death was a resident of New York within the meaning of the transfer tax law and that her estate was subject, therefore, to the tax. The court said, setting forth the facts: "From the testimony given before the appraiser in this matter, and now laid before me, it appears that the decedent and her husband had their domicile of origin or prior choice in this state for many years before 1879, but that in the latter year they purchased a house in Washington, removed there, and continued to reside there until the date of Mr. Morgan's death, which occurred in 1886. That the decedent acquired a new domicile of residence in Washington after she and her husband went to live there is not and cannot be disputed. This was a new domicile of choice, and thus we have one certain or fixed premise in this cause. The decedent inherited from her husband the house which they had lived in at Washington, and she continued to own that house until the date of her death. But Mrs. Morgan occupied the Washington house as her home only until 1905, when she bought a new house situated at No. 70 Park avenue, in the city of New York. She thereafter rented the Washington house, and used the Park avenue house as her town house. She continued to rent the Washington house, and to occupy the Park avenue house, until the date of her death. She never lived at the Washington house after 1905, except for a few days, while she was making arrangements for reletting it to new tenants. It does appear that Mrs. Morgan did not reside during

the entire year at No. 70 Park avenue in this city. She lived there about six winter months of the year, the remaining months of each year she spent in Europe or in visiting relatives and friends. She owned the furniture in the Park avenue house, engaged and paid the servants, and conducted it generally as her place of residence or home. It, however, appears at various times, after the decedent had purchased the house at No. 70 Park avenue, she executed legal documents in which she described herself as a resident of Washington, in the District of Columbia. Some of these documents were executed as late as May 3, 1913. She died on the 4th of August, 1914, and her will was admitted to probate in the District of Columbia. There is no doubt in my mind that Mrs. Morgan desired to have her legal domicil, with all its advantages, in Washington, D. C., and at the same time she wished to resume her original residence in New York. The Scotch law, it may be observed at this point, makes a subtle distinction between a physical and an intellectual residence. As a matter of fact, Mrs. Morgan did resume her old physical residence in this state and in this county, and while so resident she died. It may be that Mrs. Morgan was entitled to have her legal or intellectual domicil continue in Washington and yet reside here. Upon this abstract point I express no opinion at this time. . . . In the matter now before me there is very little contention as to the fact that Mrs. Morgan at the time of her death was actually physically resident in the city of New York, and that her sojourns elsewhere were not in law tantamount to residence. Thus it happened that she received for the last years of her lifetime all the protection which the sovereignty of the state of New York affords to residents. In my judgment her estate is subject to tax, because she died a de facto resident of the state of New York. I am convinced that Mrs. Morgan's last legal residence was in the city, county, and state of New York, and I so hold."

In the case of *In re Norton*, 96 Misc. 152, 159 N. Y. S. 619, the court held that the deceased was last a resident of New York, not of Bermuda, and that his estate was subject to the transfer tax. The court said: "The testimony taken and the affidavits and documents so submitted show that the decedent's domicil of origin was in Illinois, and that he actually resided in Illinois until 1901, when he sold his dwelling house in Illinois and came to New York city. He lodged at hotels in New York city from 1901 until 1904. In the latter year he purchased a house on Riverside Drive, in this city, furnished it as a home and occupied it as a residence. In December, 1904, he purchased another house at Lake Placid, N. Y., and furnished it as a

summer home. From 1904 to 1910 he owned both the house in New York city and the summer house at Lake Placid, and during that period he did not own a dwelling house in any other state. In various legal documents executed by decedent between the years 1904 and 1910 he described himself as of New York city. He was assessed on personal property in this city and paid the tax in 1909 and 1910. In January, 1910, he went to Bermuda, and on May 10, 1910, he purchased a dwelling house and several acres of land there. He sold his Riverside Drive house during the same year. During 1910 and 1911 the Lake Placid house was leased, and in 1912 it was sold. He remained in Bermuda practically the entire year, 1911. During 1912 he made several trips to the United States for business purposes, but he did not remain in this state for more than a few days. He spent the summer of 1913 in Europe, and returned to Bermuda in the autumn. In June, 1914, he told his son-in-law that his wife wished to have some place in New York city to which she could take her two servant maids when traveling through the city instead of stopping at hotels, and thereupon an apartment at No. 640 West End avenue was rented for a term of three years. The lease was signed by Mrs. Norton and by the decedent, the signature of the latter having been made by his son-in-law as his attorney. The decedent paid the rent of the apartment. On August 12, 1914, the decedent applied for a passport when contemplating a trip to Europe for the purpose of aiding his wife to return to the United States, and in his application he stated that he was domiciled in the United States, and that his permanent residence was in New York city. This statement does not, however, coincide with the fact. In September, 1914, after Mrs. Norton had returned from Europe, she removed her personal belongings from the Biltmore hotel to the apartment at 640 West End avenue. The decedent traveled in connection with his business from September 10 until October 28, 1914. On the latter date he returned to this city and went to his wife's apartment at 640 West End avenue. He made arrangements for going to Bermuda in the early part of December following, but he was ill at that time and he died at the apartment 640 West End avenue on December 31, 1914. In 1913 the decedent had purchased property in Bermuda, and in the deed he described himself as 'of Bermuda.' He frequently thereafter referred to Bermuda as his residence. In 1911 he was assessed for personal property in this city and made affidavit stating that he had ceased to be a resident of New York and had been for a year prior to 1911 a legal resident of Bermuda. In various applications for letters patent made

by him during the years 1913 and 1914 he stated that he was a resident of Bermuda, although on September 10, 1914, he gave New York as his address in an application for a Canadian patent. In a postscript to a letter dated August 10, 1914, after the outbreak of the European war, he stated: 'America looks pretty good to me for the future.' From the foregoing facts it would appear that the decedent acquired a residence in New York about the year 1901, and that he resided in this state up to the time he sold his Riverside Drive home in 1910. The purchase of a home in Bermuda after he had sold his summer and winter houses in New York, and the fact that he described himself in several legal documents as of Bermuda, would seem to indicate that he intended to abandon his residence in New York and acquire a new residence in Bermuda. I think he actually did acquire a residence in Bermuda *facto et animo*. Whether, however, he intended by renting the apartment on West End avenue in 1914 to again take up a residence in New York is a question perhaps involved in some doubt. The testimony which was given to explain the rental of the apartment on West End avenue for three years would seem to indicate that the place was rented as a matter of convenience for Mrs. Norton only; but the statement by the decedent in his application for a passport that he was a permanent resident of New York city, coupled with the postscript to the letter of August 10, 1914, wherein he stated that 'America looks pretty good to me for the future,' somewhat conflicts with this and might seem to indicate that he contemplated returning to the United States and again making New York his principal place of residence and abandoning Bermuda. But no actual abandonment is shown. Such are the principal facts. If my solution were permitted to turn upon 'commorancy,' or the last legal 'residence' of this decedent, I should find that it was Bermuda, and that even the conflicting statements of decedent, made for national purposes, should not be allowed to estop those succeeding to his estate and now vested with it by right of succession from showing the real fact as to decedent's last residence. But, in view of the late decisions cited above, I feel constrained to find that the last domicil of decedent shown by the evidence was in New York. It appears that the decedent in or about 1904 acquired a 'domicil' of choice in New York state. This being so, the onus of showing a change of such domicil is on those asserting it. *Matter of Wise*, 84 Misc. 663, 146 N. Y. S. 789. This burden has not been sustained, and therefore the decedent's last established domicil of choice is presumed to continue. I therefore find that the decedent's last 'domicil' was in the state of New York, and not in Bermuda."

In *Matter of Grant*, 83 Misc. 259, 141 N. Y. S. 567, the courts thus stated the facts: "From . . . affidavits it appears that General Grant was born in Missouri in 1850; that subsequently he resided at Washington with his father, who was then President of the United States; that he became an officer of the United States Army in 1871 and continued in the service until 1881, when he resigned. It is apparent that a short time after his resignation from the army he became domiciled in New York city. He was police commissioner in this city from 1894 to 1898. In 1899 he was appointed a brigadier-general of volunteers, and after his discharge from the volunteer service he was appointed major-general in the United States Army. In his will, which was executed in Texas in 1903, he described himself as 'at present an officer in the United States Army stationed at Fort Sam Houston, Texas.' From 1902 to 1904 his headquarters were at Fort Sam Houston, Texas; from 1904 to 1908, as Commander of the Department of the East, his headquarters were at Governor's Island, in New York harbor; from 1908 to 1910 he commanded the Department of the West, with headquarters at Chicago, and from 1910 to the date of his death his headquarters were again at Governor's Island. He resided wholly at his headquarters, and had no residence elsewhere. It further appears that while residing in federal territory at Governor's Island, and also while on official business in the city of Washington, General Grant expressed an intention of buying a certain house in the District of Columbia and making it his permanent home; but while he selected a house, he did not either purchase the house or rent it. He, however, shipped some household furniture and his uniforms to Washington, but it does not appear that they were delivered at a house purchased or rented by him. Shortly thereafter he died while sojourning at the Hotel Buckingham, in the city of New York, temporarily, on his way to the south." Holding that the fact of residence in federal territory (Governor's Island) coupled with the intent of living in federal territory (Washington) was sufficient union of *factum* and *animus* to change General Grant's domicil from New York to federal territory, the court said: "If it be made out here that General Grant while actually residing permanently in federal territory, to wit, in this case, while at Governor's Island, *animo manendi*, or while on duty expressed his intention, as he did in fact, of always continuing to live in federal territory, to wit, the city of Washington, we have, I think the union of *animus* (intent) and *factum* (actual residence) necessary to constitute his last domicil of choice in federal territory by the most stringent rule of the American cases.

Such union of *animus* and *factum* brings General Grant within the doctrine of those early New York cases which are presumed by comptroller's counsel to establish a doctrine of private international law, that in every case where a new domicile of choice is alleged as against a former domicile of choice actual residence in the new domicile of choice must be established."

In *Matter of Crosby*, 85 Misc. 679, 148 N. Y. S. 1045, it appeared that the husband of the decedent was domiciled in New York at the time of the death of his wife, but that she had previously separated from him, voluntarily, had gone to Morristown, N. Y., and later to Charlestown, W. Va., and had there resided for about thirteen years prior to her death. On these facts the court held that the deceased was not a taxable resident of New York at her death and that her estate was, therefore, not subject to the transfer tax.

In *Matter of Rothschild*, 86 Misc. 364, 148 N. Y. S. 368, the court said: "The evidence before the transfer tax appraiser conclusively shows to my mind that the domicile of the late Charles A. Rothschild at the time of his death was in France. His household and household effects were maintained in France continuously since the year 1905, when he abandoned his prior domicile in New York *sine animo revertendi*. Since 1905 Mr. Rothschild lived only in France. Both the *animus* and the *factum* elements of a domicile in France are amply established in this instance by uncontradicted testimony."

b. *Personal Property Tax.*

(1) *Illinois.*

On facts which appear in the quoted portion of the opinion, the court, in *Mahany v. People*, 138 Ill. 311, held that a change of residence within personal property tax laws had been affected. The court said: "The taxes in question were assessed for the year 1889. Appellant is an unmarried man, and for many years has owned, and still owns, a farm in West Jersey township, in Stark county. For some twenty years appellant lived on this farm, but about four years prior to 1889 he rented it to a tenant, reserving the orchard. He thereupon commenced rooming and boarding at a hotel in the village of Toulon, in Toulon township, about four miles from his farm in West Jersey. He seems to have spent about one-third of his time in traveling about the country and in neighboring states, and the other two-thirds of his time at Toulon, attending to his business of loaning money, occasionally going to his farm and there attending to his orchard, gathering his fruit, etc., but returning to Toulon at night. The

report of the county collector was *prima facie* evidence of the legality of the taxes assessed against appellant. (*Pike v. People*, 84 Ill. 80; *Mix v. People*, 86 Ill. 312; *Durham v. People*, 67 Ill. 414.) The objections urged by him against the validity of the taxes were, that he was not liable to be taxed for personal property in the township of Toulon; that he was a resident of West Jersey township at the time of the assessment, and liable to pay personal property taxes therein, and that he was assessed in said latter township on personal property for 1889, and paid the taxes so assessed. The evidence that was submitted to the county court in regard to his residence was not entirely satisfactory, some of it tending to the one conclusion, and some to the other. The county court both heard and saw the witnesses during their examinations, and had the full benefit to be derived from a personal presence at their cross-examinations, and found that his residence was in Toulon. We have very carefully read and examined all the evidence found in the record, and we cannot either say or demonstrate that the finding of the county court was erroneous, and more especially so in view of the fact that, *prima facie*, the assessment is valid."

In *People v. Caldwell*, 142 Ill. 434, 32 N. E. 691, a change of residence was held to have been effected by facts which sufficiently appear in the following quotation from the opinion: "It appears that Caldwell was the owner of three farms, aggregating sixteen hundred acres, two of which are situated wholly in Piatt county, and one of which seven hundred and ten acres is in Piatt and one hundred and ninety acres in Champaign county. . . . One of these farms had upon it a good house, large barn, stock scales, etc., and it would appear that it had, at one time, at least, been the residence of Caldwell. In 1886 Caldwell built a house on the land in Champaign county, near the line, and as he claims, then moved into it and has ever since occupied it as his residence, and that since the spring or summer of 1886 his actual residence has been on said land in Champaign county, and that the personal property assessed by the assessor of Sangamon township, in Piatt county, was liable for taxation only in Champaign county, that being the place of his domicile. To this it is answered: First, that his residence is not in Champaign county, but in Piatt county, and that his pretense of occupying the house on the land in Champaign county is fraudulently made, to escape the listing and taxation of his personal property in Piatt county, for the reason that the rate of taxation is higher in the latter than in the former; and second, that if it be conceded that his residence was in Champaign county, yet the property assessed, and upon which the extension of the tax is sought to be enjoined,

had its situs in Sangamon township, in Piatt county, for the purposes of taxation. It would seem that much of the personal property of the complainant had, in previous years, been listed by him in Champaign county, where, as shown, the rate of taxation was less than in Piatt county, and it does not seem improbable that this cause may have led Caldwell to change his abode, and claim his residence in the former county. Be that as it may, it seems clear that from 1886 down he claimed to reside in the dwelling house upon the land in Champaign county. He lived there with his wife, at least part of the time, claimed it was his home, voted in that township, and did many acts indicative of his intention to make it his place of domicile. We have carefully considered all of the evidence, and think the chancellor fully warranted in finding that his place of residence on the first day of May, 1890, and for several years prior thereto, had been upon the land constituting part of what is known as the 'Champaign farm,' and in Scott township, in Champaign county. His motive for selecting this domicile cannot be important. If he actually resided in Champaign county the same legal consequences would result, whatever may have been his motive for choosing it."

In *Ellis v. People*, 199 Ill. 548, 65 N. E. 428, it appeared that taxes had been assessed on the personal property of the appellant, in the town of Carrollton. Her father had resided in Rubicon up to the time of his death. After his death, his widow lived in Carrollton until her death and after that her daughter, the appellant, continued to live with her sister in Carrollton, though they spent most of their time visiting different parts of the United States. The appellant had never had actual possession of the personal property sought to be taxed, it having been in the possession of a cousin who lived in Rubicon, where the property was listed for taxation. Upon these facts it was held that the appellant's residence was in Carrollton, not in Rubicon, and that her personal property was therefore properly listed for taxation in Carrollton.

(2) Indiana.

In *Culbertson v. Floyd County*, 52 Ind. 361, the court held that a change of residence from Indiana to Europe had not been effected by the following facts, as they appeared in the agreed statement: "Prior to the 8th day of August, 1870, the said John C. Culbertson resided in the city of New Albany, Indiana. He had resided there for about thirty years from choice. He was not born in Indiana. In August, 1870, he had no occupation or business of any kind. He lived upon an income

derived from the rents of real estate, bank stocks and money loaned. He had a dwelling house on Bank street, in New Albany, which he occupied with his family, consisting of his wife and two children, until the 8th day of August, 1870. On the said 8th day of August, 1870, he relinquished the possession of his house to one Conn, having rented the same to him, with all the furniture therein, in consideration of a rental of three hundred and fifty dollars per annum, payable quarterly, and agreeing to give said Conn three months' notice before requiring him to vacate the premises. No time was fixed for the determination of the lease, other than as above stated. On the same day, with the intention of ceasing to be a resident of Indiana for an indefinite time, he departed from Indiana, with all the members of his family, for the purpose of residing in Europe, with the expectation of again becoming a citizen of Indiana at some indefinite time in the future, probably two or three years. The person Conn, who from that day occupied the dwelling house and used the furniture, was not in any manner related to said Culbertson or his family, and no room was reserved therein; neither was the furniture therein reserved for them. While Culbertson and his family were in Europe, and in December, 1870, some four months after he left, he wrote a letter to his brother, William S. Culbertson, a merchant of New Albany, which contained the following: "They of course will only tax me upon my realty this year, as I have ceased to be a citizen for a year or two, and as life is uncertain, may never become one again." Culbertson and his family rented part of a furnished house in London during August, September and a portion of October, 1870, wherein he and his family regularly kept house during that period. They then traveled from place to place on the Continent, and after living in Europe for two years and a quarter nearly, in August, 1872, he notified said Conn that he would require him to vacate his house in November following. He returned with his family in November, 1872, to New Albany, and from that time to March, 1873, they resided in New Albany. Between August 8th, 1870, and their return from Europe, neither Culbertson nor any member of his family was in the United States, and during part of the time the children were at school in Europe." The court said: "From an examination of the . . . authorities, we are thoroughly satisfied that appellant did not lose his residence in this state; that immediately upon his return home, he was entitled to exercise all his political, civil and municipal rights; that he was eligible to office and entitled to vote; and that he is to be regarded as a person residing within this state, within the meaning of the third section of the

assessment law, . . . and was subject to be taxed under the first clause of said section."

In *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805, it was held that no change of residence had been effected by the following facts: "The special findings, in substance, show the date and place of appellee's birth and place of residence before marriage, her marriage on May 29, 1872, to Ulysses P. Schenck, Jr., resident of Vevay, Switzerland county, Indiana, and that from that time she continued there to reside with him as his wife until his death and burial at Vevay in 1892. During the winter of 1889-90 appellee was an invalid and went to Peru, Miami county, Indiana, to receive treatment from certain physicians, residents of that city. For about two years from May, 1880, appellee, her husband, and child, and solely for the benefit of the health of appellee and her husband, lived in Colorado and California, during which time their home in Vevay remained closed. Immediately after the death of her husband appellee and her daughter went to Peru, and remained with relatives and friends until July and then went to Vevay where they remained until October, 1892, going from there to Canton, Ohio, for one month, then to Peru, to assist in the care of appellee's mother, who at that time was a widow—old, blind, and in ill-health—requiring constant attention and physical assistance, and which care and attention devolved largely upon appellee. The mother died in July, 1903. In the spring of 1894, in anticipation of her daughter's marriage, a furnished residence in the city of Peru was leased for a term of eighteen months. The marriage occurred in June, 1894. Thereafter, when in Peru appellee occupied said dwelling with her daughter and son-in-law. In September, 1895, her son-in-law went to New York for a course in the Bellevue Medical College, his wife and appellee following in December, all returning to Peru the last of June, 1896. In July appellee went to Petoskey, Michigan, where she remained a month, then returned to Peru, and immediately, with her daughter, went to Vevay, remaining until the latter part of October, when they returned to Peru. Appellee's son-in-law, a physician, after considering various cities, decided to locate permanently in Peru, and on June 26, 1897, appellee purchased a lot in Peru, took the title in her own name, erected thereon a dwelling house, which was completed in July, 1898, and is the only real estate owned by appellee in Miami county. The dwelling was planned and constructed with reference to the wishes and conveniences of the son-in-law and his wife. Two rooms were for use as a physician's office, and one room for the special use of appellee's mother, and occupied by her when appellee

was in Peru. When appellee was away the mother was taken to the home of her son. No special room was reserved for appellee. Appellee never remarried, and after the marriage of her daughter had no one depending upon her for support. In 1899 a son was born to appellee's daughter, and for several months after the birth of the child the mother was feeble in health and unable to care for it, and the child was cared for by appellee. Appellee since the death of her husband has not kept house, and prior to July, 1898, while in Peru she occupied furnished rooms and took her meals at hotels, restaurants, and in boarding houses. Subsequently to her daughter's marriage, when convenient, they roomed at the same house and took their meals together. At other times they roomed and boarded at separate houses. Immediately prior to the death of appellee's husband he was negotiating the sale of the home they occupied in Vevay. The sale was not consummated by him. Soon after her husband's death appellee stored her household goods in a portion of the house and rented the remainder until 1893, when she sold said residence and her household goods, except certain articles which had come to her through the relatives of her husband, and which, owing to the memories associated with them, she retained for her daughter, and which she shipped and stored in Peru until the completion of her house in 1898. Appellee since the death of her husband has returned to Vevay on an average of about once a year, remaining on such occasions from two weeks to two months. Her stay on different occasions was shortened by calls from her relatives on account of sickness in their families, or on account of the condition of her own health. She has spent about nine-tenths of her time in Peru, the remainder in Vevay and other places. When appellee went to Peru after the death of her husband she had no definite time fixed during which she would remain. Appellee was a member of the Baptist church. She took a letter from that church at Vevay and deposited it in the Baptist church at Peru. When she went to Colorado and California in 1890 she took with her a church letter. On December 5, 1895, appellee intended to visit Europe for an indefinite time. To enable her brother to attend to her business, pending her absence, she executed to him a power of attorney, in which the scrivener who drew said instrument, without her knowledge, described her residence as in Miami county, Indiana, and she executed the same without observing that her place of residence was so stated, and did not know of such mistake until after the instrument was recorded. She at no time knowingly executed an instrument nor accepted a conveyance to herself in which her residence was described as Miami county,

Indiana. After the sale of her homestead in Vevay, the purchaser placed at her disposal a certain room therein, which she occupied at times, at other times, from choice, occupied another room, and at other times roomed with relatives of her deceased husband. She took her meals at the hotel, and at times boarded with her friends. Of all the times appellee was in Vevay, after the death of her husband, on but two occasions did she go on matters of business. Since the death of her husband she has continuously owned, in the city of Vevay, six residence properties, some unimproved lots, two business rooms, two livery stables, one paint shop, and an interest in a furniture factory. In Switzerland county she owns four farms, one of thirty acres, two of one hundred acres each, and one of over two hundred acres. She owns notes, secured by mortgages on real estate in Miami county, of the value of \$10,000. Since the sale of her homestead in Vevay, appellee has owned but a small amount of tangible personal property, consisting principally of a horse and buggy, which, with her daughter's household goods she listed for taxation in the city of Vevay until the year 1898, inclusive, in good faith, claiming and believing that to be her residence and the proper place to list said property, although said property was in Miami county, Indiana. For the years 1899 to 1903, inclusive, acting on the advice that tangible personal property should be listed for taxation and assessed in the township, town or city where the same is situate, irrespective of the owner's place of residence, the property just named was listed for taxation in said city of Peru, she at the time of each listing claiming Vevay as her residence. In each and every year from 1893 to 1903, appellee, claiming Vevay as her home, returned to the township assessor of the township in Switzerland county, in which the city of Vevay is located, a full, true and complete list of all moneys loaned, and credits owned by her on April 1 of each of said years, respectively, which were duly listed for taxation in said county and city, averaging for the eleven years \$21,662, and the taxes were duly assessed on the property so returned and listed, both in said county and city, and paid by appellee. Appellant is threatening to place certain property on the tax duplicates for the years 1893 to 1903, inclusive, consisting of moneys, moneys loaned and credits, ranging in amounts from \$16,240 in 1893, to \$22,896 in 1903. During said years the average rate of taxation in the city of Peru was \$1.42, and in Vevay, sixty and one-sixth cents on the \$100. She had an agent in Vevay who attended to the listing of her property, and she did not know the rate of taxation in either Peru or Vevay for either of said years. During her married life she formed sincere and

lasting friendships in Vevay, and a warm attachment for the city and its residents, which she still retains, and never at any time intended to abandon her home in Vevay and to fix her home in any other place, and intends to maintain that city as her home and be buried, there." With reference to these facts the court said: "In the case at bar it is admitted that appellee in 1893 was an inhabitant of Vevay, Indiana. With this fact admitted, the rule is well settled, both in this country and in England, that such habitancy or domicile will continue until both residence in a new locality and intent to make it her home concur. . . . The special findings show the presence of appellee in Peru, Miami county, the greater part of the time between 1893 and 1903, inclusive, that she purchased a lot and built a residence thereon, and that she has money loaned in that county. But, when these facts are considered in connection with the denial of an intention to adopt Peru as her domicile or habitancy, the magnitude of her interests in Vevay and Switzerland county, her acts and conduct in listing the property in controversy for taxation in Vevay, her long-admitted residence there, her explanation of the cause of her stay in Peru, covering practically the entire time for which she is proposed to be taxed by the latter city, the explanation and inferences to be drawn from the facts found relative to the purchase of the lot, and the building of the residence, coupled with the fact that, by the will of her late husband, she became the owner of all the property with which he died seized, and that she, during all of said time, was unmarried, together with all of the other facts found, clearly sustain the conclusions of law of the trial court to the effect that during all of said time she was an inhabitant of Vevay, and not an inhabitant of Peru, Indiana, and that the class of property mentioned in the complaint was, during all of the time mentioned, properly and rightfully listed and taxed in Vevay."

In *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524, it appeared that Mary Brookover was a person of unsound mind who had never in her life been capable of caring for her own property; that for many years she had resided with her mother in Warren county; that in 1884 her brother, the appellant, was appointed her guardian and made an arrangement whereby the mother was to furnish a home for and care for the lunatic ward; that this arrangement continued, the ward living in Warren county with her mother, until 1886, when the mother moved to the city of Huntington, the ward going with her, by and with the consent of the guardian; that they both lived in Huntington from 1886 to 1892, when they both moved back to the old residence in Warren county where they remained

a year, returning to Huntington in 1893, again by and with the consent of the guardian, and still under the original arrangement. On these facts the court held that the residence of the insane ward had been changed from Warren county to Huntington and that her personal property was taxable in Huntington for the years during which she and her mother had lived there.

(3) Iowa.

The court held, in *Nugent v. Bates*, 51 Ia. 77, 50 N. W. 76, 33 Am. Rep. 117, that a change in residence had not been effected by the moving of the appellant to Chicago. The court said: "The appellees do not dispute the proposition that if the appellant was a resident of Chicago he was not taxable in this state. The plaintiff is married, and from 1871 resided with his family in the town of Osceola, in this state, until he claims to have moved to Chicago in September, 1875, which is not disputed. This latter date is stated in the petition to have been in 1874, but this must be a mistake, as the plaintiff in his affidavit states it was in 1875. The family continues to reside at Osceola after September, 1875, there being no change in this respect except that the plaintiff was absent. He was in Osceola with his family at least once. This was in December, 1875, and how long he remained, or for what purpose he returned, does not appear. Affidavits were filed by the plaintiff which, in terms, state that he was a resident of Chicago from September, 1875, until after January, 1876. Such affidavits are not entitled to consideration because they state mere legal conclusions. The affidavits in effect merely state what, in their judgment, the law is. The plaintiff states that he was a resident of Chicago at the time the assessment was made, and that he had been such since September, 1875, and further states: 'I had at said time permanently located, as I supposed; had sold out my business in Clarke county, and was doing business in Chicago and no other place; that at the time I was assessed had all my arrangements made to move my family to Chicago, where I at that time was in business, and had purchased property, but owing to the failure of the bank at Osceola I was unable to carry out the plans. I had to let the trade go, as the bank was my security.' . . . When a residence is once acquired it is presumed to continue until there is satisfactory evidence of abandonment. . . . The only evidence of the abandonment of the residence which had been acquired in Osceola is that the plaintiff had gone to Chicago, purchased property, and gone into business with the intention of permanently locating there. But his family continued to reside in Osceola, as they

had before the plaintiff went to Chicago. It is not claimed any preparations had been made for removal. To all appearances the family was permanently located in Osceola. We are of the opinion, under these circumstances, the plaintiff was a resident of Osceola, and rightly assessed and taxed there to the extent of the personal property owned by him."

In *Babcock v. Board of Equalization*, 65 Ia. 110, 21 N. W. 207, it was said: "Plaintiff was taxable on his moneys and credits in the county of his residence, and at no other place. . . . In 1880, and prior to that, he was, without any question, a resident of Clayton county, and of the township in which the assessment in question was made. In 1877 he owned a residence in the village of Strawberry Point, in Clayton county, in which he resided with his wife. She died in that year, but he continued to keep house until 1879, when he sold his residence, and went to live with his sister in the same village. He owned a farm in Fayette county, which was occupied by a tenant. He continued to live with his sister at Strawberry Point until the fall of 1880, when he removed a portion of his furniture and household effects, and stored them in a room in the house on his farm, but a portion of his goods he left at the residence of his sister. He also took his trunk and valise, containing his wearing apparel, from his sister's place, stating to his sister at the time that he was going to live with his brother, who owned and lived on a farm adjoining the one owned by him in Fayette county. He took his trunk and valise to his brother's house, telling him and his family at the time that he had come to make his home with them. He swears that when he left Strawberry Point on this occasion he fully intended to make his home in Fayette county. He continued to make his home at his brother's until the summer of 1882. He frequently returned in the meantime, however, to Strawberry Point, and on some of these occasions remained there for some time, stopping with his sister. He and his sister were the administrators of the estate of her deceased husband, and the evidence shows that his object in going to Strawberry Point on these occasions was to give attention to the business of settling this estate. In the summer of 1882 he left his brother's place, taking his trunk and clothing with him, and returned to his sister's house. He remained there for some time, when he went east on a visit, and in the fall he was married, and returned to Strawberry Point with his wife, and they continued during the winter to board with his sister. He testified, however, that it was his intention during all this time to return to Fayette county and make his home there. On this state of facts we think it clear that

plaintiff ceased to be a resident of Clayton county in the fall of 1880. He left there at that time, intending to make his home at another place, and also intending not to return again to that county to reside. From that time up to the summer of 1882 he was an actual resident of Fayette county, and his intention was to make that his home. His domicil and residence during this time were certainly in the latter county. And we think it equally clear that he has not lost his residence there. His absence from that county was temporary, and it was his intention to return there and make that his home."

In *King v. Parker*, 73 Ia. 757, 34 N. W. 451, the court said: "The plaintiff claims that on January 1st, 1885, he was not a resident of Montgomery county, but of Burlington, Des Moines county. He so averred in his petition and so testified. The facts are, however, that he had no family, that he did not keep house, and was a mere boarder wherever he was. For the last six or eight years he had spent most of his time at Red Oak, Montgomery county, and had a post-office box there. He does not appear to have voted, nor to have paid any taxes anywhere. According to his testimony, some of his clothing and his trunks remained in Burlington, and were at a private boarding house, where he had at times boarded; but it is not shown what proportion of his clothing was there, or how often he returned to it, or whether he had occasion to return to it at all. The evidence upon this point is so meager that we are led to suspect that the clothing, upon which considerable stress is placed in argument, was a trifling matter, and that the plaintiff seldom went to Burlington for any purpose, and remained there but little when he did go. It does not appear that he had any business there, or any property there which required any attention, or that there was any reason for his being there at any time. His property, as we conclude from the evidence, consisted almost entirely of moneys and credits and real estate, and the latter was in Montgomery and neighboring counties, and he spent his time at Red Oak, because his interests were such that it was more convenient for him to be there. When approached by the assessor of Montgomery county, he gave in a small amount of personal property, as if a resident of the county, and without a suggestion that he was a non-resident, and that his personal property was not properly assessable there. This, to our mind, is a very significant fact. Taking the evidence as a whole, we have reached the conclusion that the plaintiff regarded himself as really a resident of Montgomery county January 1st, 1885, though sometimes claiming to the contrary."

In *Cover v. Hatten*, 136 Ia. 63, 113 N. W. 470, the court said: "The sole question pre-

sented by this appeal is one of fact. It is this: Where was plaintiff's residence and domicil on the first days of January in the years 1899, 1900, 1901, 1902? That his original residence and domicil from the year 1856 down to the year 1899 was in Iowa county is conceded; but it is contended that in December of the year 1898 he changed his residence to Keokuk county, and that he has lived there ever since. The testimony, as we think, shows that plaintiff never changed his original residence and domicil, which is conceded to have been in Iowa county down to the month of December in the year 1898. True, during the very last days of the years in question plaintiff made trips into Keokuk county taking some items of wearing apparel with him and went to the home of his sons, where he remained for a short time, returning finally to Iowa county and to his home, which remained furnished and in order. There he kept a horse and cow for personal use, which he never disposed of; there he had a business which demanded and received his personal attention; there he had a farm which he personally managed; and there to all intents and purposes he made his home. True, he made many declarations to the effect that he had changed his residence to Keokuk county and intended to make that his home, but these seem to have been for taxation purposes only. His conduct belies the claim that he had in fact changed his residence. He never in fact established a residence in Keokuk county, and, in the absence of some evidence of an abandonment of the old, that will continue to be to his residence for the purposes of taxation. He did not vote in either county, nor did he set up an establishment in Keokuk county. His home, the place to which he returned each time after his short visit to the neighboring county on or about January 1st of each year, was in Iowa county. This he never abandoned, save in his mind, and evidently for the purpose of escaping the burdens of taxation. True, he paid taxes in Keokuk county, but this does not relieve him from paying where he should. We shall not set out the testimony upon which we base our conclusions in detail. It is sufficient to state our conclusions, and this we have done."

In *Shirk v. Monmouth Tp. Board of Review*, 137 Ia. 230, 114 N. W. 884, the court held that intent and fact of change of residence were shown by the following facts, which were, therefore, sufficient to constitute a change: "In October, 1905, plaintiff went to Oklahoma with intent, as he claims, to make that then territory his residence, and returned according to his contention for a temporary purpose in February, 1906. During his absence he was assessed on money and credits in the township of Monmouth in Jackson county, and also in the city of Maquoketa in said county. Plaintiff appeared

before the township board of review and also before the city board and objected to said assessments, claiming that he was assessed on the same property in Oklahoma, and that his residence on the 1st day of January, 1906, was in that territory. Each board overruled his objections, and he then appealed to the district court and when the cases were reached in that court they were consolidated and tried together. In the district court plaintiff filed what he called a petition, in which he averred, his nonresidence at the time for which the assessment was made, and asked that the assessments be stricken. Defendant township board of review filed an answer, in which, among other things, it admitted that plaintiff appeared and objected to the assessment upon the ground of non-residence, and because the property had been taxed in another jurisdiction, but it pleaded that pursuant thereto time was given plaintiff to make his showing which he failed and neglected to do, and that for this reason the district court had no jurisdiction of the appeal. To this part of the answer plaintiff demurred because it appeared that the board of review had no jurisdiction over his property. Testimony was then taken upon the issue as to plaintiff's residence, and at the conclusion thereof the case was submitted, resulting in an order sustaining the demurrer and finding that the assessment made for the township was illegal and void. The assessment made by the board of review of the city of Maquoketa was also canceled and set aside. The township board alone appeals." The court said: "The next and final contention is that the trial court was in error in its finding as to plaintiff's residence. Claim is made that he was a resident of this state and of the county and township named on January 1, 1906. Much testimony was taken pro and con upon this proposition. We have gone over the record with care, and see no reason for interfering with the finding of the trial court on this issue. Fact and intent must concur in order that one may gain a residence or domicil in another jurisdiction from that in which we find his original domicile. But both are shown here."

In *Glottelty v. Brown*, 148 Ia. 124, 126 N. W. 797, it was held that there had been no change of residence, within the tax law, since no sufficient intent appeared from the facts in the case, which the court outlined as follows: "He was born in Jefferson county, and lived there until in March, 1906, when he sold the farm upon which he lived, and surrendered the possession thereof. He thereupon rented a house on the same farm, and lived there until in August, 1906. After that, he and his family visited friends in Iowa and Minnesota, and later they went into California, where they remained until the latter part of March, 1907, when they returned to

Jefferson county, Iowa. They rented a house in Fairfield during the summer of that year and in the fall bought a home there, where they have since resided. The appellant did not remove his household goods to California. He did not purchase property there, nor did he vote or pay taxes there. When he went to California, he undoubtedly intended to make that his future home if he found the conditions there satisfactory to himself and family. That he was not well enough pleased with conditions in California to stay there and to make it his permanent home is evidenced by his early return to Iowa."

In *Barhydt v. Cross*, 156 Ia. 271, Ann. Cas. 1915C 792, 136 N. W. 525, 40 L.R.A.(N.S.) 986, the following facts appeared, as stated in the opinion: "Prior to October 8, 1909, T. W. Barhydt resided at No. 420 Iowa street, in the city of Burlington, Iowa; the same being an eleven-room brick house, with brick laundry and barn, on a lot 180x117 feet, where he had lived continuously for over forty years. On October 8, 1909, while still living in that house, he and his wife started on a trip of travel, study, information, and sightseeing around the world via New York, the Suez Canal, Egypt, India, China, Japan, and Hawaii; the destination being San Francisco, Cal. He left his furnished home at Burlington in charge of a caretaker. After leaving New York, the only place where they were in territory controlled by the United States before reaching their destination was at Manila, Philippine Islands, on December 19, 20, and 21, 1909, and at Honolulu January 23 and 24, 1910. They reached San Francisco, Cal., on January 31, 1910, where their water trip ended; and, after resting a few days there, they went direct to Los Angeles and Pasadena, Los Angeles county, Cal., spending part of the time in each place, while Mr. Barhydt looked over different properties he had in view to purchase, first purchasing No. 90 South Grand avenue, Pasadena, late in March. At the same time, he had made an offer on No. 969 San Pasqual street, Pasadena, which was accepted within a few days, both of which properties he owns now. Mr. Barhydt remained in Pasadena until April 15th, when he and his wife returned to Burlington, and such portions of the summer as they were in that city occupied No. 420 Iowa street, their old home, and lived there until December 20, 1910. At the date of the trial below, March 7, 1911, his house and furniture in Burlington were in charge of a caretaker. Prior to this trip around the world, they were accustomed to spend most of their winters in Burlington, taking occasional trips, but never going away before February or March. At the time of taking Mr. Barhydt's deposition (January 30, 1911), he was living at No. 969 San Pasqual street, Pasadena, Cal., hav-

ing occupied that house since December 23, 1910, the house having been purchased in March, 1910; and Mr. Barhydt took possession of the same by placing a caretaker in charge of it on April 22, 1910. Mr. Barhydt testified that he left Iowa, with the purpose and intention of ceasing to have a residence and domicil there, on October 8, 1909. Previous to leaving Burlington, he said he looked up several places in California in view of becoming a resident and citizen of that state." For the year of 1910, an assessment of taxes on personally was made against Barhydt in Burlington, Iowa, which he sought to avoid on the grounds that he was then, and had been since 1909, when he left Burlington for his trip around the world, a resident of California. The court held, however, that until December 23, 1910, when he took up actual residence in California, Barhydt had not legally changed his residence, and that he was, therefore, properly assessed for the year in Burlington, Iowa.

(4) Kentucky.

In *Montgomery v. Lebanon*, 111 Ky. 646, 64 S. W. 509, 54 L.R.A. 914, it appeared that the plaintiff was, and had for many years been, the owner of a farm in Marion county, a few miles from Lebanon; that his only business was that of a farmer; that about two years prior to the institution of the suit, in order to secure the advantages of city schools, he, with his family, and taking many of his household effects, moved to the city of Lebanon and occupied a residence there which he had erected for his wife; that he had been sending his children to the free city schools; that he kept his house on the farm in readiness for the return of his family; and that he continued to perform his duties as a citizen in the precinct in which the farm home was situated, being a regularly appointed and acting surveyor of a public highway in that precinct. Taxes were assessed on the personal property of the plaintiff by the city of Lebanon, which he sought to avoid in the instant litigation. Holding that he was not a resident of Lebanon, and was therefore not liable for the tax, the court said: "In the case at bar it is clear that appellant never became domiciled in Lebanon unless he became so by reason of the facts occurring within two years preceding this litigation. His domicil was certainly in the county, not far from Lebanon, but outside of it. His only business is farming. He cultivates his farm, or has it cultivated. Part of his household goods remain in his house on his farm. He retains the right to remove his family back to his house at any time, and he says he spends most of his time on the farm, and that he removed his family to Lebanon

to stay only while his two children were in the school age, the youngest of whom was sixteen years old at the time of the trial. He says he never exercised any of the privileges of citizenship peculiar to the city, never registered there as a voter. It is true that he sends his children free to the free school in Lebanon, but it does not appear that there is any special municipal tax collected for the support of the free school, and it is claimed for appellant that, inasmuch as he pays his share of the state tax devoted to free schools, he should be allowed to send his children to the free school in whatever district they might for the time being reside. After careful consideration of the law and facts of the case, we have reached the conclusion that the appellant had not, at the time of the trial of this case, lost or abandoned his country domicil. It results, therefore, that the court erred in dismissing his petition."

In *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528, the following facts appeared, as stated by the court: "The defendant resisted payment of the taxes upon the ground that he was not a resident of the city, but that his permanent home was located upon his farm, some three and one-quarter miles from the city of Lebanon, and he was only liable for the tax assessed against the real estate owned by him which he offered to pay. To support his contention as to his residence, the defendant testified that he had a wife and two children; that for many years he had owned a farm of 200 acres about three and one-half miles from Lebanon, on which was located a dwelling house which contained seven rooms, which he had occupied for many years; that on the 20th of October, 1899, he purchased the residence then occupied by him in Lebanon, furnished it comfortably, and shortly thereafter took possession of it with his family, and had continued to reside in it; that after his removal from his farm it was operated by him on shares; that the tenant occupied a portion of the dwelling, but that he reserved three rooms for his own use; that he still got his vegetables, chickens, milk, and household supplies largely from the farm, and that he frequently stayed out at the farm at night during the summer; that he depended upon his farm and stock trading for a living. But upon his cross-examination he was asked this question: 'Mr. Biggers, where, in future, do you expect to make your residence for your family? A. In the country, on some farm. I do not know whether I will make it my farm or not, but I am going away from town.' He admitted that his family had not occupied his country residence during the year 1901, and that he had paid taxes upon his personal property for that year in Lebanon, but had

refused to pay for the year 1901 in consequence of the decision by the court in *Montgomery v. Lebanon*, 111 Ky. 646, 64 S. W. 509, 23 Ky. L. Rep. 891, 54 L.R.A. 914; that he had moved to town because both his own and his wife's health were better than on the farm, and because they wanted the advantages afforded by the city of attending church, etc., that when he moved into the city there was no fixed definite time in his mind of abandoning his town residence. Under this state of facts the trial court dismissed plaintiff's petition, and it has appealed." Distinguishing the instant case from that of *Montgomery v. Lebanon*, 111 Ky. 646, 64 S. W. 509, 54 L.R.A. 914, the court said, after a review of the authorities: "When we apply the law as stated in these authorities to the facts of this case, we find that when appellee left his home in the country and moved to the city of Lebanon he bought a new residence, furnished it comfortably, and took up his abode there, with no fixed or definite intention of returning to his farm. Indeed, he testifies that he does not know that he will return to his home in the country, even if, in the future, he should abandon his residence in the city. He says the hope of improving his health was one of the main inducements in moving to the city, and that his anticipations have been realized; that the opportunity afforded by the city of attending church regularly was an element in determining his choice. All of these circumstances are likely to make his residence in the city permanent, although he testifies that it is at present indefinite. The facts in this case clearly distinguish it from *Montgomery v. City of Lebanon*, supra. In that case it appeared that Montgomery moved to Lebanon for a definite purpose and for a definite time—the education of his two children, the youngest of which was then sixteen years of age; that he continued to act as surveyor of a public highway in the country in the neighborhood of his farm; that he intended to return to his farm as soon as his children had finished their education. It would be better if the questions of fact involved in cases of this character were left to the determination of a jury. But as the parties elected to submit their controversy to the chancellor, and he has decided the question upon its merits without objection, we think it not improper that upon this appeal the matter should be finally disposed of. We have reached the conclusion that under the facts of this case the appellee, J. M. Biggers, was liable for the taxes sued for, and that the trial court erred in not so adjudging."

In *Helm v. Com.* 135 Ky. 392, 122 S. W. 196, the following statement, from which the facts and holding sufficiently appear, was made by the court: "This is a proceeding

commenced in the county court of Fayette county to require the appellant, as trustee for Margaret Helm, to list the personal property of the cestui que trust for taxation as omitted property for the years 1904, 1905, 1906, 1907 and 1908. The merits of the question involved here turn upon whether or not Margaret Helm was domiciled in Fayette county, Ky., during the years mentioned, as is claimed by appellee, or whether her domicile was in Woodford county, as claimed by appellant. The question is one wholly of fact, and is not altogether free from doubt. Margaret Helm's father and mother resided on a large farm in Woodford county, Ky., up to the time of the death of the father. After his death the mother, Mary L. Helm, and her daughter, Margaret, continued to reside in Woodford county, although they were absent therefrom a large part of the time. The farm was rented out, but the mother retained a room in the house which she kept furnished, and occupied from time to time. After the death of her mother, Margaret Helm did not continue to keep a room in the house on the farm, but boarded in Lexington, Ky. She was unmarried, and able financially to live how and where she pleased. Her mother died in 1903, and since that time she has for the most part boarded in Lexington. Whether or not that was her domicile is the question for adjudication. The will of the mother, Mary L. Helm, was probated in Woodford county, and the Security Trust Company was appointed and qualified there as trustee under the will for the daughter, Margaret. It is conceded that each and every year since the appointment of appellant as trustee it has paid state and county taxes on the trust estate in Woodford county, Ky. The question of domicile is nearly, if not always, one of intent, and often very slight circumstances will serve to turn the judgment in favor of one or another of the different places claimed to be the domicile. It is a firmly settled rule of law that every person has a legal domicile somewhere; and it is equally well settled that, where the domicile is once established, an intent to abandon it and adopt a new one must be satisfactorily shown. Now, in the case before us, it is conceded that, up to the time of the death of her mother in 1903, the domicile of the mother and daughter was in Woodford county. To establish the fact that the daughter, after the death of the mother, changed her domicile from Woodford to Fayette county, the commonwealth proved that for the larger part, if not all, of the time since the death of the mother, the daughter has lived in a boarding house in Lexington, and evidence is given of certain statements of the cestui que trust relative to a proposed change of residence to avoid taxation; but this was after this procedure was

commenced and had reference to escape from city taxation. On the other hand, we have the undisputed fact that the trustee has regularly listed the whole estate for taxation in Woodford county, and paid the taxes due thereon each year. We find, also, that Margaret Helm retained her membership in the Episcopal church at Versailles, and has never changed it to a church in Lexington; and it is shown that she told the officers of the trust company that she resided in Woodford county, she having been asked this question for the purpose of ascertaining where her estate should be taxed, and this long before any question of taxation in Fayette county arose. In reaching the proper conclusion as to the domicile of the cestui que trust, her sex and status and all her surroundings should be taken into consideration. Being single, with no family ties it was not necessary for her to own a house; being wealthy, she was not required to go into any business; and, being a female, she might feel a delicacy in keeping a room in the home of her tenant. On the whole, we think that the fact that the estate was listed for taxation during all of the years involved therein in Woodford county, Ky., ought to establish, in the absence of stronger evidence, that Margaret Helm resides in Woodford county."

In *Boyd v. Com.* 149 Ky. 764, Ann. Cas. 1914B 481, 149 S. W. 1022, 42 L.R.A. (N.S.) 580, the following facts appeared, as stated by the court: "Robert Boyd has been for many years a resident of Laurel county, Ky. On the 9th of September, 1903, he stated to his friends that he intended leaving Kentucky and making his home thereafter in Texas. In furtherance of his expressed intention, he left his home, went to Louisville, from there to St. Louis, where he arrived on the 11th of September, and from that point traveled in a leisurely way toward his destination, Bonham, Texas, which point he reached on the 24th of September. He remained in Texas until sometime in the late fall or early winter, and not being in good health returned to Kentucky. He was registered as a legal voter of London, Laurel county, sometime in October, 1904. His property was listed for taxation in the county of Laurel in the falls of 1904, 1905, and 1906, and he died in November, 1906. He frequently expressed an intention of returning to Bonham, Texas, though he never did so. He did not list his property for taxation in the fall of 1903 prior to going to Texas, and the state, through one of its revenue agents, sought to compel him to do so. In the litigation which followed, it appeared that he was the owner of personal property of the value of \$35,000 on September 15, 1903, the trial judge in the county court found, from the evidence, that he was not a resident of Bonham, Texas, but

of Laurel county, Ky., and hence was answerable to the state for taxes upon this unlisted property. He appealed from the judgment of the county court, but, before the case was tried in the circuit, he died. The litigation was continued against his executor, and, upon final hearing, the chancellor was of opinion that the findings in the county court were correct and entered a judgment accordingly. The executor appeals." The court said: "As stated prior to September 9, 1903, he had expressed an intention of leaving Kentucky and making Texas his home. He had arranged with a relative there about lodging, etc., and in furtherance of that expressed intention, left Kentucky on the 9th of September, but did not arrive at his destination in Texas until September 24th, or nine days after the date upon which the property should have been listed for taxation in Kentucky, if liable for taxation here. Upon the 15th of September, he had not reached the border of the state of Texas. So, we are confronted with the naked question: Did his determination to make his home in Texas and his leaving Kentucky, for the purpose of going there, have the effect of giving him a domicile in that state before he actually reached it and settled there? If it did, then the [he] was not, on the 15th of September, a resident of Laurel county, for no principle is better settled than that one cannot have two domiciles at one and the same time. It is also true that every one must have, at all times, a legal residence somewhere. The place of one's birth is his domicile of origin; during his minority, he is without power to change this, though it may be changed for him by his parent, guardian or the person having legal custody of him. After his majority, he is free to change it, and when so changed, the new domicile is termed domicile of choice. One may have several homes, but can have only one legal residence. . . . Applying the rule announced in the . . . cases and texts to the facts in the case at bar, Robert Boyd did not become a resident of Bonham, Texas, until he located there on September 24th. Not having acquired a residence there prior to that date his legal residence necessarily remained in Laurel county, Kentucky, until that time; hence, the property sought to be subjected to taxation, was properly assessable for taxation in that county, and the trial judge correctly so held."

In the case of *Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323, it was held that a removal was temporary and did not constitute a change of legal residence, in view of the facts which appear in the following excerpt from the opinion: "The evidence shows, without contradiction, that Van Meter, in April, 1912, and for many years prior thereto, owned and conducted a large farm in Clark county,

a few miles distant from Winchester. His farm had never been leased or rented, but was managed and operated by servants and employees acting under the direct supervision of Van Meter. On this farm he maintained a furnished home, and this home was occupied by himself and family as a residence during several months each year. For a few years prior to 1910 he had been in the habit of removing with his family, which consisted of his wife and some children of school age, to the city of Lexington, in the fall of the year and remaining there until spring or early summer, for the purpose of enabling his children to attend school in Lexington. When school closed he would return, in company with his family, to his farm. In the fall of 1910 he rented a furnished house in Winchester in which he and his family lived until the spring or summer of 1911, during which time his children attended school in Winchester. At the close of school he returned with his family to his farm and lived there until the fall of 1911, when he again desired to take his family to Winchester in order that his children might more conveniently attend school. Not being able at this time to rent a house in which to live during the school period, he purchased a house in Winchester and furnished it, and in this house he and his family lived from some time in the fall of 1911 until the beginning of summer or close of the school year in 1912, when they returned to his farm. While he lived in Winchester, as well as in Lexington, it was his habit to go to the farm nearly every day for the purpose of superintending its management. He testifies that he never intended to take up his permanent residence in Winchester or to have a permanent residence at any other place than his farm, and that when he left the farm under the circumstances and for the reasons stated, it was always with the intention to return to it. It further appears that in these years all of his choses in action and personal property were listed for assessment in the district in which his farm was located, and in this precinct he always voted. Under this state of facts we think all of the choses in action and personal property owned by Van Meter in April, 1912, had a situs for taxation at his home in the country. He was merely a temporary resident of Winchester. He had never abandoned his home in the country, and when temporarily absent always had in mind the intention to return and did return when the reasons or conditions that induced temporary absence had ended."

In *Saunders v. Flemingsburg*, 163 Ky. 680, 174 S. W. 51, the facts were set forth by the court as follows: "The facts on which plaintiff relies are as follows: For many years he and his family resided in Poplar Plains in

Fleming county. Prior to March 11th, 1911, he sold his home property and gave possession during that month. He and his brother also owned about 570 acres of partnership land lying near Poplar Plains. About the same time that he sold his residence the partnership was dissolved and plaintiff purchased his brother's interest in the land. After leaving Poplar Plains plaintiff lived in Louisville for about three months and attended to certain duties there as a director of the Burley Company. Every two or three weeks he would return to Poplar Plains. When he returned he would sometimes board with Mrs. Samuel and sometimes stayed with his brother-in-law. During this time his wife remained in Louisville and his daughter continued at school at Millersburg. About the middle of July, 1911, they returned to Flemingsburg and took up their residence at Mrs. King's where they occupied furnished rooms and boarded at the hotel. They remained at the King residence in Flemingsburg for about a year. In September, 1911, plaintiff's daughter went to Lynchburg, Va., to school and remained there until after Christmas. She then returned to Flemingsburg. During the month of July, 1912, plaintiff and his wife moved to the property of Miss Ella Belt and at the time this action was filed were still occupying these rooms. While in Flemingsburg plaintiff would frequently make business trips to Lexington and other places. In March, 1914, he purchased a farm in Fayette county. After leaving Poplar Plains he always claimed that place as his home. He never intended to give up that home until he acquired a home elsewhere. He says that he had no intention of taking up his residence in Flemingsburg, but remained there only temporarily until he could find a place that was satisfactory. During the time that he remained in Flemingsburg he frequently stated to various people that he had no intention of making it his permanent residence. His church letter was transferred from Poplar Plains by the local minister at Flemingsburg, who insisted upon his becoming a member of the church at Flemingsburg. He was appointed on a church committee, but resigned because he did not know how long he would remain in Flemingsburg or how long it would be before he would locate permanently in some other place. While in Flemingsburg he was regularly assessed in Poplar Plains and paid his taxes as a resident of that precinct. On the other hand, the city relies on the following facts: The sale of plaintiff's home in Poplar Plains left him without any home there and plaintiff never intended to return to Poplar Plains. After moving to Flemingsburg plaintiff superintended the building of a large warehouse by the Burley Company and when complete became its manager. He also rented a large

stock barn just outside of the city limits where he handled a number of horses, mules, etc. He also purchased several hundred thousand pounds of leaf tobacco upon his own account and in connection with others. He was a money lender and took between thirty and forty mortgages in which he described himself as a resident of Flemingsburg. His church letter was moved to Flemingsburg. After taking up his residence in Flemingsburg he remained there for almost three years and was still there when this suit was filed during the latter part of March, 1914." Holding that the residence of the plaintiff had been changed to Flemingsburg, in spite of his "floating intention" to go somewhere else, the court said: "In the present case it is insisted that though plaintiff had abandoned his former domicile he never acquired a domicile in the city of Flemingsburg with a view of remaining there permanently. He was there merely for a temporary purpose, i. e., until he could invest in a home. It is true that plaintiff so testified. It is also true that his intention declared to others sustains his view. However, it must be remembered that a party's own testimony or declared intention cannot have a controlling effect. Where there is a conflict between the party's intention and his conduct, his conduct will control. . . . Plaintiff admits that he left Poplar Plains with no thought of ever returning there. While he was in Louisville temporarily he acquired no residence there. He returned with his family to Flemingsburg in July, 1911. For nearly three years he remained there and conducted his business. Having abandoned his former domicile with no intention of ever returning and having acquired an actual residence in Flemingsburg, it was not necessary, in order to show that a new domicile had been acquired in Flemingsburg, to prove that plaintiff intended to stay there permanently. Though plaintiff says he was there for temporary purposes only, he admits that he was to remain there until he purchased a new farm and, to say the least, his stay there was for an indefinite length of time. . . . Where a man abandons his former home and takes up a new home with a view of remaining there indefinitely, or until he actually purchases a new farm, and does remain there for almost three years, the fact that he may entertain a 'floating intention' to purchase property and go elsewhere will not be sufficient to show that no change of domicile has taken place. Here plaintiff did not move to Flemingsburg to carry out some particular purpose of a temporary character. He transacted practically all of his business there, and this business was of a large and substantial kind. Under these circumstances, there can be no doubt that he thereby surrendered his legal residence in

the Poplar Plains precinct and acquired a new domicile and legal residence in the city of Flemingsburg."

In *Covington v. Wayne*, 58 S. W. 776, 22 Ky. L. Rep. 826, the court said: "Appellee instituted this action to enjoin the collection of taxes assessed on intangible personal property. He alleges that at the time of the assessment he was a resident citizen of the state of Rhode Island, and has listed all his personal property there for taxation, and had paid taxes there on that property. The allegation of residence in Rhode Island was denied by answer, and this is the sole issue. Upon this issue of fact the only proof is that of appellee. He proved that he is without an active occupation; owns national bank stock and government and other bonds, and his attention is given to real estate owned in Cincinnati, O. He owns a dwelling in Covington, and one in Rhode Island. Usually spends his summers in Rhode Island, his winters in the South and the remaining time at Covington. He testifies that since 1892 he has claimed his home to be in Rhode Island, and has been a nonresident of Kentucky. The lower court held he was not liable for the tax because he was not a citizen. We think this judgment is in conformity with the proof."

In *London v. Boyd*, 77 S. W. 931, 25 Ky. L. Rep. 1337, the court said: "The further contention that appellee was an actual resident of London on the 15th of September, 1901, is not supported by the testimony. He testifies that his legal residence and home was at his farm five miles from the town of London; and that he resided there on the 15th of September, 1901, and had done so for several years previous to that date when in Kentucky; and that he voted in the country precinct which included his farm; that during the greater part of the year for many years he had been absent from Kentucky on account of his health: that the notes and bonds had been left in a safe in an office which belonged to him in the town of London, and which was occupied by one of his nephews, for convenience and safety alone. And whilst a number of witnesses introduced by appellant testified that appellee was frequently seen about his office and on the streets of London, and took his meals at one of the local hotels, and often spent the night there, this testimony was not sufficient to rebut the positive unequivocal statements of appellant as to his actual residence. We, therefore, conclude that the trial court properly found against appellant on both contentions."

(5) Louisiana.

In *State v. Poydras*, 9 La. Ann. 165, the court said: "But conceding that the father of defendants had become a citizen of the

United States and had acquired a domicile or residence in Louisiana, we are of opinion that the residence has been lost, by his residence in France, notwithstanding his repeated declarations of his intention to return and the various causes which it is alleged prevented it. It is in evidence, that being a native of France, he came to this country in the year 1805 or 6, being then 26 or 7 years of age, that in the year 1822 he returned to France and purchased an estate in the department of which he was a native and where his parents resided. How long he remained is not stated, but it appears that he was in Louisiana after the death of his uncle in 1824, engaged as one of his legatees and as agent of the others in arranging the affairs of his estate. In 1885, he returned to France and there married a lady whom he took to his estate near Nantz, where she has resided ever since, neither she, nor either of her children having ever been in this country. Whether he ever after his marriage visited Louisiana more than once is left in some uncertainty. One witness deposes that between the years 35 and 42, he made three visits, while several other witnesses examined by the defense, depose to only one visit made in 1841, after which he returned to France and there remained until his death in 1852. These facts . . . would seem to prove the domicile of deceased to have been in France at the time of his death."

In *New Orleans v. Sheppard*, 10 La. Ann. 268, the defendant was sued for municipal taxes and resisted on the ground that he was a citizen of Virginia. It was held that his residence was in Virginia, of which state he was therefore a citizen, and it was decreed that the cause should be remanded to the United States circuit court, on grounds of diverse citizenship. The court said, the facts sufficiently appearing in the opinion: "The defendant had been for several years a resident and avowedly a citizen of Louisiana. But about six years since, according to the testimony of several witnesses who were intimate with him, and who are not contradicted by other witnesses, the defendant announced his determination to reside on his farm at Shepherdstown, Virginia. From that period they say he began to occupy a dwelling house there, then recently finished, and which is his only domestic establishment. It is kept up by his servants during his temporary absences. He has expended about sixty thousand dollars in the improvement of this estate, and personally superintends the cultivation of the farm. For several years past some of those witnesses say he has uniformly refused to vote in New Orleans when requested to do so, declaring he was no longer a citizen of Louisiana. It appears, however, that the defendant comes annually to New

Orleans in the month of November, and stays until sometime in April, when he returns to his estate in Virginia; that he has large interests in New Orleans, real and personal, but for several years past has ceased to transact a commercial business here. It also appears that since 1847, about which period the intention to change his residence was, according to the witnesses, carried into effect, he is spoken of in a notarial act signed by him, and in three petitions filed by his counsel, as being 'of New Orleans,' or 'residing in New Orleans;' while in the registry of a vessel, he is described as of Shepherdstown, Virginia. In qualifying here as executor of the estate of a wealthy friend, he submitted to the onerous requisition of giving bond under the statute as a nonresident; this however being at a date subsequent to the institution of this suit. Although the circumstances above enumerated are somewhat conflicting, our conclusion from the whole is that the defendant has acquired a domicile in Virginia, *facto et animo*, and is entitled to be considered as a citizen of that state. Shepherdstown is considered by himself and his friends, and has fairly become, his permanent residence and home; New Orleans, on the contrary, a place of temporary sojourn during about five months of the year."

(6) Maine.

In *Judkin v. Reed*, 48 Me. 386, the court said: "It is a question of fact, whether the plaintiff was or was not, on the first day of April, 1855, a resident in Roxbury. And, in my opinion, the evidence reported greatly preponderates in favor of the position that the defendant, on that day, had his legal residence in Roxbury, and was liable to be taxed, and was legally taxed in that town. The case finds that, in 1848, the plaintiff purchased a farm situate partly in Mexico and partly in Roxbury, and that, in 1852, he built a house on said farm, on the line, so that the house stood partly in the town of Mexico and partly in the town of Roxbury. The plaintiff changed his residence from Mexico to Roxbury when he moved into this house in 1852. His domicile was in one or the other of these two towns. It could not be in both. In which, depends upon no one fact, but upon all the facts in the case. . . . Only a small part of the house is in Mexico. The most necessary and indispensable part is in Roxbury, as well as the other buildings and conveniences."

In *Church v. Rowell*, 49 Me. 367, the following facts appeared: "The plaintiff was arrested and imprisoned, on account of the omission to pay a tax assessed upon him in the town of Hartland, for the municipal year 1853; and the action is against the assessors.

upon the ground that he was not an inhabitant of Hartland on May 1, 1853. There was no controversy, that the plaintiff lived with his father, in the town of Hartland, till he was seventeen years of age. Having bought his time, he left his father's house, and lived in several different towns, and was at Hartland very little afterwards, excepting that he was there at one time for about three months, attending school and living at his father's. He went to California, in the year 1850, and, while there, he and several others owned a house, in which they lived, and carried on mining operations. In March or April, in the year 1853, he left California and came to Hartland, where he arrived on April 28, 1853. He staid there from three to five days, after which he went to Canaan; and, on the seventh day of May, 1853, he bought in Canaan a farm, stock, farming tools, and furniture, and afterwards took up his permanent abode in that town." The court held the following instruction to the jury to be correct on those facts: "First, if the plaintiff ever had a home established in the town of Hartland, and if he was in California, or other places, for a specific purpose, intending to return to Hartland, when that purpose should be accomplished, without making either of such places his home for an indefinite period of time, his former residence would not be lost. Otherwise, if he took up his abode in California, or other places, without any present intention to remove therefrom. Second, if he had acquired a home in California, and when he left there to come to Hartland, he departed with the deliberate intention of not returning there, but to abandon it, and he came to Hartland, as to his former established home, and was there on May 1, 1853, having no intention to go to reside in any other particular place as a home, he was subject to taxation in Hartland. If he had acquired a home in California, as before stated, and he left there with the intention of returning, and not to abandon it as a home, and such intention was retained by him on May 1, 1853, he was not a subject of taxation in Hartland, on that day."

In *Littlefield v. Brooks*, 50 Me. 475, the following facts appeared: "In March, 1860, the plaintiff was an inhabitant of Brooks; that on the 30th of March he formed the intention of leaving that town as his place of residence; that he accordingly left that day and went to Monroe; that on the 1st of April he proceeded to Bangor, where he spent the night, and on the 2d of April reached Oldtown, at which place it was his intention to make his residence, when he left Brooks." The court held that since the new residence in Oldtown was not acquired until April 2d, the old residence at Brooks continued until that date and that therefore the plaintiff was rightly taxed in Brooks on April 1st.

Ann. Cas. 1917B.—48.

In *Parsons v. Bangor*, 61 Me. 457, it was held that the plaintiff was, on April 1st 1867, a resident of New York and not of Bangor, Maine, and was, therefore, not taxable in Bangor on that date, the facts appearing as follows: "At the trial he [the plaintiff] rested his case upon his own testimony, which in substance was as follows: That he now resides in Brooklyn; that he resided in Bangor from 1835 to 1867, boarding the last four years of his residence there, with his wife, at the Bangor house, where the rooms they occupied were partially furnished by him; that he resigned his office as cashier of a bank in the city about the middle of March, 1867, in pursuance of an arrangement made the month preceding to take effect April 1st, to go into business in New York city as one of a firm of which his brother-in-law, a resident of Medford, Mass., was to be a member; that he sold a lot in Bangor upon which he had once intended to build, but had not; that he disposed of all his real estate in the city; that he sold his bank stock and vessel property, and some of the remnants of furniture, which he had stored when he gave up housekeeping in 1863; that he made a conditional sale of his horse because he did not know whether he should want to take him or not, and a like conditional sale of his carriage; that he afterwards took them back and had them sent to Massachusetts in the course of the summer. He says at first that he sold all his furniture, that he did not want to move, before going himself, as hereinafter stated, but afterwards admits that some of it might have been sold afterwards. What was finally removed (bedding, pictures, books, and some few articles of furniture) was sent some time in the summer, not to New York but to Lexington, Mass., where he fixed his residence the following autumn. On Saturday morning March 30, he settled his bill at the Bangor House, and, as he says, surrendered his rooms, but said to the landlord that if his wife could retain them for a few weeks she would like to do so, and taking with him nothing but his wearing apparel he started for New York where he arrived Monday morning, April 1, 1867, engaged board and commenced business the same day. He has never since lived in Bangor or in Maine. He was to pay a certain price for his own board and another and different price when his wife, whom he left behind in Bangor, to remain until the boarding place was engaged, should arrive. She never did go to live in New York. His brother-in-law died the same week and that broke up the business arrangement. The plaintiff's wife went to Massachusetts to attend the funeral a week after her husband left Bangor, and was then informed by her husband that it was uncertain under the circumstances whether he remained in New York, and she returned to Bangor in a week or two,

as he says, "to complete her arrangements for removal, with his knowledge and approval." His interest in the New York business ceased in June. The plaintiff was back and forth and between Boston and New York during the summer and his wife remained in Bangor so far as appears, retaining their old quarters at the Bangor House, until they finally settled at Lexington that year. Having testified to these facts upon his examination in chief and cross-examination, on being re-examined by his counsel, he says "on April 1st, I had no intention but that I should live in New York, and when I left her the agreement was that I should live in New York."

In *Stockton v. Staples*, 66 Me. 197, it was held from and after June, 1872, the defendant was a resident, for taxation purposes, of Searsport and not of Stockton, the following facts appearing, as stated by the court: "The defendant is the master of a vessel. Previous to 1871, his home had been in Stockton. In September of that year, he left on a voyage, intending to abandon Stockton and, on his return, to go to Searsport. On his return from sea in June, 1872, he married a resident of Searsport, in that town, and remained there ten or eleven days. He then went to sea with his wife, and returned to Searsport in May, 1874, and then left his family there. He further testified that he had not been in the plaintiff town, except on a visit, since 1871, and that he claimed his home to be in Searsport."

In *Porterfield v. Augusta*, 67 Me. 556, the court held that a change of residence had not been effected by facts which appear in the following quotation from the opinion: "This is an action to recover back a tax of \$130.50, assessed upon Allen Alexander, the plaintiff's intestate, in 1867, and paid by him under protest. It is in evidence that in 1863, Alexander purchased a house in Brooklyn, N. Y., where he resided with his family. Being a master mariner, he sailed from New York, December 1, 1866, on a voyage to the coast of Africa, from which he returned in July, 1867. Some three or four weeks after he sailed, his wife with her children and trunks containing their clothing came to Augusta to visit her mother, and remained with her until she received a telegram from her husband advising her of his arrival at the home port, when she returned to New York. Mr. Alexander was not in Augusta during the year 1867. While Mrs. Alexander was visiting her mother, the house and furniture were left in the charge of a friend, who occupied the house free of rent. There is no proof that Alexander owned any real or personal estate in Augusta, or that he had any intention whatever to change his domicile. He had done no act indicating in the most remote degree such intention. The wife could not

change the domicile of her husband against his will had she desired to do so, and the evidence negatives any such desire on her part."

(7) Maryland.

In *Stoddert v. Ward*, 31 Md. 562, 100 Am. Dec. 83, the following facts appeared: "Previous to the year 1869, the appellant had long been a resident of Charles county, and had been assessed and paid taxes on his property as such. Early in the year 1869 he resolved to change his residence and remove to the city of Baltimore. In his letter to the commissioners, exhibited with the bill of complaint, dated March 22d, 1869, he says, 'I have this day received information (which I have sought for, two months in vain), which determines me on removing to the city of Baltimore;' asking them to apportion his taxes for 1869 and stating that his farm, horses, cattle, etc., will be the only property subject to county taxation. 'The city stock and other personal property attaches to the domicile of the owners.' After this letter he continued in Charles county, with the intention to remove to Baltimore but not actually removing, till the 17th day of April, 1869, when he addressed another letter to the commissioners, upon the subject of the proof required by them with regard to his residence, and stating, 'I should have been residing in Baltimore in person, not in person and intent only, six weeks ago, if my daughter's illness of three weeks and more, following of five weeks, had not detained me here.' In reply to his letter, the commissioners by their clerk, addressed a letter to the appellant, dated April 27th, 1869, saying: 'Your favor of the 17th was to-day submitted to the board of county commissioners, and they direct me to inform you, that your application for a deduction on your taxable property came too late for this year, as they had already held their term for changing and making abatements on the assessable property for the year.' The only additional evidence furnished by the record, as to the time of the actual removal of the appellant to Baltimore, is a letter addressed to the clerk of the board of commissioners by John H. Barnes, register of Baltimore city, dated May 14th, 1869, saying: 'In the month of January of the current year, John T. Stoddert, Esq., of your county, communicated to me by letter his intention to remove to our city immediately, and make it his future home, and register his personal property here. In pursuance of such purpose, he has reported himself to me as a citizen of Baltimore, and his stocks are registered upon our books.'" The court said: "From this statement of facts, as disclosed by the bill and exhibits, it is apparent that the appellant

continued in fact to reside in Charles county until as late as the 27th day of April, or perhaps till some time in May, on or about the 14th. It is also evident that he had the fixed intention to remove to Baltimore as early as the 22d day of March, or perhaps before that time; and the error into which he seems to have fallen, is that in a case like this, the question of domicile depends merely upon intention, and that he ceased to be a citizen of Charles county, liable to taxation as such, so soon as he determined to remove from the county, and communicated that purpose to the commissioners. In this view we think he was in error. In our judgment his change of domicile, so far as it respects the question of taxation, could not be effected by intention alone, and without actual removal. So long as he continued in fact to reside in Charles county, he was liable to taxation as a citizen thereof; and the levy for the year 1869 having been completed while he so continued to reside in the county, and before he removed therefrom, he is chargeable with the taxes assessed for that year, and the injunction was properly refused."

(8) Massachusetts.

In *Lyman v. Fiske*, 17 Pick. 231, 28 Am. Dec. 293, "it appeared that the plaintiff had lived on his farm in Waltham a number of years, and had been taxed and had paid his taxes in that town; that for several years he had been a widower; that for several years he had kept a house in Boston ready furnished, one room of which he had used as a counting-room; that he usually had some person living in the house to take care of it; that he kept a clerk in Boston, and transacted business there, mostly through commission merchants, but sometimes in his own person, or by his clerk; that he spent most of his time in Waltham, but was in the habit of coming often into Boston in the summer season, occasionally spending the night in Boston, but generally returning to Waltham on the same day; and that the house in Boston was managed generally in the same manner, whether he was more or less in the city. At an interview with the assessors of Waltham in 1831, the plaintiff proposed to them to pay the sum of \$300, annually, for his taxes, and alluding to some previous difficulties with them about taxes, observed that he intended always to live and pay taxes in Waltham, unless the assessors bore too hard upon him. In March, 1832, the plaintiff directed his clerk to recall his former housekeeper, who had left his service, and have the house in Boston ready, as he intended to come to Boston that season and pay his taxes there. This direction was obeyed, and the housekeeper was at the house before the middle

of the ensuing April. From that time to the last of April the plaintiff frequently went into the city in the morning and returned at night. On the 30th of April, he went to Boston and staid till the 2d of May, when he returned to Waltham. For about two weeks after this time he was often in Boston, remaining in the day time only; and in June, while some of his grandchildren were ill in Boston, he stayed every other night in the city. Except at this time he was not in Boston in 1832 more than in previous years; but his housekeeper remained there during the rest of the year, except a few weeks in the summer, keeping the house open for his reception, in the same manner as had usually been done before the period in question. From that time till the time of the trial at October term, 1834, the plaintiff had resided at Waltham as before. After the plaintiff went to Boston on the 30th of April, 1832, he sent to the assessors of that city a schedule of his real and personal estate, and was taxed there at the sum of \$1,536.54, which tax he paid." On the foregoing facts the trial court instructed the jury that the plaintiff had a right to elect in which of the places he would be taxed and that if they found that the plaintiff had elected to be taxed in Boston they should find for him. This construction was held to be erroneous in that it withdrew from the jury consideration of all evidence except of the plaintiff's election, and because the question should have been left to the jury on all the facts and circumstances of the case.

In *Thorndike v. Boston*, 1 Metc. 242, "it appeared from the report of Wilde, J., before whom the case was tried, that in the year 1836, the plaintiff was an inhabitant of Boston, but in the month of October in that year, he went with his family to Edinburgh in Scotland, where he lived at lodgings for a short time, and afterwards went to housekeeping, taking a governess into his family for his younger children; that his principal residence, ever since, had been at Edinburgh, but during a part of each year he had lived on an estate, in the neighborhood of that city, which he had hired for a term of years; that in July, 1837, the plaintiff came to Boston on private business, where he remained a few days only, and then returned to his family in Edinburgh. It also appeared that the plaintiff, while a boy, was at school in Edinburgh for four years previous to 1813, and on his return to this country in that year, and on numerous occasions since (the last of which was not more than a year or two before his removal, in 1836) he expressed a great predilection for Edinburgh as a place of residence, and a desire and intention to live there, if he ever should have the means to enable him to do so; that about the time of his departure in 1836, and while making his preparations, he

declared to two of his friends his intention to reside abroad, as long as his wife should be pleased with or like such residence; and that he should stay as long as he could, and if he ever should come back to this country, he should not live in Boston, as he preferred New York or Baltimore; and that in April, 1837, he requested a friend then in Edinburgh, and about to return to Boston, to make a contract, for two years, with a gentleman in this country, to go out to the plaintiff for the purpose of superintending the education of his children. It further appeared, that in the winter previous to the plaintiff's removal, he made a contract for the sale of his mansion house and furniture in Boston, but shortly afterwards procured the contract to be annulled, giving as his reason for so doing that in case of his death in Europe his wife might wish to return to Boston; and before he went away, he let the house and furniture to a tenant, who still occupies it." The court said, in that case: "Guiding ourselves by the rules which have been applied to motions for new trials, the court are of opinion, that a verdict against the plaintiff, upon this evidence, finding that he had not changed his residence and ceased to be an inhabitant of Boston, at the time this tax was assessed, would have been so manifestly against the evidence, that on a motion for a new trial, it could not have been supported."

In *Sears v. Boston*, 1 Metc. 250, the following facts appeared: "The plaintiff, on the 1st of June, 1836, was, and for many years prior to that time, had been, an inhabitant of the city of Boston. On that day, he left said city, with the intention of residing, with his family, in Paris, in the kingdom of France. All the members of his family followed him in September of the same year, and his dwelling house, with its furniture, was leased for one year. The plaintiff, at the time of his departure for France, intended to resume his residence in Boston, but he had not determined, or thought of, the particular time of his return. It was his expectation to be absent three years at least, and to remain, with his family, stationary in Paris, in which city he hired a dwelling house for one year. The state of commercial affairs in this country induced the plaintiff to return to Boston in October, 1837, and his family returned in July, 1838. On the 1st of May, 1837, the plaintiff was assessed, by the city assessors, for his poll and personal estate in the taxes laid for that year, and he paid the tax to the city collector, upon compulsion. Prior to the assessment of said tax, viz., on the 29th of March, 1837, the authorized agent of the plaintiff delivered the following notice to the assessors of said city: 'The undersigned, as agent of David Sears, and in his behalf, informs you that Mr. Sears with his family re-

moved from this city, and leased his mansion house, nearly a year since. He has ever since continued and still continues absent with his family. This notice is given to enable you, before the assessment of taxes for the current year, to understand that Mr. Sears will not consider himself chargeable with taxes as an inhabitant of, or resident in, Boston.'" Upon these facts, and distinguishing *Thorndike v. Boston*, 1 Metc. 242, the court held that the plaintiff had not lost his residence in Boston. The court said: "Taking the facts as submitted to the court, in the present case, we are all of opinion that they indicate a casual and temporary departure of the plaintiff from his place of permanent abode, and that he still continued to be an inhabitant of Boston, liable to be taxed for his poll and personal property. Most of the circumstances point to Boston as the fixed place of his abode. and to Paris as a place of temporary residence. Here he was born and educated, and acquired his property. Here was his dwelling house; and though leased during his absence, it was with the furniture, and for a very short term, so that his family establishment could be resumed on his return. But the very strong circumstance which characterizes this case is, that at the time of the plaintiff's departure, it was his intention to resume his residence in Boston. It indicates that Paris was a place of temporary and not of permanent abode, and that he did not relinquish his domicile, or cease to be an inhabitant of Boston. Had he returned to Boston a few days before a town meeting or an election, we think he would have had a right to attend and vote as an inhabitant, in the same manner as if he had not been absent. He would have been in the same situation, in this respect, as a soldier, or mariner, or other person temporarily absent from his home, for purposes of business or pleasure. The circumstance of the plaintiff's taking a house in Paris for one year—it not appearing he engaged, or that it was his intention to engage, in any business or occupation abroad—is not sufficient to control the other circumstances tending to show that Paris was a place of a temporary visit, and not of permanent residence; that he was there as a sojourner, and not as an inhabitant. Each case of this description depends so much upon its own circumstances, that it is difficult to find authorities for anything more than a few general positions, which are plain and well understood. We think this case is distinguishable from that of *Thorndike v. Boston* [supra] in this, that in that case, at the time of the departure of the plaintiff from Boston, it was his declared intention not to return and resume his residence. This was strengthened by proof of preferences previously and frequently declared in favor of a foreign permanent residence and abode, and by

a declared purpose, after taking up a residence at Edinburgh, not to return to Boston. In the present case, there was, at the time of the departure of the plaintiff from Boston, an intention to return and resume his residence in Boston, though at no fixed period, accompanied with circumstances indicating a temporary and not a permanent residence in Paris. The court are therefore of opinion that the plaintiff continued to be an inhabitant of Boston, liable by law to taxation, and that he is not entitled to recover back the money paid as a tax upon his person and personal property."

In *Otis v. Boston*, 12 Cush. 44, the facts and the conclusion of the court were stated as follows: "Boston was his domicile of origin, his native place, where he passed the earlier years of his life. He was beyond doubt an inhabitant of that place till 1828. He then left Boston, went to New York, took up his abode, and established himself in business there, and beyond doubt acquired a domicile or became an inhabitant there. This continued until his return to Boston in 1840. . . . [He] came to Boston without any definite intent to return to New York; he had his abode there eight years, and until the decease of his father in 1848. He was one of the executors of his father's will, and remained there in the performance of his duties as such, until April, 1849. The question is then brought to this, whether anything was done by Mr. Otis, by which he ceased to be an inhabitant of Boston, between April 5 and May 1, 1849. . . . In April Mr. Otis went to New York, but avowedly to take passage for Europe; it was not with any intent to resume his residence in New York as a home. His frequent intimations that it was his intention, after the decease of his father, to go to Europe, were accompanied with no act having a tendency to carry such an intention into effect. And so when he returned to Boston after the first of May, and sailed thence at the end of that month, he had fixed no place of abode definitely. He sailed for England, but not to stay there. He thought of going to Paris; but with a purpose so indefinite, that he was induced, by the existence of cholera in Paris, to go to Switzerland. Indeed, the most definite declaration of purpose, when he was about taking his departure for Europe was, that he should reside in Paris, or if he returned, should settle in New York. We attach no importance to the fact of his returning to Boston in May, 1849, and sailing from there instead of New York; independently of that circumstance, we think he was an inhabitant to the fifth of April, and that he had not ceased to be an inhabitant of Boston, certainly until he sailed for Europe, after the first day of May. How much longer he may have been considered an inhabitant of Boston, we give no opinion."

In *Cabot v. Boston*, 12 Cush. 52, it was held that the plaintiff was a resident of Brookline and taxable there on May 1, although at that date he was not physically present there on account of sickness, the facts of the case appearing as follows: "It was agreed that the plaintiff for more than twenty years owned a house in the city of Boston, which he occupied with his family five or six months in every year. On the first day of May, 1850, he was remaining in the house, with his wife. For more than twenty years next preceding May 1, 1850, he had owned a house in Brookline. He had occupied this house during said period not less than six months, and generally about seven months every year, commencing his occupation in April and ending it in November. During the rest of the year it was closed. During said twenty years, the plaintiff had paid his yearly tax, and exercised all municipal privileges in Brookline. The five or six months in every year, not spent at his house at Brookline, were passed by the plaintiff in Boston, at the house before mentioned, owned and solely occupied by himself and family. This house was closed during his residence at Brookline, until within a few years last past, when a domestic was left in it for the purpose of protecting the property. Since the year 1840, about eight weeks in every year, in mid-summer, have been passed by the plaintiff at a house on the seashore, at Beverly, owned and furnished by himself. In April, 1850, the usual preparations were made by the plaintiff and his family to remove from Boston to Brookline. Certain articles of furniture, which the plaintiff was in the habit of removing from one house to the other with his change of residence, were removed during the last week in April; the carpets in his house in Boston were taken up, and the other furniture was covered, and placed in its usual condition for the summer, and a domestic was living in the house, who was engaged to remain as aforesaid. The plaintiff, at and before that time, was suffering from a severe illness, but had declared his intention of removing upon the 28th day of April. On that day, in the opinion of his physicians, a removal to Brookline would endanger his health and life, and he sent a letter to the assessors of Brookline, stating the circumstances by which he was detained in Boston, and his intention to continue a citizen of Brookline, taxable there. He remained in Boston, with his wife, with no other attendance than was requisite for his comfort, until after the first day of May. Sometime in May, and as soon as a removal was permitted by his medical attendants, he was removed to his house at Brookline."

In *Cole v. Cheshire*, 1 Gray 441, the court held that a change of residence had been achieved before May 1, by the plaintiff, a

resident of Cheshire, it appearing that he went, on April 27, to Lanesborough, with his trunks and horse, where he engaged a boarding place, telling the person with whom he contracted for board that he would like to come and live with him for one year, and make his home with him, since he intended to leave his father's home in Cheshire; that he was chosen, and served as, surveyor of highways in Lanesborough for two years and paid taxes in that town. The court said: "The question really at issue between the parties and upon which the case was determined was one of domicile, whether the plaintiff on the first day of May, 1851, was an inhabitant of Cheshire, and so liable to taxation in that town. He had been an inhabitant of Cheshire to April 27th 1851, and that domicile continued till he had acquired a new one. He averred that he had acquired such new domicile in Lanesborough. To establish this, he offered evidence to prove, first, a residence *de facto* in Lanesborough on the first of May, 1851, and secondly, that he was there with the intent of making it his home or place of abode. It was not difficult to prove that he was at Lanesborough before the first of May, that he came there with his horse and trunks, and made a contract for board and lodging. But the effect of these acts depended upon the intent and purposes with which they were done. If that intent and purpose were to work on the farm of Chase during the summer and autumn, and return to his father's house and home the ensuing winter, the facts proved would avail the plaintiff nothing. Qualified by such intent and purpose, they were perfectly consistent with the intention of retaining his domicile in Cheshire; they would not only fail to show a change of domicile, but they would exclude the conclusion. The plaintiff must prove that he left Cheshire with the intent of abandoning his old domicile and of acquiring a new one. That intent is manifested by what he does, and by what he says when doing, and sometimes as significantly by what he omits to do or to say. The plaintiff undertook to show, that before he actually went to Lanesborough to reside, he had the purpose of leaving Cheshire, and that he had a negotiation with Chase, with the view of going to live with him, and which finally resulted in his so doing. In this negotiation he stated that it was his purpose not to live with his father after his time was out in April. This negotiation, with the declaration of purpose and intent, which not so much accompanied as made part of it, was a fact competent to be proved. Whether the negotiation was successful, whether it ripened into a contract or not, might affect the weight, but not the competency of the evidence. Such declarations are, within the strictest rule, part of the

res gestae, qualifying and giving character to the principal thing done. The sum of the whole matter simply is, that, to prove his intent to leave his old domicile, the plaintiff offered and was permitted to show that he had been in negotiation for a new one, with the avowed purpose of abandoning the old. It is open, of course, to the defendants, to show that the whole thing is collusive and a sham; but if real and in good faith, it furnishes the kind of evidence of which the case is, in its nature, susceptible, and which, uncontrolled, is satisfactory. It was competent for the plaintiff, with a view to show that the purpose he had formed of abandoning his domicile in Cheshire had been carried into effect, to prove that his domicile still continued in Lanesborough, and to exclude any inference that he had gone there for a temporary object, and with the intent to return after that object should have been attained. To this end he might show that he was a highway surveyor in Lanesborough, or had engaged in any pursuit or calling indicating the design and purpose of making Lanesborough a place of permanent residence."

In *Bulkley v. Williamstown*, 3 Gray 493, the following facts appeared: "Prior to the 1st of May, 1853, the plaintiff, who had previously been an inhabitant of Williamstown, had made preparations for removing from Williamstown to the west, contemplating a residence in Rock Island, Illinois; and that the last week in April he left Williamstown with his family, and took rooms and board in Adams, where he remained for two weeks, and then left his family and went to Rock Island, purchased real estate, located himself, returned for his family and goods, and took them to Rock Island, where he had ever since resided. There was conflicting evidence as to the nature and purpose of the plaintiff's residence in Adams. The trial judges instructed the jury that if the plaintiff had removed from Williamstown before the 1st of May, 1853, with a bona fide intention of abandoning his residence in that town from that time, and with no present intention of ever again making it his home, still he remained an inhabitant of Williamstown, for the purpose of taxation, unless he had, before the 1st of May, acquired a domicile in Adams, by his temporary residence in that town; and that the plaintiff, for the purpose of taxation, retained his residence in Williamstown, until he acquired one elsewhere, although he had, before the 1st of May, abandoned the town of Williamstown, with the intention of never residing there again; and that he would not acquire a domicile in Rock Island till he went there. The verdict was for the defendants and the plaintiff alleged exceptions to these instructions." The court on appeal overruled the exceptions to these instructions, say-

ing: "The question in this case is, where was the plaintiff's domicile on the 1st of May, 1853? Clearly not in Rock Island, Illinois, for he had not taken up his abode there. But he was an inhabitant of Massachusetts, for the purposes of taxation, and of some town, city or district. There being no evidence in regard to any other place but Williamstown and Adams, his domicile or place of residence must have been in one of these, and the question is which of them. Whether he had left Williamstown, with an intent to make Adams his place of abode, was a question of fact, which was left to the jury, who decided that he had not, which appears to us to be right, according to the evidence as reported."

In *Carnoe v. Freetown*, 9 Gray 357, the facts appeared to be that the plaintiff, an inhabitant of Providence, losing his health, gave up his business there and moved, with his wife, to Freetown, Mass., and the following further facts were stated by the reporter: "The plaintiff himself testified that when he removed to Freetown, he did it with the intent of remaining there through the warm weather, and of returning to Providence as early as the September following, to do such business in Providence as he could find to do, and reside there. He remained with his wife in Freetown until September, 1854, when, his health being sufficiently restored, he attempted to get into business in Providence, and for that purpose went there several times during the subsequent fall and winter, but did not succeed in finding business agreeable to him before the 27th of March, 1855, up to which time, except when temporarily absent, he continued to reside with his wife in Freetown. On the 27th of March, 1855, the plaintiff went to Providence and bought the interest in a cotton manufactory in Uxbridge in this state, and on the 2d of April, 1855, entered into a partnership, under which he had since carried on the factory. About the middle of April, 1855, he hired a house in Cumberland, R. I., and made a contract for the carriage from Freetown to Providence, as soon as possible, of his furniture and his mother's, which were put on board a vessel and carried out of the river on the first day of May, the earliest day upon which the goods could be conveniently put on board the vessel on account of the state of the tides; and a few days afterwards, the plaintiff's wife went to Cumberland, and the plaintiff and his family had since occupied said house. From the 27th of March, 1855, to the 1st of May, 1855, the plaintiff was a part of the time in Providence, a part of the time in Uxbridge, and a part of the time in Freetown, and on said first day of May was in Freetown. The plaintiff also testified that at the time of entering into his present business, on the 27th of March, 1855, he intended,

as soon as he could make arrangements, to remove his family to Cumberland, and reside there. It was also shown by the plaintiff, that for the year 1854 he was taxed in Providence, but did not pay that tax until June, 1855, after the defendants had assessed him for the year 1855 in Freetown; and that in August, 1855, he was assessed as a resident of Cumberland." Holding that the plaintiff was domiciled for taxation in Freetown on May 1, the court said: "On the 1st of May, 1855, when this tax was assessed, the plaintiff had ceased to be domiciled in Providence, because he had in fact quitted it, and, as early certainly as March, abandoned his intention to return to it. He had not acquired a domicile in Uxbridge or Cumberland, because he had not removed there, nor exercised any right of citizenship there; he had only an intention of removing. He was actually in person in Freetown on the 1st of May, and had no domicile for taxation elsewhere. He was therefore taxable in Freetown."

In *Briggs v. Rochester*, 16 Gray 337, the agreed facts were as follows: "That in April 1858 the plaintiff, who was then an inhabitant of the town of Rochester, removed out of the state, with the intention not only not to return and have his home in that town, but also with the intention to make his future abode and home in Motthaven in the state of New York; but that, before he took up his intended new abode, he stopped at the house of his son in the city of New York 'till and including the 1st of May, 1858;' and that shortly afterwards he went to Motthaven, where he has since resided. On these facts the question is, whether the plaintiff, on the said first of May, was an inhabitant of the town of Rochester, within the meaning of the ninth section of chapter 7 of the Revised Statutes, which directs that 'personal estate shall be assessed to the owner in the town where he shall be an inhabitant on the first day of May.'" On those facts the court held that the plaintiff was not an inhabitant of Rochester on May 1, 1858, having acquired a new domicile in New York.

In *Kirkland v. Whately*, 4 Allen 462, the court held that the domicile of origin of an infant has been lost and a new domicile acquired, by facts which appeared in the agreed statement as follows: "Isaac was born in 1845, and has been blind for many years. His father died in 1852 and his mother in 1854, both having their domicile in Northampton. His paternal grandfather resides in Northampton, but has had no wife for many years. His maternal grandfather and grandmother reside in Whately. Until his mother's death, the family of his father lived in the same house with his paternal grandfather, but after her death, the grandfather having no family except hired help, he ceased to live

there. Controversies arose as to where he should remain, and suits as to matters connected with his estate. In April, 1857, these controversies were arranged, and Isaac by his guardian's direction was brought to his grandfather's house in Whately, where he has ever since remained, considering it as his home. The guardian has regularly paid for his board there. Since the death of his mother, he has had no place in Northampton to which he has habitually resorted or gone as a home, but occasionally has been to see his relations there; and the guardian has not reserved or provided for him any boarding place or rooms at Northampton, or had any such place in his mind. His friends and attachments are almost entirely in the family of his grandfather in Whately, and he has been living there without any plan or expectation of removing to any other place. He owns real estate to a large amount in Northampton, which is managed by the guardian; and the guardian has been taxed in Northampton every year since his appointment, in 1853, for personal estate of Isaac, and has paid the taxes without objection till last year. He has also been taxed in Whately since 1859, but has paid no tax there, except under protest. When Isaac first went to Whately, the guardian intended that he should merely make a visit of a few months there, and afterwards go to some school out of Whately, and so informed him, and afterwards endeavored at various times to induce him to go to some such school, but without success. The guardian has allowed him to remain in Whately, because Isaac wished it; and has no definite intention to allow him to remain, or to remove him."

In *Colton v. Longmeadow*, 12 Allen 598, the following facts appeared from the agreed statement: "On the 1st of April, 1864, the plaintiff was and always had been a resident of Longmeadow, and was subject to taxation there. That night, his buildings were destroyed by fire, and on the 12th of April he sold all his real and most of his personal estate in the town, and at various times during that month declared his intention of leaving Longmeadow and going to Philadelphia, and so informed one of the assessors. He left Longmeadow for Philadelphia on the 28th of April; reached Hartford, in Connecticut, on the 30th of April, where he was detained a few days by lameness; and then proceeded directly to Philadelphia, where he has since resided. On the 1st of May he was not in Massachusetts, but was in Connecticut, on his way to Philadelphia. Before the first of May, he had determined to leave Longmeadow, with the fixed intention not to return there to reside; and had the intention to go to Philadelphia to reside." The court said: "The plaintiff on the first day of May 1864 had abandoned his domicile in this state,

and had gone beyond its limits, not intending to return here to reside, but intending to take up his residence in the state of Pennsylvania, where he has ever since resided. On said 1st of May he was in itinere, but he had absolutely abandoned his residence in this state, and had departed therefrom. If he had still continued within the state he would have been liable to taxation in Longmeadow, although he had actually left that town. . . . But having departed beyond the limits of the commonwealth on his way to his new place of residence, he had ceased to be an inhabitant of Longmeadow on the first day of May, 1864, so as to be taxable there within the meaning of Gen. Sts. c. 11, § 26."

In *Bangs v. Brewster*, 111 Mass. 382, the court set forth the essential facts and stated their holding as follows: "The question is as to the application of this rule to the facts of this case. The plaintiff was a shipmaster, most of whose time was spent at sea. He went to sea in November, 1867, taking his wife with him, and in December, 1868, he sent his wife to Orleans, and she arrived there in February, 1869. He did not arrive at Orleans until July, 1869, so that he was not personally present in Orleans on May 1, 1869. The special findings of the jury settle conclusively that when he went to sea in November, 1867, he had the definite intent to make Orleans his home, and that in December, 1868, he sent his wife to Orleans in pursuance of that intent. We think the jury were justified in finding that his domicile was in Orleans on the first of May. By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicile. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival. We think the learned judge who presided at the trial rightly refused to rule, as requested, that the plaintiff had not shown such a personal presence in Orleans as the law required in order to effect a change of domicile, and that the instructions given upon this subject, when applied to the facts of the case, were correct."

Where a person domiciled in Boston, left there in 1876, going to Europe with his family to reside for an indefinite length of time, intending never to return to Boston, but to return to another place of domicile, selected another place of residence while in Europe, before May 1, 1877, but did not return to America and take up residence in the place of his selection until 1879, it was held that his domicile in Boston continued to adhere to him, for purposes of taxation on May 1, 1877. *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424.

In *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311, it appeared that the plaintiff was domiciled in Waltham,

Mass., until April 28, 1890, when he started for Chicago, arriving the following day and afterwards dwelling and having his residence there. It was held that his residence had been changed to Chicago, on evidence which was stated as follows: "The plaintiff was asked, 'Did you have any talk with the assessors prior to May 1, 1890, with regard to your residence?' His answer was, 'I didn't see them together; I saw the chairman, Mr. Smith, first; I told him I should change my residence to Chicago. . . . When I told him that, 'Do you require me to give you writing to that effect?' I asked him at the time. He hesitated and said, 'You say you shall change?'" "Yes, sir, I shall change," I said. Then he said, "No, there is no need of your giving me a writing; you have a right to change your residence if you like." It appeared by other testimony that this conversation was just before he started for Chicago. One Underwood, connected with the Chicago firm to which the plaintiff belonged, was asked in the seventh interrogatory of his deposition: 'Did the plaintiff at any time within these years (1889, 1890), and prior to September 1st, 1890, have any conversation or correspondence with you, or in your presence, in regard to making or having made Chicago his residence?' The answer was: 'He had a number of conversations with me on that point, and also had correspondence. He said to me that he desired to make Chicago his home; that his family was scattered, and his business interests were larger in Chicago and Omaha than elsewhere; that he had elected and decided to make a change of residence, and solicited my advice and assistance as to what steps were necessary to bring about such a result; he told me he would like to see the assessor here (Chicago) to announce his intention to become a citizen of Chicago. I told him I did not think that would be of any use; that he was an American citizen, and had a perfect right to elect his place of residence anywhere in the country if he did it in good faith and did not take any action at any other place than Chicago in the way of voting, and so on, which would show that he made that particular place his home. He said he had decided to make Chicago his home, and that he should act under that decision, and wanted to take any steps that were necessary to carry that resolution in force.' The eighth interrogatory was the same as the seventh, except that 'May 1st, 1890,' was substituted for 'September 1st, 1890.' The answer was: 'I had a conversation with Mr. Viles prior to the 1st of May, 1890, regarding his taking up his residence in Chicago, and making it his home. He told me that he had determined to do so, and should take all necessary steps possible to conform to that decision. He asked me what

it was necessary for him to do. He said he had notified his friends East that he had taken steps, and had told people here also, and that it was his decision to become a citizen of the state of Illinois, and give up his citizenship in Massachusetts.' It appeared by other testimony that these conversations were late in April and early in May, 1890."

In *Dallinger v. Richardson*, 176 Mass. 77, 57 N. E. 224, it was held that a finding by the court that for many years prior to his death the deceased was a resident of Washington and not of Cambridge on the following facts: "The defendants' testator, William A. Richardson, died in Washington, D. C., on October 19, 1896, leaving a will in which he described himself as 'a citizen and inhabitant of Cambridge in the county of Middlesex and commonwealth of Massachusetts.' The defendants applied to the probate court for the county of Middlesex for probate of the will by a petition which described the deceased as 'William A. Richardson, who last dwelt in Cambridge,' and the decree admitting the will to probate described the testator as 'late of Cambridge.' Evidence was offered and admitted, subject to the exception of the plaintiff, that the deceased was born, educated, and admitted to the bar in this commonwealth; that he resided for several years in Lowell, during which time he held offices under the city and the commonwealth; that he was appointed judge of probate and insolvency for the county of Middlesex, and then removed his residence to Cambridge, where he acquired a domicile and lived in a house which he owned. In 1872 he was appointed assistant secretary of the treasury of the United States, and resigned his office of judge of probate and insolvency. In 1873 he was appointed secretary of the treasury. While holding the two offices last named he retained his domicile and residence in Cambridge. In 1874 he was appointed a judge of the court of claims, and held that office until 1885, when he was appointed chief justice of the same court, and continued to hold that office until his death. In 1875 the deceased sold his house in Cambridge, and thereafter had no property of any kind in that city, performed no acts of citizenship therein, never remained there over night, and visited it only three or four times when he attended the reunion of his class of Commencement Day at Harvard University, and when he deposited his will in the registry of probate. In 1885 he erected a house in Washington, where he lived with his family until his death. He also purchased a burial lot there, in which the bodies of members of his family were buried. He told the register of probate for the county of Middlesex, in June, 1892, that he had never given up his residence in Cambridge, and did not consider himself

a resident of Washington, and he made some other declarations tending to show that his domicile was in Washington. The defendants, after the assessment of the taxes, gave notice in writing to the assessors of Cambridge that pursuant to an order of the probate court they had paid over the estate of the testator to trustees appointed under the will by the supreme court of the District of Columbia, and that they had no property whatsoever in their possession as executors, nor had any part been paid or distributed to any persons who were inhabitants of Massachusetts. The plaintiff offered in rebuttal of the foregoing evidence various conveyances of land by the deceased between 1885 and 1896, in which he described himself as 'of Cambridge, Massachusetts, chief justice of the court of claims at Washington, D. C.,' and a receipt given to him upon the deposit of his will in the registry of probate in which he was described as of Cambridge."

In *Gardiner v. Brookline*, 181 Mass. 162, 63 N. E. 397, it was held that the trial judge was warranted in finding as a matter of law that the plaintiff had changed his legal residence from Brookline to Newcastle, on the following agreed facts: "The judge has found as a fact that the petitioner left Brookline in 1887, and went to Newcastle, intending to make the last named place his permanent home, and that he did this with an honest intention to change his domicile or permanent residence from Brookline to Newcastle, with the intention also of making the latter the place of his permanent and real home, as distinguished from a mere place of summer resort, and further that, down to the time of the assessment of the tax in 1899, the petitioner had not returned to Brookline with the intention of leaving Newcastle and making Brookline his permanent home. . . . On May 1, 1899, the petitioner was the owner of a house and estate in Brookline, of about sixty-six acres, and had owned the same since 1883. Until 1887, he had made it his legal residence. For several years before that time he had passed a short time in Newcastle every summer, not more than eight weeks in any year. In 1889, he bought and has since owned an estate in Newcastle, of eleven and a half acres, on which are a house, stable, and farm barn. This house, as well as the house in Brookline, is fully furnished and suitable for winter and summer use. The petitioner has a library and family portraits in each house; but the main library and collection of pictures is in Brookline. From 1887 to 1889, the petitioner, with his family, lived, while at Newcastle, in a house given him rent free by his father-in-law. Since 1883, the petitioner has belonged to a church at Newcastle, and has neither attended nor belonged to a church at Brookline, although he is a

member of a church in Boston. From 1887, the house at Brookline has been closed in the summer months, except that a woman, acting as caretaker, has slept in the rear of the house; and the petitioner did not spend any time at Brookline while his family was at Newcastle. In March, 1887, the petitioner notified the selectmen of Newcastle of his intention to become a citizen of that town, and in April he notified the authorities of Brookline of his change of residence, moved himself and family to Newcastle, and was occupying his house there on the last day of April and the first day of May in that year. It was admitted that the plaintiff would testify that he removed to Newcastle with the intention of making that house his home. He voted in Newcastle at every presidential and state election from 1887 to the present time. From April, 1887, to July, 1889, the petitioner went to Newcastle with his family each year in April, remaining there several weeks. He was again in Newcastle every summer for two or three months, and off and on at other times in each year. From July, 1889, to 1893, he was at Newcastle with his family one half and more of each year. Since 1893, he and his family have been in Newcastle every summer, from July to October or later; in 1897, from July until late in November; also in December, 1898, and in January, 1899. In the last named month he returned to Brookline and occupied his house there until about July 1, 1899. From 1887 to 1894, both inclusive, the petitioner's name appears in the Boston Directory as follows: 'Charles P. Gardiner, 2 Pemberton Sq. room 13. h. at Brookline.' From 1895 to 1899, both inclusive, the petitioner's name appears in said directory as follows: 'Charles P. Gardiner, 19 Pemberton Sq. room 13, h. at Brookline.' The petitioner knew that his name so appeared, and made no objection."

In *Dickinson v. Brookline*, 181 Mass. 195, 63 N. E. 331, 92 Am. St. Rep. 407, the plaintiff sought recovery of taxes paid under protest in Brookline, claiming to be a resident of Cohasset. The court held that the plaintiff was a resident of Brookline, and properly taxable there, upon facts which appeared as follows: "The plaintiff was domiciled in Boston. In or before April, 1890, he probably changed his domicile to Cohasset, and for some years spent four or five summer months in the former place and the rest of the year in Brookline. Since 1895, or 1896, he has let his Cohasset house and has permanently inhabited only the Brookline house, which seems to be the more important structure of the two, and stands in the name of the plaintiff's wife. He has continued to vote in Cohasset, and has intended, so far as consistent with the facts, to remain an inhabitant of Cohasset."

In *Barron v. Boston*, 187 Mass. 168, 72 N. E. 951, which was an action to recover back a personal property and poll tax assessed against the plaintiff in Boston, March 1, 1901, the court held that the ruling of the trial judge was error and that the residence of the plaintiff was Cohasset, not Boston, on that date, the facts appearing, as set out in the opinion, as follows: "He owned a house in Boston which he occupied a part of the time. He also owned a large estate in Cohasset, consisting of a dwelling house containing twenty rooms, and a farm house, stables, and a cow house. This he occupied a considerable part of the time in each year. Early in the year 1900 he was a resident of Boston, but he stayed with his family at the house in Cohasset from May to December in that year. The judge who heard the case found as follows: 'That in the fall of 1900 Mr. Barron, having formed the intention of then and there becoming a resident of Cohasset and while living in his house at Cohasset and before his return to Boston, gave notice to the assessors of the city of Boston that he was a resident of Cohasset; that Mr. Barron sometime after this notice was given—in December—moved to his Boston house and was not in Cohasset again until June, but his intention of remaining a resident of Cohasset continued uninterrupted; that he left for abroad in April and before leaving notified his family to be in Cohasset by the first of May, but that as a fact they were not there until shortly after the first of May. I further found as a fact that Mr. Barron did not notify the assessors of the town of Cohasset of his having become a resident there until the summer, in June, 1901, and that Mr. Barron had not carried out his intention of becoming a resident of Cohasset by any sufficient overt act; and on these facts I ruled and found the plaintiff was a resident of the city of Boston on May first, 1901, and not of Cohasset.'"

In *Babcock v. Slater*, 212 Mass. 434, 99 N. E. 173, it was held that the trial judge was warranted in finding that the plaintiff was domiciled in Milton on May 1, 1906, on facts which were stated as follows: "She [the plaintiff] had inherited from a parent an undivided interest in a large estate in Milton, and afterward acquired the whole title therein. Upon this estate she built a large and costly house, furnished it completely, and appears to have resided there when she was not traveling or temporarily sojourning in other places. She paid without objection taxes assessed upon her general personal estate in Milton during the years 1901 to 1905, inclusive. She paid no taxes upon her general personal estate in Webster, which she now alleges to have been her domicile, until the year 1908, and only during the years 1905, 1906, and 1907 a small sum on furniture and horses,

which seem to have been assessed to her with real estate which she owned in that town. R. L. c. 12, sec. 23, cl. 3. She made only rare and brief visits to her house in that town. She went to Webster on March 18, 1905, to arrange for the opening of her house for occupation in the early spring, and she then caused herself to be registered as a voter in that town. Her stay however was very short, apparently only for that day. Soon after the middle of the next April she again went to Webster, and remained there until about May 13, when she returned to Milton, and there abode until about the first day of June, when she went to Bar Harbor. From that summer resort she returned to Milton, and remained there until about January 30, 1906, when she went to Washington, remaining there until May 16, 1906. In April, 1905, she was elected a trustee of the public library in Webster for the term of three years, and she accepted this office and acted as such trustee. She testified however that she never had voted in Webster, and never had attended a meeting of the trustees of the library. We find no evidence that before her visits to Webster in 1905 she spent any whole day or night in that town after 1901, except her testimony that she never had been in America on Memorial Day without going to the Webster cemetery. She received in 1904 two assignments of mortgages in which she was described as of Milton. When she went to Webster in April, 1905, she had a piano and some plants and furniture moved thither from her house in Milton, and afterwards brought back to Milton. She issued cards for 'at homes' in Milton, but never since 1899 had any cards with Webster as an address upon them."

(9) Michigan.

In *Beecher v. Detroit*, 114 Mich. 228, 72 N. W. 206, 4 Detroit L. N. 579, it appeared concerning the plaintiff: "That in 1882 he went to Negaunee, to take charge of the property and business of his father there. He continued in this employment, living in a house owned by his father, until the year 1892, when his father died, leaving a large estate in the city of Detroit; and, as he was one of the administrators of his father's estate, he came to Detroit that year, with his wife and children. Two years after coming to Detroit, he built a house costing \$45,000 on a lot purchased for \$35,000. This house was completed, so that he moved into it with his family, in January, 1894, and still continues to live in it. Relator claimed that his residence is at Negaunee. He gave testimony tending to show that from the time he went to Negaunee till the present he has voted there; that at the time of leaving

Negaunee he stated publicly that he had no intention of changing his residence to Detroit, and has returned twice a year to Negaunee to vote; that, after coming to Detroit, he took out two policies of life insurance in both of which he is described as of Negaunee; that he offered his house in Detroit for sale, saying his health was such that he should not leave Negaunee, and had never intended to leave it, and was only temporarily in Detroit; that he should return to Negaunee as soon as the estate of his father was closed up." It was held by the court that the foregoing facts justified the conclusion of the jury that the plaintiff was domiciled in Detroit. The court said: "If we were to decide the question here de novo, I am strongly of the opinion that the great weight of the evidence is in favor of the proposition that the relator intended, when he left Negaunee, to return there, and that his residence in Detroit was intended as temporary only, and to continue only during the time necessary to settle up his father's estate. But the case is before us on certiorari, and the question to be determined is whether there is any evidence from which the jury or the court could legitimately find that his intention was to fix his domicile in Detroit. The fact is established that he actually resides there. He has built an expensive house. It appears that in building it his wife made certain suggestions as to the internal arrangements, and evidently with a view of making it a home. The house in Negaunee where he lived belonged to his father, and the only house which he actually owns is the one built by him in Detroit. It does not appear that he was ever assessed upon this large amount of personal property in Negaunee. He does not suggest that he is not possessed of it, or that it is not property subject to taxation. The question was fully submitted to the jury, and their finding is against him upon the question of fact."

(10) Missouri.

In *State v. Renshaw*, 166 Mo. 682, 685, 688, 66 S. W. 953, the court said: "The defendant contends that there is no substantial evidence that he ever was a resident of Audrain county, and, therefore, there is no fact to support the verdict, which is claimed to be the result of passion and prejudice. The defendant's evidence tended to show that for about twenty-five years prior to 1886 he lived in Callaway county; that about 1886 he moved to St. Louis, where he remained until 1892. and while he lived in St. Louis he voted once or twice; that he had a married daughter, who lived in Howardville, Albemarle county, Virginia, and that in 1892, he and his wife visited her, and

stayed with her as her guests during 1892 and 1893, but that during 1894 he went to his daughter's said home to live permanently, and lived there during the year 1894 and during the year 1895, until September 1, 1895, when he moved to Charlottesville, Albemarle county, Virginia, rented a house, remained there until 1898, when he returned to his daughter's home in Howardville, where he remained a short time, and then moved again to Charlottesville, where he has resided ever since; that he first registered as a voter in Virginia on March 10, 1896; attended the State Democratic Convention in 1896, as a delegate from Charlottesville; that he was assessed for taxes in Virginia for the year 1895; that in 1896 he made a return of personal property for taxes, in Charlottesville, Virginia, and was listed or assessed in 1897, but made no return, and was not assessed for 1898. The evidence for the plaintiff showed that on March 31, 1894, the defendant came to Mexico, Audrain county, and boarded at the Ringo Hotel from that date until December 31, 1894, and that he returned on May 2, 1895, and remained until the latter part of July, 1895; that in 1894 he was in Callaway county, and the assessor of that county tried to assess him, but the defendant refused to be assessed in Callaway county, and said, 'My home is in Mexico;' that in 1896 when the assessor in Virginia assessed him the defendant said he was assessed in Missouri; that in 1895 the defendant again told the former assessor of Callaway county that he was living in Mexico; that after June 1, 1895, the assessor of Audrain county called upon the defendant, at the Mexico Savings Bank, where he usually transacted his business, through which bank he collected interest on loans he had outstanding in Audrain county, and in which bank he kept a deposit, and furnished him an assessment blank and asked him to make a return; that the defendant refused to do so, and said he was not a resident of Audrain county; that thereupon the assessor examined the records of the county and found that the defendant held mortgages amounting to \$34,550 for money he had loaned in that county; that thereupon the assessor assessed him for that amount of personal property, and the defendant refusing to pay, this suit was brought. Upon this showing it cannot be said that there is no evidence to support the verdict of the jury, finding that on June 1, 1895, the defendant was a resident of Audrain county, but on the contrary the great weight of the evidence and the physical facts support the finding of the jury. Thus, on the defendant's showing he was a visitor at his daughter's home in Virginia during the years 1892 and 1893, and in 1894 he determined to take up his residence there permanently,

and that he lived there in 1894 and 1895. As against this is the fact that he was actually in Mexico, boarding at the Ringo Hotel, from March 31st to May 22nd and from November 15th to December 31st, 1894, and also his own declaration to the assessor in 1894 that his home was in Mexico, and the fact that in 1895 he was actually in Mexico, stopping at said hotel, at intervals from May until August 23, 1895, and again told the ex-collector of Callaway county that he was still living in Mexico. And in addition, the further fact that he rented a house for the first time in Virginia on September 1, 1895, and became a registered voter there for the first time on March 10, 1896, and furthermore told the Virginia assessor in 1895 that he was assessed in Missouri. This being the state of the evidence, the finding of fact by the jury that the defendant was a resident of Audrain county on June 1, 1895, will not be reviewed or disturbed by this court."

In *State v. Hamilton*, 202 Mo. 377, 100 S. W. 609, it appeared that the defendant, a minor, had been domiciled in the Troy School District prior to the death of his parents, that after their death he moved to Lincoln county, School District No. 6, living there with his aunt for over twelve years, and that the curator or guardian of the estate of the defendant lived in still another school district. It was held that the defendant could not be taxed, upon this state of facts, in the Troy School District.

In *State v. Shepherd*, 218 Mo. 656, 117 S. W. 1169, 131 Am. St. Rep. 568, the following facts appeared, as stated by the court: "The uncontradicted evidence in the case shows, and the court found, that at the time the assessment of the taxes in question was made, the appellant was a resident of School District Fourteen, and not of Plattsburg School District, the one in which the assessment was made, and that during the years 1901 and 1902, and for many years prior thereto, appellant had kept a furnished room in his house on his farm, situate in said District Number Fourteen, which he occupied whenever there, but that during the greater part of those years he generally and continuously lodged at night with his parents at their home in the city of Plattsburg, which constitutes the Plattsburg School District. The evidence also conclusively shows that the sole reason for appellant's lodging with his parents was because they were old, sickly and helpless, both of whom died during those years, and he considered it his duty to stay with them at nights in order to minister unto their wants and necessities, but always returned every morning to his farm in said District Fourteen for the purpose of looking after his farm and caring for his stock. The evidence also shows that during said years

he always considered and claimed his residence to be in said District Fourteen, and voted there, and never claimed Plattsburg to be his home." On this state of facts it was held that the defendant was a resident of School District Fourteen and was not taxable in the Plattsburg School District.

(11) Nebraska.

In *White v. Lincoln*, 79 Neb. 153, 112 N. W. 369, the court said: "Appellant's first contention is that he was not a resident of the city of Lincoln on April 1, 1905, and could not be legally taxed for that year. This insistence presents a question of fact which the board of equalization, as well as the district court, has determined adversely to appellant. A review of the record constrains us to adopt their finding as the only reasonable inference to be drawn from the evidence. Appellant's testimony discloses that he was a resident of the city of Lincoln on January 1, 1905, and that he never removed from Lincoln, though absent therefrom with his family from the latter part of March until June 1, 1905—a part of the time visiting in Butler county and a part of the time boarding with relatives in University Place, a city conveniently near Lincoln. On June 1, 1905, he returned to Lincoln."

(12) Nevada.

In *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823, the plaintiff sought to avoid taxes assessed on personalty in Nevada. He claimed that his residence was in Placer county, California. But he had no business there, and only a little real property. All his securities were in Nevada. It appeared in evidence that he had avoided taxation in California by declaring that his property was in Nevada. Holding that his personal property was taxable in Nevada, in the absence of a showing that it had been taxed in California, the court said: "We are of the opinion that for the purposes of taxation the assessment of the persons and property whose locality can be readily changed must of necessity refer to the situs of the property at some particular time or day, as, for instance, our statute provides 'that the lien for taxes shall attach on all property within the state on the first Monday in March in each year.' From the plaintiff's own testimony he has had no fixed residence or place of business. Since the year 1867 he has led a roving life. During the years 1888 and 1889 three-fourths of his time was spent in Washoe county, attending to his business of loaning and collecting his money. All his securities were there, and in fact from the evidence we should infer that they were always kept in Washoe county. He owned real estate in Washoe county of

the value of five thousand dollars. Had a room in his own house rented during those two years. The total value of property assessed to him at Yankee Jim's, Placer county, Cal., was but one hundred dollars, and consisted of his house and lot. When the assessor of Placer county asked plaintiff for a statement of his personal property for the year 1889 he gave in this house, and when asked if he had no other property subject to taxation in California plaintiff answered: 'No, all my property is situated in the state of Nevada.' He tells the officers of Washoe county, Nevada, 'Yes, I have thirty-five thousand and eight hundred dollars in collaterals more than I have given a list of, but you cannot assess them to me, because I reside in California.' Under this state of the case it was proper for the judge to take into consideration the character of the plaintiff's residence during the assessing period of the year 1889, if he had any; and if he used such claim of residence merely as a pretext to escape the payment of taxes the inference would be in view of the fact that he owed a public duty to pay taxes somewhere, and as from his own statements he did not have a fixed permanent residence or place of business, and as every man is presumed to intend the natural consequences of his own voluntary acts and declarations, it follows that the plaintiff's claim of residence in California was to escape taxation in Nevada. And his statement to the assessor of Placer county, Cal., was true, because all his securities were in Nevada, but such statement was made to said assessor to avoid the payment of taxes on his collaterals in the state of California. Therefore his said claim of residence and his statement to the assessor in Placer county was claimed and made to escape taxation in both states, and to avoid the performance of a public duty by contributing his just proportion to the support of the government. He will not be permitted to take advantage of his own wrong. The books are full of cases defining residence and nonresidence. But we fail to find any where the question of taxation has arisen, but what the courts hold that it must be a fixed and definite one, not roaming from place to place, and the party must show that he pays his taxes in that place."

(13) New Hampshire.

In *Moore v. Wilkins*, 10 N. H. 452, the following facts were agreed on: "That the plaintiff, with his wife, went to the town of Hooksett, about the middle of March, 1836, about which time he commenced the performance of one year's services as a preacher there; that they resided there until about the middle of March, 1837, when they went to her father's, in the town of Bedford; that the

plaintiff went from Bedford to Hooksett, and preached the last two Sabbaths in March, 1837, which were two Sabbaths more than the year for which he engaged, when he went to Hooksett; that in the latter part of March, 1837, the plaintiff contracted with a religious society, whose meeting-house is in the town of Merrimack, to supply their pulpit one year, commencing on the first Sabbath, being the second day, of April, 1837; that on the 30th day of March, 1837, being the annual fast, the plaintiff went to Merrimack, and preached gratuitously in said meeting-house, and returned the same day to his wife's father's, in Bedford, where they were visiting; that the plaintiff went again from Bedford to Merrimack, on Saturday, the first day of April, 1837, put up at the house where himself and wife boarded the following year, preached in said meeting-house on the second day of April, 1837, and the next following morning returned to Bedford, where he remained till Saturday, the eighth day of April, 1837, on which last mentioned day he went again to Merrimack, preached there April 9th, and returned to Bedford in the evening of the 10th; that on Tuesday, the 11th, the plaintiff and his wife went, with their baggage, to Merrimack, where the plaintiff commenced boarding, by the week; that his wife proceeded the same day to Nashua, and two days after returned and commenced her residence, as a boarder, with her husband. And it was further agreed that the plaintiff was not taxed that year in Bedford, or in any other place, for his poll, or any of the property taxed by the defendants." Holding that the plaintiff was domiciled for taxation in Merrimack, the court said: "On the facts before us, the plaintiff had his home or domicile in Hooksett, or Merrimack. There is nothing to show where he resided before he went to Hooksett, and of course nothing to show that on taking up his residence there he retained any domicile elsewhere. He went there under a temporary engagement for a year; but he may well have contemplated remaining there an indefinite time, having no other home to return to, and having, so far as appears, no intention, at that time, of removing to any other place. But he left Hooksett in March, 1837, without any intention of returning there; and he contracted to supply the pulpit in Merrimack for a year, commencing on the first Sabbath in April, and actually went to that place on the first day of April. His personal residence, with his wife, at Bedford, during part of March, and again for a few days in April, being merely temporary, for the purpose of visiting at her father's, neither gave him a right to vote there, or made him liable to taxation in that town. Had the plaintiff removed from Hooksett on the first day of April, he would have been taxable

there, under the provisions of the Act of 1827, even if he acquired a new domicile on that day in Merrimack. But he actually removed before that time. Before that time, also, he had made his engagement to go to Merrimack. On the first of April, 1837, he was personally resident in Merrimack, in pursuance of his engagement to preach there a year. He must be understood to have had the same intention of residing there an indefinite time that he had of remaining in Hooksett, when he went there; for he had abandoned his home in Hooksett, with no intention of returning there; he had taken up his personal residence in Merrimack, with an intention of pursuing his calling there, for a year at least; he had no home to return to, elsewhere; and, so far as appears, no intention of going to any particular place at the expiration of that time. We are of opinion that this is sufficient to show that he had a domicile in Merrimack on the first of April, and that he was lawfully taxed in that town."

(14) New Jersey.

In *Sharp v. Casper*, 36 N. J. L. 367, the court held that the prosecutor was not liable for personal property taxes in Salem, for the year 1871, being a resident of Cumberland at that time, the facts appearing in the following quotation: "From the evidence submitted to the court in this case, I am satisfied that Dr. Sharp, the prosecutor, had no such residence in the city of Salem at any time during the year 1871. The only evidence which seems at all opposed to this conclusion, is a letter addressed, late in the summer of 1871, by the prosecutor, to Mr. Rusling, since deceased, at that time the assessor of the said West ward, in Salem. This letter, it is urged on the part of the defendant, amounts to a conclusive admission by the prosecutor that with his own knowledge and consent he had been, in fact, assessed for the year 1871, as a resident of that ward. It must be admitted that there are some expressions in the letter which, unexplained, would go far to justify the inferences drawn from them by the defendant's counsel. Writing under date of August 25th, the prosecutor says to Mr. Rusling: 'I gave you some bonds to be assessed, when I saw you in Salem,' etc.; and again: 'Can you not be so kind as to cross off my name as to bonds, and oblige yours,' etc. It cannot be wondered at, that from such language as this there should be drawn very strong inferences against the present insistent of the prosecutor. And yet, to my mind, his explanation of these apparently damaging expressions is full and entirely satisfactory. He states that in the spring or early summer of 1871, while on a visit to his son, a practicing physician

in the city of Salem, he was strongly urged by him to change his residence from Cumberland to Salem, and that he had serious thoughts of doing so, and, in fact, had almost made up his mind to do it; that being in this frame of mind, and engaged in conversation with his son upon this very subject of a change of residence, Mr. Rusling, happening to be near, was called by his son to join them, and was informed by him, that his father, the prosecutor, was about to change his residence to the city of Salem, and if he did so, should be assessed there for his personal property; that although he, the prosecutor, did, in the course of that interview, give in certain bonds to Mr. Rusling, he did it with no purpose or expectation that he would be assessed for them in Salem, unless the change of residence, which he had been thinking of, should be carried into effect; and that his plan of moving to Salem from Cumberland was never consummated. The statements of the prosecutor are corroborated in all material points by the testimony of his son, Dr. Edward S. Sharp; and they satisfy me, beyond a doubt, that the prosecutor was not liable to a personal tax in the city of Salem, for the year 1871."

In *Guggenheim v. Long Branch*, 80 N. J. L. 246, 76 Atl. 338, the court held that the plaintiff was a resident, for taxation, of Long Branch, N. J., and not of New York, on facts which appear in the following quotation from the opinion: "Our consideration of the prosecutor's testimony has not resulted in causing us to dissent from the conclusion reached by the state board, for in no part of his testimony do we find a positive and affirmative declaration by him satisfactory to us that in the year 1906 he resided elsewhere than in this state. For some years he maintained a summer residence at Long Branch, and in 1905 he paid personal taxes and voted there; and testified, by affidavit filed in New York city before the local taxing board, that he was not subject to taxation there for the reason that he then was a resident of Long Branch. In 1906 he did not vote anywhere, but resided for some weeks at Long Branch, reaching there in May and leaving his children there at his home, while he, with his wife, undertook a trip to Alaska, returning in October. During the week ends in the winter he returned to Long Branch, keeping his house open during winter; but he was uncertain whether that course of conduct was during the winter of 1906 or 1907. His reason for changing his residence from Long Branch to New York in 1906 he states was the inconvenience of the trip from his business place in New York to Long Branch, and because his vote was required more in New York than here. One of the Long Branch assessors testified that he visited the office

of the New York tax board in February or March, 1906, and that upon inquiry there the officer in charge produced the tax books for 1906, which the witness read, showing that at that time, according to the New York tax records, the prosecutor was a resident of New Jersey. There is also testimony going to show that during that year the prosecutor was assessed in New York only upon his office furniture and fixtures at the sum of \$17,000. At no time during the interim from 1905 until 1907 did the prosecutor, by word or act, indicate to anyone, and particularly to the taxing authorities of Long Branch, that he had determined to take up his residence elsewhere."

(15) New York.

In *Bell v. Pierce*, 51 N. Y. 12, the following facts appeared: "During the whole of the year 1864, preceding the 20th of June, the plaintiff resided with his family in the city of Buffalo. He owned the house in which he there resided, and had for several years. During the whole of the years 1863, 1864 and 1865, his principal and only business, which was that of an iron founder and machinist, was transacted in said city of Buffalo. On and for several years previous to the first day of July, 1864, he owned a furnished house and twenty acres of land in said town of West Seneca, and had been in the habit of sending his family there to spend about three months during the warm weather, and they there kept house. The house in Buffalo was closed, but the plaintiff personally attended to his business in Buffalo during such time, and usually slept at his house there once or twice a week during the stay of his family in West Seneca, but spent the other nights with his family in West Seneca. His wife occasionally, during said time, came into Buffalo and remained with the plaintiff at his house there over night, and had her meals there with the plaintiff, the rest of the family remaining at the house in West Seneca. About the 20th of June, 1864, plaintiff's family went to the house in West Seneca, and remained there, as in previous years, for about three months, and then returned to the house in Buffalo; and during the summer season, plaintiff was with his family in West Seneca, or at his house in Buffalo, substantially as is above stated to have been his habit in previous years. Defendants had no knowledge, before the delivery of the assessment roll to the supervisors of the town, that the plaintiff had or claimed to have any residence except in West Seneca, although they knew that he had been residing during that year in Buffalo, and that his family had come to West Seneca only a few weeks previous to July 1, 1864. They gave the

statutory notices of the completion of the assessment roll, and of their meetings to correct the same, and no one appeared before them to object to the regularity of the plaintiff's assessment. Plaintiff was not assessed for personal property in the city of Buffalo in the year 1864." The assessors having found on these facts that the plaintiff's principal business was in West Seneca, and the plaintiff not having been taxed on his personalty in Buffalo, the court held that the plaintiff was properly deemed a resident of West Seneca for purposes of taxation.

In the case of *In re Nichols*, 54 N. Y. 62, the following facts appeared: "For several years prior to April, 1863, Wells had resided in New Haven, and had owned and carried on a farm in that town. In April, 1863, he sold and conveyed his farm to Henry J. Daggett, who took immediate possession, and from that time until some time in December, 1863, Wells, who was unmarried, boarded with Daggett on the farm. On or about the 14th day of June, 1864, Wells was taken sick at the house of Henry Matthews, his brother-in-law, in the city of Oswego, and was confined to the house by such illness until some time in the following August, and did not entirely recover until some time in October, 1864. Mr. Wells remained with Mr. Matthews in Oswego until some time in the month of January, 1865, when he removed to Caledonia, in the county of Livingston, where he has since resided." Considering these facts, the court said, in the majority opinion: "The first of July seems to be the time fixed by law for the ascertainment of the persons liable to be assessed. . . . Upon the evidence in this case it is my opinion that Horace Wells was at that date, in the year 1864, yet a resident of the town of New Haven, although he had gone to Oswego on the fourteenth of June for medical treatment, and had become too ill there to return to New Haven, if he had been desirous of doing so. His undoubted residence had been in New Haven, and it must be deemed to have continued there until a change is affirmatively shown, or at least until there is satisfactory evidence of the abandonment of that place as a residence. Upon the whole evidence I do not find satisfactory proof either of change or abandonment."

The facts in the case of *People v. Taxes*, etc. Com'rs, 3 N. Y. S. 674, were as follows: "Mr. Taylor, in his lifetime, resided a part of the year in the city of New York, but during the summer months he and his family occupied a country place, which in the record is called a farm, in the town of Ovid, Seneca county. He died at the city of New York, in February, 1887, leaving a last will and testament, which was admitted to probate, and of which the relator is the duly qualified executrix. Shortly after her husband's death,

the relator determined to go with her two children to Ovid, and she took with her also the household servants from the dwelling house in the city of New York, which had been inhabited by the family before Mr. Taylor's death. This city house was closed, but was not abandoned. The relator's farm at Ovid consists of about ten acres of land, and she claims to carry on there a business, to wit, that of farming; but she admits that her farming operations are not conducted for gain, nor as a source of livelihood. In the autumn of 1887, the relator and her children and four female servants returned to the same dwelling house in New York city they had occupied at the time of and before Mr. Taylor's death, and remained there during the winter, the children attending school. At some time between September, 1887, and January, 1888, or early in January, 1888, the commissioners of taxes assessed the relator for the personal estate she held as executrix, and she claims their action was erroneous, and that she was subject to assessment only in Seneca county." The court held that the claim of the relator that she was subject to tax only in Seneca county, and a resident thereof, because she carried on there her principal business, within the meaning of the New York statute, to be unfounded. It was said: "I am of the opinion that the facts, as stated by the relator herself in the record brought up from the commissioners, do not warrant the conclusion that she transacted business in Seneca county within the meaning of the Act of 1850, amending the statute above referred to. After her husband's death she retired to what had been his country seat, a place of some ten acres, all that remained of a farm of some 300 acres he had at one time owned. She seems to have maintained this place, employing some nine servants in and about the houses and grounds, but not cultivating the land for any purpose of gain, and not trafficking in its products, but consuming in her own household some portion of what the soil yielded. This is no more transacting business than is the care and attention bestowed upon the administration of the town family residence and the supervision of the servants employed in it; and the whole testimony of the relator would indicate that her occupation in the country was nothing more than such as many people in easy circumstances engage in in the ordinary management and care of their summer places of abode. She may, for the purposes of this proceeding, choose to call it transacting business, but it is not doing so in any proper sense of the words. The action of the tax commissioners was right, and the writ must be dismissed."

In *Austen v. Crilly*, 13 App. Div. 247, 42 N. Y. S. 1097, it appeared that the defendant had two residences, one in Philadelphia, his Ann. Cas. 1917B.—49.

domicil, the other in New York, a residence for business purposes. Holding that his residence in New York was sufficient under the New York statute to render him taxable in that state, the court said: "Mr. Crilly admits that he has a residence in New York as well as in Pennsylvania. The Pennsylvania residence he characterizes as 'permanent;' the New York residence as 'temporary.' The statute (2 R. S. [8th ed.] 1094) makes no such distinction. It provides that every person 'shall be assessed in the town or ward where he resides when the assessment is made for all personal estate owned by him.' Mr. Crilly tells us that his temporary residence in this city commenced on the 1st day of October, 1894. Apparently it has been continued from that day to this. It certainly continued down to the twenty-seventh of August of the present year, when his affidavit in the proceeding was made. He hired a house in this city for a residence about the 1st of October, 1894, and he was engaged in business here from that date down to the 1st of May, 1895. Clearly he confounds residence with domicil. The fact is that, though his domicil is in Pennsylvania, he has resided here ever since the 1st of October, 1894. What he styles his permanent residence is his domicil. What he characterizes as his temporary residence is simply his residence. He says he has paid taxes in Pennsylvania during the period in question. But he does not say that these taxes were upon personalty. They may have been upon real estate. He also says that he has always voted in Pennsylvania. That may be, but it is not conclusive. He may still be a resident of this city for the purpose of taxation. Besides, the statement is too general. It may well mean that whenever he voted it was there. He does not state that he has actually voted in Pennsylvania since the 1st day of October, 1894. The court properly found upon the relator's affidavit, as matter of fact, that he was a resident of the city for the purposes of taxation."

In *People v. Crowley*, 21 App. Div. 304, 47 N. Y. S. 457, order affirmed 155 N. Y. 700, 50 N. E. 1120, it was held that the relator was a resident, for taxation, of Williams-ville, Amherst, not of Buffalo, on July 1, 1896, it appearing: "That the relator formerly resided at Williams-ville in the town of Amherst and county of Erie, in which town he owned three farms; and that in the year 1863 he removed to the city of Buffalo, where he purchased or erected a valuable house in which he resided with his family until 1895. During this period of time he spent his summer months at his country house in Williams-ville, but he regarded Buffalo as his legal residence, and he was assessed and voted in that city. In 1895, however, he conceived

the idea of changing his residence to Williamsville, at which place was located the principal office of the Buffalo and Williamsville Electric railroad, of which company he was the president and manager. He thereupon notified the board of assessors of his intention, and his assessment for personal property was omitted from the city assessment roll. From this time on his manner of living continued as before, that is, he occupied his residence in Williamsville from the latter part of May until the middle of October in each year, and his city house for the other seven months. His name, however, was placed upon the assessment roll of the town of Amherst for \$25,000 of personal property, and he paid the tax upon that sum in 1895 and 1896. He likewise voted in that town at the annual election in each of those years."

In *People v. O'Rourke*, 32 App. Div. 66, 52 N. Y. S. 1057, it was held that the relator was a resident for taxation, of White Plains, and not of New York, on facts which appeared as follows: "From the testimony given by Gilbert Wright it appeared that he had resided in the town of White Plains from November, 1892, to the 15th day of November, 1896, living in a house owned by his wife. On the last-named date he and his family went to live in a suite of rooms in the Winthrop, a family hotel on One Hundred and Twenty-fifth street in the city of New York. The family remained in the hotel until about March 15, 1897, when Wright surrendered the lease of his apartments and returned to White Plains, taking up his abode in his former place of residence and continuing therein until about August 1, 1897, when he went, for recreation, with his family to Watch Hill, and had not, up to the time of his examination, returned to the city of New York for the purpose of residence, but was still absent for pleasure. He has never claimed any other place than White Plains and the city of New York as his residence. During the time that he resided at the Winthrop hotel he removed none of his furniture from White Plains, and, so far as is disclosed by this record, it still remains there. When he took up his abode at the hotel he did not register as residing in New York, nor did he report at the hotel office that his residence was such city. He did not vote in the city of New York in 1897, and had not voted there since he took up his residence in White Plains, nor could he say when he had last voted in New York except that it was just before he came to White Plains. He was asked where his present residence was and answered, 'Well, I claim my home, so far, I suppose, the Winthrop hotel, 125th street, New York city.' At this time he had no lease of any rooms in the hotel nor had he

rented any since the surrender of his apartments about March 1, 1897. The only right which he had to claim this hotel as his residence is based upon his statement, 'I am always able to procure them (rooms) when I go there.' He, however, did testify that he went to White Plains about four years prior to 1896 for his health and under the advice of a physician; that he had recovered his health sufficient to warrant his return to New York; that it was for this reason that he went back and intended to make such place his residence and live either in a hotel or a private residence. Up to the time of his examination he had not carried such intention into effect. He has never paid any personal tax in the city of New York, and so far as appears, has never before been assessed for any either in the city of New York or White Plains."

In *Paddack v. Lewis*, 59 App. Div. 430, 69 N. Y. S. 1, affirmed in 179 N. Y. 591, 72 N. E. 1146, it appeared: "That the plaintiff is an unmarried man, and that from the year 1865 until the year 1883, with the exception of a short time spent at Jordan, he lived continuously in the town of Elbridge, where he was interested in the manufacture of paper and in the purchase and sale of real estate, stocks and other securities. He owned the paper mill, but the paper was manufactured by a firm under an arrangement by which the plaintiff furnished the raw material and disposed of the product. It was also undisputed that during this period of time the plaintiff furnished and occupied a room at the hotel, where he also took his meals, except when out of town. In 1874 he was first assessed for personal property in the town of Elbridge. In 1881 he was assessed for personal property in the city of Syracuse, but upon furnishing a sworn statement that he resided in the town of Elbridge, his assessment was vacated. In 1883 the plaintiff's assessment for personal property having been increased to the sum of fifteen thousand dollars by the assessors of the town of Elbridge, he claims to have changed his residence to the city of Syracuse, and frankly states as his reason therefor a desire to escape what he regarded as an exorbitant assessment. At this time he reserved for his own use a furnished room in a house owned and rented by him in the city, and notified the assessors of the city that he had taken up his residence there and was assessable for personal property. The Syracuse assessors thereupon assessed him for two thousand dollars of personal property, which amount was ultimately raised to ten thousand dollars. The plaintiff also testifies that he voted in Syracuse in the years 1884, 1885, 1886 and 1887, but during all this time he continued to transact his paper business at Elbridge and to occupy his room at

the hotel in that village, where he had a safe and desk, and to all outward appearances there was little if any change in his habits of life and manner of conducting business, save that he ordinarily passed a portion of each week in the city of Syracuse." On the foregoing facts it was held, by the appellate division of the supreme court, and this holding was affirmed by the court of appeals, that the ruling of the county court that the plaintiff was a resident, for taxation, in Elbridge, was correct. The court said: "It having been made to appear beyond all question that the plaintiff's taxable residence for many years prior to 1883 was in the town of Elbridge, we think there is at least some reason for saying that, under all the circumstances of this case, he has not established by affirmative and satisfactory proof the fact that for the purposes of taxation he did in good faith acquire another residence, so as to deprive the assessors of that town of jurisdiction."

In *People v. Feitner*, 78 App. Div. 287, 80 N. Y. S. 534, it was held that sufficient facts on which to find that the relator was, on January 2, 1900, not a resident of New York, for taxation purposes, but was a resident of Lawrence, were stated in the affidavit of the plaintiff in which she alleged: "I reside in the village of Lawrence in the county of Nassau, where I own a house. I have owned this house since 1894, and during all that time it has been my residence. I spend a portion of each year in the city of New York and have an apartment in the building 155 West 58th street, which I occupy while in the city, but I consider Lawrence my residence, and I was actually at Lawrence on the first of July, 1900." She further alleged in her affidavit that in the year 1900 she occupied the apartment in Fifty-eighth street only from January seventeenth to April twenty-seventh, when she removed to Lawrence and remained there, with the exception of occasional trips, until early in October, when she went to Pennsylvania, then to Fishkill and then to Lakehurst, N. J., where she remained until January 17, 1901."

In *New York v. Beers*, 163 App. Div. 495, 148 N. Y. S. 438, the court, setting forth the facts and the holding, said: "Defendant claims to have been a resident of Westhampton since July, 1910. It appears that since 1904 he has lived at Westhampton from May until November in each year. In November it is his custom to move with his family to New York city where he rents a house for the season. Since 1903 he has voted at Westhampton at both state and local elections, and he is and for the last ten years past has been assessed for personal taxes in the town of Southhampton which includes the village of Westhampton. In certain judicial proceedings to which he was a party he has, within the period last referred to, treated Suffolk

as the county of his legal domicile. In 1901 the defendant obtained a writ of certiorari to review his personal assessment in this city for the year 1901. The writ was dismissed, the court holding on the record before it that the defendant was a resident of this city and liable to taxation here. It appeared in the certiorari proceedings that defendant's course of life with respect to his several domicils in Westhampton and New York city and the period of his use of each was practically the same as appears upon the record and before us. It further appeared, however, that the defendant had voted in the city of New York at the election in 1900, and on this ground defendant was held to have elected to consider this city as his place of residence and so was liable to be assessed here. (*People v. Feitner*, 40 Misc. 368.) I think that inasmuch as defendant has since the period involved in the certiorari proceedings elected to adopt Westhampton as his voting place, and has by other acts shown an unequivocal intention to adopt Westhampton as his legal residence, these facts must be accepted as determinative of his intent and that the judgment should be reversed, with costs, and the complaint dismissed, with costs."

In *People v. O'Donnel*, 47 Misc. 226, 95 N. Y. S. 889, the court said: "Upon the facts presented I am of the opinion that the relator was a resident of the state of New Jersey, for the purposes of taxation, at the period in question and that the assessment should be vacated. According to the relator's actual assertion, he resides at Seabright, in the state of New Jersey, in a house which he has continuously owned for a number of years, his habit being to spend the summer and autumn and sometimes the winter, at that place, retaining his servants there at all times, and keeping this house always ready for his occupancy and that of his family. He also maintains a place of abode on Madison avenue, in this city, which, according to his custom, he and his family have occupied during the winter months. It appears also that in September, 1902, the relator filed a bill in chancery, in New Jersey, containing the recital that he was then residing at Rumson, township of Shrewsbury, county of Monmouth and state of New Jersey; that he voted in New Jersey, 1903, and that he was assessed for personal property in that state in 1904. Upon this state of facts, the circumstances accord with the relator's expression (founded upon his intention) that he is a resident of New Jersey, and the fact that he is also the lessee of a place of abode in the city of New York does not affect the question of his actual residence, under these circumstances."

In *New York v. Brinckerhoff*, 63 Misc. 445, 118 N. Y. S. 449, it appeared that the defendant was a lunatic, whose lunacy had come af-

ter his arrival at majority, that he had been kept for about fifteen years at the Bloomingdale Asylum, that his residence, before he became insane, had been in New York city, and that he had been recently moved from the Bloomingdale Asylum, without any intent on the part of his guardian that his domicile should be changed. On these facts it was held that the residence of the lunatic in New York city remained, since there had been no intent to change, although there had been a physical change.

In *People v. Dinneen*, 85 Misc. 128, 148 N. Y. S. 21, the court said: "The relator was residing with her husband in Ogdensburg on July 1, 1913. The statute specifically says that 'every person shall be taxed in the tax district where he resides when the assessment for taxation is made.' This does not mean where he resides for the purpose of voting or where his domicile is. The assessors of the city of Ogdensburg had jurisdiction to make this assessment. There was no evidence before the assessors, nor is there any before this court, that, after the first of July, Mrs. McGruer had in good faith changed her residence and that the said personal property is assessed in any other tax district. On the contrary the evidence shows that it is not assessed in any other district for the year 1913. The relator's business is carried on in the city of Ogdensburg, where she and her property have the protection of the laws and enjoy the benefit of the city government with its improvements. Within the letter and spirit of the statute I think the relator was properly assessed in the city of Ogdensburg."

A missionary bishop of the Episcopal church in Mexico was held to have been a resident of Mexico, not of New York, in the case of *Matter of Riley*, 86 Misc. 628, 148 N. Y. S. 623, wherein it was held that the estate of the deceased was exempt from taxation in New York. The court said: "The petition by the administratrix c. t. a. shows that decedent died March 13, 1904, in Mexico, where he resided for many years prior thereto, and that his will, dated September 16, 1889, with a codicil thereto dated April 21, 1891, was admitted to probate on or about September 8, 1904, by the surrogates' court of New York county. The petition further shows that the decedent was a bishop of the Episcopal church, in charge of the American branch of that church in Mexico. In his will he describes himself 'now in the city of New York, but for many years a resident of the city of Mexico.' In his codicil he describes himself as 'of New York, bishop in the Mexican branch of that church.' The question of domicile if decided in favor of the petitioner will dispose of the other questions involved. As above stated, the decedent for many years

prior to the making of his will was a resident of Mexico, and it further appears that he returned to Mexico after the making of the codicil to his will and resumed his labors as bishop of the Episcopal church and bishop of the American branch of that church in Mexico, and that he died in Mexico fifteen years after the making of his will and thirteen years after the making of the codicil thereto. It is evident that decedent's life work was continuously in Mexico, and that he spent but a small part of his time outside of that country. Decedent considered Mexico as his domicile, notwithstanding the allegations in his will and the codicil thereto. Statements in both said will and codicil identify decedent with his Episcopal work in Mexico. It is to be gathered from these statements that it was decedent's intention to be considered a resident of Mexico, and that the recital in his will 'now of the city of New York' and in the codicil 'of New York' are mere descriptive recitals and should not be regarded as conclusive in fixing decedent's last domicile."

In the case of *Matter of Rutherford*, 88 Misc. 414, 150 N. Y. S. 734, the court held that deceased was a citizen of New York city. The facts were stated in the opinion as follows: "From such evidence it appears that Henry Rutherford died at the Hotel Astor, in the city of New York, on the 25th of February, 1913. The record does not disclose his domicile of origin. He had no children. The papers before me do not give the date of his wife's death, but certain statements therein contained would seem to indicate that she died before he began to live at hotels in the city of New York. There is no evidence as to his residence or domicile during his married life. Charles K. Phipard, a member of the firm of bankers and brokers with which the decedent transacted business, and who is also an executor under decedent's will, testified that he had known the decedent for about forty years; that he first became acquainted with him in New York city, and that prior to the month of November, 1911, he always claimed New York as his residence. Dr. Steele, a physician, testified that he knew the decedent socially and had attended him professionally for about ten years prior to his death, and that during that time the decedent had lived in hotels in New York city. Another physician testified that he had treated him at intervals for about five years prior to his death and that during all that time he lived at hotels in this city. There is no evidence that he had a home or a residence in any other state during that time. He engaged rooms at the Plaza hotel, New York city, on June 14, 1910, and remained there until September 1, 1911. He went to the Astor hotel in September, 1911,

and remained there until he went to the Waldorf-Astoria on November 21, 1911. He remained at the Waldorf until March 20, 1912, when he returned to the Astor, and remained at the latter hotel until the date of his death. When registering at the hotel he wrote in the column marked 'residence' the words 'New York.' At the Plaza hotel his bills were rendered and paid monthly. He usually occupied two rooms in each of the hotels at which he stayed, but during part of the year 1912 he occupied a suite of five rooms at the Astor. On June 14, 1911, he rented two safe deposit boxes from the Safe Deposit Company of New York and retained them until his death. He also rented a room from the New York Storage Warehouse Company, and had a bank account in this city. Decedent was executor under the will of his brother, John Rutherford, and in his oath of office, verified April 4, 1911, he stated, 'I am a resident of the Hotel Plaza, in the borough of Manhattan, city and state of New York.' In the petition for the probate of the will of his brother, verified by the decedent on the 30th of March, 1911, he stated that he resided at the Hotel Plaza, in the borough of Manhattan, city of New York. He was executor under the will of his sister, Janet Rutherford Marshall, and in executing the oath of executor he stated on the 6th of November, 1911, that he was 'a resident of the Hotel Waldorf, in the borough of Manhattan, city and state of New York.' In the petition for the probate of her will, verified 6th of November, 1911, he stated that he resided in the borough of Manhattan, city and state of New York. In his will, which was executed on the 23d day of November, 1911, he described himself as 'at present residing in the city, county and state of New York.' He was assessed for personal taxes in New York city for the year 1911, and he paid the tax in 1912. He did not vote in New York city; in fact he never voted anywhere during his life. He was not engaged in any business, nor did he practice any profession." The executors further contended, however, that the deceased, in 1912, changed his residence to Grand Isle, Vt., the facts upon which they based their contention being as follows: "Decedent's brother, John Rutherford, owned a house at Grand Isle, Vt., which he used as a summer residence. Henry Rutherford usually spent a week or two every summer at the home of his brother in Grand Isle. John Rutherford died on February 7, 1911, and devised the house at Grand Isle to his brother Henry. Some time during the summer of 1911 Henry authorized an agent at Grand Isle to place the property in the market for sale. The furniture and pictures were packed and held at the house awaiting their final disposition. Henry went to Grand Isle dur-

ing the summer of 1911 and remained there about one week. He slept at his own house, but took his meals at a neighboring hotel. He then returned to New York, and did not again visit Grand Isle until July, 1912, when he remained there one night. In August, 1912, he instructed his agent to withdraw the place from the market and ordered that the furniture be unpacked and that the house be repaired and made fit for occupancy. He then stated that he intended to make Grand Isle his home. This is proper evidence of animus. Decedent did not, however, visit the place again during his life. In September, 1912, he received a notice of assessment for personal taxes in New York city, and complained to his brokers that the assessment was too high and that he would not pay it as he was a resident of Grand Isle, Vt. An affidavit was prepared by an employee of the firm, in which the decedent stated that he was a resident of Grand Isle, Vt., and not liable to taxation in this city. Prior to this time he informed his employee in Grand Isle that he was willing to be assessed there at the same amount as his brother, namely, forty thousand dollars. He also stated in November, 1912, when making a contract for the construction of a yacht, that he resided at Grand Isle, Vt. On February 8, 1913, he described himself in a public document as 'now residing at Grand Isle, state of Vermont.' Holding, however, that no such change of residence had been effected, the court said: "While the decedent doubtless intended to make Grand Isle his home and to acquire a domicile in Vermont, he never, for the purposes of the taxing act, completed the change of domicile, once intended, and this because of his failure to establish a residence in Vermont or to reside at the house in which he had once intended to live at Grand Isle. I will, therefore, find that the former domicile of decedent continued, and that decedent at the time of his death had his domicile in New York and not in Vermont."

In *People v. Barker*, 70 Hun 397, 24 N. Y. S. 63, affirmed 139 N. Y. 658, 35 N. E. 208, the court said: "The simple question is whether this relator is a resident within this state within the meaning of the provisions of the statute before referred to. The testimony taken in this proceeding I think clearly shows that the relator was not a resident of this state at the time this taxation was imposed. The relator is taxed upon his personal estate in Rhode Island and has been so taxed for six years. He votes in the city of Newport, state of Rhode Island, and he spends a part of the winter in New York, but that cannot be said to be his residence. To hold this relator liable for taxation in New York would be to tax his personal estate both in New York and Rhode Island, which

would be double taxation, and is opposed to the principle established in the case of *The People v. Coleman*, 119 N. Y. 137."

In *Wade v. Matheson*, 4 Lans. 158, affirmed in 47 N. Y. 658, the court sets forth the facts and its holding as to residence as follows: "There is no doubt of the fact, I think, that at the time the assessment complained of was made, the plaintiff was a resident of Fishkill, in Dutchess county, and liable to be assessed for his personal property in that town in accordance with the provisions of the revised statutes (1 R. S. 389, sec. 5), which require that the owner of personal estate shall be assessed for the same in the town where he resides. The continuance of the plaintiff's business at Ogdensburg, by and through his agents, and his visits there after the removal of his family to superintend the business, and even the entry of his name in the hotel register, with 'Ogdensburg' as the place of his residence, does not, in my opinion, establish that his residence was at the latter place. It is plain and clear that he had moved his family with the intention of making Fishkill his permanent residence; and with the exception of going to Ogdensburg at irregular intervals and devoting about one-third of his time to his business there, the remainder of his time was spent at Fishkill, in the management of the business in which he was there engaged. The latter place was his residence, his home, and his domicil, beyond any question. His transient and temporary visits to Ogdensburg did not make him a resident there, and something more was essential."

In *Bailey v. Buell*, 59 Barb. 158 (reversed on other grounds 50 N. Y. 662), it appeared that the plaintiff had for some years resided on a farm in West Bloomfield; that in April 1867 he moved to a farm he owned in Richmond, having sold the West Bloomfield farm but having reserved the right to store part of his personal property there; that he remained on the Richmond farm until the 17th of May and then sold that farm, moving part of his personalty back to the West Bloomfield house and the rest to East Bloomfield; that he moved his family to East Bloomfield, his daughter attending school there and he and his wife living with his mother-in-law; that he remained in East Bloomfield under this arrangement until the assessment in question was made, when he claimed that he was not a resident of East Bloomfield, being there only temporarily, but that his true residence was West Bloomfield. It was held that a finding by the jury, under these facts, that the plaintiff was not a resident for taxation of East Bloomfield, was proper.

(16) Ohio.

In the case of *Rockefeller v. O'Brien*, 224 Fed. 541, it was held that the plaintiff, al-

though temporarily residing in Ohio at the time of tax-listing, was not made a resident of that state by Ohio tax statutes, the court stating the facts and its conclusion as follows: "In the case under consideration, it is admitted that Mr. Rockefeller, all of the time he was in Ohio in the years 1913 and 1914, was a citizen of the state of New York; that he was a voter of that state; that he was taxed there, presumably upon this very property; that he had his permanent home there; and it cannot be doubted on the testimony introduced on this trial that he came to Ohio in June, 1913, as he had often done before, simply for a summer visit, which was continued longer than usual because of the illness of members of his family. Neither can it be doubted that when he left the state he left it with the purpose of permanently residing in the state of New York, which had been his home for more than thirty years. With these facts before us, in the opinion of this court, there can be no doubt at all that, notwithstanding the provisions of the Act of April 14, 1900, Mr. Rockefeller was a non-resident of Ohio when the tax returned in dispute was made, and that he could not properly be taxed upon his intangible property under the terms of that statute."

(17) Pennsylvania.

In *Kirby v. Bradford County*, 134 Pa. St. 109, 19 Atl. 494, it was held that a finding that the appellant was a resident of Bradford county, Pa., and not of California, was justified by the following facts: "In December, 1885, the plaintiff was living with his family in a dwelling or residence situated in Towanda township, Bradford county, and had lived therein, and had been the owner of the dwelling for several years prior thereto, furnishing the house, supporting the family, and paying all bills therefor. In December, 1885, he was a widower, and had been for some years, and his family consisted of his children. He was twenty-three years of age when he came to Towanda, and sixty-eight years of age in 1885. He continued the owner of the residence or dwelling in Towanda township, until the taking of the testimony in this case in March, 1889. The master found further, that from about December 1, 1884, the plaintiff made visits to his married daughters in Iowa and California, and spent the winters in the latter state; that he returned to Towanda township each spring of the year and did business there, as usual, his business being the lending of money, buying notes, etc.; that he frequently stated that his health was improved in California and he intended to make his residence at Alameda, in that state; that in his absence from Pennsylvania his family was left in his dwelling in Towanda township, he paying the family expenses; that in the spring of 1887 he voted in Cali-

fornia, but paid no taxes there except upon a mortgage he held upon property owned by his son-in-law."

(18) Texas.

Commorancy within a jurisdiction for twelve years has been held in Texas to constitute residence for purposes of taxation, in spite of declarations by the person concerned showing an intention of ultimately making another jurisdiction his home, and in spite of a failure on his part to exercise political rights within the jurisdiction. *Carmody v. Clayton*, 154 S. W. 1067, wherein the court said: "We are further of opinion that, in view of the evidence which we have discussed in relation to the actual situs of the property during 1910 and 1911, coupled with the long-continued residence of the appellant and his wife in this state, he was a citizen of Texas, in contemplation of the tax laws. It is true that, so far as his intention is disclosed, either by conduct or oral declaration, he has at all times refrained from the exercise or performance of those political rights and duties conferred upon him as a citizen by the laws of the state where he has resided, preferring apparently to defer those matters until such time as he and his wife might reach a conclusion as to where they would ultimately make their home. Such matters, however, are largely personal, determinable to an extent by personal predilection, and depending, in a measure, upon the view of individual duty and responsibility. But the legal duty to pay taxes is not dependent upon the exercise of political rights. In fact, it occurs to us that merely refraining from the exercise of such rights is, at most, a circumstance to prove nonresidence and in no sense establishes nonresidence incontrovertibly. . . . There are, perhaps, many persons in this state who have and desire no political rights, and who as well contemplate ultimately removing from the state when their affairs are satisfactorily adjusted, just as appellant says he intends to do; but those several facts, it occurs to us, afford no reason why their property during the years of actual residence in the state, when found, shall not bear its just share of the burden of government. As said by the cases cited, it shares in the benefits, and should not escape the burdens. It is no answer to this just demand to say that the person sought to be taxed is here temporarily, a mere sojourner, for a period of years, or that the property was removed on the first of each year. Such a claim affords its own answer and refutation. Hence, in our opinion, appellant's character of residence in Texas for the past twelve years has been, and was during the years for which he was taxed, such residence as to constitute him, in con-

templation of the tax statutes, a citizen of the state, and to subject the property in controversy to taxation, without reference to his political residence, as shown by his intentions."

(19) Vermont.

In *Mann v. Clark*, 33 Vt. 55, it was held that the plaintiff was a resident, for tax purposes, of Braintree, on April 1, 1856, the facts appearing as follows: "Prior to the 31st of March, 1856, the plaintiff resided in Randolph. During the month of March he hired a farm in Braintree, with the intention of living there the next season, and moved his goods, furniture and provisions to the house which he was to occupy, and drew his wood to the woodshed on the place. The term of the outgoing tenant expired on the 31st of March, but he did not in fact leave till two or three days after. On the 31st of March, being Saturday, the plaintiff took his wife and family, and leaving Randolph went to the house of his brother-in-law, in Brookfield, near the farm in Braintree which he had hired. He remained with his brother-in-law in Brookfield till the 4th day of April, when he moved to the farm in Braintree which he had hired, and there he lived for the ensuing year.

In *Woodward v. Isham*, 43 Vt. 123, the court said: "The plaintiff denies that he was, during the whole or any part of either of said years, an inhabitant of District No. 8, and claims that he was, during all that time, an inhabitant of School District No. 7, in said town, and taxable in the latter district. But the facts disclosed by the bill of exceptions do not support the plaintiff's action. On the 19th of March, 1866, the plaintiff, with his family, left School District No. 7, and moved on to the town farm, in District No. 8, under a contract to carry it on for the term of one year. They lived on that farm and carried it on during that year, in fulfillment of the contract. The plaintiff, with his family, moved there for that purpose, intending that the town farm in No. 8 should be their home and residence during that year. This constituted the plaintiff an inhabitant of District No. 8, within the meaning of the statute. And for the same purpose, under similar contracts and with like intentions, the plaintiff, with his family, lived on said farm the second and third years, and the facts show that he was an inhabitant of District No. 8 during the three years for which said taxes were assessed. The case states that the plaintiff, at the same time, carried on and controlled his own farm in District No. 7; that during the haying and harvesting seasons, he, with some of his family, occupied his house in No. 7, to do the work there, the rest of the family living on the town farm

and taking charge of it at the same time, and that he intended all the time to return to reside on his farm in No. 7, when he should get through carrying on the farm in No. 8. But all this does not tend to show that the plaintiff was an inhabitant of District No. 7 during any of the time for which said taxes were assessed. He was temporarily on his farm in No. 7, for the purpose merely of doing the work on that place, intending to return to the town farm in No. 8, that being his fixed abode and that of his family, during the term of each of said contracts; and having performed the labor which caused him to be temporarily from the town farm, he returned to it as his habitation and family establishment. His intention, all that time, to return and reside on his own farm in No. 7, when he had got through with his contract to carry on the town farm, did not make him an inhabitant of No. 7, or affect his relation, rights, or liability as an inhabitant of No. 8, while he lived there, under the circumstances of the case. Not only the district, but the plaintiff himself, could justly claim that he was, during that time, an inhabitant of No. 8, and the listers, in discharge of their duty, set his said list in that district."

In *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926, the question was whether the plaintiff had in 1883 a taxable residence in Wheelock. It appeared that since 1874 he had not a residence outside the county; that he had paid no taxes in 1880 and 1881; that, although he claimed to have resided in Sutton in 1882, he had not been allowed to vote there; that, although he claimed to have been a resident for taxation of Sutton or Lyndon, he had not been on the tax lists of those towns. On those facts it was held to be a proper finding that the plaintiff was a resident of Wheelock for purposes of taxation.

(20) Wisconsin.

In *Kellogg v. Oshkosh*, 14 Wis. 623, the court said: "The plaintiff's residence at Oshkosh, at the time the taxes were assessed, is not seriously questioned by his counsel. If it were, it is clear that the finding of the circuit judge could not in this respect be disturbed. His own testimony fully sustains it. Every man has, in law, a home or domicile. The plaintiff is an unmarried man. He says he came to Oshkosh in the spring of 1855, and remained until December, 1856; he voted there in the fall of 1856, and a large share of his time has since been spent there, the winter seasons being passed at different places abroad on account of his health; most of his property has been there and in that vicinity, and that has been his principal if not his only place of business, and he has never removed or gone elsewhere with the intention of re-

maining, nor exercised the rights of privileges of a citizen at any other place. This clearly made him a resident of Oshkosh. The act of voting was the highest evidence that he had changed his domicile, and made Oshkosh his home in intent as well as in fact."

(21) Canada.

In *Jones v. St. John*, 30 Can. Sup. Ct. 122, these facts appeared: "[The plaintiff] carried on business in St. John as a brewer up to 1893 when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed." On these facts it was held that the plaintiff had lost his domicile in St. John, N. B., and acquired a domicile in New York for purposes of taxation. The court said: "The circumstances chiefly militating against the acquisition of a domicile in New York by Mr. Jones, are two, his mode of living there, and the facts in connection with the maintenance of the family home in St. John. The materiality of these circumstances lies in their bearing upon the question of his intention to make a permanent, or indefinitely continuing, home in New York. As to the first, two things are to be taken into account, the continuance of the hotel life for a period covering five years, and the fact that Mr. Jones was a widower. And as to the second, the facts are to be regarded in the light of Mr. Jones's open and avowed purpose to divest himself of all proprietary interest in the house at St. John and its furnishings, and fall short of proving that he maintained the establishment. . . . Here we have explicit and repeated declarations of Mr. Jones, before the making of the assessment in question, which can leave no reasonable doubt as to his intention to abandon St. John as a place of residence and to make his home in New York (irrespective of whether he succeeded in the eye of the law in accomplishing it). His entire good faith in making the declaration has not been, and cannot well be, im-

pugned. We have therefore the fact of a long continued actual residence in New York as his chief place of abode, coupled with an avowed and bona fide intention to make it his home permanently, or, at least, for an indefinite time, and his fixed determination not to return to St. John to reside. There was, consequently, the acquisition of a new home or domicil, and the abandonment of the former one within the meaning of the act."

BARTLETT

v.

TOWN OF NEW BOSTON.

New Hampshire Supreme Court—February 2, 1915.

77 N. H. 476; 93 Atl. 796.

Domicil — What Constitutes — Intention as Essential.

For a person to gain a residence in a town, it is essential that he go there with the intention of remaining and making it his home for some definite time.

Taxation — Place of Taxation — Facts Showing Residence.

In a proceeding to abate taxes claimed by plaintiff to have been improperly assessed against him in a town from which he had changed his residence, evidence that after residing in the town for seventeen years he drove to another town and told the officials that he was a resident thereof, after which he was taxed therein, was insufficient to require a finding that he resided in the latter town, where he did not move his family or make any preparations to remove them from the former town but continued to live with them therein.

[See note at end of this case.]

Review of Assessment — Persons Entitled — Failure to List Property.

Pub. St. 1901, c. 59, § 11, gives a right of appeal from an assessment only to a property owner who has complied with chapter 57, §§ 8, 9, making it his duty to fill out a blank inventory and deliver it to the town selectmen; and hence a property owner who had failed to perform this duty cannot complain of the validity of the selectmen's action in taxing him for property owned by him but returned for taxation by others.

Transferred from Superior Court, Hillsborough county; PIKE, Judge.

Action by Eben L. Bartlett, plaintiff, against Town of New Boston, defendant. Judgment for defendant. Plaintiff alleges ex-

ceptions. Case transferred to Supreme Court. EXCEPTION OVERULED.

[476] The plaintiff lived in Deering from April 28, 1893, to January, 1894, and then removed to New Boston. He retained ownership of the house in Deering and has occupied it whenever his business took him to that town. From 1894 to 1902 he had a woman come and do the work whenever he had occasion to occupy the Deering house, from 1902 to 1906 he kept a servant in the house, and since 1906 he has employed her whenever he has remained in Deering for any considerable time. He refused to return an inventory for 1910, and the selectmen of New Boston doomed him. He announced that he should leave the town if he was compelled to pay the tax, and on March 25, 1911, he drove to Deering, told the selectmen that he was a resident of that town, and was taxed there for the years 1911 and [477] 1912. He remained in Deering two days at that time and returned again on March 31 for a stay of a day or two. Although the plaintiff claimed to be a resident of Deering, he has in fact lived and made his home in New Boston since March 25, 1911, just as he had done since 1894. During all the time he lived with his family in New Boston, he had been accustomed to make trips to Deering two or three times a month and stay there from one day to a week, the length of his stay depending on the time required to look after his property in that town. Since 1911, his visits to Deering have not been longer nor more frequent than before that year. The tax commissioner having found that the plaintiff was a resident of New Boston when the taxes in question were assessed, he moved that this finding be struck from the report as contrary to the evidence and excepted to a denial of the motion.

Branch & Branch for plaintiff.

Wason & Moran for defendant.

YOUNG, J.—The only question of law it will be necessary to consider is whether there is any evidence to sustain the finding excepted to; in other words, whether fair-minded men can reach any other conclusion than that the plaintiff was a resident of Deering when one or both of these taxes were assessed. It is conceded that he was a resident of New Boston when he started for Deering on March 25, 1911. Consequently he is a resident of that town unless he went to Deering on that or some subsequent day, intending to remain there and make that town his home. Leach v. Pillsbury, 15 N. H. 137, 138

To gain a residence in a town, a person must not only go there, but must go with the intention of remaining and making it his home for a more or less definite time. Therefore, if the plaintiff had intended to reside in Deering and make his home in that town when he went there on March 31, 1911, he would have been a resident of that town on April 1, even though he decided some time during the day to return to New Boston. But instead of these facts conclusively appearing, as the plaintiff contends, the evidence warrants the finding that when the plaintiff went to Deering he had no intention of remaining there and making that town his home; for he neither moved his family nor made any preparations to move them to that town, but continued to live with them in New Boston, just as he [478] had done for the preceding seventeen years. In short, the evidence warrants the finding that whenever the plaintiff has gone to Deering he has gone with the intention of returning to New Boston and making that town his home.

It would be useless to consider the plaintiff's other contentions. Section 8, chapter 57, of the Public Statutes, made it his duty to fill out a blank inventory and deliver it to the selectmen of New Boston on or before April 15 in each year; and having failed to perform this duty, he cannot question the validity of the selectmen's action in taxing him for property owned by him, but returned for taxation by his son and grandson. Section 11, chapter 59, of the Public Statutes, which gives the right of appeal, bases that right on compliance with the provisions of sections 8 and 9 of chapter 57. It is therefore immaterial here whether his contention that the real estate which he owned ought to have been taxed to his son and grandson is well founded. He failed to return an inventory of other property for which he was taxable, and his failure cuts off his right to appeal from any of the taxes included in the assessment of that year. The argument that on tax appeals equity is done cannot apply when there is no appeal; and the suggestion that New Hampshire procedure regards the substance rather than the form comes to nothing, for the substance of the law on this subject is that one who has conducted as the plaintiff did has no redress against the judgment of the assessors in levying taxes upon his estate.

Exception overruled.

All concurred.

NOTE.

The ruling in the reported case is that in order to acquire a residence in a town, a per-

son not only must go to that town but must go there with the intention of remaining and making it his home. The facts are reviewed and are held to show that in the instant case there was no such intent. For a complete consideration of the law of residence within personal property or inheritance tax statutes, and for the particular facts which have, in the cases, been held to constitute residence within such statutes, see the note to the case of *Rex v. Board of Assessors*, reported ante, this volume, at page 721.

STATE EX REL. ILSLEY ET AL.

v.

LEUCH.

Wisconsin Supreme Court—April 9, 1914.

156 Wis. 631; 146 N. W. 790.

Taxation — Review of Assessment — Conclusiveness of Finding.

A finding of the board of review of the city of Milwaukee, in making assessments for property omitted from taxation, that the owner resided within the city is jurisdictional, and hence is not conclusive on appeal, though sustained by some evidence.

Place of Taxation — Facts Showing Residence.

In a proceeding to have canceled an assessment by the board of review of the city of Milwaukee for property omitted from taxation, in which the owner claimed that he did not reside in the city, the evidence is held to show that the owner had established his residence out of the city with the intention of changing his domicile, so that he was not taxable by the city.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: ESCHWEILER, Judge.

Action by State of Wisconsin, on relation of Alice B. Ilsley et al., executrices, plaintiffs, against Peter F. Leuch, defendant. Judgment for defendant. Plaintiffs appeal. REVERSED.

[631] The appeal is from a judgment affirming, on *certiorari*, assessments made by board of review of the city of Milwaukee against relators as executrices of the will of Edward Bradley, deceased, for property omitted from taxation in said city in the years 1910 and 1911, during the lifetime of the testator.

It appears from the evidence taken before the board of review that Mr. Bradley was domiciled in the city of Milwaukee from 1874 to May, 1909, when he moved to his country residence in the town of Milwaukee. He continued to occupy a business office in the city jointly with his brother. In 1903 he sold his expensive city residence and built one in the country, costing \$35,000. This burned down before it was [632] ready for occupancy, and in 1908 he began building another, suitable for living in the whole year. In May, 1909, he moved into it and resided there till December 31, 1909, when he went to Washington and other places, spending part of the time at the Hotel Pfister in Milwaukee. From May 1, 1910, to December 31, 1910, he lived at his country home. He then went to California and other parts for the winter, stopping occasionally for a few days at a time at the Hotel Pfister in Milwaukee. About May 1, 1911, he returned to his country home and lived there till February 1, 1912, when he moved to the city on account of the bad roads. He rented flats in his own name and lived there with his daughter, Mrs. Ilsley, until about June 1, 1912, when he returned to his country residence. The reason he did not return earlier in the spring was because of the installation of a sewerage system at his country home, which system was not completed till then. He continued to live at his residence in the town of Milwaukee till December 1, 1912, when he returned to his rented flats in the city, where he continued to remain until his unexpected death on the 26th of the same month. So far as known, it was his intention to return to his country residence in the spring of 1913. He made frequent and continuing declarations that his residence was in the town of Milwaukee after he moved there in May, 1909. Indeed, one of his avowed objects in changing his residence from the city to the town was to escape taxation in the city, as he thought he was discriminated against on his intangible property assessment. In May, 1910, he informed the city assessor that he was no longer a resident of the city, and he paid no more personal property taxes there except on office furniture owned jointly with his brother. He was assessed in the town of Milwaukee after 1910 on personal property other than intangible property, which the assessor of the town said was never assessed therein. His name was taken off from the voting lists in the city of Milwaukee on and after the fall of 1910. That [633] fall he offered to vote in the town of Milwaukee, but as his name was not on the lists he had to be sworn in. He found one qualified witness, went to look for another but did not return. In the fall of 1912 he voted in the town of Milwaukee at the primary and gen-

eral election, but did not vote at the spring elections of 1911 and 1912. In his income tax statement made out in 1912 for the income of 1911 he gave the town of Milwaukee as his residence. His wife died in 1897 and he never remarried. His daughter Mrs. Ilsley occupied the rented flats with him in the city and lived with him part of the time at his country home.

The board of review, apparently largely upon the advice of the city attorney, refused to cancel the assessment by a vote of nineteen to ten. The assessment for 1910 was \$1,069,600 and for 1911 was \$1,143,800. The executrices are residents of different taxing districts in this state, and neither resides in the city of Milwaukee.

Van Dyke, Rosecrantz, Shaw & Van Dyke for appellants.

Daniel W. Hoan and Garfield S. Canright for respondent.

VINJE, J.—Assuming that the facts in this case bring the relators within the rule announced in *State v. Fisher*, 124 Wis. 271, 102 N. W. 566, that the assessment was presumptively correct and could be overturned only by definite and conclusive evidence impeaching it, yet we cannot escape the conclusion that there was no basis in the evidence upon which the assessment could rest. The finding attacked is one that goes to the jurisdiction of the board of review to act at all, not one confessedly made within its jurisdiction. The former finding stands upon a different basis from the latter, as was pointed out in *Borgnis v. Falk Co.* [634] 147 Wis. 327, 359, 360, 361, 133 N. W. 299, 37 L.R.A. (N.S.) 489. It is not conclusive upon appeal. If it were, such boards could determine their own jurisdiction without the right of review by the courts, no matter how erroneous their action. It is only findings made within their jurisdiction that are conclusive if based upon some evidence, not findings determining jurisdiction. The latter must have a substantial basis in the evidence or they cannot be sustained.

In the instant case the trial court was of the opinion that the renting of flats by the deceased in February, 1912, living in them till the following June, and returning thereto in December, furnished a sufficient basis for the board's determination. In this the court erred. The renting of and living in such flats, as stated, in no wise contradicted the undisputed facts that the deceased intended to change his place of residence from the city of Milwaukee to the town of Milwaukee, and that such intention was effectuated by an actual removal of residence to the town in May, 1909, which continued uninterrupted till his death in December, 1912. His

name was taken from the tax rolls in the city and placed upon the tax rolls of the town for personal property taxation. He voted in the town and ceased to vote in the city. In fact, he did everything that could, under his mode of life and business necessities, be done to effectuate his intent to change domicile.

The fact of a man having a residence in one taxing district and a business office in another is now so common as not to cast any doubt upon the question of residence. The same is almost true of the custom of residents of the country, who have a business office in the city, to move into the city temporarily for the winter months. Certainly in the case of the deceased, who was about seventy years old, such temporary winter residence in the city should not be held inconsistent with an unmistakable effectuated intent to establish his residence in the town of Milwaukee.

The question was suggested by respondent that the deceased should not be aided by the court in escaping just taxation. [635] The court can neither give nor refuse such aid. All it can do is to declare the law upon the facts presented. It appears in this case, however, that the chairman of the town of Milwaukee was present with his attorney before the board of review of the city and protested against the assessment of the estate in the city, claiming it was taxable in the town of Milwaukee. Thus it becomes a question of which taxing district is entitled to tax the estate, rather than a question of its escaping taxation.

The conclusion arrived at on the merits renders it unnecessary to determine the questions raised by the relators as to the constitutionality of the reassessment statute.

By THE COURT.—Judgment reversed, and cause remanded with directions to enter a judgment canceling the assessments.

NOTE.

In the reported case it is held that, where the facts show an actual removal from one place of residence or domicile to another, with the purpose of making the second place a permanent home, the fact of a temporary abiding in the former place, for business purposes, does not prevent the effectuation of the change of residence for purposes of taxation. For a comprehensive review of the cases discussing what constitutes residence within a jurisdiction for the purposes of personal property or inheritance tax statutes, see the note to *Rex v. Board of Assessors*, reported ante, this volume, at page 721.

NEAS ET AL.

v.

WHITENER-LONDON REALTY COMPANY.

Arkansas Supreme Court—June 14, 1915.

119 Ark. 301; 178 S. W. 390.

Mortgage — Sufficiency — Defect in Description.

A mortgage which did not give the range number of lands included is insufficient to pass the legal title.

Recording Acts — Constructive Notice from Record — Instrument Defectively Describing Property.

Kirby's Dig. § 762, declares that every instrument in writing affecting the title of realty shall be constructive notice from the time it is filed for record. Section 763 declares that no instrument for the conveyance of land shall be good against a subsequent purchaser for value without actual notice, unless after due acknowledgment and execution it shall be filed for record in the office of the clerk and ex officio recorder. Section 5396 declares that every mortgage shall be a lien on the property mortgaged from the time it is filed in the office of the recorder. A mortgage which included several parcels of land correctly described some of the parcels, but did not give the range number of two sections which were attempted to be included. After recordation of the mortgage the mortgagor disposed of the land to bona fide purchasers for value without notice. It is held that, as the doctrine of constructive notice is harsh, and such statutes are strictly construed, the purchaser, not having actual notice of the mortgage, will not be charged with constructive notice thereof on the theory that an inspection of the mortgage might have led to inquiry by which he would have discovered that the land he afterwards purchased was included.

[See note at end of this case.]

Mistake in Record — Effect.

To entitle a party to the benefit of the recording act it is sufficient if he properly file his instrument for record.

[See 4 Ann. Cas. 561; Ann. Cas. 1913B 69.]

Appeal from Mississippi Chancery Court: FRIERSON, Chancellor.

Action by Whitener-London Realty Company, plaintiff, against M. L. Neas et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

J. W. Rhodes, Jr. and W. J. Lamb for appellants.

Hawthorne & Hawthorne for appellee.

[303] SMITH, J.—Appellee, Whitener-London Realty Company, hereinafter designated as the realty company, was the plaintiff below, and instituted this suit for the purpose of reforming and foreclosing a deed of trust executed in its favor by one O. R. Lilly. The realty company conveyed to Lilly on October 25, 1910, a large body of land, all of which was situated in township 13 north, range 8 east, Mississippi County, Arkansas, except two sections numbered 26 and 35, which were situated in township 12 north, range 8 east. This deed recited that it was subject to a timber contract theretofore made by the realty company with the Chapman & Dewey Lumber Company. The deed to Lilly recited that the consideration of \$34,947 had been fully paid. On March 3, 1911, Lilly executed to W. [304] B. Flannigan, as trustee for the realty company, a deed of trust to secure notes aggregating the sum of \$17,298.50, the balance due on the purchase price of the lands. This trust deed accurately described the lands lying in township 13 north, range 8 east, but described sections 26 and 35, as being in township 12 without giving any range number. Lilly was indebted to appellant D. H. Robinson in the sum of \$6,000, and to secure the payment of this sum, which was evidenced by a promissory note for that amount, and which note was assigned to, and is now owned, by one J. W. Pumphrey, executed a deed of trust on said sections 26 and 35 in township 12 north, range 8 east. The date of this deed was April 12, 1911. Lilly later negotiated a trade with appellant Neas for the sale of section 35, township 12 north, range 8 east, for a consideration of \$8,500, and executed a deed to Neas conveying said section of land on the 14th day of October, 1911. The deed of trust from Lilly in favor of the realty company was filed for record on the 23d day of March, 1911, while the deed to Lilly from the realty company was filed on the 14th of March, 1911, and all of the other conveyances herein mentioned were filed for record subsequent to those dates.

When Neas was negotiating with Lilly for the purchase of the section above described he procured an abstract of title to that section of land, which was made by a competent abstractor, and from the certificate of this abstracter it appears that the abstract purported to show all conveyances and liens of every kind affecting said land. There is some proof in the record to the effect that Robinson and Lilly were associated together in business, and that after taking a deed of trust in his favor on both sections 26 and 35 to secure the payment of the \$6,000 due him from Lilly, Robinson thereafter, without any consideration, released his deed of trust insofar as section 35 was concerned.

But it was shown that he considered Lilly as solvent, and he stated that he would have satisfied his deed of trust entirely had he been requested so to do. It is not necessary, however, to review the transactions between [305] Lilly and Robinson, as the court below made no finding that Robinson was not an innocent purchaser except insofar as he was affected with constructive notice of the prior deed of trust from Lilly to Flannigan, as trustee.

The realty company filed suit in the Federal Court at Jonesboro on the 28th of March, 1912, in which it asked a reformation of the deed of trust to Flannigan by the insertion of the omitted range, and a foreclosure of that instrument; but this suit was never prosecuted to a final decree, and was dismissed on the 28th day of December, 1912. During the pendency of this suit in the Federal Court, Neas paid to Lilly the balance of the purchase money due on section 35, but Neas had not been made a party to this suit in the Federal Court, and had no actual knowledge of its existence.

The court below held that the registration of the deed of trust from Lilly to Flannigan was constructive notice of its existence, and that it constituted a lien prior to the subsequent conveyances. There is no circumstance in proof to support a finding that Neas was not a *bona fide* purchaser for value, and while there are some circumstances in proof which tend in a measure to show that Robinson may not have been, yet the chancellor did not make that finding of fact, nor is it now contended that the evidence is sufficient to establish that fact, but it is urged that both Robinson and Neas had such constructive notice of the Flannigan deed of trust that the conveyances to them must be held subject to that lien. The determination of the correctness of this view is, therefore, the question in the case.

Section 762 of Kirby's Digest provides that every instrument of writing affecting the title, in law or equity, to any real or personal property which is required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county.

Section 763 of Kirby's Digest provides that no instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or [306] equity shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless

such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated.

Section 5396 of Kirby's Digest provides that every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage.

(1) The description of sections 26 and 35 in the Flannigan deed of trust was insufficient to convey the legal title to those lands. It is shown without dispute that there were lands in township 12 north, in addition to those in range 8 east, there being townships numbered 12 north, 9 east; 12 north, 10 east; and 12 north, 11 east, and 12 north, 12 east. The designation of the range was, therefore, essential to a proper description of these sections.

In the case of *Howell v. Rye*, 35 Ark. 470 (to quote the syllabus), the court said:

"When a deed does not mention the township and range in which the land is situated, and no boundaries, natural or artificial objects, or other means for identifying the land, are given, on its face, is bad for uncertainty; and the grantor may make a new deed correcting the mistake and omission, which would be good between them."

To the same effect, see *Fuller v. Fellows*, 30 Ark. 657; *Mooney v. Cooledge*, 30 Ark. 640; *Doe v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Howell v. Rye*, 35 Ark. 470; *Cooper v. White*, 30 Ark. 513.

(2) Appellee concedes the insufficiency of the description when it prays that the same be reformed, and the court granted the prayer of that petition and decreed reformation of the deed by the insertion of the omitted [307] range. But appellee says that inasmuch as its deed of trust had been properly acknowledged and recorded, it thereupon became constructive notice to appellants and all others, not only of all recitals contained in it, but that its registry charged appellants and all others with the knowledge of all facts which would have been discovered by the inquiry which would have been suggested had they read the deed as recorded, that is, that this mortgage conveyed the same lands in township 13, range 8 east, which Lilly had purchased from the realty company when he purchased the two sections in township 12-8, and that as all the lands were conveyed to him by the same deed a perusal of this deed of trust would have suggested to him the necessity of inquiring whether or not the deed of trust was not in

fact intended to convey the lands in township 12 north, range 8, as well as the lands in township 13 north, range 8. In effect appellees contend that the registry of the deed of trust was constructive notice of all its recitals and notice of all facts which could have been ascertained by the pursuit of the inquiry which its recitals would have suggested.

A somewhat similar contention was made in the case of *Bluff City Lumber Co. v. Clarksville Bank*, 95 Ark. 1, 128 S. W. 58. In that case a deed of trust had been recorded which recited the dissolution of a partnership, and it was there contended that as all persons were charged with constructive notice of the instrument itself, they were likewise charged with the recitals contained in that instrument, and the trial court had been asked, but had refused, to give an instruction so declaring the law. Mr. Justice Battle, speaking for the court, said:

"The appellants contend that the trial court erred in refusing to so instruct; but it did not. The record of a deed is only constructive notice of that for which it is required. As it is not required to give notice of the dissolution of partnership, it does not subserve that purpose. Kirby's Digest, section 762."

It is said in the third edition of Warvelle on Abstracts, section 62, that "The doctrine of constructive notice under registration laws has always been regarded as [308] a harsh necessity, and the statutes which create it have always been subjected to a rigid construction."

The case of *Stead v. Grosfield*, 67 Mich. 289, 34 N. W. 871, involved a question very similar to the one now under consideration. The syllabus in that case is as follows:

"On February 17, 1873, B., the owner of certain property, executed a mortgage, under the foreclosure of which the defendant claimed title. The property was vacant and unoccupied. This mortgage failed to mention the block in which the lot was located. On July 12, 1875, B. executed another mortgage upon the same property to the plaintiff, in which it was correctly described. The plaintiff was ignorant of the existence of the defendant's mortgage. Held, that the first mortgage and its foreclosure were void for uncertainty of description, and that plaintiff's title must prevail."

In the case of *Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551, through the inaccuracy of the description employed, the question of the identity of the land conveyed was involved. But it was there contended that inasmuch as the first deed, which was of record, was intended to convey the tract of land in controversy, the subsequent purchaser stood charged with knowledge of that fact

because the identity could have been known by investigation. But in disposing of this question, it was said:

"The deed does not, of itself, give notice that the tract of land sold by W. T. Lytle to appellant was the same sold by him to John T. Lytle and James Speed; and in order to make it effective, it became necessary to show that the two deeds conveyed the same tract, and that this was known to appellant at the time he purchased. Purchasers are only charged with constructive notice of the facts actually exhibited by the record, and not with such as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make. *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304. Registration is constructive notice only of what appears on the face of the deed, as registered. *McLouth v. Hurt*, 51 Tex. 115."

[309] A very similar question was under consideration by the Supreme Court of Mississippi in the case of *Simmons v. Hutchinson*, 81 Misc. 351, 33 So. 21, in which case that court said:

"Constructive notice arising from the record of a muniment of title is imputed to purchasers and creditors from a mere presumption of law, and it imputes only such knowledge as the instrument there recorded discloses, and not what a diligent inquiry into its meaning might disclose. The registration of an instrument is constructive notice to the world of the contents of the paper there recorded or intended to be recorded, and of its particular contents only, and it will have no operation or effect unless the original instrument correctly and sufficiently describes the premises which are to be affected. The effect of the registration law is to impute to a purchaser notice of what the instrument recorded or intended to be recorded actually conveys, and has no operation in the way of putting him upon inquiry as to what premises were intended to be conveyed, unless they be substantially described therein. 2 Pom. Eq. Jur. sections 653, 654."

In the case of *American Invest. Co. v. Coulter*, 8 Kan. App. 841, 61 Pac. 820, a mortgage had described a tract of land as being in range 17 when it was in fact in range 7, and the Supreme Court of Kansas held that the record of the mortgage itself which had an improper range, and, therefore, in imperfect description was not sufficient to charge subsequent grantees with constructive notice that the mortgage conveyed or was intended to convey the land in range 7.

An old case on this subject and one that is cited in all of the more recent cases is that of *Lally v. Holland*, 1 Swan (Tenn.) 396. In that case a court of chancery was asked to reform a deed of trust in which a

mistake had been made as to the name of the bargainer, and as to that of the slave conveyed by the deed, and to enforce it as reformed against one who, subsequent to the execution of the deed, had purchased the slave without notice. In that case it was said:

"Again, registration is constructive notice in respect to such instruments only, as are authorized and required by law to be registered, and are duly registered in compliance [310] with law. 1 Story's Eq., section 404. And, furthermore, registration is constructive notice only, of what appears on the face of the deed as registered. 2 Humph. 116; 1 Johns. Ch. (N. Y.) 299. If the registration be not authorized or required by law; or if the registry itself be not in compliance with the requirements of the law; or if, upon the face of the deed as registered, the property purporting to be conveyed, be not truly and properly described, the act of registration is treated as a mere nullity, and, of course, cannot affect the subsequent purchaser with constructive notice. The object of registration is to give notice to creditors and subsequent purchasers. They have the right to presume that the instrument, as registered, speaks the truth, and expresses fully the true intention of the parties. They cannot be expected or required to look beyond the face of the paper as it appears on the register's books; nor can they be charged with notice of anything beyond."

A more recent case and one which reviews a great many authorities is that of *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054. In that case a deed had been recorded to a town lot which failed to state the block in which the lot was situated, and in that case, as here, it was contended that inasmuch as the deed had been recorded, that fact made it constructive notice to all subsequent purchasers of the property intended to be conveyed. Justice Vanderburgh, speaking for the Supreme Court of Minnesota, said:

"The legal title to land does not pass by deed unless so described that it can be identified or located by referring to or following out the description as given, and the effect of the record as constructive notice merely, cannot be aided or supplemented by proof of the actual intentions of the parties to the deed, not disclosed by the record. *Tice v. Freeman*, 30 Minn. 391, 15 N. W. 674; *Parret v. Shaubhut*, 5 Minn. 331. . . . But if the description in the deed is so defective and inaccurate that the subject of the grant is not properly identified or indicated, so that a reformation of the instrument is required, the legal title will not pass. *Roberts v. Grace*, 16 Minn. 134. Here the description is confessedly defective on its face. It is not [311] aided by the addition of particulars

containing a correct description or identification, or pointing to it, as might be done, by reference to a previous deed or well known name or locality, or anything of the kind. . . .

"We come now to consider, in the next place, whether the record of the deed—there being no actual notice—was constructive notice to the plaintiffs of the equitable rights of the defendant, as between her and her grantors, to a reformation of the deed. But this could not well be; for, if the description in the deed is altogether insufficient to locate or identify the property and pass the title, it would not be constructive notice at all to the plaintiffs, and they were not bound to notice it or look for it. *Simmons v. Fuller*, 17 Minn. 490; *Roberts v. Grace*, 16 Minn. 135; *Martind. Conv.* section 276, et seq. It is intended that the record be a correct and sufficient source of information, and the statute did not mean to put purchasers upon further inquiry by virtue of its operation making the fact of registration constructive notice; and parties are understood to purchase upon the faith of the title as appearing of record. *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 298; *Ledyard v. Butler*, 9 Paige (N. Y.) 136; *Jackson v. How*, 19 Johns. (N. Y.) 83; *Fort v. Burch*, 6 Barb. (N. Y.) 74. It is the settled rule that registration is constructive notice only of what appears on the face of the deed, and of the description of the premises therein. And if upon the face of the deed as registered, the property in controversy is not so described as to identify it with reasonable certainty, the record cannot be notice to subsequent *bona fide* purchasers. *Roberts v. Grace*, supra, 136; *Will. Eq. Jur.* *256. Under the registration laws, it is sometimes said in a loose and general way that the record of a deed is constructive notice to all the world, but this means simply that the record is open to all, and is notice to interested parties; and, strictly speaking, a purchaser has not by law constructive notice of all matters of record, but only of such as the title deeds of the estate show upon their face, or refer or direct him to. And the *bona fide* purchaser is not constructively bound to look further than the information afforded by the record of such deeds. The record of a deed is notice [312] only to those who are bound to search for it. *Dexter v. Harris*, 2 Mason 536, 7 Fed. Cas. No. 3,862; *Maul v. Rider*, 59 Pa. St. 167; *Sanger v. Craigue*, 10 Vt. 555; *Thomson v. Wilcox*, 7 Lans. (N. Y.) 376.

"The distinction between constructive and actual notice is also to be noticed. Constructive notice of the contents of a deed arises as an inference or presumption of law from the mere fact of record, and is in law equivalent

to actual notice of what appears upon the face of the record to the party bound to search for it, whether he has seen or known of it or not; that is, constructive notice under the recording acts may bind the title, but does not bind the conscience; while actual notice binds the conscience of the party. *Underwood v. Courtown*, 2 Sch. & Lef. (Eng.) 66. Hence, where the attention of an interested party is directed to a defective deed, or the recorded copy thereof, he may get actual knowledge of the facts sufficient to affect his conscience, and put him upon inquiry, so as to charge him with notice, which would not otherwise be legally attributable to him from the record only. *Thomas, Mortg.* section 491. In this case it is only upon the assumption in advance that the plaintiffs knew in fact of the existence of the defendant's deed or the description therein, or were chargeable with notice by the record thereof, that it can be claimed that they were put upon inquiry, or that the title of these lots was bound by it. But they had no actual notice of it. The search made for them did not disclose it. The land was not known by such description. They were not put upon inquiry as to the particulars of the transaction, and they could not be constructively bound by a deed which did not describe the land, and inquiry of the parties to that deed did not become a duty, since they had no notice in fact. *Maul v. Rider*, 59 Pa. St. 167. As was said in *Barnard v. Campau*, 29 Mich. 163, 164, in general, it will not be disputed that one who seeks a benefit from the recording laws must incur all the risks of the failure to have his papers spread upon the record in proper form. An equitable construction cannot be placed upon such laws, by which they may be made to give constructive notice of things the records [313] do not show. And in *Frost v. Beekman*, supra, 1 Johns. Ch. (N. Y.) 299, the chancellor says: "The registry was intended to contain within itself all the knowledge of the deed necessary for the purchaser's safety." The defendant was at fault in not seasonably examining and correcting the description in her deed; and where one of two innocent parties must suffer, the loss ought justly to fall on that one whose error has led to it. *Thomson v. Wilcox*, 7 Lans. (N. Y.) 380."

We have quoted extensively from that case, as it involves the question under consideration here, and the reasoning of the court is decisive of the point at issue, although we are not called upon to approve the statement that one seeking the benefit of the recording laws must incur all the risks of failure to have his papers spread upon the record in proper form, as we have held that one is required only to properly file his instrument for record. *Ghio v. Byrne*, 59 Ark. 280, 27

S. W. 243; *Case v. Hargadine*, 43 Ark. 144; *Oats v. Walls*, 28 Ark. 244. It would be unreasonable to extend the provisions of the registry laws so as to impose upon one who has only constructive notice, the duties resting upon one who has actual knowledge. Good faith requires of that man who has actual knowledge of any existing fact, to pursue such inquiry as would be suggested to an ordinarily prudent man by that knowledge, and equity charges him with the knowledge which he would have thus obtained had he made that inquiry. But we find no cases which impose this duty upon him who has only constructive notice. Constructive notice relates only to the instrument as recorded, and if the instrument is insufficient to give the necessary notice, then knowledge is not to be imputed. The deed of trust to Flannigan being one which requires reformation, its registry imputes no knowledge that range 8 had been omitted, and appellants having no actual knowledge of its existence are, therefore, innocent purchasers without notice, and the conveyances to them are superior to the Flannigan deed of trust.

The decree of the chancellor is therefore reversed and this cause will be remanded with directions to enter a decree in accordance with this opinion.

NOTE.

Constructive Notice from Record of Instrument Containing Defective Description of Real Property.

In General, 785.

Description Imparting Notice:

Where Property Is Identified, 785.

Where Purchaser Is Put on Inquiry, 787.

Description Not Imparting Notice:

Vague and Indefinite Description, 789.

Description Apparently Relating to Other Property, 790.

In General.

This note considers the question whether the record of an instrument containing a defective description of real property operates as constructive notice. As was pointed out in *Barnard v. Campau*, 29 Mich. 162, "subsequent purchasers are charged with constructive notice of what appears of record, and their rights are the same whether they have actually seen the record or not." And in *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550, it was said: "The law does not necessarily contemplate notice of a technically perfect legal conveyance before a subsequent purchaser could be charged." But on the other hand, it was well remarked in *Ann. Cas.* 1917B.—50.

Simmons v. Fuller, 17 Minn. 485: "Nothing could be more inequitable than because the law affects a purchaser with constructive notice of the record, to hold him affected also with constructive notice of the real intention of the parties to a deed, where the record of it utterly fails to disclose what that was. That would be a premium on negligence, not of the purchaser, but of the parties to the deed." And in *Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951, the court said: "The records should give information in such a form that the exact state of the title may be easily discovered; they must be characterized by certainty, accuracy, and reliability. A description, which in a deed of bargain and sale may be sufficient to pass title, may not be sufficient in a public record to give notice to subsequent purchasers."

A prayer for reformation of the instrument is not inconsistent with constructive notice, inasmuch as a defective description may be sufficient to put the examiner on inquiry, and yet be such as to make a correction proper and expedient. *Nolen v. Henry*, reported in full, post, this volume, at page 792; *Bowen v. Galloway*, 98 Ill. 41; *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550. But it has been held that where reformation is required in order to render the instrument valid between the parties, the record of the instrument cannot be constructive notice to purchasers. *Simmons v. Fuller*, 17 Minn. 485.

Description Imparting Notice.

WHERE PROPERTY IS IDENTIFIED.

Where a description in a recorded instrument is erroneous, but the error is apparent on the face of the instrument, and the understanding of the plain import of the record is not defeated, the record is constructive notice. *Black Eagle Oil Co. v. Belcher*, 22 Cal. App. 258, 133 Pac. 1153 (letters "S. B. & M.," meaning San Bernardino Base & Meridian, were transposed and appeared as "B. M. & S."). In *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550, the court said: "The error in this description is in the first course being set out as 'north,' when it should have been 'south.' But as the description calls for two northern courses which made it impossible to have the terminating point at the place of beginning, it was again apparent that there was a mere error in the scrivener. There is no reasonable ground to say that anyone reading such description would not have been sufficiently informed that the fourteen acres in controversy had been attempted to be conveyed to these plaintiffs."

Where the description, although defective, is correct to an extent sufficient to identify

the tract intended, the record gives constructive notice. *Loeb v. Conley*, 160 Ky. 91, Ann. Cas. 1916B 49, 169 S. W. 575; *Allen v. Hambleton*, 1 Ky. L. Rep. (abstract) 353; *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Cooper v. Bigly*, 13 Mich. 463; *Thorwarth v. Armstrong*, 20 Minn. 464; *Baker v. Clay*, 101 Mo. 553, 14 S. W. 734 (inaccuracy in call for quantity); *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96 (lands properly described by section, township, and range, but name of wrong county given); *Mohr v. Scherer*, 30 Pa. Super. Ct. 509 (county designated by former name); *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838 (mistake in number of acres, "more or less"); *Daugherty v. Yates*, 13 Tex. Civ. App. 646, 35 S. W. 937; *West v. Houston Oil Co.* 46 Tex. Civ. App. 102, 102 S. W. 927. Thus in *Anderson v. Baughman*, supra, the court said: "The description of the mortgage is as follows: 'All that certain piece or parcel of land situate in Springwells, Wayne county, Michigan, known as lot number four (4) in block number one (1) of the La Fontaine farm, so-called, lying south of the River road, so-called, and fronting on Detroit river, being now used and occupied, with the steam saw-mill thereon, by the parties of the first part.' By reference to the plat, it appears that all that part of the La Fontaine farm 'lying south of the River road, and fronting on Detroit river,' is divided into four tracts or lots, by straight lines drawn from the road to the river, parallel with the side lines of the farm; that these tracts are not designated by any word of description, as subdivision, block, or lot, but simply by numbers 1, 2, 3, and 4, in large figures; number one being on the upper or easterly line and the numbers following consecutively to the lower or westerly line, and number four adjoining the lower line of the farm. None of these four tracts appears to have been divided into smaller portions or lots. That part of the farm immediately across the road, and between that and Fort street, is also divided into four tracts or blocks, numbered, beginning on the west line, consecutively 5, 6, 7, and 8, in the same large figures; and these last four tracts are each subdivided into ten smaller lots. . . . It is admitted that tract or lot four, between the River road and the river, as shown upon the plat, is situate on the La Fontaine farm referred to, in the township of Springwells, Wayne county; and that it lies south of the River road, and fronting on Detroit river. It is also proved that the steam saw-mill of the mortgagors, at the date of the mortgage, and for years before and since, was, and is, situate on this tract or lot four; and that there was no mill on any of the other tracts or lots between the River road and

the river (though all of them were occupied as a lumber yard in connection with the mill). In all these particulars this tract or lot four agrees exactly with the calls of the mortgage. It is then evident that, if these tracts, numbered 1, 2, 3 and 4, between the road and the river, are properly called 'lots,' instead of blocks, we have, in the mortgage, a full and perfect description, by the number of the lot, and the courses and distances indicated on the plat, with the further fact in identification, not susceptible of mistake, the mill called for in the mortgage as being on this lot. The description is then perfect and certain; and it agrees with all the calls of the mortgage, with the single exception that it is not 'in block No. 1.' But, as the description is full, true, and perfect, in all respects, without the words 'in block No. 1,' and false and impossible with them, these words must be rejected under the familiar rule, *falsa demonstratio non nocet*: of which a more appropriate illustration cannot be found in the books. . . . It is quite evident the person who drafted the mortgage mistook that part of the farm between the road and the river for one block of lots, and supposed lot four to be a lot of that block. The error, however, is so palpable that it cannot fail to be discovered by construing the mortgage, as such instruments must always be construed, with reference to the plat, and facts, and monuments on the ground, referred to in the instrument itself. The mortgage was good between the parties, without correction, and the error appearing by construction, the record was notice to all subsequent purchasers and incumbrancers, as much as if the error had not occurred. No man of ordinary intelligence could have been deceived as to the land intended."

In *Cooper v. Bigly*, 13 Mich. 463, it appeared that the description in the mortgage was "lot number one (1), in section twenty-eight (28), on the Forsyth or Porter farm in said city, being on the southwest corner of Fort and Sixth streets." The lot should have been described as in section eighteen (18), the other parts of the description being correct. The court held the description to be sufficient to impart constructive notice.

In *West v. Houston Oil Co.* 46 Tex. Civ. App. 102, 102 S. W. 927, the court said: "It cannot be questioned that the description of the land as that 'tract, lot or parcel of land containing four thousand four hundred and twenty-eight acres, and being the league of land granted me by George Antonia Nixon, Commissioner of the Empresario Lorenzo de Zavalla . . . , and for further description of said land reference is hereby made to the original plat and field notes of survey which are on file and of record in the General Land Office of this Republic' is sufficient

to identify and convey the land in controversy. The insertion in the description of the statements that the land was situate in Jefferson county on Cabicera bayou and joining the land of Francis Valeras on the east, which statements as applied to the only league of land granted by Nixon to McGee and which McGee, as shown by his subsequent act, intended to sell and did sell to Dobson, are shown to be false, does not viti-ate the true description and invalidate the deed, nor can the reference to the false testimonio which was delivered to Dobson with the deed have such effect. . . . The fact that the false portions of the description indicated that the land conveyed was other than the land in controversy would not justify a purchaser in failing to make the reasonable inquiries by which the truth could have been ascertained. He could not accept the false portion of the description and discard the true and thus make himself an innocent purchaser."

It has been held to be sufficient to describe the property as "all the right, title and interest of said Richard K. Morien and wife, in and to the real estate lying in the county of Henrico of which Richard Morien died seized and possessed." *Florance v. Morien*, 98 Va. 26, 34 S. E. 890. And in *Vanvalkenberg v. American Freehold Land Mortg. Co.* 87 Fed. 617, 59 U. S. App. 102, 31 C. C. A. 145, it was held that the record of a mortgage on "thirty acres" in a certain quarter section was notice to judgment creditors, it appearing that the mortgagor owned in the designated quarter section only the thirty acres intended to be described.

In *Regan v. Milby*, 21 Tex. Civ. App. 21, 50 S. W. 587, it was held that the record of a deed with a defective description but containing a correct statement of the number of acres conveyed was constructive notice to a judgment creditor that the grantee claimed a part of the land formerly owned by the grantor.

WHERE PURCHASER IS PUT ON INQUIRY.

The general rule is that where the record of an instrument containing a defective description of the property is sufficient to put those who see it on an inquiry which, duly prosecuted, would disclose the true facts, the recorded instrument is notice to subsequent purchasers.

United States.—*Partridge v. Smith*, 2 Biss. 183, 18 Fed. Cas. No. 10,787; *Vercruysse v. Williams*, 112 Fed. 206, 50 C. C. A. 486 ("section 31, range 8, township 12" instead of "section 31, township 8, range 12;" county correctly designated and instrument recorded therein; land actually described did not lie in such county).

Alabama.—*Nolen v. Henry*, reported in full, post, this volume, at page 792.

California.—*Rogers v. McCartney*, 3 Cal. App. 34, 84 Pac. 215; *Leonard v. Osburn*, 169 Cal. 157, 146 Pac. 530, affirmed 169 Cal. 157, 146 Pac. 532.

Connecticut.—*Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143 (one line described at 35' instead of 65').

Georgia.—*Talmadge v. Interstate Bldg. etc. Assoc.* 105 Ga. 550, 31 S. E. 618 (reference to unrecorded map).

Illinois.—*Merrick v. Wallace*, 19 Ill. 480 (description included impossible sectional number); *Erickson v. Rafferty*, 79 Ill. 209; *Bent v. Coleman*, 89 Ill. 364 (omission of word "rods" in designation of starting point); *Bowen v. Galloway*, 98 Ill. 41; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492 (mistake in starting point, which would throw mortgaged premises into lot other than that owned by mortgagor and correctly numbered in mortgage); *Morrison v. Miles*, 270 Ill. 41, 110 N. E. 410; *Myers v. Perry*, 72 Ill. App. 450 (omission of township, making mortgage apply to no particular land).

Indiana.—*Walls v. State*, 140 Ind. 16, 38 N. E. 177; *Frick v. Godare*, 144 Ind. 170, 42 N. E. 1015 ("northwest" quarter instead of northeast quarter, but description by metes and bounds and reference to former deed sufficient to identify land intended to be conveyed).

Iowa.—*Albia State Bank v. Smith*, 141 Ia. 255, 119 N. W. 608.

Michigan.—*Schweiss v. Woodruff*, 73 Mich. 473, 41 N. W. 511 (land described as block 6 of certain recorded plat; plat described whole land covered but did not designate blocks by number or otherwise; subsequent purchaser purchased whole plat).

Missouri.—*Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551; *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550 (omission of western boundary). Compare *Cass County v. Oldham*, 75 Mo. 50 (cited in *Ozark Land, etc. Co. v. Franks*, 156 Mo. 673, 57 S. W. 540).

New Jersey.—*Lee v. Wodworth*, 3 N. J. Eq. 36 (ambiguity on face of record).

Texas.—*Carter v. Hawkins*, 62 Tex. 393 (ambiguous description); *Swearingen v. Reed*, 2 Tex. Civ. App. 364, 21 S. W. 383 (description defective as to certificate number, but giving correct section and name of survey); *Wilkerson v. Ward*, 137 S. W. 158. Compare *McLouth v. Hurt*, 51 Tex. 115; *Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551; *Neyland v. Texas Yellow Pine Lumber Co.* 26 Tex. Civ. App. 417, 64 S. W. 696.

Washington.—*Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250; *Wetzler v. Nichols*, 53

Wash. 285, 101 Pac. 867, 132 Am. St. Rep. 1075.

Thus in the case last cited wherein it appeared that the description was "lots (7) and (8) in Cove addition to the city Seattle, Washington" and that Cove addition consisted of twelve blocks each containing sixteen lots, the court said: "Was this deed sufficient to put a subsequent purchaser upon notice? We think it was. The record showed that Rayburn and Alexander owned no interest in any other lots numbered 7 and 8 in this addition. They had deeded these lots away and the deed was of record. An inquiry of Rayburn would have revealed the fact, or an inquiry of his grantee would have disclosed, that the grantee or her successors in interest were claiming the lots by virtue of the deed of June 4, 1907, and intended to 'fight it out' with the grantor. . . . In *Deering v. Holcomb*, 26 Wash. 588, 598, 67 Pac. 240, 561, quoting from a decision of the Supreme Court of the United States, this court said: 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' . . . The deed of June 4, above referred to, which was standing of record, even if it was not notice of itself, was alone sufficient to put the appellant upon inquiry as to whether Rayburn and Alexander had not parted with all their title. It follows that the appellants were not purchasers without notice."

In *Partridge v. Smith*, 2 Biss. 183, 18 Fed. Cas. No. 10,787, it appeared that a mortgage was intended to describe the south half of the southeast quarter of section 15, town 43 north, range 8 east of the third principal meridian, in McHenry county, Illinois. The description read: "The south half of the southeast quarter of section 15, in township No. 8 north, of range No. 43 east of the 4th principal meridian, being in the county of McHenry and state of Illinois." According to the government surveys, of which the court took judicial notice, there was no such tract of land in McHenry county as the one described. The court said: "It may be admitted—and I think the authorities go that far—that if there had been any land in McHenry county to which this description would apply, it would not be the duty of the parties to trace up and determine what the actual truth was; but, upon a mere inspection of the record, which these parties are presumed to have seen, it would appear that Mrs. Smith undertook to mortgage a particular tract of land in McHenry county; that it was east of the fourth principal meridian; that it was in town 8 north;

that it was in range 43 east. The inquiry would naturally be, what does this mean? There is no fourth meridian in McHenry county; there is no range 43 east. In point of fact the range and town are simply transposed. It should be 'town 43' instead of 'range,' and 'range 8' instead of 'town.' I think that, with this before them, there were facts from which they could infer, or any prudent man might infer, that this property upon which their deed of trust operated was encumbered, and that incumbrance was upon the record two days before their own. The property was actually mortgaged. It was the intention of the parties that it should be mortgaged. There is simply a misdescription of the property. The question is whether it is of such a character as to do away with the effect of the registry laws as against a person whose deed took effect subsequent to the recording of this mortgage. I think there was enough upon the record to put a prudent man upon inquiry and compel him to follow it up and to affect him with the consequences of that pursuit."

In *Leonard v. Osburn*, 169 Cal. 157, 146 Pac. 530, 532, wherein it appeared that the recorded deed described the lot conveyed as "lot 10, block 21, subdivision No. 6, according to the map made by N. E. Beckwith," and it appeared that the reference to the map was erroneous, it was held nevertheless that the deed was constructive notice, the court saying: "It appears that there was no lot 10 in block 2 on the Beckwith map, nor any subdivision 6; that that block was not divided into lots, but was reserved as a site for a church, which church was already built in the year 1890. It was also shown by competent testimony that the lot described in the deed through which defendant derives title can from the description therein be easily located, notwithstanding the false reference to the map. . . . We think in the present case that, had the plaintiff's predecessor before purchasing the lot examined the record of the deed of defendant's predecessor, including the map therein referred to, she would undoubtedly have been put upon inquiry, and could not have failed to discover the true facts. She would have discovered that there was no subdivision 6 delineated upon said map, and that in the only subdivision platted thereon, viz., subdivision 1, there was no lot 10 in block 2. Inquiry upon the ground would have quickly brought to light that the lot described in said record was no other than the one she was negotiating to purchase."

In *Bowen v. Galloway*, 98 Ill. 41, it appeared that a deed of trust conveyed "lot 4, in block 13, in Ogden's addition to Chicago, having a frontage of 24½ feet and a depth of 80 feet" with a two-story and basement.

frame dwelling thereon. It further appeared that in said block 13 there were both an original lot 4, and a sub lot 4 cut from original lots 1 and 2. The original lot 4 was 40' x 118' and did not have the dwelling house described; the subplot 4 was 23' x 80' and had a dwelling house as described in the deed of trust. The grantor had a fee simple title to subplot 4, and no title to the original lot 4. In holding that the description in the deed of trust was a sufficient identification of the subplot 4, the court said: "It seems plain that with this description, no reasonable man could fail to identify the property conveyed by this Munroe trust deed. The mistake of 18 inches in stating the frontage of the lot is so small as to be a matter of no moment whatever, and the identification, by the description of the house which stood upon the lot, is conclusive. The prayer for reformation of the deed is not a matter that is at all essential. The deed was sufficient without reformation. It was no doubt better that in the decree it should be more distinctly described. It is true, that where the description of property in a deed is, by mistake, so defective that it cannot be identified, the record of such deed would not be notice to a subsequent purchaser; and it is also true that while such a mistake in a deed may be reformed, as between the parties to it, no reformation of such deed could lawfully be made as against a subsequent bona fide purchaser of the property. But in this case we cannot regard Bowen, or any of those through whom he derives title, as bona fide purchasers. The record of the Munroe trust deed was sufficient notice to put each and every of them upon inquiry. Such inquiry could not fail to furnish them the necessary information as to the property which was described in that deed."

Contrary to the general rule, the view is expressed in the reported case that constructive notice does not extend to such facts as would be revealed by an inquiry duly prosecuted according to the facts disclosed by a defective description in the record. The view of the reported case finds support in the following cases: *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054; *Simmons v. Hutchinson*, 81 Miss. 351, 33 So. 21. And see the *Missouri and Texas cases* compared *supra*. But see *Cable v. Minneapolis Stock-Yards, etc. Co.* 47 Minn. 417, 50 N. W. 528.

Description Not Imparting Notice.

VAGUE AND INDEFINITE DESCRIPTION.

Where the description of the premises is omitted or is given in vague and indefinite terms that do not identify the property or impart information sufficient to put a subse-

quent purchaser on inquiry, the record does not afford constructive notice. *Bright v. Buckman*, 39 Fed. 246 (omission of block number, where there were ten blocks; grantor owned lots as numbered in only one block, but he had in some manner dealt with same numbered lots in another block); *Fuller v. Fellows*, 30 Ark. 657 (lands described by subdivisions of certain sections with reference to homestead, omitting township, range, county and state); *Adams v. Edgerton*, 48 Ark. 419, 3 S. W. 628; *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260 (number and description of lots omitted from record by mistake); *Bender v. Chew*, 129 La. 849, 56 So. 1023; *Wilfert v. Duson*, 131 La. 21, 58 So. 1019; *Thurlough v. Dresser*, 98 Me. 161, 56 Atl. 654 (twelve acres of "a farm in Caswell"); *Barrows v. Baughman*, 9 Mich. 213; *Barnard v. Campau*, 29 Mich. 162; *Stead v. Grosfield*, 67 Mich. 289, 34 N. W. 871 (omission of block number, where subdivision contained three blocks); *Roberts v. Grace*, 16 Minn. 126; *Gatewood v. House*, 65 Mo. 663 (reference to unrecorded certificates of entry); *Banks v. Ammon*, 27 Pa. St. 172; *Southern Bldg. etc. Assoc. v. Rodgers*, 104 Tenn. 437, 58 S. W. 234 (inconsistent calls and unclosed lines); *Potter v. Dooley*, 55 Vt. 512.

Thus in *Banks v. Ammon*, 27 Pa. St. 172, the following description was considered: "Beginning at a servisberry corner, thence north to a white oak, thence east to white oak, thence south to limestone quarry, thence to a white oak: all these trees are marked for the purpose of running off the above described land." The court said: "There is nothing in the description to bring home notice to the purchaser of the identity of the land. Neither township, county, nor state is given for its locality; nor is the number of the tract, or the amount of acres mentioned. No boundaries, courses, or distances referred to: all that is required to fill the description is to find one servisberry, three white oaks, a limestone quarry, with the trees marked in some manner. One about to purchase at a judicial sale, finding such a deed upon record, might safely assume that it did not apply to land of which the grantor died seized. We are of opinion that the description in this deed was too vague and indefinite, either to bring home notice to the purchaser, or to put him upon inquiry."

In *Stead v. Grosfield*, 67 Mich. 289, 34 N. W. 871, the controversy was over lot No. 9, in block 1, of Joseph Bushey's subdivision of private claim 171, *Livernois farm*. Both parties claimed through Joseph Bushey, who on February 17, 1873, executed a mortgage to Michael Darmstadter on lots 9, 13, 14, 15, 16, 17 and 18 of the Bushey plat. No block was mentioned. The plat contained

three blocks, numbered 1, 2 and 3, and each block contained a lot numbered 9. This mortgage was duly recorded on the day of its date. On July 2, 1875, Joseph Bushey executed a mortgage to Mary E. Sage covering lot 9, of block 1, of the Bushey plat, which was duly recorded. The plaintiff claimed title through this mortgage and the defendant claimed title through the mortgage to Darmstadter; and the question was whether the record of the first mortgage was notice to Sage at the time she acquired her mortgage. The court held that it was not notice for want of a sufficient description of the premises.

It has been held that the record of a deed conveying "all the estate, both real and personal, to which" the grantor was "in any manner entitled at law or in equity," was not notice to subsequent purchasers, because of the want of description of the lands intended to be conveyed. *Mundy v. Vawter*, 3 Grat. (Va.) 518. That holding was disapproved in *Warren v. Syme*, 7 W. Va. 474.

In each of the following cases it was held that the description was not sufficient to impart notice, on the ground, however, that actual notice is necessary to put a subsequent purchaser on inquiry as to the premises intended to be affected by a defective record. *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054; *Simmons v. Hutchinson*, 81 Miss. 351, 33 So. 21 ("the $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 3" etc., held to be indefinite and no notice of intention to describe the east $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 3, etc.); *Cass County v. Oldham*, 75 Mo. 50 (township and range omitted); *Ozark Land, etc. Co. v. Franks*, 156 Mo. 673, 57 S. W. 540 (land described as S. E. $\frac{1}{4}$ of sec. 26, range 5, omitting township: grantor referred to as patentee, and other record evidence showed that grantor was not patentee of land in any other section 26 in range 5). *Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551. And see the reported case.

DESCRIPTION APPARENTLY RELATING TO OTHER PROPERTY.

It has been generally held that where the recorded instrument appears by its description to relate to certain land, it is not constructive notice as to other land, which it was intended to describe.

Alabama.—*Winter-Loeb Grocery Co. v. Carroll*, 194 Ala. 402, 70 So. 5 (specific designation of property other than that owned by mortgagor and intended to be mortgaged; nothing to show that all of mortgagor's property was to be conveyed).

California.—*Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29 (land described as situated in range 24, instead of 25).

Colorado.—*Annie C. Gold Min. Co. v. Marks*, 13 Colo. App. 248, 58 Pac. 404 (misnomer of mining claims).

Illinois.—*Rodgers v. Kavanaugh*, 24 Ill. 583; *Wait v. Smith*, 92 Ill. 385; *Slocum v. O'Day*, 174 Ill. 215, 51 N. E. 243 (lots described as being in section 11 instead of section 17); *Harms v. Coryell*, 177 Ill. 496, 53 N. E. 87; *Thorpe v. Helmer*, 275 Ill. 86, 113 N. E. 954; *Munford v. McIntyre*, 16 Ill. App. 316 (section 13 instead of 12).

Indiana.—*Easter v. Severin*, 64 Ind. 375 ("three town lots in the town of Benwood" held not to apply to lots or lands outside of Benwood); *Rinehardt v. Reifers*, 158 Ind. 675, 64 N. E. 459 ("lots 13 & 14 in University Park addition to West Lafayette" instead of lots 13 & 14 in University Park, second addition to West Lafayette).

Iowa.—*Scoles v. Wilsey*, 11 Ia. 261 (Iowa statute provided for description in recorder's index); *Miller v. Bradford*, 12 Ia. 14 ("undivided" right, instead of individual right); *Noyes v. Horr*, 13 Ia. 570; *Breed v. Conley*, 14 Ia. 269, 81 Am. Dec. 485; *Stewart v. Huff*, 19 Ia. 557 (lots numbered according to unrecorded plat, and lot numbers were subsequently changed); *Halloway v. Platner*, 20 Ia. 121, 89 Am. Dec. 517 (land described as situated in range 44, instead of 43); *Peters v. Ham*, 62 Ia. 656, 18 N. W. 296 ("Zulauf's subdivision" instead of Zollar's addition).

Kansas.—*American Invest. Co. v. Coulter*, 8 Kan. App. 841, 61 Pac. 820 (range 17 instead of 7).

Louisiana.—*Robeson v. Robert*, 6 La. 1; *Adams v. Drews*, 110 La. 456, 34 So. 602; *Haas v. Fontenot*, 132 La. 812, 61 So. 831 ("N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 23, township 4 south, range 1 west" instead of S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, etc.); *Sentell v. Randolph*, 52 La. Ann. 52, 26 So. 797.

Maryland.—*Brydon v. Campbell*, 40 Md. 331 ("one-fourteenth part" instead of four-tenths).

Michigan.—*Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293; *Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951.

Minnesota.—*Simmons v. Fuller*, 17 Minn. 485 (wrong block number); *Ada Bank v. Gullikson*, 64 Minn. 91, 66 N. W. 131.

Montana.—*Baker v. Bartlett*, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. Rep. 594 ("lot 16, block 67," instead of lot 16, block 57).

Nebraska.—*Galway v. Malchow*, 7 Neb. 285 (wrong section); *Gillespie v. Sawyer*, 15 Neb. 536, 19 N. W. 449.

Pennsylvania.—*Wentz's Appeal*, 10 W. N. C. (Pa.) 284 (error in starting point).

New Jersey.—See *Rutgers v. Kingsland*, 7 N. J. Eq. 178.

New York.—*Thomson v. Wilcox*, 7 Lans. (N. Y.) 376 (metes and bounds described wrong lot, although street number was correctly given).

Texas.—*McLouth v. Hurt*, 51 Tex. 115; *Gulf, etc. R. Co. v. Gill*, 86 Tex. 284, 24 S. W. 502 (wrong block number, according to only accessible map); *Neyland v. Texas Yellow Pine Lumber Co.* 26 Tex. Civ. App. 417, 64 S. W. 696; *Dickerson v. McFarland*, 152 S. W. 1140 (second call read "east" instead of "west," thereby throwing description to another tract, although fourth call was also "east" but qualified by "to the beginning"); *Higginbotham v. Breed*, 160 S. W. 117.

Vermont.—*Sanger v. Craigue*, 10 Vt. 555 (east half of lot described as west half).

In *Thorpe v. Helmer*, 275 Ill. 86, 113 N. E. 954, the court said: "The property was described as in the subdivision by John G. Shortall, trustee, of the north half of the northeast quarter of section 16. The proof shows that there is only one subdivision in Cook county by John G. Shortall, trustee, and that it is in section 26, but there is neither allegation nor proof that the Chicago Title & Trust Company knew that fact. In any event, it was not required to look for the record of title to a lot of land in section 16. The record of an instrument affecting the title to land is constructive notice only so far as the land is correctly described, unless it is apparent from the record itself that there is a misdescription. . . . There is nothing in the description to indicate that there was not a subdivision by John G. Shortall, trustee, in section 16, and nothing to indicate that the land intended to be conveyed was in section 26." In *Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951, it appeared that the recorded notice of levy described the premises as "lot 5, block Q, Mitchell's revised plat of Cummer & Gerrish's addition to the village of Clam Lake, now city of Cadillac, state of Michigan." There was a plat known as Cummer & Gerrish's addition, but that contained no block Q; and there was no plat known as Mitchell's revised plat of Cummer & Gerrish's addition. The court said: "The property described in the levy proceedings places this lot in the proper block Q, but not in the correct plat. . . . 'G. A. Mitchell's revised plat of the village of Clam Lake, now city of Cadillac, and Mitchell's revised plat of the village of Clam Lake, now city of Cadillac, is one and the same thing.' There is a lot 5, block Q, in the G. A. Mitchell's revised plat of the village of Clam Lake, now city of Cadillac. There is but one block Q in the city of Cadillac, and that is found in Mitchell's revised plat of the village of Clam Lake. There is no lot 5, block Q, of Cummer & Gerrish's addition to the village of Clam Lake, now city of Cadillac. . . . It will be noted that the description was a wrong description, as distinguished from an imperfect or impossible description. It is the

claim of the plaintiff that, by a process of elimination, defendant Seager could have ascertained that the only block Q in the city of Cadillac was in Mitchell's revised plat, and that there was no block Q in the Cummer & Gerrish addition. But the description being a wrong description, why should the defendant be driven to take his chances upon what should be eliminated from the wrong description? Might he not as well say that block Q was a mistake, or the lot levied upon was wrongly described, or that describing it as Mitchell's revised plat was an error, as well as to say that he must find that Cummer & Gerrish's addition was an error? We do not think, in the light of the cases which we have cited, that there was any such duty resting upon the defendant Seager."

In *Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293, the court said: "The lot 7 deeded to Elizabeth Knight, and on which the mortgage rests and to which the complainant seeks to apply the levy, is lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of the Labrosse and Baker farms, situated on the south side of Pine street between Sixth and Seventh streets, according to the recorded plat of the same in the register's office of Wayne county, and the levy is described as on lot numbered 7 of the subdivision of lots numbered 12, 13 and 14 of the Labrosse and Baker farms, so-called, in the city of Detroit. . . . We have then in the one case a John Gibson subdivision of four specified lots on a specified block according to a recorded plat, and in the other a subdivision of three specified lots made by some one not named, and not located on any block nor referred to any plat. It is, we think, not possible to hold that the lot 7 in the levy was so described there as to affect the public with notice, through the certificate, that the lot 7 of the John Gibson subdivision was meant. The difficulty is not merely that the description in the levy has fewer badges of identification than were practicable, and should have been given. It goes further. Instead of being only a blind guide to the lot claimed, the description is a misleading one which points somewhere else."

In *Ada Bank v. Gullikson*, 64 Minn. 91, 66 N. W. 131, it was said: "The lots intended to be described in the mortgage were lots 6 and 7 in block 13 in the town (now village) of Ada, but the actual description was lots 6 and 7 in block 13 of the First addition to the town (now village) of Ada. The plaintiff's claim is that the land intended to be described in the mortgage can be located and identified by following out the description, which is complete if the false particular locating the lots in the First addition to the village of Ada be eliminated by rejecting therefrom the words 'The First addition to,'

thereby locating the lots in the original plat. . . . The fallacy of the plaintiff's claim lies in the assumption that the description in the mortgage on its face discloses in what particular it is false, and what should be corrected in or eliminated therefrom in order to describe the lots intended to be mortgaged. It is impossible to tell from the face of the description whether the mistake therein is in locating the lots in the wrong plat or block or village. If the mistake was in locating the lots in the wrong block, and block 23 was intended, then, if 23 was substituted for 13, the description would be correct. Conceding that a person reading the description would be charged with notice that there was no block 13 in the First addition, yet it does not, as we have suggested, charge him with notice that the mistake was in locating the lots in the wrong plat, and not in the wrong block or village."

In *Sentell v. Randolph*, 52 La. Ann. 52, 26 So. 797, wherein it was alleged that the mortgage and deed of sale described certain quarter sections other than those intended, the court said: "If we were to decree that these defendants must lose their lands, we would then virtually have to hold that they should have been aware of a fact of which plaintiff had no knowledge whatever until quite recently. Plaintiff and her ancestors in title held for years the land described in her deed of purchase without suspecting that there was the least illegality in the title to these lands, and that she had the shadow of a claim to the lands now owned by these defendants. She, in consequence, cannot, in the absence of evidence, sustain the position that they should have known that which was unknown to her and to her ancestors in title. Not only the title since a number of years did not inform the public, as required, what property it embraced, but it did not inform the plaintiff until a comparatively recent date. The intention of Mrs. Randolph to sell these tracts to plaintiff's ancestor in title, if it was the intention, does not appear of record. What plaintiff's ancestors in title intended to do, does not in the absence of all notice concern third persons."

The rule has been laid down that where, on account of a misdescription, the recorded instrument is not in the apparent chain of the title of the land in question, the record is not constructive notice. *Cunningham v. Thornton*, 28 Ill. App. 58.

NOLEN

v.

HENRY.

Alabama Supreme Court—December 17, 1914.

190 Ala. 540; 67 So. 500.

Deeds — Validity — Uncertainty of Description.

The law leans against the destruction of a deed for uncertainty of description, and will construe, where it can be done consistently with the rules, so as to effect, and not to defeat, the intention of the parties.

[See 66 Am. St. Rep. 60.]

Same.

Although a deed may be void on its face for want of a definite description of the land, a court of chancery will reform it upon proper allegation and proof of extrinsic facts.

Same.

A grantor, owning a large body of surrounding land, conveyed ten acres, to be laid off so as to include a certain shoal on the creek, which in fact was in section 15; the deed describing it as being in sections 16 and 22, to be laid off so as to include that certain shoal, the land to be surveyed and platted, and a certified plat to become a part of deed to complete a description, in view of the recording of the plat referred to therein, is an uncertain description, which may be aided by parol proof, and which comes within the maxim, "Id certum est, quod certum reddi potest."

Reformation of Instruments — Laches.

Where land was conveyed to a power company in May, 1909, and conveyed by it to complainant in March, 1913, after the death of the original grantors, complainant's bill, thereafter filed, for reformation of the description in the deed, is not too long delayed.

[See 65 Am. St. Rep. 504.]

Right to Sue for Reformation — Person Out of Possession.

To maintain a bill to correct a mistake in the description of land conveyed by a deed, it is not necessary that the complainant should be in possession of the land.

Recording Acts — Constructive Notice — Instrument Defectively Describing Property.

A deed executed in May, 1909, conveying ten acres from a body of surrounding land described as lying in sections 16 and 22, to be laid off so as to include a certain shoal on a creek, and to be surveyed and platted, and a certified plat to be a part of the deed to perfect the description, on record before the plat was filed, sufficiently described the lands to put a purchaser on inquiry, and hence was such constructive notice as to defeat his rights as a bona fide purchaser.

[See note at end of this case.]

**Corporations — Execution of Deed —
Form of Signature.**

A deed of "Big Hillabee Power Company," purporting on its face to be the deed of the company, and reciting that in witness the grantor had set its hand and seal and delivered it by its president, signed, "L. W. Roberts, Pres't Big Hillabee Power Co.," was the deed of the company, since any defect in the signature is such as a court of equity will not permit to defeat the right of the grantee.

Appeal from Chancery Court, Tallapoosa county: **WHITESIDE**, Chancellor.

Action by R. L. Henry, plaintiff, against Roy Nolen, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

George A. Sorrell for appellant.
Lackey & Rowland for appellee.

[541] **GARDNER, J.**—Bill filed for reformation of description in certain deeds, referred to therein. Woodlawn Realty, etc. Co. v. Hawkins, 186 Ala. 234, 65 So. 183. Complainant claims title through a corporation known as Big Hillabee Power Company. It is shown: That one J. H. Chisolm, who was the owner of the land, conveyed by deed of date May 19, 1909, in execution of which deed his wife, Rebecca Chisolm, joined, to said Big Hillabee Power Company a tract of land consisting of 10 acres, to be laid off so as to include a certain shoal on Big Hillabee creek known as "Lindsey Shoal." That said Chisolm owned a large body of land surrounding the particular land. The description in said deed, a copy of which is made Exhibit A to the bill, is as follows: "Ten acres of land lying and being in sections 16 and 22, to be laid off so as to include Lindsey shoals on Big Hillabee creek, said land to be surveyed and platted by J. R. Hall, and when surveyed by him and platted, a certified plat by said J. R. Hall shall be and become a part of this deed for the purpose of making the description perfect, and shall be attached to this deed and recorded as a part of this deed, with full water rights to erect a dam of sufficient height to back water to property sold Mr. Pinckard, at Chisolm's Bridge over said creek, with full rights, privileges, easements to, of the use of said stream for the purpose of a water power, said lands and water rights lying and being in township 23 of range 22."

[542] The misdescription sought to be corrected, and the averments in connection therewith, are found in section 12 of the bill, as follows: "12. Orator further shows to your honor that the Lindsey shoals on Big Hillabee creek, while the same were situated on

the lands of J. H. Chisolm, and while the same is near the section line between section 22 and 15, that part of the same is in section 16, and that 10 acres could not be laid off in section 16 and 22 so as to include Lindsey shoals, and while the same is described in the deed from Chisolm and wife to the Big Hillabee Power Company and from it to orator as being in section 16 and 22, that it was the intention of the parties in each instance to convey 10 acres of and so situated that the same should be available for the purpose of building a power plant on the said Lindsey shoals, and that neither the agent of the power company nor J. H. Chisolm knew the exact lines where the shoals were located, and that it was by mistake of the parties that the same was described as being in section 16 and 22, and that the description should have been in section 15, and that it was the intention of the vendor to convey 10 acres of land in section 15, which could include the Lindsey shoals, and it was the intention of the vendee to buy 10 acres of land in section 15 including Lindsey shoals, but by mistake as to where the lines were the lands are described as being in section 16, which by reason of that fact the line of section 22 was so near to the shoals that it was deemed probable by the parties at that time that some part of the 10 acres would necessarily be in section 22; that the description section 22 was put in the original deeds in order that there might be perfect and complete room for the laying off of 10 acres to be used for the best advantage in the development of the water power at Lindsey shoals. And orator avers that the said Roy Nolen was [543] fully informed by the record of said deed that it was the intention and purpose of the parties to said deed that said 10 acres of land should be so laid off as to include such land as would be best suited to the building of a plant for the development of the water power at Lindsey shoals."

The bill further shows that J. H. Chisolm died some time subsequent to May 19, 1909, and that his wife, Rebecca Chisolm, became the owner, either by inheritance from, or devise by, the husband, as we construe the bill, of all the lands belonging to her said husband; that prior to February 28, 1913, Rebecca Chisolm died, and that in due course of administration the lands of her said estate were sold by the administrator under the order of the probate court, and that as a part of the land ordered to be sold by said administrator was the west half of section 15, township 23, range 22, in Tallapoosa county, on which lands the Lindsey shoals were situated, and at said administrator's sale respondent became the purchaser of said lands, together with other lands then sold, the said 10 acres conveyed by J. H.

Chisolm and wife to the Big Hillabee Power Company was not excepted therefrom, but said lands were sold in a body; that the said deed to said power company was on record in the probate office of Tallapoosa county at the time of said administrator's sale.

It is alleged that the said power company, in March, 1913, conveyed to complainant said lands sold to it, by use of the same description as that contained in the deed by J. H. Chisolm and wife to it, and that at that time the surveyor had not filed a plat or description of the 10 acres as provided for in said deed; that in June, 1913, complainant, desiring to perfect said description, procured J. R. Hall, named in the deed to the power company, to make a survey, laying off 10 [544] acres of said lands so as to include the Lindsey shoals, and make a plat of the same, which said Hall did and filed in the probate office, and same has been recorded as a part of the deed.

The question considered and treated as of prime importance by counsel has reference to whether or not the description in the deed sought to be reformed is so uncertain as to render the same absolutely void.

(1-3) It is, of course, well settled that the law leans against the destruction of a deed for uncertainty of description, but will construe the deed, where it can be done consistently with legal rules, so as to give effect to the intention of the parties, and not to defeat it. "Every deed . . . ought to be so constructed, if it can, that the intent of the parties may prevail, and not be defeated." —Pollard v. Maddox, 28 Ala. 321.

In Cottingham v. Hill, 119 Ala. 353, 24 So. 552, 72 Am. St. Rep. 923, it was said: "This court has gone as far as any other in admitting parol evidence to sustain the validity of deeds, assailed upon the ground of indefiniteness in the description of the land; but the rule which we have adopted promotes justice, and does not open the door to fraud and perjury. In all cases the writing has been sufficient to show a bona fide sale and conveyance was intended by the parties, and when this appears no injustice results if by parol evidence the precise property intended to be conveyed can be clearly identified."

"Although a deed may be void on its face for want of a definite description of the land, a court of chancery will reform the deed upon proper allegata of extrinsic facts, and their proof." Greene v. Dickson, 119 Ala. 346, 24 So. 422, 27 Am. St. Rep. 920.

"The general rule, everywhere recognized, is that mere verbal declarations as to what was intended, are [545] not admissible in explanation of the terms of the writing itself. A just exception to this rule, however, is found in parol evidence going to the *identification of the subject-matter*, a principle

which seems to have been much favored by the past decisions of this court." Mayer v. Mitchell, 75 Ala. 475.

"A description which furnishes the means of making it certain by proof is sufficient." Lodge v. Wilkerson, 165 Ala. 302, 51 So. 609.

The description here involved shows the quantity of land to be conveyed and the purpose for which it was purchased. It is by no means what might be termed by some a "roving 10 acres," but its location is fixed on a certain creek so as to include Lindsey shoals. A more definite and particular description is fixed and agreed upon by the parties, as shown in the deed itself, by the agreement for a survey to be made by one Hall, the land laid off in a plat, and same to become a part of the deed, so as to complete and make perfect this description. It was agreed, as shown by the deed itself, that such survey and plat should be attached to the deed and recorded as a part of the deed. The books abound with cases of this character; the facts of each being, of course, different. A review of them here we deem unnecessary. Suffice it to say we are well convinced that the description in this deed is one of those "uncertain descriptions" which may be aided by parol proof, and comes within the maxim, "Id certum est, quod certum reddi potest." Homan v. Stewart, 103 Ala. 644, 16 So. 35; Alabama Mineral Land Co. v. Jackson, 121 Ala. 175, 25 So. 709, 77 Am. St. Rep. 46; Pollard v. Maddox, supra; Wilkins v. Hardaway, 159 Ala. 565, 48 So. 678; Greene v. Dickson, supra; Cottingham v. Hill, supra; O'Neal v. Seixas, 85 Ala. 80, 4 So. 745; Meyer v. Mitchell, supra.

[546] (4, 5) It is insisted, however, that the survey and completion of the description thereby should have been accomplished within a reasonable time, no time being fixed, and that it was too long delayed. If it be conceded, without being decided, that this should have been done within a reasonable time, we are of the opinion the bill does not show such unreasonable delay as would defeat the right here sought to be enforced. Nor is it necessary, in order to maintain a bill seeking the correction of a mistake in the description of lands conveyed in a deed, that the complainant should be in possession of the lands. Bieler v. Dreher, 129 Ala. 384, 30 So. 22.

(6) It is next insisted that the record of the deed was not sufficient notice, and that if a mistake cannot be rectified without impairing the vested rights of innocent third parties, having no notice of the mistake, the aid of equity will be withheld, citing Berry v. Sowell, 72 Ala. 14. Without regard to any consideration of effect of the averment

that respondent was a purchaser at a judicial sale, and without any decisions upon that feature (*Lindsey v. Cooper*, 94 Ala. 170, 11 So. 325, 16 L.R.A. 813, 33 Am. St. Rep. 105; *Ezzell v. Brown*, 121 Ala. 150, 25 So. 832), we are of the opinion that the deed of J. H. Chisolm and wife to the power company, which was on record at the time of the purchase by respondent, embraced sufficient description of the subject-matter to put a purchaser on inquiry, and therefore was such constructive notice as to meet the law's requirements. It gave notice to the world that the power company had purchased 10 acres of the land of said Chisolm, which was to be surveyed and laid off for a more perfect description by one J. R. Hall, selected and agreed upon by the parties, so as to include Lindsey shoals; that it [547] was for the purpose of erecting a dam for use of the stream of Big Hillabee creek, for the purposes of water power, with rights and easements to such end. It gives the township and range, but mistakes the section number, in placing the 10 acres in sections 16 and 22, while in fact a survey made in accordance with the provisions of the deed shows that the 10 acres laid off so as to include Lindsey shoals is situated in section 15. The plat made shows the section line, and how easily the mistake could occur. The deed gave notice, however, that it did not contain a complete description, but that such was to be perfected by a survey to be subsequently made, and that the purchaser had bought 10 acres, so as to include Lindsey shoals on Big Hillabee creek.

Counsel for appellant cites the case of *Florance v. Morien*, 98 Va. 26, 34 So. 890; but we are of the opinion that case tends to support our conclusions rather than the contrary. It was there said: "The recorded instrument is sufficient to operate as constructive notice under the registry laws, if the property be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it."

So here we think the language of this recorded deed was sufficient to give to a subsequent purchaser notice of what was intended to be conveyed, and a survey made in accordance with the very provisions of the deed itself would have disclosed the error as to the sections named, here sought to be corrected.

(7) Counsel further urge that the bill fails to show title to the said 10 acres in complainant, for that the [548] deed of the

corporation, the power company, to complainant, is not signed as in the name of the corporation, but is signed only by L. W. Roberts, president of the Big Hallabee Company—citing *Standifer v. Swann*, 78 Ala. 88; *Mickle v. Montgomery*, 111 Ala. 415, 20 So. 441; *Taylor v. West Alabama Agricultural etc. Assoc.* 68 Ala. 229. The deed purports on its face to be the deed of the power company, the corporation. It begins: "This indenture, made on . . . between Big Hallabee Power Company, by its president, L. W. Roberts, . . . of the first part, and R. L. Henry, . . . of the second part."

And it concludes: "In witness, the said party of the first part has hereunto set its hands, affixed its seal, and delivered these presents the day and year first above written, by its president, L. W. Roberts, of Fulton Co., Ga.

"(Signed) L. W. Roberts, Pres't
Big Hallabee Power Co.

"Signed, etc., in the presence of

"J. W. Preston, Sr.

"W. P. Felker."

We need not stop to inquire as to whether or not the provisions of the act approved February 20, 1911 (*Gen. Acts 1911*, p. 31), are applicable to the above deed. This we do not determine, as it is unnecessary. In the fifth paragraph of the bill it is alleged that the said corporation conveyed said property to complainant. The above objection, therefore, relates only to a matter of form, and in a court of equity the defect would not be such as to render the bill subject to the demurrer. Assuming full authority to act, and the bona fides of the sale to complainant, a court of equity would not permit the mere defect in execution of the deed to defeat the right of the complainant. As was said in *Taylor v. West Alabama Agricultural, etc.* [549] *Assoc. supra*: "Equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them. . . . This power existing, and its exercise having been attempted, the parties are not to be disappointed, and their just rights defeated, merely because, from inadvertence, or from ignorance, or mistake as to the method which ought to be pursued to bind the association, passing its estate and interest in the lands, there is a defective execution of the power."

The maxim that equity will treat that as done which ought to have been done would, in such case, have controlling effect.

We have reviewed the questions presented by counsel in brief, and we conclude that the learned chancellor decreed correctly in over-

ruling the demurrer to the bill, and his decree is accordingly affirmed.

Affirmed.

Anderson, C.J., and Somerville and de Graffenried, JJ., concur.

NOTE.

The court in the reported case holds that the record of a deed containing a defective description of the premises operates to give constructive notice where the description is sufficient to put subsequent purchasers on an inquiry which would disclose the true facts. It is demonstrated in the reported case that the reformation of the description is not incompatible with the enforcement of constructive notice from the record containing the description. The question of constructive notice from the record of an instrument containing a defective description of real property is comprehensively discussed in the note to *Neas v. Whitener-London Realty Co.* reported ante, this volume, at page 780.

CRANE

v.

JOHNSON ET AL.

United States Supreme Court—January 8, 1917.

242 U. S. 339; 37 S. Ct. 176.

Physicians and Surgeons — Regulation of Drugless Treatment — Validity.

The exemption in favor of persons treating the sick by prayer from the application of Cal. Laws 1913, chap. 354, as amended by Laws 1915, chap. 105, which provides that persons may not practice drugless healing unless holding a "drugless practitioner certificate," obtainable only upon completion of a prescribed course of study and after an examination, does not render the statute invalid as denying the equal protection of the laws guaranteed by U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), to one who does not employ prayer in his treatment of disease, but does use faith, hope, and the processes of mental suggestion and mental adaptation, a form of treatment in which skill enhanced by practice is to be exercised.

[See note at end of this case.]

Same.

The state's police power extends to requiring, as is done by Cal. Laws 1913, chap. 354, as amended by Laws 1915, chap. 105, that drugless practitioners employing faith, hope, and the processes of mental suggestion and

mental adaptation in the treatment of disease shall have completed a prescribed course of study and passed an examination.

[See note at end of this case.]

Appeal from United States District Court, Southern District of California.

Action by P. L. Crane, plaintiff, against Hiram W. Johnson, et al., defendants. Judgment for defendants. Plaintiff appeals.

The facts are stated in the opinion. AFFIRMED.

Tom L. Johnston for appellant.

Robert M. Clarke, Thomas Lee Woolwine, George E. Cryer and U. S. Webb for appellees.

[339] McKENNA, J.—Appeal from an order denying an interlocutory injunction, three judges sitting. The court took jurisdiction of [340] the action, citing *Raich v. Truax*, 219 Fed. 273, 283; *Truax v. Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 U. S. (L. ed.) 131, but denied the injunction on the ground that the averments of the complaint did not justify it.

Complainant is a drugless practitioner, he avers (we state the facts averred narratively), and has practiced his profession in City and County of Los Angeles for the last seven years and is dependent upon it for making a living. He does not employ either medicine, drugs or surgery in his practice, nor is there anything harmful in it to the individual or dangerous to society; but he does employ in practice faith, hope, and the processes of mental suggestion and mental adaptation.

Under a statute of the State that went into effect August 10, 1913, amended in 1915, a board of medical examiners was created which was empowered to prescribe a course of study and examination for those practicing medicine (using this word in a broad sense for convenience) and to issue certificates of qualifications and licenses.

Three forms of certificates were required to be issued, first, a certificate authorizing the holder thereof to use drugs, or what are known as medicinal preparations, in or upon human beings and to perform surgical operations, which certificate shall be designated "physician and surgeon certificate." Second, a certificate authorizing an opposite treatment to that which the first certificate authorized (we are using general descriptions), which certificate shall be designated "drugless practitioner certificate." Third, a certificate authorizing the holder to practice chiropody. And the statute also provides for the issuance of what it designates

as a "reciprocity certificate." Any of these certificates, on being recorded in the office of the county clerk, as provided in the act, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate.

Applicants must file with the board testimonials of good [341] moral character and diplomas of a school or schools and, in addition, each applicant for a "physician and surgeon certificate" must show that he has attended four courses of study, each to have been not less than 32 weeks' duration, with some other additions; and each applicant for a "drugless practitioner certificate" must show that he has attended two courses of study, each of such courses to have been of not less than 32 weeks' duration, but not necessarily pursued continuously or consecutively, and at least ten months shall have intervened between the beginning of any course and the beginning of the preceding course; and the course in chiropody is to be of not less than 39 weeks' duration consisting of not less than 664 hours. There is a provision that, in lieu of a diploma or diplomas and preliminary requirements in the other courses, if the applicant can show to the board that he has taken the courses required by the statute in a school or schools approved by the board totaling not less than 64 weeks' study of not less than 2,000 hours for a "drugless practitioner certificate" or 128 weeks' study of not less than 4,000 hours for a "physician and surgeon certificate," he shall be admitted to examination for his form of certificate.

The statute sets out the course of instruction which the respective applicants must have pursued, giving the course that is necessary for a "physician and surgeon certificate" and the course for a "drugless practitioner certificate." The descriptions are very elaborate and technical. The statute also prescribes the manner of examination, states the exemptions from its provisions, the penalties for its violation, and for what conduct and upon what conditions the certificates may be revoked. Among the latter is the following:

"Ninth. The use, by the holder of a 'drugless practitioner certificate,' of drugs or what are known as medicinal preparations, in or upon any human being, or the [342] severing or penetrating by the holder of said 'drugless practitioner certificate' of the tissues of any human being in the treatment of any disease, injury, deformity, or other physical or mental condition of such human being, excepting the severing of the umbilical cord."

By § 22 of the original act (unaffected by the Act of 1915) it is provided: "Nor shall this act be construed so as to discriminate

against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion."

It is alleged that the statute violates the Fourteenth Amendment of the Constitution of the United States (9 Fed. St. Ann. 416), especially the equal protection clause thereof, in that it imposes greater burdens upon complainant than upon others in the same calling and position. That it discriminates in favor of the Christian Science drugless practitioner, distinguishes between the treatment of the sick by prayer, the treatment of the sick by faith, mental suggestion and mental adaptation, and treatment by laying on of hands, anointing with Holy oil or other kindred treatment.

Complainant does not employ prayer in the treatment of disease and is, therefore, not exempt from examination by the medical board, and is subject, therefore, to the penalties of the act if he practices his profession for which he has fitted himself by study and practice, and upon which he is dependent and by reason of his age he is in large measure unable to take up any new branch of work. That defendants, appellees here, are threatening prosecutions under the act and he is without remedy at law.

There is an allegation that the Supreme Court of the State of California has decided that the statute is not offensive to the Fourteenth Amendment, in *habeas corpus* proceedings prosecuted by one Chow Juyan, who was [343] convicted of practicing some form of Chinese healing which was adjudged a violation of the act.

The allegations of the bill set forth complainant's particular grievance to be that the statute discriminates between forms of healing the sick by the use of prayer and other drugless methods, and invoke the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. In other words, he attacks the classification of the statute as having no relation to the purpose of the legislation. Of course, complainant is confined to the special discrimination against him; he cannot get assistance from the discrimination, if any exist, against other drugless practitioners. The case, therefore, is brought to the short point of the distinction made between his practice and certain forms of practice, or, more specifically, between his practice of drugless healing and the use of prayer.

The principle of decision needs no exposition and the only question is whether it was competent for the State to recognize a distinction in its legislation between drugless healing as practiced by complainant and such healing by prayer. That there is a distinc-

tion between his practice and that of prayer, complainant himself, it seems to us, has charged in his bill. He has not only charged that he does not employ either medicine, drugs or surgery in his practice but that he does employ faith, hope and the processes of mental suggestion and mental adaptation. These processes he does not describe. Presumably they are different from healing by prayer, different from the treatment by Christian Science. But he alleges that for his practice he has become "particularly fitted, . . . by many years of study and practice therein." In other words, the treatment is one in which skill is to be exercised and the skill can be enhanced by practice, and the objects of the treatment are diseased human beings whose condition is to be diagnosed. To treat a disease there [344] must be an appreciation of it, a distinction between it and other diseases, and special knowledge is therefore required. And this was the determination of the State; but it determined otherwise as to prayer, the use of which, it decided, was a practice of religion. We cannot say that the State's estimate of the practices and of their differences is arbitrary and therefore beyond the power of government. And this we should have to say to sustain the contentions of complainant, and say besides, possibly against the judgment of the State, that there was not greater opportunity for deception in complainant's practice than in other forms of drugless healing.

Because of our very recent opinions we omit extended reply to the argument of counsel and the cases cited by him, not only of the general scope of the police power of the State but also of the distinctions which may be made in classifying the objects of legislation. And for like reason we do not review or comment upon the cases cited in opposition to complainant's contentions.

It is to be observed that the order of the court was put upon the narrow ground of the averments of the complaint, no opinion beyond such averments being expressed.

Decree affirmed.

NOTE.

Special Regulation of Christian Science or Other Drugless Treatment of Disease.

Generally.

Within a comparatively recent period there have developed various schools of drugless healing based in the main on prayer or mental suggestion or on manipulation or adjustment of parts of the body. Considerable diversity of opinion is manifested in the decisions as to whether such practices fall within the scope of statutes forbidding the

"practice of medicine" without a license. See the notes to the following cases: *State v. Herring*, 1 Ann. Cas. 51 (osteopathy); *State v. Marble*, 2 Ann. Cas. 898 (Christian Science); *Germany v. State*, Ann. Cas. 1913C 477; and *Com. v. Zimmerman*, Ann. Cas. 1916A 858 (massage and chiropractic). Whichever way that question was decided the result was not wholly satisfactory, involving on the one hand the unregulated practice of a treatment of disease or on the other the subjection of one school of treatment to requirements primarily adapted to a wholly different school. As a result, statutes have been passed in a number of jurisdictions specially regulating the drugless treatment of disease, and the present discussion is devoted to regulations of that kind. As to the regulation of drugless treatment of diseases of the eye, see the note to *McNaughton v. Johnson*, reported post, this volume, at page 801.

The cases are agreed that the regulation of the treatment of disease is a proper exercise of the police power though no drug is administered and no surgical operation performed, and that a special regulation of drugless treatment of disease is not invalid as class legislation. *Collins v. Texas*, 223 U. S. 288, 32 S. Ct. 286, 56 U. S. (L. ed.) 430, affirming 57 Tex. Crim. 2, 121 S. W. 501 (osteopathy); *People v. Jordan*, 172 Cal. 391, 156 Pac. 451 (drugless healers); *People v. Ratledge*, 172 Cal. 401, 156 Pac. 455 (chiropractic); *Ex p. Bohannon*, 14 Cal. App. 321, 111 Pac. 1039 (osteopathy); *People v. Chong*, 28 Cal. App. 121, 151 Pac. 553 (chiropractic); *State v. Siler*, 169 N. C. 314, 84 S. E. 1015 (drugless treatment); *Arnold v. Schmidt*, 155 Wis. 55, 143 N. W. 1055 (osteopathy and chiropractic). And see the reported case. See also the following cases wherein statutes of that character have been applied without discussion of their validity: *State v. Collins* (Ia.) 159 N. W. 604 (osteopathy); *Green v. Hodges*, 91 Kan. 658, 138 Pac. 605 (chiropractic); *Cutty v. Carson*, 125 Md. 25, 93 Atl. 302 (osteopathy); *Mills v. State Board of Osteopathic Registration*, etc. 135 Mich. 525, 3 Ann. Cas. 735, 98 N. W. 19 (osteopathy); *Stretch v. State Board of Medical Examiners*, 88 N. J. L. 92, 95 Atl. 623 (osteopathy); *People v. Reid*, 135 App. Div. 89, 119 N. Y. S. 866 (osteopathy); *State v. Greiner*, 63 Wash. 46, 114 Pac. 897 (chiropractic); *State v. Witter*, 68 Wash. 356, 123 Pac. 471 (osteopathy); *Piper v. State*, 163 Wis. 604, 158 N. W. 319 (osteopathy). As to what is included in the practice of osteopathy, see *State v. Bonham* (Wash.) 161 Pac. 377, wherein the definition and history of that school are discussed at length.

"In view of the large increase of those who attempt remedies without drugs or instruments, legislatures in this and other states

have found it necessary to deal with all who assume to treat or prescribe for physical ailments. Such regulations are within the state's police power." *People v. Ellis*, 162 App. Div. 288, 147 N. Y. S. 681. In *Arnold v. Schmidt*, 155 Wis. 55, 143 N. W. 1055, it was said: "Osteopathy is defined in Webster's New International Dictionary as 'a system of treatment based on the theory that diseases are chiefly due to a deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts.' 'Chiropractic' appears to be a newly coined compound word suggesting hand practice. To plaintiff's counsel it means an operation or manipulation founded in ignorance, ineffectual in results, and propagated and spread by fraud, while to defendant's counsel it indicates a very simple and beneficial massage of the spine. The state may well require a license for the purpose of regulation, and it may prescribe reasonable qualifications of the licensee having reasonable relation to the business or profession of osteopathy, understanding the latter as above defined. Some of the qualifications required in the case of osteopaths seem quite extreme; but we must grant something to the judgment of the legislature, and people must learn to hold their legislators responsible for unwise or extreme laws which are nevertheless constitutional." In *Collins v. Texas*, 223 U. S. 288, 32 S. Ct. 286, 56 U. S. (L. ed.) 439, the court said: "An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centres. It is intelligible therefore that the state should require of him a scientific training. *Dent v. West Virginia*, 129 U. S. 114 [9 S. Ct. 231, 32 U. S. (L. ed.) 623]; *Watson v. Maryland*, 218 U. S. 173 [30 S. Ct. 644, 54 U. S. (L. ed.) 987]. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the state requires him to prove. The same considerations that justify including him justify excluding the lower grades from the law. *Watson v. Maryland*, 218 U. S. 173, 179, 180 [30 S. Ct. 644, 54 U. S. (L. ed.) 987]. Again, it is not an answer to say that the plaintiff in error is prosecuted for a single case. If the legislature may prohibit a general practice for money except on the condition stated, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of a

general practice. A distinction between gratuitous and paid for services was made in the Maryland statute sustained in *Watson v. Maryland*, 218 U. S. 173, 178. Finally, the law is not made invalid as against the plaintiff in error by the fact that he had an established business when the law was passed."

In *Louisiana State Board, etc. v. Charpentier (La.)* 73 So. 248, a statute expressly exempting certain drugless treatments of disease from a medical licensing law was sustained, the court saying: "The water cure is a known method of treatment from which many persons have, no doubt, derived great benefit, and which, for the protection of the public, may not require a medical education of those by whom it is administered. And 'the practice of Christian Science, or the religious tenets of any church,' is a spiritual or psychological matter which should, perhaps, best be left to the practitioners and their patients."

Particular Regulations.

In *State v. Siler*, 169 N. C. 314, 84 S. E. 1015, it was said: "By the Act of 1907 (chapter 764) it was intended to protect the public against imposition by those claiming to heal diseases without the use of drugs as osteopaths. Since then those claiming to heal without prescribing drugs have taken various and numerous appellations, and thus avoided the protection intended to be afforded the public as to 'nondrug-giving physicians' by the Act of 1907. In consequence the Act of 1907 was amended in 1913 to add after the word 'osteopathy' the words 'or other nondrug-giving school of practice.' The act also, as above set out, fully and elaborately prescribes that it should apply to all practice of healing of every kind that was not drug-giving, excepting only 'Christian Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians.' The object of the Act of 1913 is simply to extend the protection to the public given by the Act of 1907 as against all other nondrug-giving practitioners of healing, with the exception just quoted. That this is the scope of the act, and that it is not intended to make compliance therewith a monopoly in the hands of 'osteopaths,' the act prescribes an examination only in the following subjects: 'Anatomy, physiology, pathology and diagnosis. Less could not be required reasonably of any one holding himself out as competent to prescribe for 'the ills that flesh is heir to.' The statute makes a violation of the Act of 1907 a misdemeanor, and the Act of 1913 makes a violation of the act in its extended scope, taking in other nondrug-giving practitioners, 'likewise a misdemeanor.' The ob-

ject of the act, as already said, is not to give 'osteopaths' or any school of practice a monopoly but to protect the public by requiring of all nondrug-giving practitioners, with the exceptions named, the prescribed examination and license. To give this statute any effect, it was necessary to make its violation a misdemeanor. The power of the legislature to pass such enactments has been already considered in the cases above cited [relating to practice of medicine], and the intent of this statute is clearly and solely for the protection of the public. An uneducated, ignorant, and incompetent doctor turned loose on a helpless community is as deadly as a park of artillery. Upon the special verdict, the court should have held the defendant guilty."

In *People v. Ratledge*, 172 Cal. 401, 156 Pac. 455, it was held that certain requirements made with respect to chiropractors were not unreasonable, the court saying: "The argument is made that because the law includes such subjects as histology, elementary chemistry, toxicology, physiology, elementary bacteriology, and pathology in the examinations to be taken by applicants for certificates to practice as drugless healers, it is unfair, because these are standard courses of study in the preparation of physicians, and surgeons, but are not needed in the art of those who intend to alleviate human suffering by manual and mechanical means only. The answer is that the legislature is committed the duty of determining the amount and quality of scientific education necessary for the individual to possess before he may hold himself out to practice the healing art. Unless the legislative conclusion upon that subject is obviously unfair we may not interfere, for the scope of the police power is very extensive and the discretion of the legislature in exercising such power is very broad. It is not for us to substitute our discretion and judgment for those of the legislature, although we may say in passing that the wisdom of some of the requirements for practice mentioned above would strongly appeal to us, even if we did possess a broader power than is given to us. For example, the importance of a knowledge of toxicology will be evident to every one. Without it the drugless practitioner might apply his manipulations to one suffering from the effects of a poison and might continue his efforts until time for the successful administration of an antidote had passed."

In *People v. Jordan*, 172 Cal. 391, 156 Pac. 451, the act sustained in the reported case was upheld as against a contention that in regulating drugless healers it discriminated against mechanical healers in favor of those treating by prayer. The court said: "Clearly the purpose of the law is to protect both the individual and the public from the dan-

gers and evils which might result from treatment by those not possessing the knowledge and skill requisite in the treatment of diseases with which mankind is afflicted. It is likewise clear that the degree of knowledge and skill, as well as the character thereof required, depends upon the treatment in the practice of which the practitioner engages. Thus, different qualifications are prescribed for those engaging in practice as physicians and surgeons (section 10 of the act) from those designated as drugless practitioners; the intention as to each class being that they shall qualify as possessing the knowledge and skill deemed necessary for the practice of the treatment in which the individuals of each class engage. The physician and surgeon is required to possess a knowledge of many subjects which it is not deemed necessary that the drugless practitioner shall possess. By reason of the different treatment, there is a rational and intrinsic distinction which clearly justifies the classification. Coming to the exempted class of drugless healers, namely, those who treat by means of prayer, here, too, there exists an obvious ground for the classification. The treatment practiced by many, though not all, of the drugless practitioners is by manipulation of the bones and kneading of the muscles and tissues of the person treated. It is apparent that without a proper knowledge of the human body, its organs and functions thereof, or lack of skill, grave consequences to the patient might follow as a result of their treatment. Not so, however, as to one who in prayer invokes divine power to afford relief to one afflicted by disease. The possession of the prescribed knowledge and skill, without which the chiropractic, osteopath and neuropath is denied the right to practice his treatment, in no wise renders the prayers of one thus treating bodily ills more efficacious in the curing of disease; nor can it be said the prayer of an illiterate person may, in the consequences of the subject thereof, be more productive of harm or less beneficial than that of one possessing the learning and skill of an educated physician. To our minds, it is obvious that no reason exists for requiring the class engaged in treatment by prayer to possess the knowledge and skill required of others engaged in drugless treatment. The ground for the classification is as obvious as is the distinction between physicians and surgeons on the one hand, and drugless practitioners on the other, and as to each of which classes a different rule applies." See also *Ex p. Bohannon*, 14 Cal. App. 321, 111 Pac. 1039, wherein the court sustained an act regulating osteopaths and exempting faith healers.

A prohibition against the diagnosis of disease by drugless healers is not unreasonable. *People v. Jordan*, 172 Cal. 391, 156 Pac. 451,

wherein the court said: "It is impossible to dissociate diagnosis from the practice of the art of healing by any physical, medical, mechanical, hygienic, or surgical means. It is therefore competent for the legislature to permit only those persons who are proficient and who have been found to be educated up to certain standards to 'diagnose' ailments. The objection that those who profess to treat bodily afflictions by prayer are not required to be proficient in diagnosis, and that their exemption, under the law, is the extension of a favor to them which is withheld from others is met by the obvious answer that diagnosis is no part of such treatment. Those who believe that divine power may be invoked by prayer for the healing of the body believe also that God is all-powerful. Patients receiving their ministrations know this, and therefore no fraud or injury may be practiced upon such persons by reason of any lack of skill by the healers in determining the nature of the diseases to be treated. But those who elect to depend upon some other system of treatment have a right to protection by the state from the ministrations of unskillful, uneducated persons. For example, a sufferer from a fever who summons a licensed physician holding himself out to the public as one qualified to treat the sick, is entitled to the services of a doctor who has been taught to discriminate between typhoid and smallpox."

In *People v. Chong*, 28 Cal. App. 121, 151 Pac. 553, it was said: "Defendant contends that section 8 of the act is unconstitutional and void in that it is an unrestricted invasion of the art of osteopathy, chiropractic, and mechanotherapy, in that it prevents practitioners of said system of the healing art from practicing their profession 'without in any manner severing or penetrating any of the tissues of the human being.' Assuming, as asserted by defendant, that members of such schools, in practicing, as they do, by manipulation and adjustment, are constantly and continually severing tissues of human beings, and that the practice of their art is impossible without it, still it is very plain from a reading of the whole section that the word 'sever,' as therein used, means a severance by cutting. Under one form of certificate the holders thereof, as provided in the act, may not only prescribe and use drugs, but may also sever and penetrate with a knife the tissues of human beings. The holders of other certificates are drugless practitioners, and they may not prescribe or use drugs, nor may they operate with a knife or in that way sever or penetrate the tissues of human beings, except that they may sever the umbilical cord."

An exception of clairvoyants from a statute regulating the practice of medicine does
Ann. Cas. 1917B.—51.

not authorize a clairvoyant to prescribe medicine in accordance with revelations obtained while in a condition of trance. *Com. v. DeLon*, 219 Mass. 217, 106 N. E. 846.

A longer course of study cannot be required to obtain a limited license to practice as an osteopath than is required to obtain a full license to practice as a physician and surgeon. *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L.R.A. 791, wherein it was said: "Why the exacting of four years of study should be made of those only who are to take a shorter examination, and receive a certificate of limited effect, we need not inquire. It is quite obvious that this additional requirement could not have been made of those contemplating the practice of osteopathy because of the number and character of the subjects upon which they are to be examined, nor of the effect of their certificates, nor because of any consideration affecting the public health or safety which does not involve a scientific conclusion adverse to the efficacy of osteopathy. A conclusion of that character cannot be drawn by a body to which legislative power alone is given, and for whose members there is no prescribed qualification of education, knowledge or intelligence. Authority to discriminate against osteopathy would imply authority to discriminate against any other school of medicine. It seems clear from the reasons involved, and from the discussion of the subject, and the points decided in *The State v. Gardner*, 58 Ohio St. 599, that this discrimination against those who occupy the position of the defendant is unwarrantable, and that compliance with it cannot be required."

McNAUGHTON

v.

JOHNSON ET AL.

United States Supreme Court—January 8, 1917.

242 U. S. 344; 37 S. Ct. 178.

Physicians and Surgeons — Regulation of Optometrists — Validity.

A state may, in the exercise of its police power, confine to registered optometrists who have passed the examination prescribed by Cal. Laws 1913, chap. 598, the right to employ means other than drugs to measure the range of human vision, and the accommodative and refractive states of the human eye.

[See note at end of this case.]

Same.

The exemption in favor of duly licensed physicians and surgeons, which is made by Cal. Laws 1913, chap. 598, confining to registered optometrists who have passed the prescribed examination the right to employ means other than the use of drugs to measure the range of human vision, and the accommodative and refractive states of the human eye, does not deny the equal protection of the laws guaranteed by U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), to a regularly graduated ophthalmologist who employs drugless means for such purposes.

[See note at end of this case.]

Appeal from United States District Court, Southern District of California.

Action by Kate P. McNaughton, plaintiff, against Hiram W. Johnson et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AF-FIRMED.**

Tom L. Johnston for appellant.

Robert M. Clarke, Thomas Lee Woolwine, George E. Cryer, Ray E. Nimmo and *U. S. Webb* for appellees.

[435] **MCKENNA, J.**—This case was submitted with *Crane v. Johnson*, 242 U. S. 339, 37 S. Ct. 176. It was considered in the District Court with that case, three judges sitting as in that case. It comes here on appeal from an order denying an interlocutory injunction. The court entertained jurisdiction upon the authority of *Raich v. Truax*, 219 Fed. 273, 283; *Truax v. Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 U. S. (L. ed.) 131.

The court in denying the injunction said "that the granting of such orders is within the sound discretion of the court, and in the exercise of such discretion, based upon the averments of the bills, we are of opinion that the application should be denied." The court did not pass upon the merits, expressing a doubt of its authority to do so as the court said it was composed of three judges "under statutory requirement."

Appellant—we shall call her complainant, and state [346] narratively the facts she alleged—is a regularly graduated ophthalmologist, which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye. She has practiced her profession in the city and County of Los Angeles for the past three years and is dependent upon the proceeds of her labor and services. She does not employ either medicine, drugs or surgery, nor is there anything in her practice hurtful to the individual or dangerous to society.

In her practice it is absolutely necessary and indispensable that she measure the

powers and range of human vision without the use of drugs and there is no law in the State of California prescribing an examination for and regulating the practice of ophthalmology.

At its 40th session the legislature of California enacted a statute by which it provided that it should be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry under an act to regulate that practice approved March 20, 1903, and the acts amendatory thereof.

The practice of optometry is defined to be "the employment of any means other than the use of drugs for the measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof."

The board is given the power, among others, to visit schools where the science of optometry is taught and accredit such as the board finds give a sufficient course of study for the preparation of optometrists; to keep a register of all persons to whom certificates of registration have been issued and of all itinerant licenses, and to grant or refuse or revoke such certificates. The act [347] prescribes a course of examination, describes the particulars of the examinations, and provides that every applicant for an examination upon passing it shall be entitled to be registered in the board's register of optometrists and a certificate of registration shall be issued to him.

"At such examinations the board shall examine applicants in the anatomy of the eye, in normal and abnormal refractive and accommodative and muscular conditions and co-ordination of the eye, in subjective and objective optometry, including the fitting of glasses, the principles of lens grinding and frame adjusting, and in such other subjects as pertain to the science and practice of optometry, such subjects to be enumerated in publication by the board. . . . All such applicants without discrimination, who shall satisfactorily pass such examination shall thereupon be registered in the board's register of optometrists and a certificate of registration shall be issued to them, under the seal and signature of the members of said board upon payment of a fee of five dollars. Such certificate shall continue in force until the first day of August in the year next succeeding."

Before engaging in practice it shall be the duty of each registered optometrist to notify the board in writing of the place or places where he is to engage or intends to engage in practice and of changes in such places.

There are other provisions intended to fortify those above mentioned, and violations of the act are made misdemeanors, with fines and imprisonment, increasing with repetition of the offense.

It is provided that the act shall not be construed to prevent duly licensed physicians and surgeons from treating the human eye nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business in good faith and not in evasion of the act by any person not holding himself out as competent to examine and prescribe for the human eye.

[348] Registry certificates may be revoked for certain specified causes.

Complainant charges that the act offends the Fourteenth Amendment of the Constitution of the United States (9 Fed. St. Ann. 416) in that it deprives her of her property without due process of law and denies her the equal protection of the laws, and as specifications of the last she instances the exemption from the provisions of the act of licensed physicians and surgeons; the appropriation to the sole use of registered optometrists of the right to employ any means other than the use of drugs in the measurement of the powers or range of vision; the denial to all other schools of scientific learning and practice the right to measure the range of human vision other than by the use of drugs on equal terms with the physician and surgeon; and contends generally that her occupation being a lawful one, not hurtful to the individual or dangerous to the community, the State has no power to impose discriminatory regulations upon it.

She alleges her competency to practice her profession and apply its treatment, that appellees are threatening to enforce the law, and hence prays temporary and permanent injunctions.

These specific objections are brought down to the general objection that the statute discriminates against those who employ any other means than the use of drugs and, therefore, "creates a monopoly favored and protected by law, in the interest of practitioners who employ drugs in determining the accommodative and refractive states of the human eye."

To sustain the statute appellees adduce the police power of the State; against the statute complainant urges the Fourteenth Amendment and its prohibition of discrimination. The case requires, under the averments of the bill, adjustment of these contentions.

It is established that a State may regulate the practice [349] of medicine, using this word in its most general sense. *Dent v. West Virginia*, 129 U. S. 114, 9 S. Ct. 231, 32 U. S. (L. ed.) 623; *Hawker v. New York*, 170 U. S. 189, 18 S. Ct. 573, 42 U. S. (L.

ed.) 1002; *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390, 47 U. S. (L. ed.) 563; *Watson v. Maryland*, 218 U. S. 173, 30 S. Ct. 644, 54 U. S. (L. ed.) 987; *Collins v. Texas*, 223 U. S. 288, 32 S. Ct. 286, 56 U. S. (L. ed.) 439.

Complainant tries to escape from the rulings in those cases by asserting a discrimination against her. She is an ophthalmologist, she avers, "which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye," and that she has practiced her profession for the past three years, and does not employ medicine, drugs or surgery. She, however, attacks the statute because, to use the language of her counsel, it "arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye." It undoubtedly does, but gives the name of the school that of "optometry" and its practitioners "optometrists." We cannot suppose that any injury is done her by the difference in names, and yet she gives no other tangible ground of complaint. Whether they are different and whether the difference is of substantial or unsubstantial degree she does not inform us. She practices one of them in preference to the other, and for the practice of that one the State has declared that its certificate of competency is necessary. The cases cited above establish that the State has such power and it requires no more of complainant than it requires of any other ophthalmologist, to use her word, or of any other optometrist, to use the word of the statute.

The District Court was, therefore, right when it decided that on the averments of the bill complainant was not entitled to an injunction.

Decree affirmed.

NOTE.

Special Regulation of Persons Treating Ocular Diseases.

Whether a person engaged in treating ocular diseases is a practitioner of medicine within statutes regulating such practice, has been held to depend largely on the nature of the treatment offered or administered. See the note to *State v. Yegge*, 9 Ann. Cas. 202.

In *Louisiana State Board, etc. v. Charpentier (La.)* 73 So. 248, a statute expressly exempting from a statute relating to the practice of medicine "opticians fitting glasses or testing eyes in their own establishments" was sustained, the court saying: "The op-

tician is often found where the oculist is not, and may be better qualified than he to fit glasses, if not to test the eyes, is likely to inflict little or no injury in either case, and he who performs those functions in his own establishment may be regarded as more responsible than the itinerant vendor."

In recent years, however, statutes have been enacted in a number of jurisdictions regulating specially that class of persons, the regulations being ordinarily designed to embrace the so-called "optometrists" whose practice is defined by the regulations of their association (see *Martin v. Baldy*, 249 Pa. St. 253, 94 Atl. 1091) as "the employment of any means other than the use of drugs for the measurement of the powers of vision and the adaption of lenses for the correction and aid thereof." Such persons are held not to be engaged in the practice of medicine. *Martin v. Baldy*, supra. But statutes specially regulating them have been sustained. *State v. Utah State Board of Examiners*, 37 Utah 339, 108 Pac. 347. And see the reported case. The provisions of the Utah act were summarized in *State v. Utah State Board of Examiners*, supra, as follows: "The material parts of the act on which the petition of respondent is based are, in substance, as follows: Section 1686x provides that it shall be unlawful to practice optometry in the state of Utah without obtaining the certificate provided for in the act. Section 1686xl defines what shall constitute the practice of optometry in the following language: 'The practice of optometry is the employment of subjective and objective mechanical means to determine the accommodative and refractive conditions of the eye and the scope of its functions in general and the application and adjustment of lenses for the correction of errors of refraction, the relief of eye strain, and the aid of vision.' The three succeeding sections create a board to be known as the Utah State Board of Examiners in Optometry, to be appointed by the governor, and said sections also define the powers and duties of said board, and provide how and to what extent applicants shall be examined before being authorized to practice optometry in this state. There is, however, a proviso to these sections, which, in our judgment, is controlling in this case, which reads as follows: 'Provided further, that every person who shall have been engaged in the practice of optometry in the state of Utah on March 14, 1907, shall file an affidavit in proof thereof and satisfactory evidence with said board, who shall make and keep a record of each person and shall, in consideration of the sum of three dollars, issue to him a certificate of registration.'" Holding the act to be valid but not to warrant an examination of persons engaged in

the practice before its enactment, the court said: "No one can doubt the power of the legislature to define and regulate the practice of optometry, and, to that end, to prescribe reasonable qualifications to be possessed by those who desire to engage in the practice, and to provide reasonable means by which such qualifications may be ascertained, in order to authorize those qualified to practice, and to prevent those who are not from doing so. We are of the opinion that it was the intention of the legislature to require all those who were not engaged in the practice of optometry in this state on March 14, 1907, to pass an examination and prove their fitness and qualifications to use and apply both subjective and objective mechanical means to aid them in the 'correction of errors of refraction, the relief of eye strain, and the aid of vision.' The board of examiners were thus by the act authorized to examine applicants, not then engaged in the practice with respect to their knowledge and proficiency in the application and use of both the means aforesaid, and to withhold a certificate from the applicants if the board was satisfied that the applicants were not so qualified. But we find no warrant in the statute to authorize the board of examiners to examine or pass upon the qualifications of any one who was engaged in the practice of optometry on March 14, 1907, provided such person made application for a certificate of registration 'by July 15, 1907,' and furnished proof of the fact that he was engaged in the practice of optometry at the time aforesaid. To make such proof is all that the law required of such applicants, and this is all that the board of examiners could require from them."

THOMAS

v.

KNIGHTS OF MACCABEES OF THE WORLD.

Washington Supreme Court—June 3, 1915.

85 Wash. 665; 149 Pac. 7.

Beneficial Associations — Amendment of By-laws — Increase of Assessment — Validity.

A certificate, issued by a fraternal insurer, authorized the association to levy as many assessments as might be necessary to meet death losses. The by-laws under which the certificate was issued declared that the member should pay the same rate of assessment as long as he remained in good stand-

ing. The association reserved the right to change the by-laws. It is held that there was no contract in the ordinary sense, the insurance being but a mutual promise by every member to pay the certificate of every other member; hence the holder had no vested right, preventing the association from raising the assessment to such a rate as would pay death claims.

[See note at end of this case.]

Same.

As there was no contract, there could be no estoppel preventing the society from raising the assessments.

[See note at end of this case.]

Same.

Where the assessments paid by younger members were sufficient to pay their insurance, an older member cannot complain that an increase in assessments was made solely upon members of more advanced age.

[See note at end of this case.]

Same.

That a fraternal insurer, authorized to levy as many assessments as might be necessary to meet death losses, increased the amount of the assessments, but not their number, does not give a member any equitable rights; the effect being the same as if more numerous assessments were levied.

[See note at end of this case.]

Same.

In view of Laws 1911, pp. 279, 281, §§ 210, 214, declaring that fraternal associations may create and invest a surplus and grant paid-up insurance, not exceeding in value the proportion of the reserve to the credit of such members, and that no member shall have individual rights or become entitled to any part of the reserve otherwise, a member of a fraternal insurer, which accumulated a reserve to pay death claims, has no right to require the insurer to apply the reserve to current deficiencies in assessments, where the reserve was not sufficient to make up the deficiency in assessments and pay the estimated claims.

[See note at end of this case.]

Same.

Where a fraternal order increased the assessments, as was its right, a member is not entitled to rescind his contract and recover back the sums already paid in; the order not breaching its contract.

[See note at end of this case.]

Same.

Under Laws 1911, pp. 281, 290, §§ 214, 228, respectively, declaring that no fraternal association shall transact business in the state which does not provide for periodical assessments sufficient to provide for meeting its mortuary obligations, and that the laws of such societies shall provide that if the stated contributions are insufficient, increased rates shall be collected, a fraternal order has the right to increase the rates of members so as to be able to meet death claims.

[See note at end of this case.]

Costs — Award against Successful Party — Test Case.

Where the suit by a member of a fraternal association to enjoin the collection of increased assessments to meet death claims was novel and of general interest, costs should be borne by the insurer, though it was successful on appeal, particularly where its brief and abstract were unnecessarily long.

Appeal from Superior Court, Pierce county:
CLIFFORD, Judge.

Action by Jesse Thomas, plaintiff, against Knights of Maccabees of the World, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion.
REVERSED.

Reynolds, Ballinger & Hutson and Carlos S. Hardy for appellant.

Jesse Thomas, in propria persona.

George W. Miller, amicus curiae.

[667] CHADWICK, J.—Jesse Thomas, respondent, then thirty-eight years old, applied for and received a certificate of membership in the appellant order, a fraternal beneficiary association organized under the laws of the state of Michigan. The society was organized, and commenced to do business as such, in the year 1883. It is what is popularly known as a fraternal benefit association, having no other object than to promote social and fraternal intercourse among its members and to pay benefits in case of sickness or death. It is carried on by a lodge system having a secret ritual. It adopted and has maintained a representative form of government. Its subordinate or local bodies are called "Tents." A state body, known as the "Great Camp," is made up of delegates elected by the "Tents." The Great Camp in turn elects delegates to a national council or assembly known as "The Supreme [668] Tent." Each of these bodies have legislative powers, the Supreme Tent having a general revisory power over the acts of all subordinate bodies, as well as jurisdiction to make all changes in the substantive law of the order which in its judgment may be necessary for its preservation and well being. At the time it was organized, the society adopted a schedule of rates to be collected by assessment upon the membership, the fundamental thought being that the society would make an assessment upon the membership to meet each death loss as it occurred, and "in case one assessment per month shall not be sufficient to pay the death and disability claims as they occur, then the supreme record keeper is hereby authorized to levy such additional assessments as may be required from time to time to pay such claims."

There seems to have been an assumption that it would not be necessary to levy more than twelve assessments per annum to meet the maturing obligations of the society. In the first three years of its existence only eighteen assessments were levied. Thereafter assessments were levied with greater frequency, so that, notwithstanding an increase in rates, for example, from 60c per thousand at the time of organization (1883) for age thirty-eight, to 90c per thousand (1895) for the same age, the society was compelled from time to time to levy what is commonly known among fraternal insurance societies as "double headers," that is, two assessments at the same time.

Mr. Thomas joined the society in 1896. His rate was 90c per one thousand dollars. The increased rates did not apply to members who had joined before they were adopted. The resources of the society, if that term is proper, seemed to be still inadequate to meet its obligations. The Supreme Tent, through its officers and members, and through a commission aided by the advice of an actuary who is said to be an expert in the line of insurance, investigated its affairs. Without going into their findings in detail, it will be enough to say that they found that there were 234,000 members, with [669] benefit certificates aggregating \$375,599,000, with accumulated funds, or so-called reserve, of \$1,950,303. The commission also found and put into figures what the experience of the society had made manifest, that the original rates were wholly inadequate to mature the outstanding certificates at twelve assessments per year. It found that, although the then face value of the outstanding certificates was \$375,599,000, the real value was not more than \$123,597,104, and that the amount to be paid by the members (upon a basis of twelve assessments per year covering the term of their expectancy) to meet this insurance was \$58,735,995, leaving a deficiency of \$64,861,109. Or, to state it in another way, the members, not having met the current cost of their insurance, must (if their certificates were to be matured, not of those who may die first, but the last as well as the first) adopt some plan to meet this deficiency, either by the accumulation of a reserve of \$64,861,109, or to so increase the rates as to make each member meet the future current cost of his own risk.

It would seem that the first plan was manifestly not feasible. The Supreme Tent adopted the only other alternative, that is, a general increase of rates. These were adopted at the session of 1904. We shall refer to them only in so far as they affect Mr. Thomas. The rate for age thirty-eight was increased to \$1.65 per thousand for each assessment. Respondent was given an option

to re-rate and carry his certificate, without medical examination, at that rate at his attained age of forty-six years. This he did not do. Had respondent done so, his monthly assessment would have been \$1.65. In all other respects his certificate would have been as before. It was also provided that all members who did not elect to re-rate and who should thereafter attain the age of fifty-five should pay an assessment of \$3 per month. Not having elected to re-rate in 1904 at his attained age of forty-six at the rate of \$1.65, respondent was notified, when he had attained the age of fifty-five (1913), that he would thereafter be required to pay assessments at the rate of \$3 per [670] month. He began this suit to enjoin the collection of the new rate, or, in the alternative, if the court could not enjoin the new rate, he asks that the contract be rescinded as for fraud, and that he recover all sums theretofore paid to the society. From a decree enjoining the collection of the new rate, the society has appealed.

Respondent rests his case solely upon his contract. He says: "Fortunately the questions involved are few and simple, not going beyond the elementary law of contracts." The contract calls for a whole life certificate with certain endowment features after seventy years, at an assessment rate per \$1,000 of 90c. The society had adopted and published a constitution and by-laws in which the rates were published. A copy had been put into respondent's hands at the time his membership was solicited. The section fixing rates provides, among other things, that "He [the member] shall pay the same rate of assessment thereafter so long as he remains continually in good standing in the order." It is contended that this provision in the general law of the society entered into and became a part of the contract, and is in terms a specific assurance or guaranty that the rates will not be raised in the future, and because of its mention of rates, it will not be overcome by a so-called general provision on the face of the certificate that the member "will comply with the laws of the order now in force or that may hereafter be adopted."

It was so held in *Wright v. Knights of Maccabees of World*, 196 N. Y. 391, 89 N. E. 1078, 134 Am. St. Rep. 838, 31 L.R.A. (N.S.) 423; and *Smythe v. Supreme Lodge*, etc. 198 Fed. 967, and although his findings cover a wide range, it is the essence of the holding of the trial judge. In the *Wright* case, the whole contention of respondent is stated as follows, quoting from *Ayers v. Grand Lodge*, etc. 183 N. Y. 280, 80 N. E. 1020:

[671] "While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of

administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implied by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution."

This holding is sustained by many New York cases, which are referred to and freely quoted by the writer of the opinion.

It may be fairly said that all cases holding as do the New York cases, do so upon the theory that the society and the members are contracting parties, the one assuming to pay a certain sum in event of certain contingencies, in consideration of intermittent payments by the other pending the happening of the event. Of necessity, then, our first inquiry must go to the character and nature of the contract or certificate.

It is elementary that a contract must have parties—a promisor and a promisee. We cannot assure ourselves that respondent bears or has ever borne the one relation to the society to the exclusion of the other. The society is not organized for profit and, from the nature of things, is no more than its membership, in whom all rights and all obligations are mutual. The so-called Tent, Great Tent and Supreme Tent are not separate entities, any more than a legislative assembly is an entity distinct from the people of a commonwealth. It is an institution for convenience only; a vehicle for the collection and disbursement of funds necessary to meet the mutual obligations of the members. *Barrows v. Mutual Reserve L. Ins. Co.* 151 Fed. 461, 81 C. C. A. 71.

"In the ordinary sense a fraternal order is not an insurance company." *Peterson v. Manhattan L. Ins. Co.* 244 Ill. 329, 18 Ann. Cas. 96, 91 N. E. 466.

The membership of such societies speak in mutual conclave through selected representatives, whose voice is their voice and whose act is their act.

[672] "Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured." *Korn v. Mutual Assur. Soc.* 6 Cranch 192, 3 U. S. (L. ed.) 195.

"Insurance on the mutual plan being different from insurance on the old line plan, the members of the company are, so to speak, partners." *Haydel v. Mutual Reserve Fund L. Assoc.* 98 Fed. 200.

"The contractual relations between the members and the association should not be measured by the standard, or determined by the legal principles, which are applicable between an ordinary insurance company and the holder of one of its policies. The insured

are members of the association; each has a voice in all proceedings pertaining to its business or general welfare, and in some ways it assimilates a partnership." *Miller v. National Council*, etc. 69 Kan. 234, 76 Pac. 830.

"The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise." *Reynolds v. Supreme Council of Royal Arcanum*, 192 Mass. 150, 7 Ann. Cas. 776, 78 N. E. 129, 7 L.R.A.(N.S.) 1154.

"The defendant was organized upon the principle of equality and mutuality among its members, and it must have been fairly within the contemplation of the parties that changes of membership might necessitate changes in rates, in order to preserve that equality. . . . Each member of the society is an insurer, as well as an insured. . . . The argument that the amount of the assessment was as fixed and unalterable as the amount of benefit to be paid entirely overlooks the purpose and character of the defendant and the dual relation of its members." *Mock v. Supreme Council of Royal Arcanum*, 121 App. Div. 474, 106 N. Y. S. 155.

The latest expression of this principle is found in *Hartman v. National Council*, 76 Ore. 153, 147 Pac. 931, L.R.A.1915E 152, where it is said:

"The contract is not purely between the individual member and the corporate organization. It is in spirit and in truth a covenant, not only with the central body, but with every other individual participating in the benefits afforded by the project, for the concern is mutual, and the co-operation [673] of every member is essential to its success as an insurance society. . . . Moreover [she was] controlled . . . by the terms of her certificate and the laws of the order, which are made a part thereof, and to which she was subject, having had her part in the enactment of the same through her representatives."

There being no contract in the commercial sense, but a mutual promise of every member to pay the certificate of every other member, there can be no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give.

"Each member participates in the business results and as there are profits or losses, so is his insurance affected in its cost to him." *Swan v. Mutual Reserve Fund L. Assoc.* 155 N. Y. 9, 49 N. E. 253.

A member cannot throw his brothers overboard under the guise of contract and vested right. He must share his life belt with all.

If it is not strong enough to sustain him he is in duty bound to sink to the same level with his fellow members, for whatever the words of his contract may imply, it is to be measured by the object of the society which he has bound himself to support.

The error of the New York case and the Federal case, relied on by respondent, is fundamental. It is assumed that the subject-matter of the contract is a promise to pay \$1,000 at the death of the member, in consideration of a sum named. This is but one of the things to be considered. If we are to make any one consideration paramount over another, it must necessarily be the object of the society. When that is considered it cannot be said that any one member, or any number of members who have joined the society upon a misconception of the ability of the members to meet their mutual [674] obligations by the assessments agreed upon, can disassociate his own certificate or contract and insist that the object of the fraternity or society is to pay him in full without reference to his fellow members. The society being mutual and every member being subject to the same burdens and entitled to the same benefits, it follows that the society cannot be sustained unless the supreme representative body is granted authority to do that which will bring the greatest good to the greatest number. Or it being possible, in the light of present experiences, to do that which will reasonably insure the payment of all certificates, the agreement made by the member when accepting his certificate to abide by all the laws, rules and regulations of the society that may have been or that might thereafter be passed, binds him to observe such legislation as is calculated to insure a rate sufficiently adequate to pay the cost of his own insurance.

"Mutuality is its controlling feature. It is obvious, therefore, that for a benefit bestowed on one member, there must be a corresponding burden imposed on the other members collectively, and that a proper adjustment of the benefits to the burdens is essential to its existence as a mutual organization. The constitution is the fundamental compact between the members, and usually, as in the present instance, outlines the plan for the distribution of the benefits and adjustment of the burdens among them. Unerring foresight is not the gift of any man or body of men, and experience alone can demonstrate whether the plan authorized by a constitution is the best or even practicable. The welfare of the association, if not its existence, may demand a change in the constitution and a readjustment of the relations between the benefits and burdens. The association is a self-governing body, and it is for

its members to determine when such change is required or advisable." *Hall v. Western Travelers' Acc. Assoc.* 69 Neb. 601, 96 N. W. 170.

"To justify interference by the courts and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there was an abuse of power, or that the later by-law is unreasonable. It is not enough to show that a better or wiser course might have been pursued, [675] for it must be shown that there was an abuse of discretion, or that the by-law is so unreasonable as to be void. We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance, but we do affirm that, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It may sometimes happen that the interests of one individual, or of a few individuals, may be impaired, but it is the right, and, indeed, it is the duty, of the society to protect the interests of the many rather than of the few. Persons who become members of such societies must take notice of this, and one person cannot, therefore, demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit." *Supreme Lodge, etc. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L.R.A. 409.

Nor are these observations met by the suggestion that appellant was in a way lured into an improvident undertaking by the provision of the by-law fixing rates which we have quoted, the speeches of the officers of the Supreme Tent, or other matters tending to show an estoppel. There being no contract in the strict sense, there can be no estoppel. When respondent joined he agreed, in consideration of a promise on the part of other members to pay him a certain sum, that he would, in turn, do all that would be required of him. He became an insurer as well as an assured. He cannot get away from his associates if he would. He must meet his obligation to them, and all this legislation does is to call upon him to pay his own cost as a member. To this end he agreed to be bound by the laws and rules of the order and such changes as might thereafter be made.

"There is no vested right in having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to alter or amend those theretofore made." *Klein v. Knights, etc.* 79 Wash. 173, 140 Pac. 72.

[676] In the same case we said:

"To destroy a vested right arising out of a contract is, in some way, to impair or destroy the rights guaranteed by the contract; not to enforce them."

It seems idle to attempt to add to the force of this language. If we were to attempt it, we would say that there can be no vested right in any contract so long as a duty to the other contracting parties rests upon the one asserting it and his duty is unperformed.

It is lamentably true that most if not all of the fraternal benefit associations with which courts have been called upon to deal in recent years were founded upon false assumptions and self deceptions; a purpose to make something out of nothing; to have others do for us, without doing our whole duty to ourselves and to them. And the pity of it all is that those who promoted and organized such associations, as well as those of us who have joined them, were undoubtedly honest in our beliefs. We did not know the horse was blind until we took him out on the road. Insurance societies have been generally organized and built up among young men. Low death rates for the first few years made a show of prosperity. Time, the increasing age and mortality of the membership, has brought them face to face with the problem of paying those who die in age, as they have paid those who died in youth. It took nearly fifty years for the truth to rise to the surface of our infatuations, and the consequent realization that a new member who in fact was not paying the cost of his own insurance was a liability and not an asset. We were foolishly blind to the simple equation that if ten men mutually promise to pay each other \$1,000 at death, \$10,000 must be gathered from the promisors if all of the contracting parties are to be paid. To illustrate, it is asserted in the briefs, and is not denied, that respondent, between the time he joined the order and the time he brought this suit, had paid into the order \$169. If he should attain the age of [677] seventy years he would have paid in an additional \$162, at twelve assessments per year. Wherefore then can he claim that the society, himself and his co-members, shall continue a plan that must surely bring inevitable ruin and leave the greater part of its certificates unpaid, when a resort to business principles will insure stability? At fifty-five his life expectancy is 17.40 years. If he pays an assessment at the new rate from now on he will have paid in at the expiration of that time \$626.40, which added to \$169 makes a total of \$795.40, which we may assume will be sufficiently increased by interest accumulations to make up a sum sufficient to mature his certificate or meet

his obligation to the society, whichever way it is put. Hence respondent was bound to know, as were all members of the society, that their plan was inadequate; as much so as if they had each agreed to pay in so much from month to month for a term of ten years and buy a piece of property at a certain price. No one could thereafter claim imposition or fraud, when a simple calculation would have shown that the net accumulations would not be more than fifty per cent of the necessary amount.

"The theory that a mutual association can afford to carry its members at less than cost on account of its increasing membership is as fallacious as that of the merchant who said he could afford to sell goods at less than cost because he sold so many of them." Supreme Ruling of Fraternal Mystic Circle v. Ericson (Tex.) 131 S. W. 92.

For these reasons it is held by the greater number of cases and, as we think, by the greater weight of authority, that it is within the legislative power of these associations to increase rates to the plane of adequacy. As said by the supreme court of the United States:

"There is no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 24 S. Ct. 549, 48 U. S. (L. ed.) 832.

[678] The test of a vested right is thus defined in 3 Am. & Eng. Enc. of Law (2d ed.) 1065:

"The true criterion appears to lie in the determination of the question whether or not an actionable property right has in fact accrued; if so, it cannot be divested; but it is otherwise in case such rights are only prospective, or in process of accruing, when they may be changed or arrested by the association under the general governing power, provided the member, in his contract of membership, has agreed to conform to after-enacted laws."

This definition is sustained by practically all of the authorities. Respondent has no right to insist that the society shall carry his certificate at a loss because of the form of the by-law at the time he took out his certificate. His position is not tenable, for no member of a mutual insurance society has a right to insist that it continue to do business upon an unsound basis for his individual benefit.

Respondent complains that, in the plan proposed, no attempt was made to meet the alleged deficiency in rates by a general increase upon all of the members; that the entire burden is cast upon those who attain the age of fifty years, thus forcing members of fifty-five years and over into a class to take care of themselves as if there were no

other members. Respondent overlooks the fact that the mortality tables show that, at about the age of fifty-five, the adequacy of the original system begins to break down. It is not an arbitrary age or date fixed by the society producing a class distinction. It is the working of the law of experience, which has demonstrated that the danger of default to the members among these societies has increased under old plans in geometrical proportion after the member has reached an age, approximating fifty-five years.

However, it would seem that in these days of understanding, born of experience, that the fallacy of the "new blood" theory had been exploded, or if there had ever been anything in it, that no lodge could hope to succeed by loading the rate upon men still young enough to find insurance at cost, or [679] upon men who have been paying their own way, to make up a deficiency for those who had not.

"The new blood theory is simply a method of selling obligations to mature in the future at less than their face or cost, and using the money thereby obtained to temporarily meet the maturing obligations of the institutions. It works out simply to the end of accumulating liabilities for which no provision has been made, and for which, under the cumulative force of increasing obligations maturing more and more rapidly, no provision can be made in the end, and thereby results in ultimate bankruptcy." Anon.

If we assume that a society might lawfully load young men and new members to make up the valuation (see Laws of 1911, Ch. 49, p. 292, § 229; 3 Rem. & Bal. Code, § 6059-229), the result would in all probability be disastrous. The young man in health would most likely go into some order where he would not be subject to such an imposition. There would be no new members.

"The chief complaint seems to be that other younger men were not raised so much in their assessments, and some were even reduced; but this was the result of making the basis of assessment the age of the member and the estimated cost of his insurance. It was evident that the old plan was a failure, and the court of chancery appeals report that some change in the assessment plan was necessary to accomplish the objects and purposes of the order and to save it from dissolution. It must be evident that the younger men would not be burdened with the heavy cost of insurance upon the older ones, and they would not join the order, and would withdraw, if such a rule was attempted; and this would leave the older men with no one but the old ones upon whom to rely for their protection. As we view it, the effect of this rule was only to accentuate the disabilities of old age, after the insured had enjoyed in-

demnity for many years at less than cost; and we cannot see that the basis of assessments was unreasonable." *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306.

Respondent says that if the whole burden is put upon the old members he will be turned out and all fraternal features of [680] the society destroyed. This may be true in a sense, but experience has no doubt taught the lesson that the fraternal features of these societies cannot be depended on to mature deficiencies in other men's certificates running into the millions. Fraternity that will adorn a ritual is one thing; fraternity that will balance the debit side of the ledger is quite another thing. Each life must pay the cost of its own experiences and the penalties attaching to its own mistakes.

There are some cases which would sustain the decree of the lower court, but the great majority of the courts have held to the contrary. Among the more prominent cases sustaining our view and which we have not already cited in this opinion, are: *Gaines v. Supreme Council of Royal Arcanum*, 140 Fed. 978; *Gaut v. Mutual Reserve Fund L. Assoc.* 121 Fed. 403; *Schmierer v. Mutual Reserve Fund L. Assoc.* 153 Cal. 208, 94 Pac. 887; *Champion v. Hannahan*, 138 Ill. App. 387; *Supreme Lodge Knights of Honor v. Bieler*, 58 Ind. App. 550, 105 N. E. 244; *Messer v. Grand Lodge*, etc. 180 Mass. 321, 62 N. E. 252; *Wineland v. Knights of Macabees of the World*, 148 Mich. 608, 112 N. W. 696; *Williams v. Supreme Council*, etc. 152 Mich. 1, 115 N. W. 1060; *Shepperd v. Bankers Union of World*, 77 Neb. 85, 108 N. W. 188; *Clarkson v. Supreme Lodge Knights of Pythias*, 90 S. C. 134, 82 S. E. 1043.

Respondent concedes the right of a society to increase rates from time to time if it has reserved the right to do so in its by-laws. He seems to distinguish the cases upon which appellant relies, by asserting that in none of them was there an assurance in the by-laws that the rate would continue for the life term. There is apparent ground for this contention, but it does not bear the test of reason. For, after all, the so-called warranty is a by-law. The right to amend does not except any one or more of the by-laws. It is a general reservation. And furthermore, there can be no difference in principle between an assertion in the by-laws that the member will be required to pay no more than the published rate during [681] his life, and the publication of the rates without such assurance. When it is remembered that the rates of such societies are almost always fixed in their by-laws, and that members join upon the understanding that they are taking a life certificate at a certain rate for life, we

cannot escape the conclusion that there is no ground upon which the cases can be distinguished. In the one, the so-called contract is express, in the other it is implied. When reduced to their lowest terms, the fact that some cases hold one way and some another way is apparent to all. It will not be asserted that respondent did not assent to a representative form of government. It is provided for in the same way as the rates are fixed, by a by-law. The representative body has spoken for him. Its act is his act and is binding upon him, so that

"Whether this reasoning is strictly correct we need not decide, for here we have an objecting member, who on his own account has agreed not only to conform to the present laws of the order, but also to such future laws as may be from time to time enacted by the official body governing the same, and as to such contracts the better reasoned cases hold that assessments may be raised by such societies under such reserved power to amend by-laws." Supreme Lodge Knights of Honor v. Bieler, *supra*.

Neither are we prepared to hold that the increased rate is a violation of respondent's contract. Under his certificate as written, the society might levy any number of assessments. He agreed, in consideration of the promise of his fellow members to pay his beneficiary \$1,000 at death, to pay all assessments necessary to meet death losses. It was held in *Wineland v. Knights of Maccabees of the World*, *supra*:

"We have no doubt that it was lawful, and no violation of contract rights, for defendant to increase the number of assessments to meet the demands arising from the death of members. There seems to be no good reason why fewer assessments, at a greater rate, should not be levied, so long as the increase in rates is proportional; young and old members, alike, contributing. Whether such action be a mere detail [682] in management aimed at procuring for distribution the same sum of money in a different way, or intended to actually increase the contributions over present necessities for distribution and to accumulate a fund, it may be, so long as it is proportional and reasonable, supported, as against a protesting member, by his agreement in his application to conform to and be governed by laws to be from time to time made by the representative governing body of the association."

See also *Supreme Lodge, etc. v. Ray* (Tex.) 166 S. W. 46.

Although it is not necessary to our decision, it may well be questioned whether a court of equity could interfere to protect respondent. His grievance goes not to the amount of his assessment, for the society could levy a like amount under its old rates,

but to the method. Having in mind the character of the society and its objects, it would seem that there is no room for equitable interference, for by his assent to unlimited assessments, respondent has subscribed to the right of the society to perpetuate itself. In law he has acknowledged that

"There must be a premium *somewhere* which represents the normal cost of permanent insurance, which is based upon the law of mortality, and below which point no organization, on any plan, can safely promise permanent insurance protection at a uniform price for life." Anon.

Respondent further contends that, inasmuch as there is a reserve fund of something like \$12,000,000, the society cannot raise his rate until that is exhausted. In other words, granting the right to the society to raise rates in the event of a necessity, that such necessity is not present; that the society is, because of such surplus, in a flourishing and prosperous condition.

It is likely that there is no word in the lexicon of business terms so little understood or so misapplied as the word surplus or reserve, when used in connection with mutual insurance companies or societies. A surplus accumulated over the necessities of an old line life company is a tangible thing to [683] which any policy holder or creditor may look for the satisfaction of his claim. It is an asset of the company. On the other hand, an apparent surplus of a fraternal society may be merely a mortality fund, or an accumulation to meet a deficiency in rates, so that in the end the accumulation will balance the deficiency. It generally represents a loading, over what may be called a possible minimum contract rate. It is a modern thing among fraternal societies. Indeed, the thought was generally discountenanced in their earlier years. Necessity has driven them into the only open port. An accumulation to balance the deficiency in rates is a bridge over which the society may pass from the quicksands of bankruptcy to the high ground of business solvency. The surplus or reserve, whichever it may be called, is a trust fund, and in that sense is in truth a liability and not an asset. Its purpose is to pay death claims, not to retire policies during the life of the member; and until it is shown that the society is collecting more than is reasonably necessary to insure its solvency, no living member can claim a remedy or an individual interest in it. Under the record before us, the so-called surplus is a mortuary fund. The member has no vested interest and no power to control its disposition during his life. Its disposition, within legal bounds, is for the officers duly elected and authorized to act for the society. Niblack, *Benefit Societies and Accident Insur-*

ance (2d ed.) p. 238; Kentucky Mut. Security Fund Co. v. Turner, 89 Ky. 665, 13 S. W. 104.

A like contention was made in the Ericson case, and answered in this way:

"The facts show that appellant had paid all death claims and other benefits that had accrued, and had left in its treasury in 1908 \$225,000 subject to the payment of such claims as there should thereafter accrue. But that appellant was therefore 'in good financial condition,' or that this sum was 'surplus assets over all liabilities,' is a *non sequitur*—a fallacy that has proved the undoing of many life insurance companies, and especially fraternal associations. What are the [684] assets of a life insurance company? The money which it has in its treasury and the money which it will hereafter be able to collect under its contracts with its policy holders, above its necessary expenses. What are its liabilities? The amounts unpaid on claims that have already accrued and the amounts which it has promised to pay by its contracts of insurance which will accrue in the future. If its assets exceed its liabilities as thus stated, it is in good financial condition; otherwise it is not. Many fraternal insurance orders honestly conducted have been lured to their destruction by this mirage apparent of accumulated surplus during the early period of their existence. Among institutions born of the wisdom, philanthropy, and altruism of modern times, none are more capable of or are accomplishing greater good than mutual fraternal benefit societies, and it is encouraging to see some of them awakening from this delusion to which too many of them have been given over. A mutual insurance association has no capital stock, and can pay its policy holders only out of the money paid in by them and the accumulated interest thereon. A statement of its affairs at an early period of its existence may show what is frequently called a surplus, when it is hopelessly insolvent in the sense that it cannot possibly meet its future obligations. . . . In 1907 this order had insured its members in the sum of \$39,937,000. This was its liability. Its real assets were not the so-called \$225,000 surplus in its treasury, but the amount that it would collect from its members in the future. Whether or not it was in good financial standing depended upon the adequacy of its rates, which it appears was not considered by the court."

The insurance code seems to have been drawn upon this theory. After declaring that societies may create and invest a surplus, and that the society may grant paid up or extended insurance if so provided by the laws of the society, it says:

"Such grants shall in no case exceed in value the portion of the reserve to the credit

of such members to whom they are made." Laws of 1911, p. 279, § 210 (3 Rem. & Bal. Code, § 6059-210); and

"No member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the [685] surrender of any part thereof, except as provided in section two hundred ten." Laws 1911, p. 281, § 214 (Id. § 6059-214).

The reserve is still far short of the deficiency in appellant's contracts, and inasmuch as the undisputed facts show that respondent has not met the cost of his own insurance, it follows, if his argument were otherwise sound, he has no interest in the reserve.

Respondent contends that his contract has been violated in this, that his insurance has been changed from a semi-endowment policy maturing at the age of seventy years, to a straight life policy. We do not concede that this question is before the court at the present time, although some of the authorities cited in this opinion sustain the right of the society to make such change.

Neither has respondent a right to rescind and recover the amount paid as dues and assessments. The society has not repudiated its contract; it is endeavoring to perform it. Respondent's contributions to the society have not met the cost of carrying his certificate, and so long as he has had protection for less than cost, he cannot complain.

This is the first time the question raised by this appeal has been before our court. Because of its importance and the far reaching effect of our decision, we have endeavored to make it plain that a member of a beneficiary society having a democratic or representative form of government has no right, under a certificate providing for a change of by-laws, as does the certificate held by respondent, that can be called vested, except a right to insist that the face or amount to become due under his contract shall not be lessened or impaired; that the object, plan, spirit and purpose of such a society is written into its certificate; that the true meaning of the promise to obey its rules and regulations and such changes and amendments as thereafter may be made is that the society may from time to time correct its mistakes, or take such steps as may be necessary to keep its promises, and further, where it appears to be necessary, it is a recognition [686] of a duty resting upon the society so to do; that a member has a vested interest only in the object of the society, and in turn impliedly agrees, notwithstanding the state of the by-laws at the time of joining, that the society may so legislate that its certificates, whether matured by death or time, will be worth their face; that the accomplishment of this purpose is a mere detail, and so long as all members similarly

situated are treated alike and no member is called upon to pay more than the cost of his certificate, as may be determined by the mortuary and experience tables recognized by the laws of this state, there can be no just cause of complaint on the part of any one; that a by-law fixing impossible rates, followed by a clause saying that such rates shall continue so long as the member remains in good standing, is to be measured by the objects of the order and is of no higher order than any other by-law, for the very evident reason that the object of the society to pay the face of each certificate cannot be accomplished unless such by-law is amended.

It may seem that our holding works a hardship to those of us who became members in our younger days, but the mistake was ours. The society was not to blame. Our mistake was its mistake; but whatever the result may be to those of us who have passed the age limit, we have had insurance for which we have paid less than cost, and under the holding of the courts and legislative enactments in most of the states, such mistakes will not occur again, and fraternal insurance will be in the end what it assumed to be in the beginning—insurance at cost, and as sound as any insurance of whatever kind can be.

It should not be understood that we are holding that a member has no remedy against the fraudulent and arbitrary acts of the officers of a fraternal society. The question in this case goes solely to the power to legislate in representative assembly, and whether such legislation can affect respondent's initial rate of assessment. If we have not made these things plain and our reasoning is so far faulty, it would seem that our holding is nevertheless compelled by a consideration of [687] the provisions of the insurance code, Laws of 1911, p. 161, ch. 49 (3 Rem. & Bal. Code, § 6059-1 *et seq.*).

That these societies were organized, and for many years have continued to do business, upon a fundamentally unsound basis has become known to all who have had the interest or the courage to make a simple arithmetical calculation. It has been found that, in so far as maturing certificates upon the lives of members is concerned, fraternity is not always a dependable factor. This condition became apparent to most of these societies a long time ago, and some of them have attempted to meet the situation by their own efforts and by appropriate legislation within their governing bodies. Progress has been slow. Men are loath to lose faith in their ideals. Wherefore, to insure the future stability of societies then doing business, and to prevent the organization by designing men of new societies with inadequate rates and

which could not be promoted, in the light of the experience of other societies, without practicing fraud upon prospective members, the state, in the exercise of its sovereign right to regulate insurance companies, has defined the status of fraternal benefit societies and provided the terms under which they may do or continue to do business in the state of Washington. Laws of 1911, p. 281, ch. 49, art. VI, § 214 (3 Rem. & Bal. Code, § 6059-214). It provides:

"That no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality," and that after 1913 all societies now doing business in the state shall be subject to the law. It provides for annual reports to the insurance commissioner and a valuation of existing and outstanding certificates and a standard of valuation, and further,

"The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay [688] all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum." Laws of 1911, p. 290, art. VI, § 228 (3 Rem. & Bal. Code, § 6059-228).

And further, that if the valuation shows a deficiency of more than ten per cent, the society must reduce such deficiency at a rate of not less than five per cent each three years succeeding. Section 229, p. 292 (Id. § 6059-229). It is made the duty of the insurance commissioner to wind up the affairs of any society which has not complied with the law or is not carrying out its contracts in good faith (we take it that good faith is to be measured not by the intent, but by the statute). Section 230, p. 293 (Id. § 6059-230).

The rate fixed by the society for the respondent, and which by reference to the statute we are bound to assume is necessary to mature his certificate, being no higher than the National Fraternal Congress rates, it follows that respondent cannot complain, for the society has done only what the state would have required but for its voluntary action. The law of the state is a part of

every contract of insurance. *Finnell v. Franklin*, 56 Colo. 156, 134 Pac. 122.

"Compliance with the general laws of the state affecting such corporations [Benevolent and Beneficial Associations] is as essential to their continued existence as to their creation." 3 Am. & Eng. Enc. of Law (2d ed.) 1049.

This is a suit in equity, and the allowance of costs is a matter within the discretion of the court. The case has an importance to the appellant aside from the reversal of the case. It is a test case which affects, not alone the respondent, but every member of the society. A penalty should not be put upon a member because he has seen fit to question the act [689] of the appellant in raising its rates. The briefs and abstract filed by appellant are, in the judgment of the writer of this opinion, unnecessarily long, and if costs were allowed for them it would, in a way, operate as a penalty. Considering, then, the nature of the case and the good faith of the respondent, and the fact that the opinion affects every member of the order, we have decided that the costs shall be borne by the appellant.

The decree of the lower court is reversed, and the cause remanded with instructions to enter a decree denying to respondent the relief prayed for in his complaint.

Morris, C.J., Mount, and Parker, JJ., concur.

Holcomb, J., took no part.

NOTE.

Validity of Amendments to By-laws of Fraternal Benefit Societies as Applied to Existing Members.

Introductory, 814.

Reasonable Amendment:

Generally, 814.

Suicide Clause, 815.

Other Amendments, 816.

Amendment Impairing Vested Rights:

Generally, 817.

Beneficiaries, 817.

Occupation of Insured, 817.

Amount Payable under Certificate, 818.

Sick Benefits, 818.

Increase in Assessments, 819.

Introductory.

It is the purpose of the present note to review the recent cases dealing with the validity of an amendment to the by-laws of a fraternal benefit society as applied to the existing members. The earlier cases on this subject are collected and discussed in the notes to *Gilmore v. Knights of Columbus*,

1 Ann. Cas. 715, 107 Am. St. Rep. 17; *Olson v. Court of Honor*, 10 Ann. Cas. 622, 117 Am. St. Rep. 676; *Hart v. Life, etc. Assoc.* Ann. Cas. 1913C 672; *Supreme Conclave, etc. v. Rehan*, Ann. Cas. 1914D 58; *Strauss v. Mutual Reserve Fund L. Assoc.* 83 Am. St. Rep. 699; *Supreme Conclave, etc. v. Miles*, 84 Am. St. Rep. 528, 553; and *Wright v. Knights of Maccabees of World*, 134 Am. St. Rep. 838.

It is the intention to include only those cases involving fraternal benefit societies, excluding all cases dealing with regular life insurance companies though they may be mutual in character.

Reasonable Amendment.

GENERALLY.

While the authorities differ greatly as to what is a reasonable amendment of a by-law, it seems to be well settled that where either the certificate or policy itself, or the by-laws or constitution in existence at the time of the issuance of the policy, contain a stipulation for future changes, reasonable changes may be made, and when made, apply to existing members. *Eminent Household of Columbian Woodmen v. Hewitt*, 122 Ark. 480, 184 S. W. 52; *Streep v. Mutual Protective League*, 186 Ill. App. 535; *Moses v. Illinois Commercial Men's Assoc.* 189 Ill. App. 440; *Apitz v. Supreme Lodge, etc.* 274 Ill. 196, 113 N. E. 63; *Arold v. Supreme Conclave, etc.* 123 Md. 675, 91 Atl. 829; *Royal Arcanum v. Vitzthum*, 128 Md. 523, 97 Atl. 923; *Messer v. Grand Lodge, etc.* 180 Mass. 321, 62 N. E. 252; *Ledy v. National Council of Knights, etc.* 129 Minn. 137, Ann. Cas. 1916E 486, 151 N. W. 905, L.R.A.1915D 1095; *Newman v. Supreme Lodge, etc.* 110 Miss. 371, 70 So. 241; *Cunningham v. Supreme Council, etc.* 165 App. Div. 52, 151 N. Y. S. 83; *Cipriano v. Societa San Salvatore*, 161 N. Y. S. 284, reversing 94 Misc. 130, 157 N. Y. S. 467; *Faulk v. Fraternal Mystic Circle*, 171 N. C. 301, 88 S. E. 431; *McGovern v. Brotherhood of Locomotive Firemen, etc.* 31 Ohio Cir. Ct. Rep. 243; *Clarkson v. Supreme Lodge, etc.* 99 S. C. 134, 82 S. E. 1043; *Dean v. Dean*, 162 Wis. 303, 156 N. W. 135.

In *Arold v. Supreme Conclave, etc.* 123 Md. 675, 91 Atl. 829, the court stated the rule and the reason therefor as follows: "Where a member of a beneficial society in his application for membership has agreed to be bound by the rules or laws then in force, or which might thereafter be adopted, the society has the right to bind him by such after adopted by-law even though the by-law is not in its terms made retroactive, limited only by the qualification that such

by-law must be reasonable in its character. This rule is supported by reason as well as by authority. The very foundation of organizations of this character is their mutual character, and if a member or his beneficiary is bound only by such regulations as are in force at the time when he joins the order the result will inevitably follow that different members will have entirely separate and distinct rights as between themselves and the order according to the time when they became members of it, and the mutuality of the organization would be destroyed." And in *Dean v. Dean*, 162 Wis. 303, 156 N. W. 135, the rule in Wisconsin was stated as follows: "It is settled in this state that, where the benefit certificate provides that the insured shall be bound by by-laws thereafter adopted, he will be so bound, provided the change made is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself of a nullification of any substantial part of the existing contract or insurance."

The changes need not be indispensable in order to be reasonable. *Uhl v. Life*, etc. Assoc. 97 Kan. 422, 155 Pac. 926, wherein it was said: "'Necessary' is a word the force of which depends upon the context. . . . Here it is not used as the equivalent of 'indispensable.' If some change in the association's methods was required to enable it to continue business, and while acting in good faith it effected a readjustment by means reasonably adapted to the end sought, its action must be regarded as necessary, although some other plan might also have been available. The requirement that a change in the rules shall be reasonable fairly implies that it shall be necessary in this sense, so that the former decisions of this court may be said to have determined that under its contract with the plaintiff the defendant had authority to make the changes in its by-laws now in controversy, provided they were reasonable."

But in *Marshall v. Modern American Fraternal Order*, 184 Ill. App. 224, it was held that an after enacted by-law did not affect pre-existing contracts unless it was clearly the intention that it should, the court saying: "A by-law passed after the issuing of a benefit certificate will not be held to be retroactive and applicable to certificates then in force, unless the intention that it shall be so operative is expressly declared or must necessarily be implied from its language, and this rule is adopted even where a member has stipulated that he will be bound by the laws of the order that may thereafter be enacted."

Where the facts are undisputed, the question whether a by-law, rule or regulation

passed by a fraternal benefit society is reasonable, is one of law for the court. *Uhl v. Life*, etc. Assoc. 97 Kan. 422, 155 Pac. 926; *Clarkson v. Supreme Lodge*, etc. 99 S. C. 134, 82 S. E. 1043. In the case last cited it was said: "When the exercise of judgment and discretion is vested, either by law or contract, in an individual or governing body, a reservation is implied that it must be exercised in good faith and reasonably. In determining whether it has been so exercised, the court will not substitute its judgment for that of the individual or body in whom the discretion has been vested. In such a case, the inquiry is: Does the action under consideration fail to measure up to any fair test of reason? If the facts and circumstances are such that reasonable men may differ as to the wisdom and expediency thereof, the judgment and discretion of those vested with authority to decide must be upheld. It follows that a very clear case of abuse of discretion must be made out to warrant judicial interference."

SUICIDE CLAUSE.

It is generally held that where a member of a fraternal benefit society agrees in his certificate or application to be bound by the laws of the society then existing or which may be thereafter adopted, a by-law subsequently enacted which either reduces the amount to be paid in the event of suicide or totally abrogates all the rights of the insured on the happening of such an event is valid and binding on such existing members. *Streesper v. Mutual Protective League*, 186 Ill. App. 535; *Ledy v. National Council of Knights*, etc. 129 Minn. 137, Ann. Cas. 1916E 486, 151 N. W. 905, L.R.A.1915D 1095; *Dessauer v. Supreme Tent*, etc. 191 Mo. App. 76, 176 S. W. 461. In *Ledy v. National Council of Knights*, etc. supra, the court in upholding the reasonableness and validity of a suicide clause subsequently enacted said: "Where a fraternal beneficiary association, in the contract for insurance entered into with its members, stipulates that they shall be subject to, and bound by, the subsequently enacted laws and regulations of the order, the rule is well nigh universal that the association must exercise the power so reserved in a reasonable manner, and that a law of the order, enacted under such power, which would make an unreasonable change in the terms of prior contracts, is void as against such contracts. While the courts differ little as to the general rule, they differ much as to what amendments are unreasonable within the meaning of the rule. They agree quite generally, however, that an amendment, which relieves the association, in whole or in part, from liability in case the assured intentionally ends his

own life, is not forbidden by the rule and is valid."

But in *Marshall v. Modern American Fraternal Order*, 184 Ill. App. 224, it was held that a by-law providing that the certificate should be void in case of suicide was not applicable to an existing member, where the society, by issuing a new certificate containing the original incontestable clause after the enactment of the amended by-law, had construed such amended by-law as not being applicable to pre-existing contracts, the society being bound by its own construction as to the retrospective nature of the new by-law.

OTHER AMENDMENTS.

A limitation on the time within which an action may be brought on the contract of insurance may be lawfully declared by a by-law subsequently enacted provided such limitation is reasonable. Thus it has been held that a limitation of one year is binding on holders of pre-existing contracts. *Arold v. Supreme Conclave*, etc. 123 Md. 675, 91 Atl. 829; *Faulk v. Fraternal Mystic Circle*, 171 N. C. 301, 88 S. E. 431.

Likewise an amended by-law, whereby a member's certificate was declared to be forfeited if death resulted directly or indirectly from his use of intoxicating liquors, has been held to be valid and binding as to existing members. *Curtis v. Modern Woodmen of America*, 159 Wis. 303, 150 N. W. 417.

In *Cipriano v. Societa San Salvatore*, 161 N. Y. S. 284 reversing 94 Misc. 130, 157 N. Y. S. 467, it was held that an amendment limiting the benefits of the society to members residing within greater New York was valid as against a member who had removed to New Jersey before the enactment of the amendment. In that case it was said: "Plaintiff's contract with the defendant was based upon the constitution and by-laws, which must be deemed part of the contract of insurance. . . . One of the provisions of the by-laws was that sick benefits should be given to every member residing within the territory limited by the by-laws. Another provision was that the by-laws could be modified or expanded with the assenting vote of two-thirds of the enrolled members. The amendment, therefore, was strictly in conformity with the contract between plaintiff and defendant, and was binding upon the plaintiff."

By-laws which change the rules of procedure or affect the nature of evidence have been held to be valid and binding on existing members. Thus it has been held that where the by-laws of a fraternal benefit society provided that a member could be expelled for conviction of crime after trial, a by-law

subsequently enacted providing that proof of a judgment and conviction and sentence should be sufficient evidence was valid and applicable to existing members. *Cunningham v. Supreme Council*, etc. 165 App. Div. 52, 151 N. Y. S. 83. Similarly, a by-law which provided that a member claiming a benefit for a fractured arm must accompany the proof of the fracture by an x-ray photograph made by the society's physician has been held to be valid, but it was further held that if the x-ray did not show the fracture, the member could introduce other evidence to prove it. *Eminent Household of Columbian Woodmen v. Hewitt*, 122 Ark. 480, 184 S. W. 52. In answer to the contention that a by-law subsequently enacted, providing that the association would not be liable for death or disability resulting from the discharge of firearms when there was no witness except the member himself, was invalid on the ground that it was contrary to public policy because it undertook to make a rule of evidence, the court in *Moses v. Illinois Com. Men's Assoc.* 189 Ill. App. 440, said: "It was indispensable under the first part of the by-law for the plaintiff to prove an accidental death resulting from the discharge of the firearm and that there was an eyewitness to the discharge other than the assured. This was a condition precedent to the creation of a liability under the first part of the amendment of the by-law, even if the amendment had not specifically so provided. It follows, therefore, that the amendment does not establish a new rule of evidence and is not obnoxious to that objection."

Likewise by-laws subsequently enacted and providing for the suspension of a member after stated periods of disappearance have been held to be valid. *Apitz v. Supreme Lodge*, etc. 274 Ill. 196, 113 N. E. 63 (disappearance for one year); *Royal Arcanum v. Vitzthum*, 128 Md. 523, 97 Atl. 923. In the case last cited, the court, holding to be reasonable a by-law enacted after a member had joined the order which provided that if a member should disappear and should not be discovered within six months after the order first tried to locate him he should be suspended, said: "This law imposes no hardship upon the member, nor does it deprive him of any vested right acquired under the contract with the defendant. It does not prevent him from changing his domicile or abode. He may do so with impunity, but, should he disappear from his home and his whereabouts are unknown to the order, the law is then invoked, and, if he cannot be located within six months from the time when the first effort is made by the order to so locate him, or if he does not comply with the provisions of the by-law within such time, he

is suspended from the rights and benefits of the order. This is not at all inconsistent with the agreement made with the defendant at the time he was admitted into the order; for at such time he expressly agreed that, should he voluntarily sever his connection with the order, such act of his should forfeit the rights of himself, family and dependents, to all benefits and privileges of the order."

But in *Linneweber v. Supreme Council, etc.* 30 Cal. App. 315, 158 Pac. 229, it was held that a provision in the by-laws in force at the time of membership relating to the presumption of death from absence governed pre-existing contracts, and that a by-law subsequently enacted providing that there should be no presumption of death from absence was not applicable.

In *Benjamin v. Bankers' Union of World*, 173 Ill. App. 620, where by the express terms of the certificate the constitution and by-laws were made a part of the contract, it was held that a subsequent amendment providing for forfeiture of the policy in case the premiums were not paid monthly in advance was not binding without the consent of insured, the court saying: "This was as binding on the association as it was on the member, and we do not think that in so important a matter as the time given by the by-laws then in existence for the payment of monthly dues a change could be made without the specific consent of the assured, which should place her in default because she did not conform to the more drastic provisions of the amendment."

Amendment Impairing Vested Rights.

GENERALLY.

While a fraternal benefit association may make changes in its by-laws so long as they are reasonable, it is well settled that it cannot by amending its by-laws deprive a member of vested rights. *Brown v. Grand Fountain, etc.* 28 App. Cas. (D. C.) 200; *Uhl v. Life, etc. Assoc.* 97 Kan. 422, 155 Pac. 926; *Maheu v. L'Union Lafayette (Me.)* 98 Atl. 821; *Strauss v. Mutual Reserve Fund L. Assoc.* 126 N. C. 971, 128 N. C. 465, 36 S. E. 352, 39 S. E. 55, 83 Am. St. Rep. 699, 54 L.R.A. 605; *Palmer v. Protected Home Circle*, 252 Pa. St. 201, 97 Atl. 188. See also *Ellison v. District Grand Lodge, etc.* 11 Ala. App. 442, 66 So. 872. In *Strauss v. Mutual Reserve Fund L. Assoc. supra*, it was said: "A mere general consent that the constitution and by-laws may be amended, applies only to such reasonable regulations as may be within the scope of its original design. We must again repeat what we said in our former opinion: 'Whatever may be
Ann. Cas. 1917B.—52.

the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.'"

BENEFICIARIES.

The cases are not in entire accord as to what constitutes vested rights in connection with the naming of beneficiaries in a policy or certificate of membership in a fraternal benefit society. It has been held that a by-law subsequently enacted which provided that in the event of the divorce of a member a policy originally made payable to the wife should be payable as if the beneficiary had died, was valid and binding. *Knights of Maccabees of World v. Brown*, 186 Mich. 284, 152 N. W. 1085. And so where a policy was issued to a member of a fraternal benefit society payable to a certain designated beneficiary, but was by express stipulation made subject to such modification as might be made by the grand lodge, a by-law adopted subsequently to the issue of the policy allowing a change of beneficiary to be made was valid, and a change made under its authority was enforceable. *Knights of Pythias of North America v. Long*, 117 Ark. 136, 174 S. W. 1197.

On the other hand it has been held that a policy made payable to a creditor under a by-law allowing the assigns of a member to be made beneficiaries, could not be affected by a subsequent change in the charter of the society restricting the beneficiaries of policyholders to their family, etc., and omitting assigns. *Brown v. Grand Fountain, etc.* 28 App. Cas. (D. C.) 200. And where by a by-law subsequently enacted it was provided that death benefit certificates should "only be issued to a wife, child or children," etc., it was held that it did not affect a certificate in which a friend of the member was made the beneficiary as it was clearly the intention from the language used that the new by-law was not to apply to pre-existing contracts. *Wheeler v. Tolbert*, 19 Pa. Dist. 845.

OCCUPATION OF INSURED.

Where a member agreed in his application for a beneficial certificate to accept the certificate subject to such laws, rules and regulations as then existed or might thereafter be adopted by the organization, it was held that a by-law subsequently adopted providing that any member who should engage in the liquor business should be expelled, was valid and binding, and that this was true even though a member was engaged in the liquor business at the time he joined the order and after a period in which he was

not so engaged re-entered the business after the adoption of the by-law. *Shutte v. Kibler*, 55 Pa. Super. Ct. 199.

AMOUNT PAYABLE UNDER CERTIFICATE

The same lack of uniformity exists in regard to the right of a fraternal benefit society to abolish or diminish the amount payable under a certificate of insurance by an amendment of its by-laws made subsequent to the issuance of the policy. It has been held that an amended by-law which provided for the payment yearly, on arrival at the period of physical disability, of one-twentieth of the amount specified in the benefit certificate instead of one-half as provided by the by-laws in force at the time the policyholder became a member, was invalid, the court saying: "That certificate, issued by the appellant to the appellee on September 1, 1889, constituted the contract between them, and there is nothing to be found in it, or in the application for it, signed by the appellee, to justify the attempt of the appellant to impair or alter the terms of the contract. It is true that the appellee stipulated that compliance on his part with all the rules, regulations, and requirements then in force, or that might thereafter be enacted by the association, was the express condition upon which he was to be entitled to participate in the beneficiary fund, but that stipulation was not that the association might radically change the terms of its contract." *Palmer v. Protected Home Circle*, 252 Pa. St. 201, 97 Atl. 188. And it has been held that a provision in the contract reserving the right to alter, amend or rescind the existing laws when necessary was limited by a subdivision of the same rule providing that no member should be deprived of any right or privilege which he became entitled to under the code of rules which were in operation at the time he joined the society, and that reading the two together the society did not have the power to destroy or diminish benefits which it contracted to give its members when they became such. *Stewart v. Thorborn*, 171 App. Div. 258, 157 N. Y. S. 242. Likewise it has been held that where it was provided in the declaration of incorporation that on reaching the expectancy age a member should be entitled to one-half of the amount of his certificate, the remaining half to be payable at death, the society could not, by a by-law enacted after a member had attained the age of expectancy, cut off his right to the benefit contracted for, though it might under the reserved right to amend its rules and by-laws alter the method of payment. *Grainier v. Order of Canadian Home Circles*, 33 Ont. L. Rep. 116, 7 Ont. W. N. 649, *affirming* 31 Ont. L. Rep. 461, 6 Ont. W. N. 489. How-

ever, it has been held that a member might consent to such an amendment and a reduced assessment would be a sufficient consideration for a reduction of benefits. *Ankele v. Workingman's Relief Soc. etc.* 182 Ill. App. 470. The court said: "A member in a mutual benefit society may consent by his contract that subsequently enacted by-laws or amendments shall enter into and form parts of his contract modifying or varying it. He may also be bound by such new by-laws if he consents to be so bound for a sufficient consideration, although such consent or agreement be not a part of his original contract. Where in such case he acts under the new laws and clearly recognizes them as modifying his contract, and accepts the benefits accruing to him therefrom, he will be estopped to deny that he has consented to the modification." And in *Niemyski v. Schlessinger*, 91 Misc. 50, 154 N. Y. S. 219, it was held that a member of a labor union who paid his dues after an amendment to the constitution repealing a section providing for death benefits was presumed to have consented to the amendment.

On the other hand it has been held that under the rights reserved in the certificate and the consent given in the application for membership, a benefit society has the power to amend its by-laws by providing that old age benefits shall not be paid unless accompanied by actual disability. *Kirk v. Fraternal Aid Assoc.* 95 Kan. 707, 149 Pac. 400, wherein the court distinguished the case of *Hart v. Life, etc. Assoc.* 86 Kan. 318, Ann. Cas. 1913C 672, 120 Pac. 363, on the ground that in that case the certificate had been fully paid before there was any change in the by-laws.

In *Uhl v. Life, etc. Assoc.* 97 Kan. 422, 155 Pac. 926, while admitting the right of a benefit society to change the rule by which the amount of a paid-up certificate should be determined, it was held that it could not deprive a member of the right wholly. In a headnote by the court the rule was stated as follows: "Where the certificate held by a member of a fraternal beneficiary society provides that after a certain time it shall be nonforfeitable, and that he shall be entitled to a paid-up certificate in proportion to the number of payments he has made, a change is unreasonable which denies him, unless he shall make further payments, any benefits whatever from his admitted present share of a reserve fund which has already accumulated."

SICK BENEFITS.

Where a society is authorized by its by-laws voluntarily to assist its members by the payment of sick benefits it has the im-

plied power to suspend the by-laws providing for such voluntary payments when its funds become depleted. *Faso v. LaCerdese Commadore Vito La Mantia Soc.* 93 Misc. 163, 156 N. Y. S. 1090.

But, where a member has become ill and his rights to sick benefits have attached, a benefit society cannot defeat his right and repudiate its existing obligation by amending its by-laws. *Maheu v. L'Union Lafayette* (Me.) 98 Atl. 821.

INCREASE IN ASSESSMENTS.

Where the power to amend its constitution and laws is reserved by a fraternal benefit society, and a member agrees in his contract with the society to comply with and abide by its laws then existing or which may be thereafter adopted, an amendment increasing the rate of assessment is not an impairment of the vested rights of a member, and, if reasonable and necessary, is valid and binding. *Supreme Lodge, etc. v. Mims*, 241 U. S. 574, 36 S. Ct. 702, 60 U. S. (L. ed.) 1179, L.R.A.1916F 919, *reversing* 167 S. W. 835; *Haydel v. Mutual Reserve Fund L. Assoc.* 104 Fed. 718, 44 C. C. A. 169, *affirming* 98 Fed. 200; *Gaut v. Mutual Reserve Fund L. Assoc.* 121 Fed. 403; *Holt v. Supreme Lodge, etc.* 235 Fed. 885; *Schmierer v. Mutual Reserve Fund L. Assoc.* 153 Cal. 208, 94 Pac. 887; *Barbit v. Mutual Reserve Fund L. Assoc.* 100 Ga. 681, 28 S. E. 498; *Gibson v. Iowa Legion of Honor* (Ia.) 159 N. W. 639; *Miller v. National Council, etc.* 69 Kan. 234, 76 Pac. 830; *Moore v. Life, etc. Assoc.* 93 Kan. 398, 95 Kan. 591, 148 Pac. 981, 96 Kan. 397 151 Pac. 1107; *Uhl v. Life, etc. Assoc.* 97 Kan. 422, 155 Pac. 926; *DeGraw v. Supreme Ct. etc.* 182 Mich. 366, 148 N. W. 703; *Newman v. Supreme Lodge, etc.* 110 Miss. 371, 70 So. 241; *Sheppard v. Bankers Union of World*, 77 Neb. 85, 110 N. W. 188; *Clarkson v. Supreme Lodge, etc.* 99 S. C. 134, 82 S. E. 1043. And see the reported case. See also *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906. Compare *Smyth v. Supreme Lodge, etc.* 220 Fed. 438, 137 C. C. A. 32.

In *DeGraw v. Supreme Ct. etc.* 182 Mich. 366, 148 N. W. 703, the court upholding the right of a mutual benefit society to raise its rate of assessment, said: "It is clear that no one could tell to a certainty what the assessments in the future should be to make it possible for the defendant to pay the beneficiaries of its members definite sums of money. It is equally clear if it was selling insurance for less than it cost it would be only a question of time when it must go out of business. The record shows that it did insure those members joining prior to 1899, at a rate less than the cost of insurance.

We do not think it was against public policy or an infringement upon vested rights for the insured to agree that such changes might be made in the laws of the association during his membership, as would enable it to carry out its insurance agreements." And in *Newman v. Supreme Lodge, etc.* 110 Miss. 371, 70 So. 241, it was said: "When we consider the facts in this case—that appellee had the reserved power to amend its constitution and laws; that its laws designated the rate of assessments of its members, and provided that they should continue to pay the same amount as long as they remained a member, 'unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World;' that appellant agreed to pay all assessments for which he 'may become liable;' that he would be governed, and his contract should be controlled, by all the laws then in force, or that might thereafter be enacted; and that the certificate of insurance which he accepted was made dependent upon his payment of all the assessments 'as required,' and his full compliance with laws that might be thereafter enacted—we have no hesitation in deciding that the amendment in question, increasing appellant's rate of assessment, was valid and binding on him, as being within the scope of his contract." In *Supreme Lodge, etc. v. Mims*, 241 U. S. 574, 36 S. Ct. 702, 60 U. S. (L. ed.) 1179, L.R.A.1916F 919, *reversing* (Tex.) 167 S. W. 835, it was held that the benefit certificate of a member "was not a contract, but was a regulation subject to the possibility inherent in the case." It was further said in that case: "Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. Its charter expressly provides by sec. 5 that it 'shall not engage in any business for gain; the purpose of said corporation being fraternal and benevolent.' It is manifest therefore that it would be a perversion of its purposes if, through some ambiguity of phrase, the necessary source of benefits were closed in favor of certain members, while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other cause, either they must pay more or the beneficiary take less."

Setting out facts to show the necessity and therefore the reasonableness of a by-law in-

creasing the rate of assessment, the court in *Clarkson v. Supreme Lodge, etc.* 99 S. C. 134, 82 S. E. 1043, said: "According to these experts, the defendant could not have adopted a less rate, without endangering its own existence as an insurance society, and the safety of the protection upon which its thousands of members rely for the benefits of their families, when they shall be taken from them. The defendant did not undertake to insure its members at less than cost. In the nature of things, it could not do so and live. The rates and the plan adopted provide for no more than the actual cost of carrying the risks on an adequate and equitable basis. That the rating at their attained ages falls heavily upon the plaintiffs on account of their advanced ages is not the fault of defendant. It is their misfortune. And, regrettable as their situation is, it does not give them a right of action against defendant, for they cannot in reason ask that they be carried at a rate which is shown to be inadequate; or that they be rated at less than their attained ages, for that would be unfair to the younger members of the order. The rates are not unreasonably high, because they are shown to be necessary to afford the protection given. The action of the governing body was based upon good and substantial reason, and, therefore, it should not be interfered with by the courts."

In *Haydel v. Mutual Reserve Fund L. Assoc.* 104 Fed. 718, 44 C. C. A. 169, the fact that a table of rates was indorsed on the back of the policy was held not to alter the rule, the court saying: "In the first place, the defendant was a mutual company operating on the assessment plan. It had no means wherewith to pay expenses and death losses, other than such as it derived from assessments on its members. It is by no means probable, therefore, that by the indorsement in question it intended to divest itself of the authority plainly conferred by its constitution upon the board of directors to make such assessments as might at any time be found necessary to meet its liabilities, or to tie its hands so that it could not exercise this necessary power. In the second place, the cost per year to a person aged 56 of a policy for \$10,000 at the rate indicated by the indorsement would only be \$210, which is a sum so far below the usual cost of that amount of insurance to a person of that age as constrains us to believe that the deceased did not himself regard the indorsement as a contract binding the defendant to furnish insurance at that rate, without reference to what might be its actual experience. It is most probable, we think, that he understood it to be an estimate of the probable cost of insurance, the accuracy of which would be determined by the class of risks which it suc-

ceeded in obtaining. In the third place, if such a wide departure from the principle of operation described in the defendant's constitution was contemplated by the parties as an agreement for a fixed or level rate of assessment irrespective of the company's actual experience, then it is most likely that a stipulation of that nature would have been embraced in the body of the contract, instead of being indorsed in the form of a memorandum on the back of the policies. And lastly, if it be conceded that the memorandum in question is adequate to raise a doubt as to the proper interpretation of the contract, then the contract should be construed as the parties themselves saw fit to construe it in their dealings with each other."

While possessed of the power to increase its rates under the reserved power to amend its by-laws, an amendment to be valid and binding as to existing members must be adopted in strict conformity to the constitution and laws of the society both as to the method of its adoption and as to its scope. *Gibson v. Iowa Legion of Honor (Ia.)* 159 N. W. 639; *Hicks v. Northwestern Aid Assoc.* 117 Tenn. 203, 96 S. W. 962. In the case first cited an amendment increasing the rate of assessment was held to be invalid because of the failure to give proper notice of the change, as stipulated for in the contract, the court saying: "We are not unmindful of holdings . . . that members of a mutual insurance society are bound to take notice of and be governed by its laws, whether adopted prior or subsequent to the contract, if the contract makes such by-laws a part thereof, but have to say: . . . notwithstanding this general rule, it is competent for the parties to the contract to stipulate what alone shall be legal notice of a change, and in this case this was done. . . . If the change in law which raised the assessment of Cook and scaled his certificate was not legally adopted and legal notice thereof was not given, plaintiff was under no obligation to make or tender payment at the rate existing before the change. On renunciation there arose a right to elect whether to hold the insurer for damages or wait until the policy became payable according to its tenor and surviving the beneficiary." And in *Hicks v. Northwestern Aid Assoc. supra*, where it appeared that the insured had agreed in his certificate to be bound by future changes in the laws of the association, not "in conflict with the contract rights of the insured" herein and that the association had stipulated that it would not increase the rates except in the case of unusual emergency, it was held that such an emergency must exist as a condition precedent to making the increase, and the burden of proof thereof was on the association.

The right to increase its assessments reserved to the society in its laws and by contract does not empower it arbitrarily to discriminate against one class by requiring the members thereof to pay an increased assessment based on their attained age, while members of other classes are assessed as of their age of entry. *Benjamin v. Mutual Reserve Fund L. Assoc.* 146 Cal. 34, 79 Pac. 517; *Ebert v. Mutual Reserve Fund L. Assoc.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; *Strauss v. Mutual Reserve Fund L. Assoc.* 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L.R.A. 605, *affirmed* on rehearing in 128 N. C. 405, 39 S. E. 55, 83 Am. St. Rep. 699, 54 L.R.A. 605. In *Ebert v. Mutual Reserve Fund L. Assoc.* *supra*, it was said: "It is evident that the contract contemplated an unsteady and varying death fund from which to pay death claims and that the amount of the assessments would vary according to the number of deaths, the growth of the association in membership, and earning capacity of the reserve fund. It is also clear that the law of self-preservation applied, and if, at any time, in order to meet maturing claims, it should become necessary to levy a larger amount than that stipulated as the maximum rate of the table, the power so to do was inherent in the association, and the directors would have authority to pass suitable rules and regulations for that purpose. But it is equally clear that neither by the contract of insurance, in contemplation of the laws of New York, the constitution and by-laws, nor from the natural, inherent power of the association, based upon the doctrine of the general good, does there exist authority to arbitrarily determine in favor of one class of members and against another class."

It has been held that a change in the by-laws cannot affect the contract of an existing member unless such intention is clearly shown. *Bass v. Life, etc. Assoc.* 96 Kan. 205, 150 Pac. 588, wherein it appeared that a provision of the certificate gave the members a right to cease payments at any time and to receive a paid-up certificate for a proportionate part of the amount reserved. In answer to the contention that the repeal of a by-law containing a similar privilege cut off the right to a paid-up certificate it was said: "Conceding the power of the association to deprive the plaintiff of his right in this respect, a purpose to do so was not shown. The by-law on the subject was merely repealed. No affirmative action was taken indicating an intention to change the effect of any certificate already issued. No showing was offered of any conduct or circumstance suggesting such a design, and it is not readily to be inferred."

Similarly it has been held that unless there is an express agreement that a member shall

be bound by future by-laws, he is not so bound even though the certificate states that the by-laws shall constitute a part of the contract and that they are subject to amendment. *Covenant Mut. L. Assoc. v. Kentner*, 188 Ill. 431, 58 N. E. 966. And particularly is this so where it is stipulated that the application and certificate constitute the only contract between the parties and the rates of assessment are fixed in the certificate. *Covenant Mut. Benefit Assoc. v. Baldwin*, 49 Ill. App. 203; *Covenant Mut. L. Assoc. v. Tuttle*, 87 Ill. App. 300.

In each of the following cases it was held that as the societies were chartered and controlled by the laws of Canada the right to increase their assessments must also be governed by those laws, and as they were allowed by the law of Canada to increase their assessments when reasonable and necessary, by-laws providing for such increases must be held to be valid and binding: *Supreme Council, etc. v. Green*, 237 U. S. 531, 35 S. Ct. 724, 59 U. S. (L. ed.) 1089, L.R.A. 1916A 771, *reversing* 206 N. Y. 591, 100 N. E. 411; *Stockwell v. Supreme Court, etc.* 216 Fed. 205; *Simmelink v. Supreme Court, etc.* 152 App. Div. 892, 136 N. Y. S. 527; *McClement v. Supreme Court, etc.* 169 App. Div. 77, 154 N. Y. S. 700, *reversing* 88 Misc. 475, 152 N. Y. S. 136.

PEOPLE EX REL DWIGHT

v.

CHICAGO RAILWAYS COMPANY ET AL.

Illinois Supreme Court—October 27, 1915.

270 Ill. 87; 110 N. E. 386.

Pleading — Plea Puts Darrein Continuance — Waiver of Former Pleas.

Practice Act, § 50 (Hurd's Rev. St. 1913, c. 110, § 50), provides that the pleading of a plea puts darrein continuance shall not waive former pleas, so that the law, as it was prior to the revision of the Practice Act in 1907, that such a plea would supersede an answer theretofore filed and strike the answer from the record by operation of law, confessing the matters set forth in the petition, no longer applies.

Answer — Admission of Sufficiency — Replication.

By filing a replication plaintiff conceded that the allegations of the answer operated as a bar to the relief sought, unless the new allegations of the replication were sufficient to avoid the legal effect of the answer's al-

legations as a bar to the cause of action originally stated.

Demurrer — Effect — Admission of Allegations.

Defendant's demurrer to a replication admits as true new matters alleged in the replication, but challenges its sufficiency to avoid the bar to the originally stated cause of action presented by the plea.

Carrying Demurrer Back.

Where on demurrer to the replication no motion was made by plaintiff to carry the demurrer back to the plea, the sufficiency of the plea as a defense to the petition was not presented to the court for determination.

Municipal Corporations — Construction of Ordinance.

The rules for the construction of a city ordinance are the same as those applied in the construction of a statute.

Construction of Statute — Effectuating Legislative Intent.

The primary rule for the interpretation and construction of a statute is that the intention of the legislature is to be ascertained and given effect.

Aids to Interpretation — Opinions of Legislators.

The rule that in construing a statute the legislative intent is to be ascertained and given effect does not permit the court to consider statements made by the author of a bill, or by those interested in its passage, or by members of legislature adopting it, showing the meaning or effect of the language used in the bill as understood by the persons making such statements.

[See 19 Ann. Cas. 1026.]

Municipal Corporations — Interpretation of Ordinance — Opinions of Members of Council.

Where a city ordinance embodies a contract between the municipality and street railways, the court, in construing it, should look solely to its text and the situation existing between the railways and the city when the ordinance was passed, and not to the letters, statements, and opinions of the aldermanic body that passed it, since justice to the street railways who accepted the contract demands that the intention of the city council be determined from a consideration of the enactment itself.

[See note at end of this case.]

Same.

A city ordinance embodying a contract between the municipality and street railways could be construed only in the light of its text, and not in the light of letters, statements, and opinions as to its meaning of members of the local transportation committee of the city council which it did not appear were brought to the attention of the council itself at large when the ordinance was submitted to it for passage, since it is the intention of the city council which the courts must endeavor to determine, not the intention of committee members, in construing an ordinance.

[See note at end of this case.]

Error to Superior Court, Cook county: FOELL, Judge.

Action for mandamus. Walter E. Dwight, relator, and Chicago Railways Company et al., defendants. Judgment for defendants. Plaintiff brings error. The facts are stated in the opinion. **AFFIRMED.**

S. S. Gregory, William R. Moss and B. F. Langworthy for plaintiff in error.

John J. Herrick and Horace Kent Tenney for defendant in error Chicago Railways Company.

John W. Beckwith and Chas. M. Haft for defendant in error city of Chicago.

[88] COOKE, J.—On February 14, 1911, a petition was filed in the circuit court of Cook county in the name of the People of the State of Illinois, on the relation of Walter E. Dwight, president of the village of Oak Park, praying for a writ of *mandamus* requiring the Chicago Railways Company and the County Traction Company to forthwith establish and thereafter maintain a rate of fare of five cents for transportation of each passenger in one direction between the Seventy-second avenue terminals of the County Traction Company in the village of Oak Park (Seventy-second avenue being the western boundary of the village of Oak Park) and the eastern terminals of the Chicago Railways Company in the city of Chicago, the said terminals in the city of Chicago being in that portion of the city commonly known as the loop district. The right to this relief was by the petitioner based primarily upon section 3 of an ordinance [89] passed by the board of trustees of the village of Oak Park on June 4, 1903, which ordinance conferred upon the Chicago Consolidated Traction Company, as the successor of the Cicero and Proviso Street Railway Company, the right to maintain and operate street railways upon certain streets in the village of Oak Park until December 1, 1948. Said section 3, so far as here material, is as follows:

"Sec. 3. From and after the passage and acceptance of this ordinance the rate of fare for each passenger, for any one ride in one direction, between Seventy-second avenue terminal points of the lines of said company in said village of Oak Park and the eastern terminal points of the lines of the Union Traction Company in the city of Chicago, which eastern terminal points shall be within that district of the city of Chicago bounded on the north by the Chicago river, on the west by the south branch of the Chicago river, on the south by VanBuren street and on the east by Lake Michigan, shall be five cents and no more, during the entire term

of its franchise in said village, which shall include the right to a ride in each direction over and along the following routes, namely:

"(A) Upon the Chicago avenue line in Oak Park by way of Chicago avenue and Forty-eighth avenue to the Lake street surface lines in the city of Chicago, and thence by transfer to the eastern extremity of said Lake street lines.

"(B) Upon the Lake street line in the village of Oak Park by way of the Lake Street surface lines in the city of Chicago to Forty-eighth street, and thence by transfer to the eastern extremity of said Lake street line.

"(C) Upon the Madison street line in the village of Oak Park and the city of Chicago to West Fortieth street in the city of Chicago, and thence by transfer to the eastern extremity of said Madison street lines.

"(D) Upon the Twelfth street line in the village of Oak Park by way of Twelfth street to the eastern terminus [90] of said line, and thence by transfer upon the Union Traction lines to the eastern extremity of said Union Traction lines."

The obligation on the part of the County Traction Company to comply with the requirements of said section 3 was claimed by the petitioner to exist by reason of the fact that the County Traction Company had succeeded to the rights and franchises conferred by said ordinance on the Chicago Consolidated Traction Company, and was at the time of filing the petition herein operating the street railways in the village of Oak Park which had been formerly operated by the Chicago Consolidated Traction Company by virtue of said ordinance of June 4, 1903, and was and is therefore bound by all the terms and provisions of said ordinance. The obligation on the part of the Chicago Railways Company to comply with the requirements of said section 3 was claimed by petitioner to exist by reason of the fact, as charged in the petition, that the Chicago Union Traction Company, at the time of the passage and acceptance of the ordinance of June 4, 1903, owned, controlled and operated, under the name of the Chicago Consolidated Traction Company, the system of street railways in the village of Oak Park, and the acceptance of the ordinance by the Chicago Consolidated Traction Company was, in effect, the acceptance of that ordinance by the Chicago Union Traction Company; that the defendant the Chicago Railways Company is the successor of the Chicago Union Traction Company and is the beneficial owner of the street railway system in the village of Oak Park, and is operating the same under the name of the County Traction Company, and by reason thereof is bound by the terms and provisions of the ordinance of June 4, 1903.

For the purpose of supporting the charge that the provisions of said section 3 are binding upon the Chicago Railways Company, the petition sets forth substantially all the facts disclosed by the opinions in Chicago Union Traction [91] Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L.R.A. 631, and Chicago Union Traction Co. v. Chicago, 199 Ill. 579, 65 N. E. 470, which show the intimate relation existing between the Chicago Consolidated Traction Company and the Chicago Union Traction Company a short time prior to the passage of the said ordinance of June 4, 1903, and which we held in the last mentioned case established the charge there made that the Chicago Union Traction Company was the beneficial owner of the lines of street railways operated under the name of the Chicago Consolidated Traction Company, including the lines in the village of Oak Park. The petition then alleges that on or about April 22, 1903, receivers were appointed by the Federal court for the Chicago Union Traction Company and for the West Chicago Street Railroad Company and the North Chicago Street Railroad Company, respectively, the two companies last named being then the owners and lessors of a large portion of the street railway system operated by the Chicago Union Traction Company. It is further alleged that the Chicago Railways Company was organized under the laws of this State on October 30, 1903, for the purpose of reorganizing the street railway system of the Chicago Union Traction Company, including the lines operated under the name of the Chicago Consolidated Traction Company; that thereafter, as a result of negotiations between representatives of the Chicago Union Traction Company and its lessors and the city of Chicago, the city council of the city of Chicago, on February 11, 1907, passed an ordinance granting authority to the Chicago Railways Company, its lessees, successors and assigns, to construct, reconstruct, maintain and operate, for the term of twenty years (subject to the right of the city to purchase the same at any time,) a system of street railways in, upon and along certain streets in the city of Chicago upon which the receivers for the Chicago Union Traction Company were then operating street railways without any franchise from the city, one of the conditions [92] of the grant being that the Chicago Railways Company should within a specified time acquire all the property constituting the system of street railways then operated by the receivers for the Chicago Union Traction Company, and another condition being that the city of Chicago should receive fifty-five per cent of the net receipts from the operation of the system of street railways to be acquired by the Chicago Railways

Company. The petition then sets out various steps taken in the suits in the Federal court in which receivers were appointed for the Chicago Union Traction Company, the West Chicago Street Railroad Company and the North Chicago Street Railroad Company, which culminated in a sale on January 25, 1908, by a special master commissioner, under a decree of the Federal court, of all the property, estate, rights, franchises, contracts, credits, choses in action and effects of the Chicago Union Traction Company, the West Chicago Street Railroad Company and the North Chicago Street Railroad Company, to a committee acting under a plan and agreement of reorganization and readjustment promulgated by the Chicago Railways Company and approved by the Federal court and by the city of Chicago, and the petition then alleges that on February 25, 1908, the special master commissioner, acting under order of the Federal court, conveyed the property thus purchased by the said committee to the Chicago Railways Company, as the assignee and successor in interest of the said committee. The petition alleges that thereafter, on or about June 1, 1908, default was made in the payment of interest on certain bonds of the Chicago Consolidated Traction Company, and foreclosure proceedings were brought in the circuit court of the United States for the northern district of Illinois to foreclose the mortgage securing said bonds, and receivers were appointed; that on October 6, 1910, a decree of foreclosure was entered and a sale of all the property of the Chicago Consolidated Traction Company was directed; that [93] accordingly, on November 30, 1910, all the property of the Chicago Consolidated Traction Company was sold at public auction under said decree to one Andrew Cooke, acting for and on behalf of the Chicago Railways Company; that thereafter, on or about December 27, 1910, Andrew Cooke filed in said cause his petition asking that a portion of the property purchased by him at said sale be transferred to the Chicago Railways Company and the remainder thereof to the County Traction Company, which had been organized under the laws of this State on May 21, 1910, for the purpose of constructing, owning, purchasing, leasing or otherwise acquiring street railways in Cook county and in the cities, villages and municipalities of said county; that the court, upon the report of the special master as to said sale and upon the petition of Andrew Cooke, on December 27, 1910, ordered that the report be approved and the sale confirmed, and that the special master make conveyance of the property as Andrew Cooke might direct; that accordingly, by direction of Andrew Cooke, the special master on December 27, 1910,

conveyed all the street railway property of the Chicago Consolidated Traction Company within the limits of the city of Chicago to the Chicago Railways Company, and all the remainder of the property of said company, being that portion without the city of Chicago and including the lines of railway in the village of Oak Park, to the County Traction Company.

From the petition it appears that the terminal or transfer points between the lines of street railway operated by the Chicago Railways Company and its predecessors and the lines of street railway operated under the name of the Chicago Consolidated Traction Company which extended into and through the village of Oak Park, were within the city of Chicago until the conveyances of December 27, 1910, above mentioned, were made, but that thereafter the terminal or transfer points between the railways operated by the Chicago Railways Company and those operated by [94] the County Traction Company were on the line between the city of Chicago and the village of Oak Park.

With reference to the incorporation of the County Traction Company, and the acquisition, on December 27, 1910, of the lines of street railway formerly operated by the Chicago Consolidated Traction Company outside the city of Chicago, including the lines in the village of Oak Park, the petition alleges that the County Traction Company was organized at the instance of the Chicago Railways Company and is virtually an agency or subsidiary thereof; that it is entirely controlled and dominated by the Chicago Railways Company and has no separate corporate existence or autonomy but is a mere dependency of the Chicago Railways Company, organized for the purpose of endeavoring to aid that company in escaping from its legal duties and obligations.

The petition alleges that the Chicago Railways Company having on February 25, 1908, acquired title to and possession of the street car properties formerly operated by the West Chicago Street Railroad Company, the North Chicago Street Railroad Company, the Chicago Passenger Railway Company, the Chicago Union Traction Company, and the subsidiary or suburban companies mentioned in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470, as having been merged in the Chicago Consolidated Traction Company, became, in law, liable for all the obligations of its predecessors, and accordingly, and in apparent recognition of this situation, continued to operate the lines of street railway in Oak Park and the connecting lines in the city of Chicago in substantially the same way they had been operated by the Chicago Union Traction Company and its receivers, and observed substantially all the

conditions and provisions of the ordinance of June 4, 1903, securing to passengers a trip between the loop district in the city of Chicago and the village of Oak Park for one fare, until on or about December 27, 1910, when, [95] without any notice to the public authorities of the village of Oak Park, it suddenly discontinued this service and proceeded to carry passengers to the city limits of the city of Chicago and there compelled them to transfer and to pay an additional fare when they passed the city limits, and that since that time the Chicago Railways Company and the County Traction Company have refused to comply with the requirements of section 3 of the said ordinance of June 4, 1903, and insist upon charging two fares, of five cents each, for a trip between any point in the village of Chicago and any point in the village of Oak Park, wherefore the petitioner seeks a writ of *mandamus* against the Chicago Railways Company and the County Traction Company, as hereinbefore stated.

On May 17, 1911, by consent of all the parties, the cause was transferred from the circuit court to the superior court of Cook county, and on May 19, 1911, the city of Chicago was made a defendant to the petition, on the theory that by virtue of the terms and provisions of the ordinances under which the Chicago Railways Company was operating its street railway system in the city of Chicago the city was a necessary party to the proceeding. The Chicago Railways Company, the County Traction Company and the city of Chicago answered the petition, but as the cause, so far as the Chicago Railways Company and the city of Chicago are concerned, was finally determined upon the facts set forth in a plea thereafter filed, and as the rights of the County Traction Company are not involved upon this writ of error, it will not be necessary to mention any of the matters contained in the answers.

On April 2, 1913, the Chicago Railways Company filed a plea to the petition, which was adopted by the city of Chicago, in which it was alleged that on March 18, 1913, the city council of the city of Chicago passed an ordinance, which was thereafter, on March 20, 1913, signed by the mayor and accepted by the Chicago Railways Company, [96] authorizing the Chicago Railways Company to enter into an operating agreement with the County Traction Company with reference to the use of certain tracks in the town of Cicero, section 8 of this ordinance being as follows:

"Sec. 8. The consent, permission and authority hereby granted are so granted upon the express condition that the Chicago Railways Company shall not carry on any of its lines of railway in the city of Chicago or

on any line authorized to be operated hereunder, without the payment of a cash fare to it, as provided by the ordinance of February 11, 1907, herein referred to, any passenger presenting a transfer issued on any line of street railway outside the limits of the city of Chicago, or carry any passenger over its said lines who has not paid a cash fare to it, on any transfer or transfers issued on any other lines of street railway, except such transfers as are expressly provided for and authorized by said ordinance of February 11, 1907, or the amendatory ordinance of October 10, 1910. Nor shall said Chicago Railways Company issue to any passengers transported on its lines within said city or on the lines authorized to be operated hereunder, any transfers entitling such passengers to be carried on any other lines of street railway, except such transfers as are expressly provided for and authorized by said ordinance of February 11, 1907, or said amendatory ordinance, and the aforesaid resolution or ordinance of the board of trustees of the town of Cicero shall expressly recite this provision of this ordinance: *Provided, however*, that it is not intended hereby to change, add to or detract from the said ordinances of February 11, 1907, and October 10, 1910, except as therein and thereby provided."

The plea sets forth the ordinance of February 11, 1907, and the ordinance of October 10, 1910, referred to in said section 8 of the ordinance of March 18, 1913, and a certain release executed in compliance with the ordinance of October 10, 1910. Among other provisions, the ordinance [97] of February 11, 1907, provides that the Chicago Railways Company shall be entitled to charge a fare of five cents for a continuous trip in one general direction, within the present or future limits of the city, over its street railways covered by the ordinance and all extensions thereof, whether owned, leased or operated by it, and that the company's obligation to pay the city fifty-five per cent of the net receipts from the operation of the system of street railways authorized by the ordinance is based upon its right to charge and receive the said rate of fare. It also provides that the Chicago Railways Company, at all times during the life of the grant, shall secure to passengers the same right of transfer between its lines and the connecting lines of the Chicago Consolidated Traction Company for continuous travel in one general direction, for a single fare, within the limits of the city of Chicago as if the lines of the Chicago Railways Company and the lines of the Chicago Consolidated Traction Company were owned and operated by the Chicago Railways Company under the provisions of the ordinance.

By the ordinance of October 10, 1910, it was recited that the receivers of the Chicago

Consolidated Traction Company and of certain of its grantor and lessor companies were then maintaining and operating a system of street railways in certain streets and public ways in the north and west divisions of the city of Chicago, but that the right of said companies and of their receivers to maintain and operate important parts of such system had expired by virtue of the limitations and conditions of the ordinances applicable thereto, and that the right to maintain and operate other portions of said system would soon expire, and that the system was not then being operated so as to furnish adequate or proper street car service upon the streets and public ways on which such system was then located. The ordinance then refers to the provisions in the ordinance of February 11, 1907, reserving to the city the [98] right at any time to require the Chicago Railways Company to make extensions of and additions to the lines of street railway expressly authorized by that ordinance, and recites that the city desires and has determined to require the Chicago Railways Company to extend street railway lines in, upon and over said streets and public ways then occupied, without license or franchise from the city, by the said consolidated system. The ordinance authorizes and requires the Chicago Railways Company to construct, maintain and operate, in accordance with the provisions of the ordinance of February 11, 1907, extensions of and additions to its lines of street railway in, upon and along certain street in the city particularly designated in the ordinance, and including all streets and portions of streets in the city upon and along which were located those lines of the Chicago Consolidated Traction Company specified in section 3 of the said ordinance of June 4, 1903, of the village of Oak Park. The ordinance of October 10, 1910, also provided that for the purpose of complying with its terms and provisions the Chicago Railways Company was thereby authorized to acquire all the street railway property that was located in said streets and public ways of the city of Chicago belonging to or claimed by the Chicago Consolidated Traction Company or its receivers, together with the equipment thereof, and that such property should be acquired free and clear from all liens and claims of every description, including the release, waiver or extinguishment of all and every right and claim, of every kind and nature, in respect to the location, maintenance or operation of street railways in the said streets or public ways of the city then vested or claimed to be vested in or to belong to the Chicago Consolidated Traction Company and other companies mentioned, including the Cicero and Proviso Street Railway Company, or in the receivers of any of

said companies. It was further provided that during the period of the grant the Chicago Railways Company should [99] sell tickets at the rate of five cents each, which should entitle the holder to one continuous ride, either way, to or from any lawful stopping place in the city of Chicago at or east of Austin avenue (Austin avenue being the boundary line between the city of Chicago and the village of Oak Park on the west) on the Chicago avenue line, and Madison street, Lake street and Forty-eighth avenue lines (those being the lines formerly operated by the Chicago Consolidated Traction Company over which passengers from the village of Oak Park were required to travel in order to reach the loop district of the city of Chicago), from and to any station on the Lake Street Elevated railroad and the Union Elevated railroad.

The plea further alleges that at the time of the passage of the ordinance of October 10, 1910, and until December 27, 1910, all the property of the Chicago Consolidated Traction Company within and without the city was, and had been since June 24, 1908, in the possession of and was being operated by receivers appointed by the Federal court, but that upon the execution, on December 27, 1910, of the deeds referred to in the petition, possession of the property of the Chicago Consolidated Traction Company within the city of Chicago was delivered to the Chicago Railways Company and possession of that lying without the city was delivered to the County Traction Company. The plea further alleges that after the execution of said deeds the Chicago Railways Company, pursuant to the requirements of the ordinance of October 10, 1910, by a written instrument filed with the city, released to the city all the rights and claims in respect to location, maintenance and operation of street railways in the streets of Chicago vested or claimed to be vested in the Chicago Consolidated Traction Company and its grantor or lessor companies.

Thereafter, on April 2, 1913, the petitioner filed a replication to the plea, alleging that on March 10, 1913, the [100] city council of the city of Chicago passed an ordinance which had been on February 24, 1913, reported to the council by the local transportation committee, which was in all respects identical with the ordinance set up in the plea as having been passed on March 18, 1913, except that section 8 of said ordinance did not contain the proviso appended to said section in words and figures following: "Provided, however, that it is not intended hereby to change, add to or detract from the ordinances of February 11, 1907, and October 10, 1910, except as therein and thereby provided;" that thereupon counsel concerned in

this case on behalf of the petitioner, on March 12, 1913, saw the mayor of the city and various members of the committee on local transportation regarding said ordinance, and that accordingly, on March 13, 1913, the mayor caused to be addressed to W. R. Moss, counsel for the petitioner, a communication, which is set out in full in the replication. The substance of this communication is that the clause of which Moss had complained (section 8) was inserted in the ordinance to protect the city against any conditions unprovided for in the ordinance of February 11, 1907, which would reduce the city's income from fifty-five per cent of the net receipts of the Chicago Railways Company; that the mayor did not feel justified in vetoing the ordinance, and that the corporation counsel did not agree with the contention of Moss that the interchange of transfers between the Chicago Railways Company and the County Traction Company would not affect the income of the city as fixed by the ordinance of 1907, and that the corporation counsel did not regard the insertion of section 8 in the ordinance as finally settling the controversy in the courts. The replication then alleges that thereafter, on March 18, there was a meeting of the committee on local transportation, at which Eugene Block, presiding, called the attention of the committee to section 8 of the ordinance passed by the city council on March 10, 1913, and that the following proceedings [101] were had, as appears from a stenographic report taken at the direction of the committee.

The chairman caused to be read a letter addressed by him to the corporation counsel of the city of Chicago under date of March 12, asking whether section 8 of the ordinance, as passed on March 10, strengthens the case of the Chicago Railways Company in any degree in the suits pending in the courts for a five-cent fare to the western suburbs, and caused to be read the reply of the corporation counsel thereto, under date of March 13, to the effect that section 8 consists perfectly with the terms of the ordinances of February 11, 1907, and October 10, 1910, and neither adds to nor detracts from the prior ordinances but simply reiterates what was said in the prior ordinances and adheres thereto. After a discussion between certain members of the committee and a representative of the village of Oak Park and an assistant corporation counsel of the city of Chicago, the representative of the village presented an amendment which he claimed would relieve section 8 of its objectionable feature, and read from the opinion of Judge Foell rendered in disposing of a demurrer, in which he held that the ordinances of February 11, 1907, and October 10, 1910, did not

prohibit the relief in this case. Alderman Long, one of the members of the committee, then asked the assistant corporation counsel whether the amendment presented by the representative of the village was desirable, and the assistant corporation counsel replied that it was not desirable from a legal point of view, and that it would be better to defeat the ordinance than to adopt that amendment,—that the amendment would not protect the city's rights. Alderman Long then stated that the committee did not want to act contrary to the advice of the corporation counsel. The representative of the village then stated that the corporation counsel understood that the city council desired to assist the Chicago Railways Company to win the cases. Alderman Long replied that [102] they did not want to legislate the villages out of court, and asked the assistant corporation counsel if he could not prepare an amendment that would not legislate the villages out of court, and whether there was any objection to an amendment which, so far as pending litigation was concerned, would leave the parties just where they were before. The assistant corporation counsel replied that there was no objection to that, and in his opinion the ordinance as theretofore passed accomplished that very thing. Alderman Long then stated that he did not think they should do anything that would throw the villages out of court, and the assistant corporation counsel replied that the villages were already thrown out by the 1907 ordinance. Alderman Long then suggested that the assistant corporation counsel prepare an amendment as he thought it ought to be and that the committee would indorse it. Shortly afterwards the secretary of the committee read a communication from the assistant corporation counsel which was accompanied by a proposed amendment to said section 8 and which the communication stated was in accordance with the request made by Alderman Long. The amendment prepared by the assistant corporation counsel and thus transmitted to the committee was the proviso to said section 8 as it appears in the ordinance of March 18.

The replication then alleges that on March 18, at the meeting of the city council, Eugene Block moved to reconsider the vote by which the council, at its last preceding meeting, passed said ordinance, which motion prevailed; that thereupon Alderman Block moved to amend said ordinance by adding said proviso to section 8, whereupon Stanley Kunz, a member of the council, arose and inquired the purpose of the proposed amendment; that the mayor, who was then presiding, directed that the amendment be read again, which was accordingly done, and that Alderman Kunz then stated that he did not

understand the amendment, whereupon the mayor stated from the chair that it [103] had been suggested that the ordinance without the amendment might affect pending suits brought by western villages against the traction companies, and that the purpose of the amendment was to prevent the ordinance from prejudicing the rights of the towns in those cases; that thereupon Alderman Block arose and in substance repeated what had been said by the mayor, and after some further remarks (which are not set forth) the amendment was duly adopted, and that the said ordinance of March 18, 1913, was thus, and not otherwise, adopted by the unanimous vote of those present; all of which the petitioner is ready to verify.

The Chicago Railways Company and the city of Chicago filed general demurrers to the replication, which the court sustained, and the petitioner declining to plead further, the petition was dismissed as to the Chicago Railways Company and the city of Chicago and judgment was rendered in their favor for costs. In the meantime the name of the County Traction Company had been changed to Chicago and West Towns Railway Company, and the change in name had been brought to the attention of the court by the petitioner by an amendment to the petition, and subsequently, after a hearing, a writ of *mandamus* was awarded against the Chicago and West Towns Railway Company in accordance with the prayer of the petition. The petitioner has sued out this writ of error to reverse the judgment rendered in favor of the Chicago Railways Company and the city of Chicago.

The plea filed by the Chicago Railways Company setting up the ordinance of March 18, 1913, as a defense to the petition was, in effect, a plea *puis darrein continuance*. Under the law as it existed prior to the revision of the Practice act in 1907 this plea would have superseded the answer theretofore filed, and by operation of law the answer would have been stricken from the record and the matters set forth in the petition confessed. (East [104] St. Louis v. Renshaw, 153 Ill. 491, 38 N. E. 1048; People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775.) Section 50 of the Practice act now provides that the pleading of a plea *puis darrein continuance* shall not waive former pleas, so that rule no longer applies. Instead of demurring to the plea and thereby testing its sufficiency as a defense to the cause of action stated in the petition, plaintiff in error filed a replication admitting the facts stated in the plea but setting up new matters intended to avoid the legal effect of the plea as a defense to the petition. By filing the replication plaintiff in error conceded that the ordinance of March 18, 1913,

operated as a bar to the relief sought by the petition unless the new matters set forth in the replication were sufficient to avoid the legal effect of the ordinance as a bar to the cause of action stated in the petition. (Chicago Great Western R. Co. v. People, 179 Ill. 441, 53 N. E. 986.) The Chicago Railways Company demurred to the replication, thereby admitting as true the new matters set forth in the replication but challenging their sufficiency to avoid the bar presented by the plea. The action of the court in sustaining the demurrer to the replication amounted to a holding that the new matters set forth in the replication were not sufficient, in law, to avoid the bar presented by the plea, and this was the extent of the holding of the trial court in disposing of the case. The sufficiency of the plea as a defense to the petition was not presented to the court for determination, as no motion was made by plaintiff in error to carry the demurrer back to the plea. (Schofield v. Settley, 31 Ill. 515; Mix v. People, 86 Ill. 329; Scott v. Artman, 237 Ill. 394, 86 N. E. 595; Heimberger v. Elliott Frog, etc. Co. 245 Ill. 448, 92 N. E. 297; People v. Strawn, 265 Ill. 292, 106 N. E. 840.) The arguments of counsel in this court embrace numerous questions which were not involved in the trial court in passing upon the demurrer to the replication and which are therefore not before us for determination. The only question proper for us to consider is whether, conceding the ordinance of March 18, 1913, as set forth in the plea, to [105] be a bar to the relief sought by the petition, the new matters contained in the replication are sufficient, in law, to avoid the effect of that ordinance as a bar.

The new matters in the replication are set forth for the purpose of showing the intention of the city council in adopting section 8 of the ordinance of March 18, 1913, it being the contention of plaintiff in error that such new matters show that the city council did not by said section 8 intend to limit or enlarge the obligation of the Chicago Railways Company, under the ordinances of February 11, 1907, and October 10, 1910, to issue and accept transfers. The matters claimed to show such intention consist of certain letters read and statements made at a meeting of the committee on local transportation before the ordinance was submitted to the city council, and certain statements made at the session of the council at which the ordinance was passed. Whether these extraneous matters can be considered by the courts in construing section 8 of the ordinance of March 18, 1913, is the question presented to us for determination.

We have held that the rules for the construction of an ordinance are the same as

those applied in the construction of a statute. (*People v. Hummel*, 215 Ill. 43, 74 N. E. 68; *People v. Mohr*, 252 Ill. 160, 96 N. E. 893.) It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. (*People v. Price*, 257 Ill. 587, Ann. Cas. 1914A 1154, 101 N. E. 196.) This rule does not, however, permit the courts to consider statements made by the author of a bill or by those interested in its passage, or by members of the legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements. Thus, in *Belleville, etc. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589, it was said: "Nor can the presumptions or even well known views of all the members of the legislature be allowed to repeal an express provision of a law or to control [106] its construction. The law, alone, can speak the legislative will. When the courts shall be driven to the lobbies of the legislature to learn the sentiments of the members, for the purpose of construing the laws, a new rule of construction will have been adopted." Again, in *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174, we said: "While journals and proceedings of the legislature are sometimes looked to in an endeavor to ascertain a proper construction of the statute, so that the court may have before it what is authentic that surrounded the enactment of the law, we are aware of no authority, and none has been pointed out, where the action of the lobby or the opinion of the legislators as individuals has been taken into account. In fact, we understand the rule to be otherwise and that such matters are inadmissible." In *U. S. v. Trans-Missouri Freight Assoc.* 166 U. S. 290, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007, the United States Supreme Court, in considering this subject, said: "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. . . . The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it, by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

While the language used in the cases above cited was used as applicable to the construction of statutes generally, an additional reason exists for refusing to consider

the opinions of members of the legislative body as to the meaning of the proposed enactment, where, as here, the enactment is not for the government of the public generally, [107] but is a proposition for a contract. In such cases justice to the party accepting the contract demands that the legislative intention be determined from a consideration of the enactment itself. *Belleville, etc. R. Co. v. Gregory*, supra.

The principal matters intended to show the meaning of said section 8 as contended for by plaintiff in error, are the letters read and the statements made at the meeting of the local transportation committee. A further reason exists why these matters cannot be considered by the courts in construing that section. The ordinance was passed by the city council,—not by the local transportation committee,—and it does not appear from the replication that any of the correspondence referred to or any of the statements made at the meeting of the committee on local transportation were brought to the attention of the city council when the proposed ordinance of March 18, 1913, was submitted to the council. It is the intention of the city council which the courts must endeavor to determine,—not the intention of the members of some committee having the proposed ordinance before them for consideration before it was presented to the council. So far as this record discloses, the courts, in construing said section 8, are limited to the language used in the section; considered in connection with the situation existing between the Chicago Railways Company, the village of Oak Park and the city of Chicago at the time the ordinance was passed, which situation was fully disclosed by the petition and plea.

The replication set forth no new matters proper to be considered in construing said section 8. The demurrer thereto was therefore properly sustained.

The judgment of the superior court is affirmed.

Judgment affirmed.

Rehearing denied December 9, 1915.

NOTE.

Opinions, Acts, etc. of Members of Council as Aid to Interpretation of Ordinance.

In those cases wherein the question has arisen as to the admissibility of the acts, opinions or statements of members of a municipal council as an aid to the construction of an ordinance, the courts have applied the rules and principles applicable to the analogous cases arising with respect to members of legislatures. For a discussion of the cases of the latter class see the note to *Tennant v. Kuhlemeier*, 19 Ann. Cas. 1026.

It has been held that the acts and statements of the members of a municipal council at the time of the passage of an ordinance cannot be considered by courts in ascertaining the meaning thereof. *Barnes v. Mobile*, 19 Ala. 707. And see the reported case wherein it is held that the foregoing rule should particularly be applied where the ordinance is a proposition for a contract and not for the government of the public generally, for under such circumstances it is said that justice to the party accepting the contract demands that the intention of the enacting body shall be determined from a consideration of the enactment itself. In *Barnes v. Mobile*, supra, the court said: "It is for the court to construe the ordinance and gather the intention of the law-maker from the law itself, and not from the contemporaneous avowals of the individual law-makers."

The testimony or opinions of individual members of a municipal council are not admissible for the purpose of showing what in fact was intended or meant by an ordinance. The meaning is to be found from the language used. *Vermillion v. Northwestern Telephone Exch. Co.* 189 Fed. 289, 111 C. C. A. 21. See also *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A 56. In the case first cited it was said: "The meaning of municipal ordinances, like other legislative acts, must be ascertained from their language. The record of debates in Congress is official and contemporaneous with the acts to which they relate, and yet they are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." . . . Much less can the private and undisclosed views of members of a city council be received, years after an ordinance is passed, and after litigation has arisen, to explain its scope or qualify its meaning. We must, therefore, find the meaning of this resolution in its language alone."

PEOPLE
v.
GIBBS.

Michigan Supreme Court—June 7, 1915.

186 Mich. 127; 152 N. W. 1053.

Municipal Corporations — Reasonableness of Ordinance — Judicial Review.

Whether an ordinance is reasonable, and within the discretionary power of the municipal authorities, is a judicial question.

[See Ann. Cas. 1914B 204.]

Presumption of Reasonableness.

City licensing and regulation ordinances are primarily presumed to be reasonable unless the contrary appear on their face, but if the inherent character of their provisions appear to be unreasonable, the courts must declare such provisions void.

[See Ann. Cas. 1916B 502.]

Motives of Municipal Council.

Since courts will not inquire into the motives which actuate the members of the legislative body in passing an ordinance, whether an ordinance regulating public auctions was passed to benefit special interests cannot be considered.

[See note at end of this case.]

Reasonableness of Ordinance — Evidence of Extrinsic Facts.

In certiorari to review a judgment based upon a city ordinance, evidence as to its reasonableness as applied to the subject-matter or local conditions is admissible.

Auctions — Validity of Regulation.

An ordinance of the city of Detroit prohibited the holding of public auctions except between the hours of 8 A.M. and 6 P.M., and also prohibited the use of musical instruments or criers to attract the attention of the public thereto. Defendant, being convicted of a violation of such ordinance, brought certiorari to determine its constitutionality. It is held that the prohibition in the ordinance being neither necessary nor proper for the public welfare or protection of society, it was a discrimination in restraint of trade and an unreasonable regulation.

[See Ann. Cas. 1915A 1097.]

Certiorari to Recorder's Court of Detroit:
CONNOLLY, Judge.

Lipman A. Gibbs convicted of violating city ordinance and brings certiorari. The facts are stated in the opinion. **REVERSED.**

William E. Tarsney and Richard I. Lawson
for People.

Doyle & Cameron for respondent.

[128] STEERE, J.—Defendant seeks here by certiorari to review and reverse on constitutional grounds a judgment rendered in the recorder's court of the city of Detroit convicting him of violating an ordinance of said city entitled "An ordinance to license and regulate auctioneers and auctions held within the city of Detroit." The particular provision of said ordinance, under which he was convicted (section 12a) so far as directly material here, reads thus:

[129] "No such person doing business as a duly licensed auctioneer shall operate a public auction room, or sell goods at public auction, within the meaning of this ordinance, except on week days between the hours of 8 A. M. and 6 P. M. Any person convicted of a violation of the provisions of this section shall be

fined," etc.—with resulting imprisonment in case of failure to pay said fine.

Section 12 of said ordinance, with which appellant contends section 12a should be construed, is as follows:

"SEC. 12. Noises Prohibited. No bell-man or crier, nor any drum or fife, or other instrument of music nor any show signal or means of attracting the attention of the public, other than a sign or flag, shall be employed, or suffered or permitted to be used in connection with any auction sale at or near any place of such sale, or at or near any auction room."

The objections urged and argued against said conviction, as set out in appellant's brief, are as follows:

"(1) The court erred in refusing to rule that the power of the common council of the city of Detroit granted by the charter to license and regulate auctioneers is not sufficient authority to authorize the common council to prohibit auction sales entirely between the hours of 6 o'clock P. M. and 8 o'clock A. M.

"(2) The court erred in refusing to rule that section 12a of the ordinance in question when construed with section 12 thereof and other sections of said ordinance discloses great want of reasonableness and hence is invalid.

"(3) The court erred in refusing to rule that section 12a of the ordinance apart from its connection with section 12 is clearly unreasonable, unfair and partial in its operation, and hence invalid. It cannot be by its terms sustained as a legitimate exercise of the police power.

"(4) The court erred in refusing to rule that this ordinance is in violation of the Constitution of the United States and of this State."

[130] We do not understand any serious question is or can be raised as to the general power of the city under its charter to enact an ordinance to license and regulate auctioneers and auctions held within its limits, and therein prescribe such regulations as are necessary and appropriate in that connection to eliminate fraud, and protect the public from annoyance and imposition.

Divested of auxiliary elaborations, the substance of defendant's grievance is that the provision of the ordinance prohibiting auction sales in the evening after 6 o'clock, during customary evening business hours, is unreasonable and invalid, and is beyond the city's power of regulation, which is limited to protection of public safety, health, and welfare, to which objects this prohibition has no real and substantial relation.

The facts in this record are few and concise, briefly establishing without dispute that defendant was a duly licensed auctioneer, and, on February 14, 1914, the same being a week

day, did business as an auctioneer and sold goods at public auction after 6 P. M. at 51 Monroe avenue in said city.

This does not purport to be an ordinance for revenue or to prohibit, but one within the police power, enacted to license, regulate, and control for the public welfare a calling or occupation of that class recognized as peculiarly requiring surveillance for the reason that when unrestrained their inherent tendency is often towards dishonest and annoying methods, inimical to the quiet, good order and general welfare of a community. When rightly conducted, the business of an auctioneer is regarded not only as a legitimate calling, but often as a useful and important line of vending in the sum total of business activities. The question therefore arises: Does this provision of the ordinance pass the limit of the power of reasonable regulation?

[131] In reviewing section 12a, which gives rise to the question, it is proper not only to take into consideration section 12, as urged by counsel for appellant, but also the entire ordinance and any fact or matter disclosed by the record which may throw light upon the contention. This ordinance, considered as a whole as originally enacted, is an unusually comprehensive, well worded, logically arranged, and readily understood piece of municipal legislation, keeping well within the scope of its title and the legislative power of the enacting body. It is confined and devoted strictly to the one general object and purpose of authorizing and regulating the business of auctioneering, and to that end licensing certain qualified persons to conduct auction sales, with the well known and generally understood evils attending such business when unrestrained, enumerated, and prohibited. It provides for licensing, as auctioneers, persons of good character, who must pay a stated license fee and give a bond in the sum of \$1,000 to faithfully observe all provisions of applicable ordinances, with two freehold sureties, or a surety company, to be approved by the mayor, and imposes proper punishment for engaging in the business without a license. Among its salient restrictions are the following: The purchaser of jewelry of specified kinds at any auction held by a licensed auctioneer may within five days from the date of the sale return the same if not of the quality represented, when, upon demand, the auctioneer must return the purchase price of the article so purchased, he and his bondsmen being liable therefor; in case of refusal the auctioneer becomes liable to forfeit his license and pay a fine of from \$25 to \$100; as a further safeguard he is prohibited from closing the place of sale, for the purpose of avoiding an offer to return such articles, during the five days following such sale; substitution of any article in lieu

of one sold; making [132] any false representation or statement as to the ownership or character of property offered for sale or as to the poverty of the owner; offering for sale goods, wares, and merchandise falsely representing or pretending them to be in whole or in part bankrupt stock, damaged goods or goods saved from fire; the making of any false representation as to the previous history or character of goods offered for sale; receiving for sale goods from any minor; "down-hill" selling, or offering an article at a high price and then offering the same at successive lower prices; conducting any auction sale of personal property in any street, avenue, alley, or public place in the city; and the use of bellmen, criers, musical instruments, etc., as specified in section 12 already quoted, are all strictly prohibited, with punishment by fine and cancellation of the license of any auctioneer violating any of these provisions.

With these safeguards thrown around the business, in what particular are the provisions of section 12a, prohibiting evening sales, related to, or necessary for, the preservation of public health, peace and safety? There is no evidence showing, and nothing is pointed out in this record which indicates what special wrong to the public would or could result from auctions during business hours after 6 P. M., when conducted according to the requirements of said ordinance, justifying their prohibition as a necessary police regulation. The most to be claimed is that such is to be inferred from the provisions of the enactment itself, because power to legislate upon the subject has been conferred upon the city council whose members are better able to judge the necessities to which local conditions give rise, and the discretion, or judgment, of that body rather than of the court should control.

Courts do not substitute their discretion for that of municipal authorities acting within the scope of discretionary [133] powers conferred upon them; yet it is settled textbook law that the question of whether an ordinance is reasonable and within the range of conferred discretionary power is always for the courts to determine. 2 Dill. on Mun. Corp. (5th ed.) § 589; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *People v. Detroit United R. Co.* 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L.R.A. 746.

"Where the power to legislate upon a given subject is conferred, but the mode of its exercise is not prescribed, the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L.R.A. 721, 16 Am. St. Rep. 578.

"It is quite possible that some things have a greater tendency to produce danger and

disorder in the cities than in smaller towns or rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. . . . It is lawful to provide for dealing with the mischief, but it is not lawful to go beyond reasonable measures and precautions in anticipating it." In re *Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

This ordinance in its general scheme is within the grant of police power conferred upon the city to license and regulate the business of auctioneering, and such ordinances are primarily presumed to be reasonable unless the contrary appear on their face; but if the inherent character of any of its provisions appear upon the face of an ordinance to be unreasonable, or if upon a state of facts shown it so appears, the courts must declare such unreasonable provisions void. The only state of facts shown here is that respondent, a duly qualified and licensed auctioneer, therefore of good character and under bonds, sold goods at auction in a certain place of business after [134] 6 o'clock in the evening. No other misconduct or violation of the ordinance is charged or shown, and presumably the business was otherwise conducted honestly, without fraud or misrepresentation as to the goods offered and sold, off the street, without bellman, crier, or other prohibited noises and in general compliance with restrictions specified in the ordinance. In what manner the business so conducted did, or could, at that particular time of the day, annoy or disturb the public, or menace the peace, good order, health, or welfare of the community more than before 6 o'clock, or more than other lines of business carried on at the same time, is not shown or suggested.

The provision in question (section 12a) is an amendment to a municipal by-law enacted under a delegated police power of the State granted to license and regulate. Its validity is to be tested by the following limitations as stated by Justice Brown, defining the police power of the State in *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 U. S. (L. ed.) 385:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its

determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The contention that this amendment was enacted for the purpose of protecting or benefiting special interests and was inspired by other motives than guarding the general welfare is immaterial and cannot be considered here. Courts are not concerned with the [135] motives which actuate members of a legislative body in enacting a law, but in the results of their action. Bad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives.

"Nothing is better settled than the rule that the motives of a legislature or of the members cannot be inquired into, for the purpose of determining the validity of laws." *People v. Gardner*, 143 Mich. 104, 106 N. W. 541.

Entirely apart from all question of motive we are impressed that, with the meager facts shown here, and upon its face, section 12a, necessarily treated as a part of the ordinance and considered in that relation, is a discriminatory and unreasonable interference with the freedom of trade beyond any necessities of the case, does not appear upon its face, and is not shown to be a necessary means to an end within the police power of public protection, and is therefore without the legitimate field of reasonable regulation.

Auctioneering, honestly conducted, is a business within the legitimate scope of trade, traffic or merchandizing. When by ordinance all fraud and misrepresentation in effecting sales and when all questionable methods of attracting attention or conducting sales, which are recognized as likely to develop in that special line of business, and which may tend to public annoyance, imposition, and disturbance of public peace and safety of a community, have been guarded against and prohibited, further restriction extends beyond the fair scope of powers granted to regulate for the protection of society. Though no directly controlling case in this court is found, we are satisfied that the reasoning and views expressed in cases where plainly analogous principles are involved tend towards the foregoing conclusions.

[136] Cases cited from other jurisdictions where the question has arisen cannot be entirely reconciled. In *Butte v. Paltrovich*, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698, an ordinance which made it unlawful to keep open and transact business in a pawnshop, loan office, or second-hand store after 6 o'clock in the evening, except the evening preceding a legal holiday, was sustained as within the
Ann. Cas. 1917B.—53.

police power. That short ordinance, consisting of but one section, besides a concluding penal and repealing clause, contained no other regulating provisions, and it was shown that under the circumstances there was no discrimination in the particular complained of, as all other places in that city were accustomed to close for the day at 6 P. M.

In *Hyman v. Boldrick*, 153 Ky. 77, 154 S. W. 369, 44 L.R.A. (N.S.) 1039, a short ordinance regulating pawnbrokers, second-hand dealers, junk merchants or junk dealers, similar in its provisions to the Montana case, was held to be a reasonable restriction. In support of and disclosing reason for the restriction it was shown that in the city (Louisville) there were many petty thieves difficult of detection in a city of its size, that:

"Thieves resort to second-hand stores especially at night to dispose of stolen goods, and as they do this under cover of darkness, it is almost impossible to apprehend them. Housebreakers and other thieves follow their calling usually under cover of darkness and when they get booty, try to dispose of it as soon as possible. If the second-hand stores are not allowed to remain open at night, they will be more easily detected, as they can safely carry things in the darkness which the police could detect in the daylight, and when property has been once sold to a second-hand dealer it is often difficult to find the thief." 44 L.R.A. (N.S.) 1040.

The case at bar is destitute of any proof even suggesting [137] any reason for the provision in question. It is recognized in this State that evidence bearing upon the reasonableness or unreasonableness of an ordinance, as applied to the subject-matter or to local conditions, is admissible (*People v. Detroit United Ry.* 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626); but no such evidence was produced here.

Most directly analogous in facts to this case of any cited in briefs, or found, is *Hayes v. Appleton*, 24 Wis. 542, in which an ordinance that no licensed auctioneer should "sell any goods, wares, or merchandize after sundown," was held upon its face to be unreasonable as not manifesting any beneficial purpose within the meaning of the charter; therefore unconstitutional and void. What other provisions the ordinance contained is not shown by the published report. It was there said in part:

"It is not shown in the case what evil was to be prevented or good promoted by the passage of the ordinance in question; nor can we judicially see that any restriction of the kind was necessary. No cause for it, whether good or bad, is even suggested in the brief submitted by counsel for the city; and it is impossible for us to conjecture that any sufficient one existed. . . . And so, too, it

might be proper to restrain such sales on particular days or at particular places; or, if the manner of conducting them was particularly objectionable, to prescribe how they should be conducted."

Here the ordinance does prescribe the manner of conducting them, and that the place shall not be in a public street or alley.

In harmony with and sustaining the general principles governing the Hayes case, Justice Marshall later, in *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408, exhaustively discussed [138] the limitations, rules, and controlling elements of the police power, under which citizens may be restrained for the general good in their pleasures and business activities. This case was cited with approval and freely quoted from in *Dougherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A 1163.

We are unable to discern from this record that section 12a was proper or necessary for the public welfare, or the protection of society; it does not appear, and certainly is not a matter of common knowledge, that the business of a licensed auctioneer of good character, under bond, is a menace to public peace, health, or safety when properly conducted, in his place of business, during general business hours, or that the excluded hours would be more disturbed by such business, than those which are not. This attempt to prohibit it during a portion of business hours without any disclosed, special reason therefore, impresses us as a discrimination in restraint of trade, and an unreasonable regulation, beyond the limits of police power conferred upon the municipality to license and regulate.

The judgment is reversed.

Brooke, C.J., and McAlvay, Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

NOTE.

Judicial Inquiry into Motives Prompting Enactment of Legislative Ordinance.

The question of judicial inquiry into the motives prompting the enactment of legislative ordinances is considered at length in the note to *Gardiner v. Bluffton*, Ann. Cas. 1912A 713. The present note is confined to a discussion of the more recent decisions passing on that question.

The general rule that the motives which prompted the legislative branch of the state or federal government in exercising its legislative powers cannot be judicially inquired into, has in several recent cases been held

to be applicable to the legislative bodies of municipalities. *Hadacheck v. Alexander*, 169 Cal. 616, 147 Pac. 259; *Murphy v. Chicago*, etc. R. Co. 247 Ill. 614, 93 N. E. 381; *Higgins v. Lacroix*, 119 Minn. 145, 137 N. W. 417, 41 L.R.A.(N.S.) 737; *Douglass v. Greenville*, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958; *Knoxville v. Heiskell*, 2 Tenn. Civ. App. 459. And see the reported case.

The rule has been applied where the ordinance in question provided for the regulation of business. *Hadacheck v. Alexander*, 169 Cal. 616, 147 Pac. 259 (brickmaking); *Higgins v. Lacroix*, 119 Minn. 145, 137 N. W. 417, 41 L.R.A.(N.S.) 737 (theatres); *Douglass v. Greenville*, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958 (livery feed and sale stables). And see the reported case (auctioneers and auctions). In *Higgins v. Lacroix*, supra, the court said: "We think evidence of the motives of the individual members of the village council in passing the ordinance was erroneously received. Legislative acts would rest on insecure ground, indeed, if admissions of the individual legislators that the attainment of a nonpermissible or unlawful end was the motive and purpose in enacting a law are to be received in evidence and be considered by the courts when called to pass on their validity. . . . Manifestly it ought to be beyond the power of one who has been intrusted with authority to enact a law to impeach the same by any subsequent statement of secret or avowed motives entertained at the time of its passage that would work its invalidity."

The rule has also been applied to an ordinance providing for the vacation of a street. *Murphy v. Chicago*, etc. R. Co. 247 Ill. 614, 93 N. E. 381. In that case the court said: "It is said that the members of the council, in the passage of the ordinance, were controlled by a corrupt motive. An ordinance passed by a city council, in the exercise of the legislative powers conferred upon it, for the purposes of police regulation or municipal government, cannot be impeached by an inquiry into the motives of the members of the council who voted for it. If within the legislative power granted to the council, a court cannot declare an ordinance invalid on account of the improper motives which induced its passage. It is a well-known rule of law that the knowledge and good faith of a legislature are not open to question and its motives cannot be inquired into. Courts must always assume that the legislative discretion has been properly exercised. . . . We know of no reason why the same rule should not govern in the case of the exercise of legislative power granted to a city council. . . . The ordinance was a valid exercise of the power of the city council. The motives for its passage cannot be inquired into."

In *Knoxville v. Heiskell*, 2 Tenn. Civ. App. 459, the rule was applied with reference to certain ordinances of the city of Knoxville, fixing the salaries of members of the police or fire department on a sliding scale, or scale varying with the length of service of the members of the departments affected.

HOUSER

v.

FAYSSOUX ET AL.

North Carolina Supreme Court—December 9, 1914.

168 N. Car. 1; 83 S. E. 602.

Bills and Notes — Notice of Dishonor — Accommodation.

Accommodation indorsers of a note are entitled to notice of dishonor.

Notice to Directors Indorsing Note of Corporation.

That accommodation indorsers of a note are directors of the corporation, which is the maker, and constitute a majority of the board of directors, does not deprive them of right to notice of dishonor.

[See note at end of this case.]

Renewal — What Constitutes — Part Payment.

A payment by the maker on a note before the bar of the statute does not operate as a renewal of the note as to mere accommodation indorsers, though it does as to sureties, as well as the maker.

Appeal from Superior Court, Gaston county: SHAW, Judge.

Action by Evon L. Houser, administrator, plaintiff, against T. M. Fayssoux et al., defendants. Judgment for defendants. Plaintiff appeals. **AFFIRMED.**

[1] Civil action to recover on a promissory note, as follows:

\$2,000.

One day after date we promise to pay J. B. White or his order the sum of \$2,000, for value received of him, interest at 6 per cent per annum from 1 July, 1902.

This the 2d day of July, 1902.

DALLAS COTTON MILLS,

(Seal)

J. R. LEWIS, President.

Attest: J. D. MOORE, Secretary and Treasurer.

[2] The defendants indorsed this note by writing their names on the back before de-

livery to plaintiff's intestate, said defendants being directors of Dallas Cotton Mills. The interest on the note was paid by the corporation semiannually to 1 July, 1910. On 1 October, 1910, \$100 was paid by the corporation, and similar payments 15 November, 1910, and 1 February, 1911.

At the conclusion of the evidence the court rendered judgment for the defendants dismissing the action, and the plaintiff appealed.

S. J. Durham and F. I. Osborne for appellant.

Mason & Mason and Mangum & Woltz for appellees.

BROWN, J.—There are two defenses interposed: want of notice, of dishonor, statute of limitations. That the defendants were accommodation indorsers on the note sued on is admitted.

It appears that the defendants placed their signatures on the back of the note; that they were not otherwise parties to the note; and it not appearing that they intended to be bound in some other capacity, they became liable as indorsers and were entitled to notice of dishonor. *J. W. Perry Co. v. Taylor*, 148 N. C. 362, 62 S. E. 423; *Eaton and Gilbert on Commercial Paper*, sec. 108.

It is contended, however, that the defendants were directors of the cotton mills and, therefore, no notice of dishonor was required; and for this position the plaintiff cites *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653.

It appears in the declaration in that case, and is admitted by the demurrer:

1. "That each of said directors so signing said notes did so as surety for the maker, and it was so understood and agreed between each of them;" and

2. "That the maker (the company) was 'utterly insolvent' at the time of the execution of the note."

The Court bases its decision upon these facts, and the inference from this opinion is that the Court would have decided the case differently if it had not been *understood and agreed between the directors, who indorsed their names on the notes, that they were "doing so as sureties for the maker,"* or if the company had been solvent.

In the case at bar there was no understanding or agreement that the indorsers were signing the note in controversy as sureties, and there was no evidence tending to prove that the Dallas Cotton Mills was insolvent. The facts in that case distinguish it from this. If the defendants had "understood and agreed that they were signing the note in controversy as sureties," it would take the case out of the provisions of section 2212 of the Revisal; but nothing of that nature appears in the case. The Hall case is

not in line with the great weight of authority.

[3] It is generally held that the fact that the indorsers constituted a majority of the board of directors of a corporation does not dispense with the necessity of notice of dishonor. *Phipps v. Harding*, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L.R.A. 513, C. P. A. and cases cited.

The prevailing doctrine is that the corporate entity is as distinct from its officers and directors as it is from third persons with whom it transacts business, and stockholders or directors who lend their individual credit to the corporation of which they are members by indorsement of negotiable paper, or otherwise, are entitled to the same rights and immunities which attach to the status of indorser or surety, where third parties have assumed those liabilities. *Eaton and Gilbert on Commercial Paper*, p. 486; *Burgh v. Legge*, 5 M. & W. (Eng.) 418; *Carter v. Flower*, 16 M. & W. (Eng.) 749; *Brown v. Ferguson*, 4 Leigh (Va.) 39, 24 Am. Dec. 707.

Referring to *Hull v. Myers*, the Circuit Court of Appeals in *Phipps v. Harding*, supra, says: "The case of *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653, is urged upon our attention in support of this contention. The decision of the Court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority."

A very full and able discussion of this subject is to be found in the case of *McDonald v. Luckenback*, 170 Fed. 434, 95 C. C. A. 604, in which it is said: "It is true that the defendant and the two other indorsers were officers and stockholders of the company, as was also the decedent and payee of the note; that they were interested in the success of the corporation of which they were directors and stockholders; that they were, so to speak, managing directors, and as such were financing the affairs of the corporation. . . . We think there is no evidence disclosed by the record tending to show that anything else was contemplated by those who negotiated this loan than that it was to be a loan to the corporation for the promotion of its business, for which the corporation was to be primarily bound by the promissory note, which it made, and that the directors who loaned their credit by indorsement assumed the secondary liability of indorsers, and none other."

"All evidence is consistent with this state of the transaction, and no other interpretation, it seems to us, can be given to it, unless, indeed, directors and officers of a corporation interested in its successful operation cannot, in negotiating a loan for the benefit of the corporation, insure its credit by assuming only the liability of indorser of its nego-

tiable paper. Such a proposition, of course, can be sustained neither by reason nor authority."

As to the plea of the statute of limitations, we think the note is barred.

It is true that it is well settled in this State that a payment by the principal on a note before the bar of the statute operates as a renewal [4] of the debt as to himself and also as to the sureties on the note. At one time this was true as to indorsers likewise, as an indorser was regarded as a surety. *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Dec. 579; *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636.

In *Johnson v. Hooker*, 47 N. C. 29, Pearson, J., says: "The act of 1827 makes an indorser liable as surety. The effect is to put him on the footing of a maker of the note and to make him liable to the holder, the same as if his name was on the face of the note instead of being on the back."

While the law remains the same as to a surety, and a payment by the principal will operate as a renewal of the debt, as to the surety, who is regarded as a maker of the note, an indorser is no longer so regarded.

There is a broad and well recognized distinction between a surety and an indorser, as is pointed out clearly in *LeDuc v. Butler*, 112 N. C. 461, 17 S. E. 428, in which case it is said: "Part payment of a note by the payee, who has indorsed it, will not repel the bar of the statute of limitations as against the maker, the statute confining the act, admission, or acknowledgment, as evidence to repel the bar, to the associated partners, obligors, and makers of a note."

The judgment is
Affirmed.

NOTE.

Right to Notice of Dishonor of Stockholder or Officer Indorsing Corporate Paper.

General Rule.

The distinguishing feature of the liability of an indorser of negotiable paper is that his liability is contingent on due presentment for payment and notice of dishonor. The rule is based on the implied undertaking of the indorsee that he will use due diligence in the prosecution of his demand against the maker, and that he will present the paper for payment immediately on its maturity and will not, by his negligence, expose the indorser to a hazard of loss, against which he, in case of notice of dishonor, might be able otherwise to protect himself. And if the holder fails to perform this duty to give timely notice of nonpayment, the law pre-

sumes injury to the indorser and discharges him. 3 R. C. L. tit. *Bills & Notes*, p. 1224. It is also a general rule that a corporation is an entity distinct from the body of its stockholders, so that a director or stockholder of a corporation is not as a matter of law charged with actual notice of its business transactions. See 7 R. C. L. tit. *Corporations*, p. 302.

Accordingly the general rule is that a stockholder or officer of a corporation, who indorses its negotiable instruments, cannot be held liable thereon in the absence of notice of dishonor. *Maltass v. Siddle*, 6 C. B. N. S. 494, 95 E. C. L. 494, 141 Eng. Rep. (Reprint) 549; *Phipps v. Harding*, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L.R.A. 513; *McDonald v. Luckenback*, 170 Fed. 434, 95 C. C. A. 604, reversing 164 Fed. 296; *Grandison v. Robertson*, 231 Fed. 785, 145 C. C. A. 605; *Winter v. Cox*, 41 Ala. 207; *Louisville First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856; *Field v. New Orleans Delta Newspaper Co.* 21 La. Ann. 24, 99 Am. Dec. 699. And see the reported case. Thus in *Grandison v. Robertson*, supra, it was said: "The question arises whether the president and treasurer of a corporation, who indorses in his individual capacity the note of his corporation, is an indorser entitled to presentment of the note for payment and notice of nonpayment. The question is somewhat analogous to that which arises in the case of an indorser who has become the executor of the maker of a note, who died before its maturity. The latter question came before the supreme court of Pennsylvania, in 1827, in *Juniata Bank v. Hale*, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558, and it was held that the indorser was entitled under such circumstances to notice of nonpayment. 'Policy and the convenience of the public,' said the court, 'require a rigid adherence to the rule; for, otherwise, exception would creep in after exception, and leave the law, which ought to be certain, open to speculation and to doubt.' . . . It seems to be well settled that such is the law as to the right of an indorser who becomes the executor or the administrator of the maker to have notice that he is looked to personally for payment. 2 Daniel on Negotiable Instruments (6th Ex. 1913) sec. 1175. We are unable to see any distinction in principle between the case of an executor and that of a president or treasurer of a corporation. Each is entitled to a notice and for similar reasons." And in *Field v. New Orleans Delta Newspaper Co.* 21 La. Ann. 24, 99 Am. Dec. 699, in holding that the business manager of a corporation who had not received notice of dishonor could not be held liable on his indorsement of a note made by the corporation, the court said:

"The notes were made payable at the Canal Bank and although Leovy, as business manager, may have known that they were not paid, he did not, therefore, know without legal notice from the holder or other proper party that he would be looked to for payment as indorser." So in *Phipps v. Harding*, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L.R.A. 513, it was held that the fact that the indorsers of a corporate note constituted a majority of the board of directors of the maker of the note did not excuse the failure of the holder to give notice of its dishonor. Similarly in *Winter v. Cox*, 41 Ala. 207, it appeared that a note was executed by a corporation by its agent to his order and then transferred by his indorsement. In an action on the note against the agent, an averment that the defendant was, at the maturity of the note, the sole agent of the corporation giving the note and that no other person was authorized to pay the note for the corporation was held not to be sufficient to relieve the plaintiff from the giving of notice to the indorser of the nonpayment of the note, the allegation not being equivalent to an averment that the defendant was the sole agent to pay the note and that the officers of the corporation were not authorized to do so at the maturity of the note. In *Louisville First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856, it was held that the officer of a corporation who indorsed a corporate note was entitled to notice of dishonor of the note although he was also vice-president of the bank holding the note. The case of *McDonald v. Luckenback*, 170 Fed. 434, 95 C. C. A. 604, is discussed at length in the reported case.

Exceptional Holdings.

In *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653, it appeared that the directors and stockholders of an insolvent corporation agreed among themselves to indorse its demand notes. In an action against the indorsers on the note it was held that they could not avail themselves of the failure of the plaintiff to give them notice of dishonor. It was said, however, that a single director or even a minority of the directors indorsing a note for the corporation might be entitled to notice of dishonor.

In *Brooke v. Rutland*, 15 Ga. App. 26, 82 S. E. 580, the facts were stated in the opinion of the court as follows: "Rutland & Co. brought suit against Geo. W. Brooke and T. J. Brooke upon a promissory note, executed in behalf of the Steel Elevator & Storage Company, by John W. Gartner, its general manager, and the judge of the city court of Atlanta directed a verdict in favor of the plaintiff, for the principal of the note, with

interest. The Brookes moved for a new trial, but Geo. W. Brooke abandoned the motion, and T. J. Brooke alone excepts to the judgment, overruling it. . . . As appears from the record, the following facts were admitted: (1) That the contract of defendants was a Tennessee contract: (2) that no notice of the dishonor of the note was ever given the defendants by the holder; (3) that, before and at the time the note was given, the defendants were stockholders and directors in the Steel Elevator & Storage Company, the maker of the note. . . . The uncontradicted evidence in this case shows that Brooke signed his name on the back of the note before delivery to Rutland & Co., and that the purpose of placing his signature upon the back of the note was to obtain credit for the maker, the Steel Elevator & Storage Company, of which he was a stockholder and director, so far, at least, as to procure the renewal of a previous obligation of that company, and that he was as much interested in the first obligation as he was in the latter. It appears that the note in the suit was given in renewal of a previous note which represented a debt of the Steel Elevator & Storage Company to Rutland & Co. When this note was brought to the plaintiffs, signed only by the Steel Elevator & Storage Company, they refused to accept it, and thereupon Geo. W. Brooke proposed to make the note satisfactory if the plaintiffs would consent to carry it a while longer for the Steel Elevator & Storage Company, and later, after the signatures of Geo. W. Brooke, T. J. Brooke, and John W. Gartner had been placed upon the back of the note, the plaintiffs accepted it." Following *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390, it was held that the defendant was liable as a maker and that the failure to give him notice of the dishonor of the note did not affect his liability.

Where the directors of a corporation indorsed a note made by it and were indemnified against loss by a deed of trust of the corporate property it was held that the failure to give them notice of the dishonor of the note was no bar to their liability on the note as they put themselves in the place of the maker of the note by accepting the security. In *re Alldred*, 229 Pa. St. 627, 79 Atl. 141.

Under statutes providing that notice of dishonor may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment, it has been held that the knowledge of an officer of a corporation of the nonpayment of a note made by the corporation which he may have indorsed is sufficient to hold him liable on the note without

a formal notice of its dishonor. *Merrell Chemical Co. v. Root*, 152 N. Y. S. 368; *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518. Thus in *Merrell Chemical Co. v. Root*, supra, it appeared that a corporation made and delivered to the plaintiff its note signed for it by its president and assistant treasurer. Prior to the delivery of the note it was indorsed by the assistant treasurer. On the maturity of the note payment was demanded of the corporation and a written notice of presentment was left at its office. All the checks of the corporation were required to be signed by the assistant treasurer. It was held that the failure to give notice of dishonor did not relieve him of liability because he had knowledge of the fact that the note was presented for payment and was not paid. So in *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518, it appeared that an officer of a corporation who had indorsed a corporate note was the agent of the payee in the making and collection of loans including the corporate note. In an action on the note against the indorser, the court in holding him liable, although he did not receive notice of dishonor, said: "Appellant argues that the note was not presented for payment to the maker on the 3d day of May, 1909, nor to the indorsers, and that no notice was given. As we have seen above, the note was in possession of Mr. Lichty, or under his control, at the time it became due. When the note was made, Mr. Lichty was an officer of the insurance company, the maker of the note. He was the person to whom Mrs. Gleeson looked for payment of the note. He was also her agent to collect the note. At the time the note matured, the insurance company was in the hands of a receiver, and Mr. Lichty was not in control of the affairs of the company. The evidence is not clear that Mrs. Gleeson knew this fact, but that we think is immaterial because it was Mr. Lichty's duty to present the note for payment. If he did not do so, it was because he knew that such presentment would be an idle ceremony. He had the note in his possession on the day it should have been paid. He knew that it was not paid. He was not entitled to further notice as an indorser. *Rem. & Bal. Code*, sec. 3486. Such notice was sufficient to bind him as an indorser."

In *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. S. 359, it appeared that the indorser of a note was the president of the corporation making it. The corporation was adjudged bankrupt after a written admission by the president of its inability to pay its debts and a willingness so to be adjudged. In an action on the note against the president it was held that under the circumstances the president had waived notice of dishonor of the note.

ESTATE OF PHILPOTT

LE CLERC

v.

PHILPOTT.

Iowa Supreme Court—March 17, 1915.

169 Iowa 555; 151 N. W. 325.

Bills and Notes — Demand Note — Reasonable Time for Transfer — Bona Fide Purchaser.

Whether a demand note negotiated six months after date was negotiated an unreasonable length of time after issue, so that, under Code Supp. 1907, § 3060a53, the holder was not a holder in due course, is held to be for the jury, in view of section 3060a193, requiring the facts of the particular case to be considered in determining what is a reasonable time.

[See note at end of this case.]

Reformation of Instruments — Note Containing Blank.

Where a note recited that it was payable in "four —," the instrument may be reformed so as to supply the omission and give effect to the parties' intention.

Bills and Notes — Bona Fide Purchaser — Note Containing Blank.

Code Supp. 1907, § 3060a52, defines a holder in due course as one who, in good faith and for value, has taken a note regular on its face, before it was overdue, and without notice of dishonor or of any infirmity or defect in the title of the party negotiating. A note recited that it was payable in "four —." Section 3060a8 declares that the validity of a note shall not be affected because it is undated. It is held that the holder of the note was not a "holder in due course," for it was not complete and regular on its face; the omission not falling within the exception.

Same.

Under Code Supp. 1907, § 3060a14, providing that the person in possession has prima facie authority to complete a note by filling up blanks, and that if any such instrument after completion is negotiated to a holder in due course, it shall be effectual in his hands as if the blanks had been filled in in accordance with the authority given, the indorsee of a note payable in "four —" is not a holder in due course; the blanks not having been filled.

Burden of Proof as to Taking in Due Course.

Code Supp. 1907, § 3060a55, declares that the title of one who negotiates a note in breach of faith is defective. Section 3060a59 declares that every holder is deemed prima facie a holder in due course, but when it is shown that the title of one of the persons who negotiated the instrument was defective, the holder has the burden of proving that

he or some one under whom he claimed had acquired title in due course. It is held that on proof that a note was indorsed in breach of an agreement that it should be returned for cancellation, plaintiff has the burden of proving that he was a holder in due course.

Evidence Insufficient.

In action on a note negotiated in breach of faith, evidence is held not to show conclusively that the plaintiff was a holder in due course.

Pledge — Note as Collateral — Right to Enforce — Payment of Debt.

A holder of notes received as collateral is not entitled to enforce them after payment of the principal obligation.

Payment — Evidence for Jury.

In an action on notes admittedly received as collateral, the question whether the principal obligation had been paid is held to be for the jury.

Appeal from District Court, Polk county: BRENNAN, Judge.

Claim against decedent's estate on two promissory notes. Ed. Le Clerc, claimant, and Eva B. Philpott, executrix, defendant. Judgment for claimant. Defendant appeals. The facts are stated in the opinion. REVERSED.

Mac. J. Randall and Read & Read for appellee.

Clinton L. Nourse for appellant.

[556] EVANS, J.—The defendant is the executrix of the estate of her husband, C. H. Philpott. On June 12, 1911, Philpott entered into a contract with the American-Canadian Land Company, a copartnership, for the purchase of certain Texas lands, and executed his notes therefor to a total of about \$7,000. October 25, 1911, this contract was canceled by a written agreement and the land company agreed to return to Philpott his notes. The return was never made. Philpott died a year later. The claim herein is based upon two of said notes, one for \$1,500 and the other for \$1,000. The defense here indicated being good as to the payee of the notes, the ultimate question is whether upon this record it conclusively appears that the plaintiff was in good faith a holder in due [557] course, so as to require a directed verdict in his favor. This ultimate question depends upon two or three preliminary ones, viz.: (1) Was each note negotiable on its face? (2) Was the title of the person who negotiated the note to the plaintiff, defective? (3) Upon which party was the burden of proof as to the good or bad faith of the plaintiff?

I. First as to negotiability. The \$1,500 note is conceded to be negotiable upon its face and due in three years after date. The defendant challenges the negotiability of the

other note. It was drawn payable "on or before four ——— after date." It does not appear therein whether it was to become payable in four *days*, four *months*, or four *years*. The defendant contends that, because of this defect, the time of maturity was rendered uncertain and the negotiability of the instrument was thereby destroyed. On the other hand, plaintiff contends that inasmuch as no time of payment was actually expressed, it became a note payable on demand, under Sec. 3060-a7. Adopting for the moment the plaintiff's contention at this point, and reading the note as payable on demand, another difficulty confronts him. Upon the negotiating of such a note an unreasonable length of time after its issue, the holder is not deemed a holder in due course. Sec 3060-a53. In this case the date of issue was June 12, 1911, and that of negotiating, January 18, 1912. Under the authorities, a reasonable time for the negotiating of a demand note is rather brief. Its dishonor is not long delayed. In the following cases respectively, two days, seven days, and thirty days were held to be a reasonable time: *Field v. Nickerson*, 13 Mass. 131; *Thurston v. McKown*, 6 Mass. 428; *Ranger v. Cary*, 1 Metc. (Mass.) 369.

In the following cases respectively, two months and a half, three months and a half, and eight months have been held beyond a reasonable time and sufficient to dishonor a demand note: *Losee v. Dunkin*, 7 Johns. (N. Y.) 70, 50 Am. Dec. 245; *Stevens [558] v. Bruce*, 21 Pick. (Mass.) 193; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; *American Bank v. Jenness*, 2 Metc. (Mass.) 288.

There is, however, no definite rule to be applied, and among other elements "the facts of the particular case" are to be considered. 3060-a193. It is clear, therefore, that the defendant was entitled to go to the jury on this question if upon no other.

II. As to this particular note, there is a further consideration that militates against the plaintiff as a holder in due course. Sec. 3060a52 is as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

This note was not "complete and regular" upon its face. It indicated upon its face

that some word had been omitted in an attempted specification of the time of payment.

If it were made to appear that the real contract between the parties was that the note should be payable in four *months* or four *years*, the instrument was reformatable in equity at the suit of either party. This would not destroy the validity of the note, but it would destroy its negotiability until such reformation was had. The manifest irregularity in this case is not one of the "omissions" specified in Sec. 3060-a6, which section is as follows:

[559] "The validity and negotiable character of an instrument are not affected by the fact that:

"1. It is not dated; or

"2. Does not specify the value given, or that any value has been given therefor; or

"3. Does not specify the place where it is drawn or the place where it is payable; or

"4. Bears a seal; or

"5. Designates a particular kind of current money in which payment is to be made.

"But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument."

Sec. 3060-a14 provides for the filling of blanks by the holder of an instrument duly signed within the scope of the holder's authority as follows:

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima-facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima-facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Such instrument is thereby rendered negotiable. But it becomes so *after* the blanks are filled and not before. If the [560] real intent of the parties in interest was to make this instrument payable in four years, it may be that the payee could have lawfully corrected the oversight by inserting the word "years;" and it may be also that this would have rendered the note negotiable to a holder in due course as defined in the section above quoted. The question in that form is not now

before us and we need not pass upon it. We think it quite clear that this irregularity upon the face of the note prevented its taker from becoming a holder in due course. It could be deemed a demand note, unless the agreement of the parties was in fact otherwise. If otherwise, such fact was suggested by the incompleteness of the terms actually used.

The controlling fact at this point is, not that the blank was not filled, but that it *was filled imperfectly* or irregularly. Though we grant that the note was presumptively good as a demand note, yet it was not "complete and regular" within the requirements of Sec. 3060-a52, and therefore was not negotiable.

III. As to the \$1,500 note, the primary question is, Was the title of the payee defective when he negotiated the same to the plaintiff on January 18, 1912?

"The title of a person who negotiates an instrument is defective within the meaning of this act (Negotiable Instrument Act) when . . . or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Sec. 3060-a55.

In this case, the plaintiff took the note in question from the payee. The evidence was abundant to show that such negotiation was in breach of faith on the part of the payee.

Sec. 3060-a59 provides as follows: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove [561] that he or some person under whom he claims acquired the title as a holder in due course."

The defendant, therefore, having introduced sufficient evidence to show that the title of the payee was defective when the negotiation was made, the burden was thereby cast upon the plaintiff to show, notwithstanding, that he was a holder in due course within the conditions specified in Sec. 3060-a52. We find in the record little, if any, attempt to prove these conditions affirmatively. The field of good faith was involved, with its possible ramifications. Likewise the field of notice. The plaintiff was called to the witness stand by the defendant and testified as follows:

"I am the claimant herein. In January, 1912, The American-Canadian Land Company made two notes to me: one for \$2,000 and the other for \$4,700, and for these two notes I claim to hold the notes Exhibits 'B' and 'C' as collateral. I now produce the two notes above referred to, the one for \$2,000 is dated January 18, 1912, and marked by the reporter, Exhibit 'E' and the other for \$4,700 of the same date, marked by the reporter, Exhibit 'F'."

Exhibits "B" and "C," referred to in his testimony, were the notes in suit. The foregoing was his entire testimony as to the circumstances attending his acquisition of the notes. It is too clear for argument that such testimony did not conclusively meet the burden of proof laid upon him.

For previous cases see *Bushnell Bank v. Buck*, 161 Ia. 362, 142 N. W. 1004; *Iowa Nat. Bank v. Carter*, 144 Ia. 715, 722, 123 N. W. 237; *Arnd v. Aylesworth*, 145 Ia. 185, 191, 123 N. W. 1000, 29 L.R.A.(N.S.) 638; *McKnight v. Parsons*, 136 Ia. 390, 399, 15 Ann. Cas. 665, 113 N. W. 858, 125 Am. St. Rep. 265, 22 L.R.A.(N.S.) 718; *Bennett State Bank v. Schloesser*, 101 Ia. 571, 573, 70 N. W. 705; *Commercial Bank v. Paddick*, 90 Ia. 63, 66, 57 N. W. 687; *Frank v. Blake*, 58 Ia. 750, 13 N. W. 50; *Columbus City Deposit Bank v. Green*, 130 Ia. 384, 106 N. W. 942; *Citizens' Sav. Bank v. Houtchens*, 64 Wash. 275, 116 Pac. 866; *Johnson County Sav. Bank v. Rapp*, 47 Wash. 30, 91 Pac. 382; *Johnson County Sav. Bank v. Walker*, 82 Conn. 24, 72 Atl. 579; *New England Mortgage Security Co. v. Gay* [562] 33 Fed. 636, 649; *Shellenberger v. Nourse*, 20 Idaho 323, 118 Pac. 508; *Bluthenthal v. Columbia*, 175 Ala. 398, 57 So. 814; *Winter v. Nobs*, 19 Idaho 18, Ann. Cas. 1912C 302, 112 Pac. 525; *Parsons v. Jackson*, 99 U. S. 434, 25 U. S. (L. ed.) 457; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *National Bank North America v. Kirby*, 108 Mass. 497; *Merchants' Nat. Bank v. Wadsworth*, 166 Mich. 528, 131 N. W. 1108; *Union Nat. Bank v. Mailloux*, 27 S. D. 543, 132 N. W. 168; *Citizens' Sav. Bank v. Couse*, 68 Misc. 153, 124 N. Y. S. 79; *Union Nat. Bank v. Winsor*, 101 Minn. 470, 11 Ann. Cas. 204, 112 N. W. 999, 118 Am. St. Rep. 641; *Park v. Winsor*, 115 Minn. 256, 132 N. W. 264; *Iowa Nat. Bank v. Carter*, *supra*.

IV. It appeared in evidence that the plaintiff claimed to hold the notes in suit as collateral only for the security of two notes of the American-Canadian Land Company for \$2,000 and \$4,700 respectively. These notes purported to have been executed January 18, 1912. Upon notice served by defendant, they were brought into court. They appeared upon their faces to have been paid and canceled. The plaintiff testified that they were not in fact paid and that the cancellation was a mistake. An entry had been made upon the notes to that effect and the entry had been signed by members of the partnership. Manifestly, if such notes were paid, the plaintiff was no longer a holder in due-course of the collateral. The appellant contends that upon the evidence here disclosed the question was for the jury as to whether such notes were paid and the collateral thus discharged. We see no escape from this contention. Surely the cancellation stamp upon the notes was *prima facie* suffi-

cient to prove the discharge of the collateral. The truth and good faith of the explanation was pre-eminent a question of fact. It is urged by appellee that the pleadings made no issue at this point. It is true that no pleading of the defendant alleged the payment of the notes for which the collateral purported to be held. We do not think she was required to plead to such effect. The facts thus developed on the trial were peculiarly within the knowledge of the plaintiff and outside the knowledge of the defendant. The defendant's pleadings did challenge the plaintiff as not a [563] holder in due course and for that reason claimed the right to interpose her defense against the original payee. We think the pleading was sufficient to call in question the good faith of the plaintiff's claim as a holder in due course.

We reach the conclusion that the plaintiff was not entitled to a directed verdict and the order of the trial court is therefore

Reversed.

Deemer, C.J., and Ladd, Preston and Salinger, JJ., concur.

DEEMER, C. J. (*concurring*).—While I agree to the result reached, I am not satisfied with that part of the opinion holding that the note in suit is non-negotiable because of uncertainty as to the time of payment.

Code Sec. 3060-a7 provides that "an instrument is payable on demand:

"1. When it is expressed to be payable on demand, or at sight, or on presentation; or
 "2. In which no time of payment is expressed."

The first paragraph does not apply to the note in suit, but the second does, as I understand it.

The majority say that there is an unfilled blank in the note, and suggest that it was intended to insert therein days, months or years. How do we know that, except from inference? Surely no time for payment is *expressed*, and the statute says in terms that, if not expressed, it is payable on demand. It does not say that it is not negotiable if it be inferred that it was the intention of the parties to fill the bill, but specifically provides that if no time is expressed it is payable on demand. It is suggested that the note might be reformed in equity and the blank filled in such a suit. Any note is subject to be reformed in equity, but that does not necessarily destroy its negotiability.

The statute quoted is but a codification of the law merchant, and courts have held under that law that a note in [564] which there is an unfilled blank as to the time of payment is payable on demand, and is negotiable. See Daniel on Neg. Inst. Sec. 88, wherein he says: "If the time of payment be left blank, as for instance, if the instrument be payable ———

months after date," it is payable on demand. Citing: *McLean v. Nichlen*, 3 Vict. 107; *Stowe v. Merrill*, 77 Me. 550, 1 Atl. 684. See also, sustaining the same rule: *Hotel Lanier v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *McVeigh v. Howard*, 87 Va. 599, 13 S. E. 31; *O'Mohundro v. O'Mohundro*, 21 Grat. (Va.) 626.

If payable on demand, it was negotiable and complete and regular on its face, and not subject to reformation in the hands of an innocent purchaser for value. Even if the note be not fair and complete on its face, the only uncertainty is as to the time of payment. This uncertainty did not give notice of any other infirmity in the note or indicate that the consideration had failed or that it was negotiated in bad faith. The blank could have been filled in by any holder, and in any event it could be filled to express the true date as agreed upon by the parties or by action in equity.

That the defect was not notice of infirmities see the following cases: *Miller v. Crayton*, 3 Thomp. & C. (N. Y.) 360; *McSparran v. Neeley*, 91 Pa. St. 17, and cases cited.

NOTE.

When Note Payable on Demand Is Overdue as between Maker and Indorser.

Introductory, 842.

General Rule:

Rule Stated, 842.

What Constitutes Reasonable Time for Transfer, 843.

Rule in Georgia, 845.

Introductory.

The earlier cases passing on the question when a note payable on demand is overdue as between the maker and the indorser, are reviewed in the note to Northern Crown Bank v. International Electric Co. Ann. Cas. 1912A 472. This note presents the recent cases on the subject.

General Rule.

RULE STATED.

The recent decisions support the rule that a note payable on demand is not to be considered as overdue at the time of its date or delivery, thereby depriving a subsequent purchaser of the protection afforded by the law merchant to bona fide purchasers of negotiable notes before maturity. *Chartered Mercantile Bank v. Dickson*, L. R. 3 P. C. (Eng.) 574; *Ottawa Bank v. Christie*, 37

Ont. L. Rep. 330; *Molson's Bank v. Parent*, 18 R. L. N. S. (Eng.) 458; *Martin v. Winslow*, 2 Mason 241, 16 Fed. Cas. No. 9,172; *Otis Elevator Co. v. Ford*, 4 Boyce (Del.) 286, 88 Atl. 465; *Leonard v. Olson*, 99 Ia. 162, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L.R.A. 381; *Seaver v. Lincoln*, 21 Pick. (Mass.) 267; *Field v. Nickerson*, 13 Mass. 131; *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625; *Foley v. Emerald*, etc. Brewing Co. 61 N. J. L. 428, 39 Atl. 650; *German-American Bank v. Atwater*, 165 N. Y. 36, 58 N. E. 763; *Hussey v. Sutton*, 160 N. Y. S. 934; *Union Bank v. Ezell*, 10 Humph. (Tenn.) 385; *Verder v. Verder*, 63 Vt. 38, 21 Atl. 611; *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576; *Turner v. Iron Chief Min. Co.* 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L.R.A. 533. The foregoing rule is applicable to instruments indorsed and transferred after maturity, which are in legal effect payable on demand. *Colt v. Barnard*, 18 Pick. (Mass.) 260, 29 Am. Dec. 584; *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 153, 153 S. W. 101; *Basenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Gray v. Bell*, 3 Rich. L. (S. C.) 71; *Union Bank v. Ezell*, 10 Humph. (Tenn.) 385; *Barger v. Brubaker* (Tex.) 187 S. W. 1025.

The recent authorities also support the general rule that a promissory note payable on demand is payable within a reasonable time, so that, unless transferred within a reasonable time after its date, it is considered as overdue, and a subsequent purchaser takes it subject to every infirmity which it had in the hands of the payee. *Otis Elevator Co. v. Ford*, 4 Boyce (Del.) 286, 88 Atl. 465; *Miller v. Del Rio Min. etc. Co.* 25 Idaho 83, 136 Pac. 448, 25 Idaho 95, 136 Pac. 452; *Brophy Grocery Co. v. Wilson*, 45 Mont. 489, 124 Pac. 510; *McAdam v. Grand Forks Mercantile Co.* 24 N. D. 645, 140 N. W. 725, 47 L.R.A. (N.S.) 246. And see the reported case. See also in *Re Wenatchee-Stratford Orchard Co.* 205 Fed. 964; *Elgin First Nat. Bank v. Russell*, 124 Tenn. 618, Ann. Cas. 1913A 203, 139 S. W. 734.

WHAT CONSTITUTES REASONABLE TIME FOR TRANSFER.

In determining what is a "reasonable time" within which a demand note is to be transferred so as to entitle the holder to protection as a bona fide holder, regard is to be had to the nature of the instrument, the usage of trade or business with respect to such instruments, and the facts of the particular case. *Murray v. St. Louis Third Nat. Bank*, 234 Fed. 481; *Lockwood v. Crawford*, 18 Conn. 361; *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952; *Sheffield v. Cleland*, 19 Idaho 612, 115

Pac. 20 (Rev. Codes, § 3650); *Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644; *Seaver v. Lincoln*, 21 Pick. (Mass.) 267; *Field v. Nickerson*, 13 Mass. 131; *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987 (St. 1898, c. 533, § 193); *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020 (Law 1897, p. 719, c. 612, §§ 131, 4); *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576. See also *German-American Bank v. Mills*, 99 App. Div. 312, 91 N. Y. S. 142; *Union Bank v. Ezell*, 10 Humph. (Tenn.) 385. And the term "a reasonable time" has reference to the ability of the holder of the note, and excludes any notion of credit to or indulgence of the maker. *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 153, 152 S. W. 101; *Foley v. Emerald*, etc. Brewing Co. 61 N. J. L. 428, 39 Atl. 651.

Whether the transfer of a note payable on demand is within a reasonable time, is a question of law for the court where the facts are few and simple and not in dispute, or are presented in a special verdict or a demurrer to the evidence. *Murray v. St. Louis Third Nat. Bank*, 234 Fed. 481; *Oley v. Miller*, 74 Conn. 305, 50 Atl. 744; *Sheffield v. Cleland*, 19 Idaho 612, 113 Pac. 20; *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804; *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020; *Basenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Turner v. Iron Chief Min. Co.* 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L.R.A. 533. See also *Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644. But if the evidence or probative facts are such that reasonable men might draw different inferences therefrom, the question must be submitted to the jury under proper instructions from the court. In other words between certain maximum and minimum limits there is a field where the unreasonableness of the delay is either a question of fact or a mixed question of law and fact, so that its determination falls within the province of the jury. *Murray v. St. Louis Third Nat. Bank*, 234 Fed. 481; *Oley v. Miller*, 74 Conn. 305, 50 Atl. 744; *Sheffield v. Cleland*, 19 Idaho 612, 115 Pac. 20; *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020; *Hussey v. Sutton*, 160 N. Y. S. 934; *Basenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Union Bank v. Ezell*, 10 Humph. (Tenn.) 385. And see the reported case.

In determining whether a demand note is to be considered as overdue, it has been said that the mere fact that the note draws interest does not make it the less a demand note, but is evidence of the probable or reasonable time which the parties intended should elapse before demand should be made, the periodical payments of interest tending to show an understanding, direct or inferential, that the loan was to be regarded as more or less continuing in character, and the indorsement as

a continuing guaranty. *Murray v. St. Louis Third Nat. Bank*, 234 Fed. 481; *Lockwood v. Crawford*, 18 Conn. 361; *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804; *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020; *Verder v. Verder*, 63 Vt. 38, 21 Atl. 611. And especially is this true where, notwithstanding the fact that the holder of a demand note has the right to demand immediate payment, the note was given for a loan rather than for a debt in the current business, as this tends to show that the parties did not expect an immediate or early demand. *Murray v. St. Louis Third Nat. Bank*, 234 Fed. 481; *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804.

In *Elgin First Nat. Bank v. Russell*, 124 Tenn. 618, Ann. Cas. 1913A 203, 139 S. W. 734, it appeared that two promissory notes purported to be due and payable on certain fixed dates after the date of execution, but they contained a provision authorizing a confession of judgment in favor of the holder "at any time thereafter" and a "consent to immediate execution upon such judgment." The court held that they were non-negotiable, as they were not due at a fixed and determinable period, unless they were treated as due from and after delivery, and that, under such a construction, they were due in the payee's hands, and therefore were past due when they came into the hands of the payee's transferee, and were subject to all the defenses that would have existed against the payee.

In a case wherein it appeared that though by an express recital in the face of a note payable on demand the necessity for demand was waived, yet the payments indorsed on it disclosed that the principal sum named had been almost fully paid, it was held that this fact must of itself be deemed sufficient as a matter of law to give notice to any one dealing with it that the payee had already demanded payment, or, in any event, that the payee and the maker had regarded the obligation as due long prior to that time, and that therefore an indorsee did not become a holder in due course. *Brophy Grocery Co. v. Wilson*, 45 Mont. 489, 124 Pac. 510. In the reported case it is held that, adopting the contention that a note drawn payable "on or before four ——— after date," is to be treated as a note payable on demand, inasmuch as no time of payment is actually expressed, the question whether it was negotiated within a reasonable length of time after its issue, so as to make the holder thereof a holder in due course, was a question for the jury, under the statute (Code, 2a, Supp. 1907, § 3060a, 193).

In each of the following cases it was held that, under the circumstances disclosed by the particular case, a note payable on demand was transferred within a reasonable time so

as to entitle the purchaser to protection: *Lockwood v. Crawford*, 18 Conn. 361 (sixty days); *Seaver v. Lincoln*, 21 Pick. (Mass.) 267 (seven days); *German-American Bank v. Mills*, 99 App. Div. 312, 91 N. Y. S. 142 (four months and six days); *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. S. 383 (ten months—note bearing interest); *Becker v. Horowitz*, 114 N. Y. S. 161 (seven months); *Hussey v. Sutton*, 160 N. Y. S. 934 (two years).

In each of the following cases the transfer of a demand note was held to have been made after the lapse of an unreasonable length of time, and the note was treated as being overdue at the time it was transferred: *Martin v. Winslow*, 2 Mason 241, 16 Fed. Cas. No. 9,172 (seven months); *Miller v. Del Rio Min. etc. Co.* 25 Idaho 83, 136 Pac. 448, 25 Idaho 95, 136 Pac. 452 (three years and seven months); *Leonard v. Olson*, 99 Ia. 162, 68 N. W. 677, 61 Am. St. Rep. 231, 35 L.R.A. 381 (ten years); *Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644 (three years and nine months); *Field v. Nickerson*, 13 Mass. 131 (eight months—note bearing interest); *Yy-lie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305 (fourteen months); *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987 (sixty days); *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625 (two and one-half years—note bearing interest); *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 153, 152 S. W. 101 (one year); *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639 (nearly twelve years); *German-American Bank v. Atwater*, 165 N. Y. 36, 58 N. E. 763 (one year, and notice of protest two weeks later); *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020 (three and one-half years—note bearing interest); *McAdam v. Grand Forks Mercantile Co.* 24 N. D. 645, 140 N. W. 725, 47 L.R.A.(N.S.) 246 (time cannot be extended beyond year); *Turner v. Iron Chief Min. Co.* 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L.R.A. 533 (ten months—note bearing interest).

Under the *Vermont* statute (R. L. 2013), a promissory note payable on demand is overdue in sixty days from its date. *Verder v. Verder*, 63 Vt. 38, 21 Atl. 611.

The *Kentucky* Negotiable Instruments Act (Ky. St. sec. 3720b) provides (subsection 71) that where a note is payable on demand, presentment must be made within a reasonable time after its issue, and (subsection 192) that "in determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." In *Frazee v. Phoenix Nat. Bank*, 161 Ky. 175, 170 S. W. 532, under that statute and in view of the fact that

"it is a matter of common knowledge that in the banks of Central Kentucky commercial paper is rarely permitted to run longer than four months without renewal, and it may be said to be a custom, or usage of trade, that such paper is ordinarily payable within that time," it was held that a demand note should be treated as due at least four months from its date.

In *Kerby v. Wade*, 101 Ark. 543, 142 S. W. 1121, the rule that demand paper is considered as overdue if it remains unpaid for an unreasonable time after its date or the date of delivery was declared to be applicable to a mortgage given to secure a note in which no date of maturity was fixed, but which was past due.

Rule in Georgia.

In Georgia a statute [Civil Code, § 3700 (Code 1910, § 4292)] provides that a note payable on demand is due immediately, and so it has been held that the purchaser of such a note takes it subject to the equities between the original parties. *Brinson R. Co. v. Springfield Exch. Bank*, 16 Ga. App. 425, 85 S. E. 634; *Oakfield Exchange Bank v. Odum* (Ga.) 90 S. E. 977. So, a note payable "on demand next after date," and not otherwise expressing any time for payment, has been held to be a note payable on demand, and not a note payable on time, and therefore to be due immediately and within the foregoing statute, which subjects the purchaser thereof to the equities of the original parties to the note. *Oakfield Exchange Bank v. Odum* (Ga.) 90 S. E. 977.

JAMES CLARK DISTILLING COMPANY

v.

WESTERN MARYLAND RAILWAY COMPANY ET AL.

JAMES CLARK DISTILLING COMPANY

v.

AMERICAN EXPRESS COMPANY ET AL.

United States Supreme Court—January 8, 1917.

242 U. S. 311; 37 Sup. Ct. 180.

Intoxicating Liquors — State Regulation — Shipment for Personal Use.

A state may, consistently with the due process of law clause of U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), forbid all

shipments of intoxicating liquor, whether intended for personal use or otherwise.

[See 19 Ann. Cas. 163; Ann. Cas. 1916E 780.]

Validity and Effect of Webb-Kenyon Law.

Any immunity from the prohibitions of W. Va. Code 1913, chap. 32A, as amended by Laws 1915, chap. 7, § 7, Laws 1915, 2d Ex. Sess. p. 660, § 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise give, is taken away by the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Fed. St. Ann. 1914 Supp. p. 208), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law.

[See note at end of this case.]

Same.

Congress did not exceed its power under the commerce clause in enacting the provision of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Fed. St. Ann. 1914 supp. p. 208), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

[See note at end of this case.]

Same.

There is nothing repugnant to the due process of law clause of U. S. Const. 5th Amend. (9 Fed. St. Ann. 288), in the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Fed. St. Ann. 1914 Supp. p. 208), under which an interstate shipment of intoxicating liquor, though intended for personal use, may be subjected to the state prohibitory laws.

[See note at end of this case.]

Appeals from United States District Court, District of Maryland.

Action by James Clark Distilling Company, plaintiff, against Western Maryland Railway Company et al., defendants, and action by James Clark Distilling Company, plaintiff, against American Express Company et al., defendants. Judgments for defendants. Plaintiff appeals in each action. The facts are stated in the opinion. **AFFIRMED.**

Lawrence Maxwell, Joseph S. Graydon, Walter C. Capper and J. Phillip Roman for appellant.

W. B. Wheeler and Fred O. Blue for state of West Virginia.

Wiley E. Jones, Clifford Walker, J. H. Peterson, George Cosson, S. M. Brewster, Ross Collins, T. W. Bickett, Henry J. Linde, S. P. Freeling, George M. Brown, Thomas H. Peebles, Frank M. Thompson, John Garland Pollard, W. V. Tanner and William L. Martin, as amici curiae.

[315] WHITE, C. J.—To refer to the principal state law relating to these suits, to the pleadings and the decision of the court below will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition [316] law to go into effect on July 1st of the following year. Code 1913, c. 32A. Putting out of view the right of druggists under stringent regulations provided by the statute to sell for medicinal purposes and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale" intoxicating liquors, and the intoxicants embraced were comprehensively defined. The statute contained many restrictions concerning hotels, restaurants, clubs and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor with the State, (b) from the clause providing that every delivery made in the State by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the State at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor and against the publications in the State of all circulars, advertisements, price-lists, etc., which might tend to stimulate purchases of liquor.

Under this statute and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. 699; Fed. St. Ann. 1914 Supp. p. 208) the State of West Virginia in one of its courts sued the Western Maryland Railway Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In substance [317] it was

charged that very many shipments had been taken by the carriers contrary to the law both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the State subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use and deliver it in West Virginia, on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry and that besides the West Virginia prohibition law when rightly construed did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions and averred that to receive and carry the liquor would violate their provisions and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use and that as there was no state prohibition, the Webb-Kenyon Law had no application, and that as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia by making herself a party to the suits had submitted herself to the jurisdiction of the court. All questions concerning the power of the State of West Virginia [318] to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. 333. Before the decrees entered became final the Circuit Court of Appeals for the Fourth Circuit in a case pending before it (*West Virginia v. Adams Express Co.* 219 Fed. 794, 135 C. C. A. 464, L.R.A. 1916C 291) decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that by operation of the Webb-Kenyon Act there was no longer a right to ship liquor into the State in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision.

the trial court recalled its opinion, heard a re-argument, and, although not changing its view, accepted and gave effect to the conclusions reached by the Circuit Court of Appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. *The correct meaning of the West Virginia law as to the subjects in dispute.*

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and if it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the State. But the possibility of dispute over these subjects no longer exists because after the decision below and since the cases were first argued (for they have been here argued twice) the State of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the State. The pertinent [319] provisions of the amendments are placed in the margin.¹ As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as

¹"Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; provided, however, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one

amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the [320] parties since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. *The power of the State to enact the prohibition law consistently with the due process clause of the Fourteenth Amendment (9 Fed. St. Ann. 416) and the exclusive power of Congress to regulate commerce among the several States.*

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment.

But that it was a direct burden upon interstate commerce and conflicted with the

place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes."

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

power of Congress to regulate commerce among the several States, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 U. S. (L. ed.) 128. And this brings us to consider whether the Webb-Kenyon [321] Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting intoxicating liquors of their interstate character in certain cases.

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, . . . into any other State, Territory, or District of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, . . . is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the State whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State," there would seem [322] to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law

since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use, and hence as individual use was not forbidden by the state law, the shipment, receipt and possession for such use was not embraced by the Webb-Kenyon Act and the state law, so far as it was outside of that act, was repugnant to the commerce clause. This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debates on its passage and by a decision of this court, as well as decisions of state courts (which are in the margin¹) which, it is insisted, have so construed that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the States to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have the effect of compelling the States to prohibit personal use, since if all the prohibitions of state laws against manufacture, sale, receipt and possession of intoxicants remained subject to the danger of indirect [323] violation by permitting shipment, receipt and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the States by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct, the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313; 3 Fed. St. Ann. 853) forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin²)

¹ *Van Winkle v. State*, 4 Bovee (Del.) 578, Ann. Cas. 1916D 104, 91 Atl. 385; *Adams Express Co. v. Com.* 154 Ky. 462, 157 S. W. 908, 48 L.R.A.(N.S.) 342; *Adams Express Co. v. Com.* 160 Ky. 66, 169 S. W. 603; *Palmer v. Southern Express Co.* 129 Tenn. 116,

165 S. W. 236; *Ex p. Peede*, 75 Tex. Crim. 247, 170 S. W. 749.

² *In re Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 U. S. (L. ed.) 572; *Rhodes v. Iowa*, 170 U. S. 412, 18 S. Ct. 664, 42 U. S. (L. ed.) 1088; *American Express Co. v. Iowa*, 196 U.

which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 18 S. Ct. 674, 42 U. S. (L. ed.) 1100. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, [324] there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Express Co. v. Kentucky*, 238 U. S. 190, Ann. Cas. 1915D 1167, 35 S. Ct. 824, L.R.A.1916C 273) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle v. State*, 4 Boyce (Del.) 578. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was

held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited [325] the shipment of intoxicants "only when the liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. Did Congress have power to enact the Webb-Kenyon Law?

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Op. A. G. 88; Veto Message of the President, Cong. Rec. vol. 49, pt. 5, p. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several States, such action would have been lawful because within the power [326] to regulate which the Constitution conferred. *Lottery Case*, 188 U. S. 321, 23 S. Ct. 321, 47 U. S. (L. ed.) 492. *Hoke v. U. S.* 227 U. S. 308, Ann. Cas. 1913E 905, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law,

S. 133, 25 S. Ct. 182, 49 U. S. (L. ed.) 417; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925; *Rosen-Ann. Cas. 1917B.*—54.

berger v. Pacific Express Co. 241 U. S. 48, 36 S. Ct. 510, 60 U. S. (L. ed.) 880.

but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact the contention previously made that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question [327] that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several States (*Cooley v. Philadelphia*, 12 How. 299, 13 U. S. (L. ed.) 966), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (*Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 U. S. (L. ed.) 128). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the application [328] of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject-matter would have been free from state control, and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy v. Hardin*, *supra*. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy v. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. Thus in that case in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the State over the subject, it was said (p. 108): "Yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional-

al action." Again, referring to the uniform operation of interstate commerce regulations it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, [329] sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, . . ." Again after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (pp. 123, 124): "But notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." And finally, after pointing out that the States had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the State, it was said that this limitation obtained "in the absence of congressional permission" to the State (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy v. Hardin*, we could not accept the contention which is now based upon that classification without in effect overruling that case, or what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the [330] ruling in *Leisy v. Hardin* by Congress in legislating when it adopted the Wilson Act and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a State and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in

the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer*, supra. As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: the mistaken assumption that the accidental considerations which cause a subject on the one hand to come under state control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to [331] regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to, announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its

regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both State and Nation in their respective spheres of authority possessed the supremest authority before the action of Congress which is complained of, and hence the argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated.

[332] It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment (9 Fed. St. Ann. 288) since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

Affirmed.

McReynolds, J., concurs in the result.

Holmes and Van Devanter, JJ., dissent.

NOTE.

In the reported case the Federal Supreme Court affirms the validity of the Webb-Kenyon

Law (Act March 1, 1913, Fed. St. Ann. 1914 Supp. p. 208) and holds that the act renders applicable to interstate shipments a state statute forbidding the possession of liquor in the state or the transportation of liquor into the state for any purpose. In other words, while the act of Congress adds nothing to a state regulation, it relieves any and every state regulation of intoxicants from the objection that it is an attempted regulation of interstate commerce. The validity and construction of the Webb-Kenyon Law are discussed in the note to Adams Express Co. v. Kentucky, Ann. Cas. 1915D 1167.

As to the validity of certain state regulations whose operation is by that law extended to interstate shipments, see the note to Longmire v. State, Ann. Cas. 1917A 726 (discussing the validity of a statute forbidding the bringing of liquor into prohibition territory) and the notes to Com. v. Campbell, 19 Ann. Cas. 159, and Cortland v. Larson, Ann. Cas. 1916E 775 (discussing the right to prohibit the possession of intoxicating liquor for personal use).

ONTARIO ASPHALT BLOCK COMPANY

v.

LUKE MONTREUIL.

Canada Supreme Court—February 21, 1916.

52 Can. Sup. Ct. 541.

Vendor and Purchaser — Breach of Contract — Inability to Make Title — Measure of Damages.

A vendor who, without fault on his part, is unable to make title is not liable in damages to the vendee for the loss of his bargain though the contract to sell is part of a lease to the vendee which binds him to make extensive improvements.

[See note at end of this case.]

Appeal for Appellate Division of Supreme Court of Ontario.

Action by Ontario Asphalt Block Company, plaintiff, against Luke Montreuil, defendant. Judgment for plaintiff in trial court. Judgment modified by Appellate Division. Plaintiff appeals. **DISMISSED.**

[541] On the 2nd day of February, 1903 the respondent leased to the appellants a certain parcel of land in the Township of Sandwich East, and extending from [542] the front River Road to the water's edge and from

there to the channel bank of the Detroit River, for a term of ten years at a rental of \$1,000 a year. The lease contained a provision giving the appellants the right to purchase the premises at the end of the term of ten years for \$22,000, provided the company gave six months previous notice in writing of its intention to do so.

The appellant company was incorporated for the purpose of manufacturing asphalt blocks, and upon entering the premises under the lease they erected a large expensive manufacturing plant and built expensive docks, partly on the land and partly on the water lot, the whole of the expenditure amounting to about \$200,000, and from year to year the company spent some \$8,000 to \$12,000 a year for betterments and improvements, including the necessary repairs.

The company gave the required six months notice in pursuance of the terms of the lease, and on the 2nd day of February, 1913, at the end of the said term granted by the lease, tendered to the respondent the sum of \$22,000 demanding a conveyance of the lands and premises. But the respondent refused to accept said sum and refused to make the conveyance as provided under the terms of the lease.

The company commenced an action on the 10th day of February, 1913, claiming specific performance of the covenant contained in the lease, and damages.

The action came on for trial before the Honourable Mr. Justice Lennox without a jury on the 27th day of May, 1913, and it appeared at the trial from the evidence of the respondent, Montreuil, that he had made the lease in question under the assumption that he was the owner in fee simple of the property set out [543] in the lease, but that he discovered in 1908 that he only had a life estate in the property.

The respondent was advised by counsel at that time that the property went to his children after his death, but no evidence was offered of any effort being made by the respondent to get in a title to the property, nor was any evidence offered of any refusal by the respondent's children to join in a conveyance of the property to the appellant company under the terms of the lease. But there is evidence that they did join with him in the conveyance of other portions of the property.

Evidence was given that the property had increased enormously in value since the making of the lease.

The learned trial judge reserved judgment, and subsequently on the 19th day of June, 1913, delivered judgment decreeing specific performance of the agreement for the interest of the defendant in all the demised lands and an abatement in the purchase money for the difference in value on the 2nd day of Feb-

ruary, 1913, of an estate in fee simple and an estate for the life of the defendant in respect of so much of the land as the defendant was not able to convey in fee, and also in respect of the damages which the plaintiffs might suffer by reason of such breach of contract over and above the difference in value of an estate in fee simple and for the life of the defendant; and directed reference to the master of the court at Sandwich.

The respondent appealed to the Appellate Division of the Supreme Court of Ontario, which gave judgment on the 27th day of November, 1914, varying the judgment of the trial judge by directing that the abatement in the purchase money should be based upon the assumption that the value of the fee simple [544] was, at the date of expiry of the term, the proportionate part of the purchase price agreed upon attributable to the land in which the lessor had only a life estate and by directing further that the plaintiff company should have no damages for any loss sustained by reason of the money expended upon the property or by reason of any other matter except the abatement aforesaid.

D. L. McCarthy K. C. and Rodd for appellant.

Cowan K. C. for respondent.

Rodd, Wigle & McHugh, solicitors for appellant.

Kenning & Cleary, solicitors for respondent.

THE CHIEF JUSTICE (dissenting).—The respondent granted to the appellant a lease dated 2nd February, 1903, of certain parcels of land in the Township of Sandwich East fronting on the Detroit River for the term of ten years at the rents and subject to the [545] covenants and conditions therein mentioned. The lease contained the following (amongst other) provisions:—

"It is agreed between the parties hereto that the lessee, its successors and assigns shall have the right to purchase the demised premises at the end of the demised term of ten years for the cash sum of \$22,000, provided it shall have given six months' previous notice in writing of its intention so to do.

"And the said lessor for himself, his heirs, administrators, executors and assigns, covenants that he will on the exercise by the lessee of said option to purchase and on payment of said sum of \$22,000 execute and deliver to the lessee, its successors and assigns, a good and sufficient deed in fee simple free of incumbrances of the land hereinbefore described.

"It is also agreed that in case said lessee fails to exercise said option to purchase by, giving said notice it may on giving three

months' notice in writing before the expiration of the demised term have a renewal of this lease for a further term of ten years on the same terms as to rent, payment of taxes and water rates.

"The lessee for itself, its successors and assigns agrees to build a dock on the demised premises within one year from the date hereof at a cost of at least \$6,000, which dock is to become the property of the lessor at the end of the demised term or after the renewal term in case of renewal as aforesaid unless in the exercise of the option the lessee purchases the said lands."

The appellant constructed the dock stipulated for in the lease and during its currency expended many thousand dollars in buildings on and improvements to the property.

The appellant duly gave the requisite notice to purchase the demised premises. It then appeared that the respondent was not possessed of the fee simple of the premises and was consequently unable to carry out his agreement to sell. Such title as the respondent had was derived from the will of his father, Luc X. Montreuil.

The devise which covers the lands in question in this suit is in the following terms:—

"I give and devise to my son Luc all that, etc., . . . to him said Luc during his natural life, then to his children, should he [546] marry and have issue share and share alike their heirs and assigns forever."

The respondent had nine children.

The appellant claimed:—

1. Specific performance of the covenant to convey contained in the indenture of lease.
2. Damages.

The judgment of the appeal court proceeds on the rule established by the jurisprudence of the English courts that the contract for sale of real property is an exception to the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract.

This rule, first laid down in the case of *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, is that upon a contract for the purchase of real estate if the vendor, without fraud, is incapable of making a good title the intended purchaser is not entitled to any compensation for the loss of his bargain.

Flureau v. Thornhill, 2 W. Bl. (Eng.) 1078, was much disputed and in several cases held open to exceptions. It was, however, discussed and approved in the case of *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, in the House of Lords when the judges were summoned to advise the House.

Though it is claimed to have been introduced from the civil law it has been said that the exception to the general rule as to damages established by *Flureau v. Thornhill*,

2 W. Bl. (Eng.) 1078, is not founded upon any principle. In the case of *Engell v. Fitch*, L. R. 4 Q. B. (Eng.) 659, 666, Lord Chief Baron Kelly speaks of the rule as a "qualification of the rule of common law, . . . founded entirely on the difficulty that a vendor often finds in making a title to real estate, [547] not from any default on his part, but from his ignorance of the strict legal state of his title."

Where the condition for this reason for the rule does not exist, at any rate to the same extent, it would seem that the latter would have a more limited application. The state of the title to real estate in England is undoubtedly vastly more complicated than in this country. The defect in the title in the present case is so obvious that it does not require a lawyer to discover it; the property is left to the devisee "during his natural life, then to his children;" if the respondent had looked to his title at all he could hardly have thought himself the absolute owner of the property to dispose of as he alone pleased.

There is another ground which distinguishes this case from *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078. It was held that the case of *Hopkins v. Grazebrook*, 6 B. & C. 31, 13 E. C. L. 100, provided an exception to the rule in the former case and one of the grounds on which the decision was based was that the defendant expressly undertook to make a good title. The respondent in this case expressly undertook to execute a conveyance in fee simple.

The rule in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, finds little favour in the United States. In *Sedgwick on Damages*, 9th ed. vol. 3, at p. 2121, we read:—

"If the defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court Rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle."

I have thought it well to make the foregoing remarks as perhaps affording support to the appeal, but [548] the real ground on which I rest my judgment is that in any event this case is outside the transactions to which in its widest interpretation the rule making exception to the general law of contracts has any application.

The rule deals solely with a simple contract for an immediate sale of real estate. According to the English practice this is directly followed by the delivery by the vendor to the purchaser of the abstract of title. If it then appears that the title is defective the expenses to which the purchaser has been put are ordinarily little more than

for the investigation of the title and these he is entitled to recover; beyond this actual outlay he has lost nothing but the fancied goodness of his bargain and for this he is not entitled to damages.

It must be remembered that the practice of giving options does not obtain to any great extent in England and there is very little to be found in the books on the subject.

Now in *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, Mr. Justice Denman speaking of the case of *Engell v. Fitch*, L. R. 4 Q. B. (Eng.) 659, in which it was held that the rule in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, did not apply, said:—

“The case is of great value as shewing beyond all question that the rule in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, is a rule wholly confined to cases of inability to make a title, and not to breaches of contract in respect of the sale of real property from whatever cause arising.”

And criticising the judgment in *Hopkins v. Grazebrook*, 6 B. & C. 31, 13 E. C. L. 100, he says:—

“When carefully examined, I think that all the observations of the learned judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to [549] make a good title does not, of itself, bring a vendor within the rule laid down in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, as to damages; but that it depends upon the nature of the contract, and also upon the reasons for the inability, whether he can avail himself of that rule; and that in such a case as that of *Hopkins v. Grazebrook*, 6 B. & C. 31, 13 E. C. L. 100, a vendor was not within the rule. . . . In my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, was correctly decided or not, it certainly was no authority for the proposition that under all circumstances, and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages.”

In *Mayne on Damages* (8 ed.) p. 245, we read:—

“It has also been held that the rule in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078, does not apply in cases where the agreement shews upon its face that the vendor has not as yet got and, therefore, possibly may never get the title which he undertakes to convey; yet he expressly undertakes at once, or on a given date, to put the purchaser in possession; and the purchaser, in consideration of such agreement, undertakes to do, and does, something which cannot be undone, and which is of permanent benefit to the vendor; for the

very nature of the undertaking, on both sides, shews that it is not dependent on the contingency of a good title being made out. In such a case damages for breach of agreement will not be merely nominal. The purchaser will be entitled, under the general rule of common law, to such a pecuniary amount as is the difference between the present state of things, and what it would have been if the contract had been duly carried out.”

A case in support of this is *Wall v. London Real Property Co. L. R. 9 Q. B. (Eng.) 249*.

Now what is the contract in this case? The respondent leases to the appellant for ten years at \$1,000 a year with onerous covenants by the lessee; it is agreed that the lessee shall at the expiration of the term have the option to purchase for \$22,000, the lessor covenanting to execute a good and sufficient deed in fee simple; in case the lessee fails to exercise the option to purchase it may have a renewal of the [550] lease for a further ten years; the lessee agrees to build a dock at a cost of at least \$6,000 to become the property of the lessor unless the lessee purchases.

The lessee has not only fulfilled all the agreements in the lease and done everything requisite to obtain a conveyance in fee simple, but has expended further large sums in improvement of the property, of course, in anticipation of becoming the owner at the expiration of the lease.

Is it not obvious that the damages sustained by the appellant by reason of the failure of the respondent to implement his agreement are altogether special and by no means such loss of a bargain as alone is contemplated by the rule in *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078?

I think it is impossible to hold that such an agreement is to be governed by an admittedly anomalous rule of law in England, one based on reasons which may have little application here; presupposing entirely different conditions and intended to have application not to any damage sustained by the purchaser, but solely to the possible loss of his prospective profit on a resale of the property.

It cannot, I think, be necessary to treat this very special rule as absolutely inflexible regardless of all attendant conditions. I am not quite able to follow the learned judge of the Appellate Division in what he says as to the anomaly of a purchaser who has elected to take what the vendor can convey recovering damages as well. He states that he has not found any cases in which such damages have been awarded. Inasmuch as the rule provides that no damages can be recovered even if partial performance of the contract [551] is not decreed, this would ap-

pear to be only natural since the decision of *Flureau v. Thornhill*, 2 W. Bl. (Eng.) 1078. I think before this time cases might be found. In *Cleaton v. Gower*, Finch (Eng.) 164, the defendant agreed to lease to the plaintiff for ten years with the right to take out coal and other minerals, and in his defence pleaded that he was only tenant for life and, therefore, he could not execute the agreement because "'tis inconsistent with his power so to do." The court decreed that Gower should execute his agreement in specie as far as he was capable of doing it, and likewise shall satisfy the plaintiff, such damages as he hath sustained in not enjoying the premises according to the agreement, and seal a lease for ten years, etc.

There is no objection to the court in a proper case decreeing specific performance and also awarding damages. In the head-note in *Phelps v. Prothero*, 7 De G. M. & G. (Eng.) 722, we read:—

"In a case decided before 21 & 22 Vict. ch. 27, came into operation, *held* that the court has jurisdiction to award damages for the want of a literal performance of a contract of which it directs the specific performance and will in general do so."

Of course the "Chancery Amendment Act," 21 & 22 Vict. ch. 27 ("Lord Cairns' Act") gave express power to the court to award damages either in addition to or in substitution for specific performance.

Then as to the remarks of Chief Justice Meredith concerning the appellants' means of knowledge of the respondent's title. The latter being only tenant for life could, of course, make no demise to endure beyond [552] his own life and, therefore, was in no position to make the lease for ten years, still less to covenant for its renewal for a further term of ten years. The lessee could not call for or dispute the lessor's title and until the option to purchase was exercised there was no contract for sale which would have entitled the appellant to call for the title.

The Chief Justice says that the appellant had the same opportunity of knowing what the nature of the respondent's title was as the respondent himself had. I think this must be going too far in any case; the respondent must surely as devisee under the will of his father be credited with better knowledge than the appellant. But in any case such knowledge would have been accidental in this particular case and cannot, I think, affect the principle involved.

That it would have been the more prudent course for the appellant when making the contract to have insisted on immediate preliminary proof of the respondent's title may be admitted and perhaps the company may have to suffer loss in any event as a consequence of not doing so, but that is no reason for relieving the respondent from liabil-

ity for failure to fulfil his contractual obligations. Chief Justice Meredith says that it may seem a hardship that the rights of the appellants should be limited to the relief to which his judgment holds them entitled. I think myself the appellant would suffer a great wrong in such case and am glad to think that there is no absolute rule of law which deprives them of their remedy.

As regards the damages to which the appellant is entitled I do not know that I can do better than refer to the case above cited of *Wall v. London* [553] *Real Property Co. L. R. 9 Q. B. (Eng.) 249*. The question in that case were:—

"1st. Whether the plaintiff is entitled to nominal damages only?

"2nd. On what principle the damages are to be assessed?"

And the Court:—

"We answer the first question by saying that the plaintiff is not confined to nominal damages only. To the second we answer that the arbitrator must apply the general rule of common law, and ascertain as well as he can what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title."

The only difference in the present case is that the Master must ascertain as well as he can what is the pecuniary amount of the difference between the state of things as it will be under the limited estate which the appellant takes in accordance with the judgment and what it would have been if the contract had been performed.

I would allow the appeal with costs.

DAVIES J. (*dissenting*).—The question in this case to be determined is whether the facts bring it within the rule of law laid down in *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, that if a vendor of land without fraud is incapable of making a good title the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain.

That rule has for many years been adopted as part of their jurisprudence by the Ontario courts and it is not my desire or intention to call that adoption in question.

The question arising in this appeal is not whether [554] that rule is in force in Ontario, but whether the facts of this case bring it within the rule.

I understand a majority of the court holds that the rule applies and I desire to state very shortly my reasons for dissenting.

In the case of *Day v. Singleton* [1899] 2 Ch. (Eng.) 320, the Court of Appeal held that:—

"A purchaser of leasehold property which the vendor cannot assign without a license

from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such license."

In delivering the judgment of the court, Lord Lindley, M. R. said, p. 328:—

"Singleton never asked the lessors to accept Day as their tenant without a bar and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused."

Now, in the present case, it is contended that when the respondent Montreuil ascertained that he could not give the Ontario Asphalt Company a good title and that he had only a life estate, the remainder being in his children, it became his duty as between him and the Asphalt Company with whom he had covenanted to give a good title to do all that lay in his power to enable him to carry out his contract and to shew that he had applied to his children to join with him in conveying to the Asphalt Company and that they had refused to do so.

There was evidence that they did join with him upon request in the conveyance of other portions of the same property, but no evidence that he had applied to them to do so with respect to the property in dispute.

[555] I confess I was much struck with this argument. If it was Montreuil's duty "to do all that lay in his power" to give appellants a good title, then it seems reasonable to say that it would be part of his duty to the Asphalt Company under the peculiar facts of this case to try and obtain the signature of his children to the deed and so complete his contracts with them. *Lehmann v. McArthur*, L. R. 3 Ch. (Eng.) 496, at pp. 500 and 503; *Williams v. Glenton*, L. R. 1 Ch. (Eng.) 200, at pp. 208-209, and *Godwin v. Francis*, L. R. 5 C. P. (Eng.) 295, 306.

I do not desire, however, to rest my judgment upon that ground, but rather upon the ground that the special facts of this case and the special terms of the lease to the company with the option of purchase at the end of the term of ten years, provided six months' notice of the lessee's intention to purchase was given, together with the covenant on the lessor, Montreuil's part to convey a good title in fee simple, and a covenant from the lessee to build a dock on the demised premises within a year from the granting of the lease at a cost of at least \$6,000, which dock was to become the property of the lessor at the end of the demised term, unless the lessee purchased under his option, all combine to convince me that this is not a case in which the rule in *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, should

be applied, but rather one in which on the neglect, refusal or inability of the lessor to comply with his covenant to give a good title free from incumbrance substantial damages should be awarded.

The evidence shewed that the company had after entering upon the lands under the lease erected an [556] expensive manufacturing plant and docks partly on the leased upland and partly on the water lot in front of it as to which latter lot Montreuil had obtained a grant from the Crown, the whole expenditure aggregating \$200,000, besides yearly betterments and improvements. A part of this expenditure at least was made in pursuance of respondent's covenant in the lease to expend at least \$6,000 in dock construction.

The Appellate Division, reversing the trial judge, who had decreed specific performance and an abatement in the price amounting to substantial damages the latter to be determined on a reference, directed that the abatement in the purchase money should be based upon the value of the interest in the lands which the defendant could convey, having regard to the "purchase price" of the whole and refusing other damages beyond the abatement.

I cannot accede to the principle on which the Appellate Court has directed the abatement, basing it upon the stipulated purchase price and limiting it to that while ignoring the expenditure which as part of the consideration for the granting of the lease the lessees covenanted to make in building a dock on the lands.

This expenditure, the minimum amount of which was placed at \$6,000 and the maximum of which might reach \$60,000 or more, was really and substantially as much a part of the purchase price as the \$22,000 mentioned and has just as much right to be considered in determining what abatement should be made as the latter sum.

But over and beyond that I do not think the case [557] is one within the principle of *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, nor that substantial damages should be denied the vendee. That principle is as Lindley, M. R. says in *Day v. Singleton* [1899] 2 Ch. (Eng.) 320, "an anomalous rule based upon and justified by difficulties in shewing a good title to real property in this country, but one which ought not to be extended in cases to which the reasons on which it is based do not apply."

Now, I take it that one of the reasons on which the rule is based is that it is not within the contemplation of both parties in the ordinary case of a contract for sale of land, that if the vendor is incapable of making a good title the intending purchaser is to re-

ceive compensation for the loss of his bargain beyond the expenses he has incurred.

But if there are special facts in the case shewing that it was and must have been in contemplation of both parties that failure on the part of the vendor to carry out his covenant to "execute and deliver to the purchaser a good and sufficient deed in fee simple of the land" must inevitably cause the intending purchaser great damage, as was the case here: and if, in addition, the purchaser has bound himself on the faith of this covenant to expend very large sums of money on dock and other improvements as the purchaser did here, then I say in the event of the vendor failing to give the good title he covenanted to give, the common-law rule as to damages for breach of contract applies and the "anomalous rule" laid down in *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 158, relating to ordinary contracts between vendor and vendee with respect to the sale of lands does not apply.

[558] I do not contend that any damages can be recovered in respect of anything that the purchaser did or incurred after he discovered the defect in the title; I limit my observations to those incurred by him before such discovery.

For these reasons, I would allow the appeal.

IDINGTON J.—I think the judgment appealed from is right for the reasons assigned in support thereof by the learned Chief Justice for Ontario.

The case seems a hard one, but that is no reason for our adopting bad law and disturbing the minds of those who prefer that well-settled law should be upheld.

In truth we are asked to assess damages besides giving such relief in way of specific performance as can be given.

Assuming for argument's sake damages recoverable at all in such a case (which I do not admit) the basis therefor must be proved as in any other claim for damages. It is not enough to rouse mere suspicion.

The respondent was a witness and counsel for appellant refrained from asking him a single question, much less anything tending to shew he had acted in bad faith or failed in any regard to do what his contract bound him to do. It can only be in such a case as shews a failure of duty on a defendant's part that damages would be assessable even if all questions relative to specific performance were out of the case. The circumstances relied on do not supply such proof as required.

The appeal should be dismissed with costs.

DUFF J.—I concur in the judgment of the court dismissing the appeal.

[559] ANGLIN J.—Admitting the applicability of the rule laid down in *Bain v. Fothergill*, L. R. 7 H. L. (Eng.) 175, to the original option in this case, the appellants have sought to bring it within the qualification upon that rule recognized in *Day v. Singleton* [1899] 2 Ch. (Eng.) 320. But in the latter case the Court of Appeal, as the judgment of Lord Lindley shews (p. 328), took the view that the correspondence between Singleton's solicitors and the lessor established that if Singleton (the vendor of the leasehold) did not actually procure the refusal of the lessors' assent to the assignment to Day, he "certainly made no effort to obtain it . . . as it was the duty to do . . . and it ought to be inferred as against Singleton that the lessors would have accepted Day if Singleton had asked them to do so."

The decision there proceeded upon the fact, held to have been sufficiently proven, that it was within the vendor's power to carry out his contract and that he refused or neglected to take the means available. Here the plaintiffs rely upon the fact that the defendant maintained silence after his inability to make title had become known and they had asked him to obtain confirmation of the option from the remaindermen, the fact that the remaindermen had (under what circumstances, or for what consideration does not appear) confirmed the title of some other grantees of the defendant who were in like plight with the plaintiffs, and the further fact that, in answer to the plaintiff's suit for specific performance, other defences were set up in addition to that of inability to make title. I am quite unable to find in these bald facts—and the plaintiffs have nothing else—enough [560] to warrant an inference that the defendant after discovery of the defect in his title made no effort to procure the concurrence of the remaindermen; still less do I find enough to warrant the inference that such an effort, if made, would have been successful.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR, J.—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

NOTE.

Measure of Damages for Breach of Contract to Sell Land Due to Vendor's Inability to Make Title.

Introductory, 859.

View Allowing Substantial Damages for Breach, 859.

View Refusing Substantial Damages in Absence of Fraud, 860.

Rule in Kentucky, 862.

Introductory.

The earlier cases passing on the measure of damages for the breach of a contract to sell land, due to the vendor's inability to make title, are collated in the notes to *Arensten v. Moreland*, as reported in 2 Ann. Cas. 628 and 106 Am. St. Rep. 951. The recent cases, which are reviewed in the present note, disclose the same conflict of authority which appeared in the former discussions of the question. In some jurisdictions the courts regard as settled law the English rule which allows only nominal damages in the absence of fraud or misrepresentation on the part of the vendor, and adhere to that doctrine though confessing in some instances their inability to find a satisfactory reason for its existence. In other jurisdictions the damages actually sustained by the vendee are allowed, irrespective of the vendor's good faith.

View Allowing Substantial Damages for Breach.

In many jurisdictions the vendee is allowed to recover substantial damages against a vendor who fails to perform through inability to make title, the courts either ignoring the question of good faith on the part of the vendor or repudiating the view that it is material in determining the right of the vendee to recover the damages actually sustained by him. *Clark v. Belt*, 223 Fed. 573, 138 C. C. A. 1; *Bender v. Barton*, 182 Ala. 181, 62 So. 732; *Crandall v. Kirk*, 185 Ill. App. 460; *Cullumber v. Winter*, 154 Ia. 263, 134 N. W. 601; *White v. Harvey* (Ia.) 157 N. W. 152; *Adams v. North American Ins. Co.* 210 Mass. 550, 96 N. E. 1094; *Nolde v. Gray*, 73 Neb. 373, 102 N. W. 759, 104 N. W. 165; *Beck v. Staats*, 80 Neb. 482, 114 N. W. 633, 16 L.R.A.(N.S.) 768; *Anderson v. Ohnoutka*, 84 Neb. 517, 121 N. W. 577; *Beetem v. Follmer*, 87 Neb. 514, 127 N. W. 858; *Merritt v. Adams County Land, etc. Co.* 29 N. D. 496, 151 N. W. 11; *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750. *Compare* *Eggert v. Pratt*, 126 Ia. 727, 102 N. W. 786; *Portsmouth Sav. Bank v. Yeiser*, 81 Neb. 343, 116 N. W. 38.

Thus in *Clark v. Belt*, *supra*, the court said that the rule, which was supported by the weight of state authority in the United States, was that the measure of damages was the difference between the purchase price and the market value of the property at the time of the contract of sale. See to the same effect *Nolde v. Gray*, 73 Neb. 373, 102 N. W. 759, 104 N. W. 165; *Beck v. Staats*, 80 Neb. 482, 114 N. W. 633, 16 L.R.A.(N.S.) 768; *Merritt v. Adams County Land, etc. Co.* 29 N. D. 496, 151 N. W. 11; *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750. So in *Crandell*

v. Kiek, 185 Ill. App. 460, the court said that the measure of damages for the breach of a contract to deliver a merchantable title was the difference between the actual value of the title delivered and its agreed value. Likewise in *Adams v. North American Ins. Co.* 210 Mass. 550, 96 N. E. 1094, wherein it appeared that the property contracted to be sold, when the time came for making the conveyance, was subject to attachments to an amount far exceeding its apparent value, the court said that the purchaser could not have been compelled to accept a conveyance and that the vendor would have been liable for damages in a sum equal to the value of the property. In *Bender v. Barton*, 182 Ala. 181, 62 So. 732, it appeared that the vendor had wrongfully obtained possession of the deed of the property which he had contracted to convey to the vendee. The court said that the vendor could not show his own wrong for the purpose of defeating the vendee's claim and that he was liable for all the damages suffered by the vendee as the natural and proximate result of the breach and which might reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach. So in *White v. Harvey* (Ia.) 157 N. W. 152, wherein it appeared that the defendant was unable to comply with the terms of his contract because of a defect in the title of the land, the court said that the purchaser was entitled to damages for the breach of the contract, which might include compensation for the loss of his bargain. See also *Anderson v. Ohnoutka*, 84 Neb. 517, 121 N. W. 577; *Beetem v. Follmer*, 87 Neb. 514, 127 N. W. 858.

But in *Eggert v. Pratt*, 126 Ia. 727, 102 N. W. 786, it appeared that the defendant, being the owner of the undivided one-third of the land in question, and guardian of her minor daughter who owned the other undivided two-thirds, entered into a written contract to convey the entire property to the plaintiff. In entering into the contract, the plaintiff knew the condition of the title, and knew that a conveyance of the daughter's interest could be had only by authority of the court. Proceedings were afterward begun to obtain the necessary authority to make a conveyance, but were dismissed. It appeared that about the time the contract was made, land in that vicinity was advancing rapidly in value, and that the sale, if carried into effect, would have materially prejudiced the interests of the ward. The court below refused specifically to enforce the agreement, except as to the one-third owned by the defendant, and refused to allow the plaintiff more than nominal damages on account of the defendant's failure to make title to the remainder of the property. The court said:

"The question presented in argument is upon plaintiff's demand for substantial damages. It is shown that the land, at the date when it should have been conveyed according to the contract, was worth materially more than the agreed purchase price, and it is plaintiff's contention that defendant is answerable to him for the margin of profit thus lost. Had defendant represented herself as the owner of the land, and as such entered into the contract to convey it, she would ordinarily be subject to the rule relied upon by plaintiff, and liable to him in damages in the amount by which the market value of the land exceeds the contract price. But this rule has been held by us not to apply where, to the knowledge of both buyer and seller, the latter has no title, and without fraud or bad faith on his part fails to make or convey title in discharge of his contract. In such case there can be no recovery for loss of profits."

View Refusing Substantial Damages in Absence of Fraud.

In some jurisdictions the rule obtains that where a vendor contracts to sell believing that he possesses a good title, on his failure to perform through inability to do so, the vendee is not entitled to damages for loss of his bargain. But if the vendor is guilty of fraud or misrepresentation, substantial damages are recoverable. *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L.R.A.(N.S.) 522; *Kiger v. McCarthy Co.* 10 Cal. App. 308, 101 Pac. 928; *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820; *Fossum v. Requa*, 218 N. Y. 339, 113 N. E. 330, *reversing* 163 App. Div. 890, 147 N. Y. S. 1112; *Blate v. Clarry*, 50 Misc. 668, 99 N. Y. S. 463; *Empire Realty Corp. v. Sayre*, 107 App. Div. 415, 95 N. Y. S. 371; *Haney v. Hatfield*, 241 Pa. St. 413, 88 Atl. 680; *Dobson v. Zimmerman*, 55 Tex. Civ. App. 394, 118 S. W. 236; *Yzaguirre v. Garcia* (Tex.) 172 S. W. 139; *West Coast Mfg. Co. v. West Coast Imp. Co.* 31 Wash. 613, 72 Pac. 455; *Babcock v. Marquhart*, 53 Wash. 168, 101 Pac. 713; *Crosby v. Wynkoop*, 56 Wash. 475, 106 Pac. 175; *Seymour v. Jaffe*, 78 Wash. 1, 138 Pac. 276; *Mullen v. Cook*, 69 W. Va. 456, 71 S. E. 566; *McLennan v. Church*, 163 Wis. 411, 158 N. W. 73. See also *Willard v. Smith*, 34 Mont. 494, 87 Pac. 613; *Marsh v. Johnson*, 125 App. Div. 597, 109 N. Y. S. 1106. Compare *Bowen v. Speer* (Tex.) 166 S. W. 1183; *Spaulding v. Smith* (Tex.) 169 S. W. 627. Thus in *Seymour v. Jaffe*, 78 Wash. 1, 138 Pac. 276, the court said: "By repeated decisions, it has become the settled doctrine of this court that, where a person contracts to sell real property and is unable to make the conveyance through failure of title, the measure

of damages is the purchase money paid, with interest, or nominal damages where no payments have been made; provided that such vendor acts in good faith in the transaction, and without intentional fault or wrongdoing." And in *Empire Realty Corp. v. Sayre*, 107 App. Div. 415, 95 N. Y. S. 371, it was said: "Whatever the origin of the rule may be, we regard the law as settled that where the vendor, without fraud on his part, is unable to convey a marketable title, the vendee is not entitled to damages for the loss of his bargain, beyond the money paid with interest and expenses resulting from the obligations of the contract itself, although the completion of the bargain might have been profitable to him. But where the vendor is guilty of collusion, tort, artifice or fraud, the vendee is then entitled, not only to compensatory damages, but to damages arising from the loss of the bargain, or the money he might have derived from its completion." So in *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820, an action for breach of contract to convey real estate on the ground that the title to the property was involved in litigation, the court said there was no error in an instruction that if the jury found that the defendant acted in good faith in failing to perform the contract of sale, the plaintiff was entitled to recover only the amount of his deposit with interest and the expense, if any, incurred in the investigation of the title; but if they found that the defendant had not acted in good faith then in addition to the amounts mentioned the plaintiff could recover the excess, if any, of the market value of the property, at the time of the sale, over the contract price. Likewise in *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L.R.A.(N.S.) 522, it appeared that the defendant was unable to give title to land in accordance with the contract entered into by him with the plaintiff for the reason that his wife had a right of homestead in the property and refused to release it. Nominal damages only were allowed. The court said: "The measure of damages in such cases is clearly defined by section 3306 of the Civil Code. The difference between the price agreed to be paid and the value of the estate may be recovered only where there has been bad faith on the part of the vendor. Here the court came to the conclusion that the defendant Bangham did not act in bad faith. On this appeal on the judgment-roll, we cannot, therefore, direct the allowance of damages for any greater sum than that recovered. But the question of good or bad faith should be considered anew by the trial court in the light of our views on the main question discussed in this opinion."

In *Marsh v. Johnson*, 125 App. Div. 597, 109 N. Y. S. 1106, the court said: "Where

a vendor, knowing he has no title, engages to deliver a title upon a particular day, without providing for the contingency which he knows is likely to happen, he is not taken out of the rule which requires the vendor to respond in damages for the value of the bargain as well as for the deposit and expenses. He knew the situation; acting in good faith he could easily provide for limiting the damages in his contract in the event that he was unable to close the transaction at the appointed time, and, failing to do this, he must answer for the breach, the same as in any other contract not coming within the exception."

In *Bowen v. Speer* (Tex.) 166 S. W. 1183, it was said: "Where an owner, after his offer has been accepted, or during the time in which the proposed purchaser is given to accept, sells to some other person, and in the latter case when the offer is accepted within the time limited, without notice of the withdrawal thereof by the owner, a liability for damages as for breach of contract arises, and the measure of damages is the difference between the market value of the property at the time of the breach and the price at which the owner had so offered to sell it."

In *Willard v. Smith*, 34 Mont. 494, 87 Pac. 613, the action was brought to recover damages for the breach of a contract to convey real property. The defendant was unable to convey a good title. On this account the plaintiff was compelled to purchase the property from the real owner for the consideration of \$500 to protect himself for improvements which he had made on the premises. The plaintiff proceeded on the theory that he was entitled to recover the amount paid by him to secure title after his discovery that the defendant could not convey it to him. Affirming a judgment for the defendant the court said: "What is the proper measure of damages? There is a conflict in the decision of the courts of the different states upon this question, but the rule in this state has been fixed by statute. Section 4306 of the Civil Code provides: 'Section 4306. The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land.' Here no bad faith is alleged; therefore the rule stated in the first part of the section must apply, viz., that the amount recoverable, if anything, is the price paid, together with the expenses properly incurred in examining

the title and preparing the necessary papers, with interest thereon. Upon his own statements the plaintiff has secured the title. He therefore has the land with the improvements and thus has the advantage of any enhancement of value since the contract was made. So that the only detriment he has suffered has been his payments to defendant, together with the incidental expenses, if any." In *Prentice v. Townsend*, 143 App. Div. 151, 127 N. Y. S. 1006, in refusing to allow a purchaser expenses incurred for the services of an architect to prepare plans on the vendor's failing to give good title, the court said: "The general rule is that expenditure by the purchaser for improvements, while he is uncertain about his title, cannot be recovered."

In *Meighen v. Couch*, 23 Manitoba 117, 9 Dominion L. Rep. 829, 23 West. L. Rep. 523, it was held that a purchaser was not entitled to compensation by way of damage for loss of his bargain where the vendor was unable to make title which on entering into the contract she believed she could do. The court said: "On the 10th June, 1910, the defendant having, between the 2nd and 10th June, discovered that the land did not belong to her, but to the estate of her deceased husband, wrote the plaintiff advising him of the fact, and that she was told she could not sell it, and stating that she wished to sell for the purpose of clearing up a debt on the estate."

Her prompt action in advising the plaintiff of the condition of the title seems to me an answer to any suggestion of improper conduct on her part. The evidence disposes of any question of fraud. The agreement as stated was by correspondence. There was no representation as to the title. The defendant could make no provision for compensation. I believe she was honest in the belief that on the death of her husband she could deal with the property and, upon discovery of her mistake, she immediately advised the plaintiff. As the widow, it is urged that she is the owner of one-third interest in the property, and that, to the extent of this interest, she should be ordered to convey. It is true she is entitled as the widow to one-third of the estate after payment of debts. She has no ascertained or fixed interest in this land, and it is impossible until the debts of the estate are paid to know what her interest may be. So that the *cy-pres* principle cannot be invoked. I doubt if, indeed, it could even were she the absolute owner of a one-third interest, such interest being so out of proportion to the entirety." And see the reported case. In *McNiven v. Pigott*, 31 Ont. L. Rep. 365, 33 Ont. L. Rep. 78, 19 Dominion L. Rep. 846, 5 Ont. W. N. 921, 6 Ont. W. N. 341, 7 Ont. W. N. 593, the court said that if a vendor is unable to make title the purchaser cannot obtain damages for the loss of

his bargain unless he could recover damages in an action for deceit or unless the failure to make a good title is caused by fault on the part of the vendor.

Rule in Kentucky.

In *Freeman v. Falconer*, 201 Fed. 785, 120 C. C. A. 32, the court said: "We understand the rule in Kentucky to be that in contracts for the sale of land situated in that state, and in cases not involving his fraud or bad faith, the vendor, in the event of his failure to convey, is liable to the vendee on the basis of the value of the land at the date of making the contract, rather than such value at some later date contemplated for conveyance, and is liable, also, for such expense as the vendee may reasonably and properly incur under the contract." The foregoing rule is supported by the weight of earlier authority in Kentucky jurisdiction, but in a recent decision in that jurisdiction (*Jenkins v. Hamilton*, 153 Ky. 163, 154 S. W. 937) the court, without referring to the earlier cases, said: "The court properly instructed the jury that the measure of damages was the difference between the contract price and the fair and reasonable market value of the land on the day it was to have been conveyed under the contract, if the value was in excess of the contract price, and further, that if the value and the contract price were the same on that day, they could find for the plaintiffs only nominal damages for the breach of the contract."

APPEAL OF DELLARIPA.

Connecticut Supreme Court of Errors—
November 10, 1914.

88 Conn. 565; 92 Atl. 116.

Taxation — Local Assessment — Time within Which Proceeding May Be Discontinued.

Until an assessment for a public improvement has been made and adopted by the court of common council, the obligation of the city is not fixed, and the proceeding may be discontinued, notwithstanding the electors of the city have voted to appropriate a sum of money for the construction of the improvement.

[See generally Ann. Cas. 1913E 1062.]

Appropriations — Diversion.

An appropriation of public moneys for one object cannot be used for another.

[See note at end of this case.]

Same.

The electors of a municipality voted to appropriate a sum of money to pay the cost of the construction of certain portions of a proposed sewer. The layout by the board of street commissioners was rejected by the court of common council, under the charter, which gave it plenary powers over the layout for sewers, and a new layout made. It is held that an assessment for the sewer as newly laid out was valid, notwithstanding the appropriation had not been apportioned, for until the assessment was made the court of common council had the right to discontinue the original proceeding, and the appropriation could be used only for the construction of the sewer on the original layout.

[See note at end of this case.]

Municipal Corporations — Debt Limit — Expenditure Assessed against Property.

Though the charter of a municipality provided that the common council should not order any public work requiring an expenditure of more than \$10,000, unless approved by a majority at a city meeting, the board of street commissioners may make a valid assessment for the construction of a sewer, costing much more than \$10,000, before any appropriation has been made, for until the amount of the special assessment has been laid, the portion to be paid by the city cannot be determined.

Taxation — Local Assessments — For What Purpose — Improvement Abating Nuisance.

Where the power of a city to construct sewers was plenary, the fact that a proposed sewer would also do away with a public nuisance which it was the duty of the city to abate will not invalidate an assessment of benefits on the ground that the construction of the sewer was merely to abate a public nuisance.

[See generally Ann. Cas. 1912A 718.]

Assessment of Benefits — Conclusiveness of Finding.

A finding by the committee of special benefits to landowners from the construction of a sewer is conclusive on appeal, where no facts appear of record showing that such finding could not reasonably have been made.

Appeal from Court of Common Pleas, Hartford county: SMITH, Judge.

Appeal to court of common pleas by Francesco Dellaripa from assessment by board of street commissioners for local improvement. From judgment rendered, Dellaripa appeals. The facts are stated in the opinion. **AFFIRMED.**

Birdsey E. Case for appellant.

John W. Coogan and William J. Hamersley for appellee.

[566] **WHEELER, J.**—The Gully Brook sewer ran along the course of the stream known

as Gully Brook in Hartford, and for quite a distance in the bed of the brook, being in part an open sewer. Thence it was extended in part on private land and in part on highways.

While the sewer was in this location, the board of street commissioners of the city of Hartford made its report to the court of common council of the city, recommending the layout and construction of a conduit to enclose the part of the sewer located in Gully Brook. The common council board amended the resolution accompanying [567] the report by appropriating \$50,000 to be applied toward the cost of constructing a certain part of the conduit, and directed the mayor to insert in the warning of the next city meeting a clause providing for a vote at the meeting upon the question of such appropriation. The report of the street board was accepted, and the resolution, as amended, adopted by both branches of the court of common council. The resolution was then duly referred to the board of street commissioners for assessment of the benefits and damages. Up to this point all the provisions of the charter had been complied with.

Subsequently the city meeting voted to appropriate \$50,000 to be applied toward the cost of constructing certain portions of this conduit in accordance with the amendment, and this part included the portion of the conduit crossing the appellant's land. Thereafter the court of common council rejected this resolution of layout. The board of street commissioners thereupon recommended to the court of common council a new layout and construction of a conduit to enclose the Gully Brook sewer. The court of common council accepted the report and adopted its accompanying resolution for the layout and construction of the new conduit.

All proceedings were duly had and the report referred to the board of street commissioners for assessment. The board made report of its assessment to the court of common council, which accepted it. The cost of the conduit was therein estimated to be \$132,789.65. The assessments to those specially benefited was \$22,789.65, and this amount included the sum of \$404.07 of special benefits to property of the appellant. The remainder of the cost was assessed against the city of Hartford, viz., \$110,000.

The appeal attacks the assessment made upon the [568] appellant upon four grounds, which we shall consider in order.

1. That the city of Hartford was without power to levy this assessment, because the appropriation of \$50,000 had not been apportioned or applied toward the construction of this conduit.

The appropriation was voted by the city meeting to apply toward the cost of construct-

ing the Gully Brook conduit as then laid out. The power of the court of common council of Hartford over the layout of sewers is plenary. Charter (Revision of 1908) pp. 58, 59, §§ 112, 113. This layout was duly made by it. Before the proceeding was complete and the assessment adopted, it rejected the report of the board of street commissioners with the accompanying resolution of layout, and in lieu of the layout theretofore made adopted a new layout for this conduit which was in part along the course before adopted. Until the assessment had been made and adopted by the court of common council, the obligation of the city did not become fixed; before that time it had the right to discontinue the proceeding. *Kelly v. Waterbury*, 83 Conn. 270, 76 Atl. 467. The final rejection of the report with the accompanying resolution, it is conceded, was equivalent to a reconsideration and repeal of the former action of the court of common council. The action theretofore taken upon this layout was thus rescinded and the old layout became nonexistent. The new layout was a new proceeding wholly separate from and independent of the old. The power of the court of common council under the charter to reject the old layout and adopt the new is not open to question. The existence of the appropriation of the city meeting did not affect the power of the common council to reject the old layout. The appropriation, by the terms of the vote, was applicable only to the construction [569] of a sewer along the old layout. There was nothing in the vote which made the expenditure of the appropriation obligatory upon Hartford for any conduit save that authorized by the old layout. An appropriation of public moneys for one object can be used solely for that object. It was beyond the power of the officials of Hartford to divert the appropriation to the construction of a conduit based upon a new layout, since that constituted in law a new purpose and a different use.

2. That the board of street commissioners was without power to make the assessment, because no legal appropriation had ever been made of the sum assessed as the share of the city of Hartford of the cost of construction of this conduit.

The foundation upon which the appellant rests this claim is § 163 of the charter (Revision of 1908, p. 79), which provides that the common council shall not order a public work or improvement, which shall require an expenditure of more than \$10,000, unless approved by a majority at a city meeting. The amount of special assessments cannot be known until laid, and hence the net amount to be paid by those specially benefited, and the amount remaining to be paid by the city, cannot be ascertained until that time. No

made according to law with a specified board, and it was therefore not a county debt.

Where an appropriation is made to pay claims for a certain period, claims arising without that period cannot be paid out of the money appropriated. *Allen v. Watts*, 88 Ala. 497, 7 So. 190; *Klein v. Johnson*, 33 La. Ann. 587; *State v. Seibert*, 103 Mo. 401, 15 S. W. 761; *Opinion of Judges*, 5 Neb. 566; *State v. Hallock*, 20 Neb. 73, 15 Pac. 472. *Compare In re Taxpayers, etc.* 157 N. Y. 78, 51 N. E. 512. Thus, in *Allen v. Watts*, supra, the statute under consideration (Code of Alabama, 1886, § 908) made the claims of jurors preferred claims and required the county treasurer to "set apart a sufficient fund from the moneys of the county for their payment." Under that statute the treasurer set apart the funds for the coming year. A claim was presented for services rendered during the preceding year. It was held that the claim could not be paid out of the fund appropriated for a different year. The reasons for the decision were given as follows: "The purpose of this, as well as all former laws on the subject, was to assure a fund to pay such current expenses of the body politic, as were essential to its very existence, and the continued discharge of the functions for the performance of which it was created. It is clear, on the one hand, that the purposes of this statute would not be met by a construction which would admit of the payment, out of the fund thus set apart, of claims, even of the classes mentioned, which had accrued for services already rendered, and, on the other, that to hold it to be the duty of the treasurer to pay other claims out of this fund would be to emasculate the law of all meaning and effect." In *Klein v. Johnson*, supra, it was held that where a constitutional provision declared that the revenue raised should be devoted solely to the expenses of the year for which it was raised, the legislature could not divert the funds to the payment of a claim arising during a previous year. In *Opinion of Judges*, supra, it was said that a constitutional provision declaring that appropriations should be made for only two years precluded the right to apply an appropriation for one period to claims arising during another period. But in the case of *In re Taxpayers, etc.* 157 N. Y. 78, 51 N. E. 512, it was held that in the absence of a contrary charter provision, a debt of a previous year could be paid out of an appropriation for the same purpose. The court said: "One of the fundamental rules laid down by the learned judge, and upon which the order largely rests, is the proposition that trustees acted illegally in paying out, from the proper village fund, debts chargeable to that fund, but contracted during previous years. For instance, the charter provides that the trustees may raise

by taxation in each year a sum not to exceed \$3,000 for the purpose of constructing necessary sewers. The order under review shows that during the year 1896 the trustees paid out more than that sum, but the excess was for sewers actually constructed during that and previous years, which had not yet been paid for. I do not think this can be said to be an illegal payment. It may happen in a perfectly honest and prudent administration of village affairs that the trustees may be required by the local board of health to construct in some one year sewers costing \$6,000, whereas they have raised only \$3,000 to pay for them; but, if in the next year they should conclude not to construct any sewers at all, they would have in the treasury \$3,000 applicable to the payment of the expense of constructing sewers. I have no doubt that they may legally pay out this money for the balance due and unpaid on sewers constructed in previous years, and what is true with regard to sewers or the sewer fund is equally true of many of the other funds referred to in the order. There is no prohibition in the charter against paying an honest debt incurred during previous years, from the proper fund, when there is money in the treasury, although the debt was not contracted during the year when the payment was made."

Where a fund is set aside as a sort of endowment for a specified purpose, that fund cannot be diverted to another use. In *re Canal Certificates*, 19 Colo. 63, 34 Pac. 274; *Davis v. Muscatine County*, Morris (Ia.) 161; *Halbert v. Sparks*, 9 Bush (Ky.) 259. And see *Collins v. Henderson*, 11 Bush (Ky.) 74; *State v. Westerfield*, 23 Neb. 468, 49 Pac. 119; *People v. Board of Education*, 13 Barb. (N. Y.) 400; *People v. Allen*, 42 N. Y. 404; *State Female Normal School v. Auditors*, 79 Va. 233; *Hall's Free School Trustees v. Horne*, 80 Va. 470; *State v. Donald*, 160 Wis. 21, 151 N. W. 331. Thus the case of *In re Canal Certificates*, supra, involved the following provision of the state constitution: "The public school fund of the state shall forever remain inviolate and intact. . . . No part of this fund, principal or interest, shall ever be transferred to any other fund or used or be appropriated except as herein provided." It was held that the legislature could not provide for the sale of school lands under a proposed canal in order to facilitate the construction of the canal. In *Halbert v. Sparks*, 9 Bush (Ky.) 259, it was held that a provision of the state constitution that the common-school fund should be held to be inviolate for the purpose of sustaining a system of common schools, precluded the legislature from appropriating a portion of the fund for the use of a private school. In *People v. Board of Education*, 13 Barb. (N. Y.) 400. Under a constitutional provision (New York constitu-

tion, art. 9) similar to that involved in the preceding case it was held that a Roman Catholic orphan school was precluded from participating, because it was not a common school. And, similarly, in *People v. Allen*, 42 N. Y. 404, it was held that the legislature could not lend the fund to a school not in the common school system, where the security was so insufficient as to amount to a donation. And in *Hall's Free School Trustees v. Horne*, 80 Va. 470, it was held that where the state constitution provided a fund for the support of the public school system, the legislature could not appropriate a part of that fund to a school not included in that system. In *State v. Westerfield*, 23 Nev. 468, 49 Pac. 119, under a provision of the constitution that the legislature should provide for public schools, and that the proceeds derived from certain designated sources should be pledged for educational purposes, and should not be transferred to any other fund for other purposes, it was held that since the school of the state orphanage was foreign to the state public school system, the legislature could not appropriate any of the school fund to maintain the orphans' school.

In a few cases it has been held, apparently without any intention of questioning the soundness of the general rule, that under the circumstances therein appearing a diversion of public money from the purpose of its appropriation was proper. Thus, in *Power v. May*, 123 Cal. 147, 55 Pac. 796, it was held that a part of a hospital fund could be used to pay commissions to a collector for collecting the fund. In *Fuller v. Heath*, 80 Ill. 296, there was involved a requirement of the charter of Chicago that the annual appropriation bill should specify the amount appropriated for each object or purpose, and that the treasurer should keep a separate account of each fund or appropriation and the debts and credits belonging thereto. It was held that if sufficient taxes were collected to pay all necessary expenses, the money from one appropriation could be taken from one fund and applied to another, if the whole of the first fund was not needed for the purpose specified. The court said: "It may turn out that the entire amount of the appropriation made for one purpose may not be needed for that purpose, while the whole of the appropriation for some other purpose may be needed. In such case, if the amount of all taxes collected be sufficient to meet all the necessary expenses, it is not perceived that there is anything in the statute to forbid the application of the funds in the treasury to the full payment of the sums needed, to exhaust one appropriation, even if that should not leave money enough in the treasury to cover the full amount of another appropriation, when the exigencies of the city do not require that the

whole of the latter appropriation should be expended." In *Spokane, etc. Trust Co. v. Lavigne*, 14 Wash. 681, 45 Pac. 664, it was held that where a statute (Act of March 26, 1890, § 36) created a salary fund and provided that if that fund was insufficient the treasurer should supply the deficit from the general fund, the transfer from the general fund was valid even though it left that fund insufficient to meet other demands thereon.

DISPOSAL OF SURPLUS.

Generally, the surplus remaining after the purpose for which the appropriation was made has been accomplished, may be diverted to other uses. In *re House Resolution No. 25*, 15 Colo. 602, 26 Pac. 145; *People v. Cairo*, 50 Ill. 154; *Field v. Stroube*, 103 Ky. 114, 44 S. W. 363; *Smith v. Lowell*, 190 Mass. 332, 76 N. E. 956; In *re Taxpayers*, 157 N. Y. 78, 51 N. E. 512. And see *Flowers v. Logan County*, 148 Ky. 822, 147 S. W. 918. In *Union Pac. R. Co. v. Cheyenne County*, 64 Neb. 777, 90 N. W. 917, it was said that a statute which provides for the transfer of the unexpended balance remaining in a fund to the general fund, does not apply to funds for which a levy is required each year.

The surplus cannot be diverted until the original claims have been paid. Thus in *Shotwell v. New Orleans*, 36 La. Ann. 938, there was involved an act providing that the municipal council should adopt an annual budget and should state the purpose of each fund. It prohibited a diversion of the funds from their purposes so long as any claims for which the appropriation was made remained unpaid. It was held that the funds could not be diverted by the council, until all of the budget claims had been paid. In *Bacon v. Dawes County*, 66 Neb. 191, 92 N. W. 313, the statute involved (Comp. St. 1901, c. 18, art. 3, § 4) provided that the county commissioners of the several counties might appropriate to the county general fund any county moneys from whatever source, excepting the school fund, that remained on hand in the county treasury and were no longer required for the purposes for which the same were levied. It was held that this did not give the commissioners the power to make the transfer before the taxes were collected and before the claims against the funds were paid.

In *George S. Chatfield Co. v. Waterbury*, 88 Conn. 322, 91 Atl. 436, the court applied a statute (Waterbury charter of 1895, § 93) providing as follows: "Any appropriation, regular or special, so made for any specific purpose shall not be expended for any other purpose, but, if unexpended, shall be covered back into the treasury thirty days after the expiration of the fiscal year for which it is so made." On the recommendation of the

board of education, the municipal council appropriated \$40,000 for a "New School and Land, North End." The board bought land and erected a building in that section at a cost of \$22,000, and sought to use the surplus for another school. It was held that this would be diverting the appropriation to a new purpose, and was therefore unlawful. The court said: "Appropriations of municipal funds, whether general or specific, for a given object or a definite purpose, cannot be diverted to any other purpose. This is a general rule of the law. . . . The board asked for a specific appropriation for a new Locust street school, which location was in the section of the city known as the north end. The board of aldermen made the appropriation for 'New School and Land, North End, \$40,000.' This was a specific appropriation, not for new schools, but for a new school. The board of education had requested it in its estimate, and the appropriation as made was responsive to its request, and must be read in connection with it. It was an appropriation for a school to be located in any part of the section known as the north end. The estimate of the board of education located the new school on a designated street; the board of aldermen made its appropriation for a designated section. It extended the range of selection of the board of education. That board, when it selected the Hill street site in the north end and built a school thereon at an expenditure of \$22,000 from the \$40,000 appropriated for a new school in the north end, exercised the discretion vested in it to use this appropriation for a new school in the north end. It cannot use the balance of the unexpended appropriation either for another school site or any other school purpose. Its power over the appropriation was exhausted when it purchased a site and built a school thereon in the north end. The board of aldermen had the undoubted right to appropriate this fund for one school; the board of education cannot disregard the terms of the appropriation and use the fund for several schools. If the departments of the municipality can use the funds voted for their several departments for specific objects for purposes of their own choosing, the power over the purse strings vested in the municipal legislative body is shorn of much of its efficacy as an instrument for the protection of the funds of the community."

Fund Raised for Particular Purpose.

Where, by a special tax, bond issue or the like, a special fund is raised for a particular purpose, it cannot be used for a different purpose. *New Castle-upon-Tyne v. Atty.-Gen.* [1892] A. C. (Eng.) 568; *Gray v. Matheny,*

66 Ark. 36, 48 S. W. 678; *Jenkins v. Williams*, 14 Cal. App. 89, 111 Pac. 116; *People v. Auditor*, 30 Ill. 434; *Cook County v. McCrea*, 93 Ill. 236; *Davis v. Muscatine County*, Morris (Ia.) 161; *Bradley v. Love*, 76 Ia. 397, 41 N. W. 52; *Doty v. Ellsbree*, 11 Kan. 209; *Adams v. Helms*, 95 Miss. 211, 48 So. 290; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 359; *Red River Val. Nat. Bank v. Fargo*, 14 N. D. 88, 103 N. W. 390; *State v. Mikkelsen*, 24 N. D. 175, 139 N. W. 525; *Daley v. Board of Public Works*, 9 Ohio Dec. (Reprint) 118, 11 Cinc. L. Bul. 25; *Northup v. Hoyt*, 31 Ore. 524, 49 Pac. 754; *Wolff Chemical Co. v. Philadelphia*, 217 Pa. St. 215, 86 Atl. 344; *State v. Cardozo*, 8 S. C. 71, 28 Am. Rep. 275; *Kennedy v. Montgomery County*, 98 Tenn. 165, 38 S. W. 1075. Thus, in *Jenkins v. Williams*, supra, there was involved a statute (Pol. Code § 4088, Stat. 1907, p. 382) which set forth the manner in which bonds could be issued for county purposes. The board of supervisors should by order specify the purpose for which the indebtedness would be incurred. The revenue derived from the sale of the bonds could be used for the purpose so specified and for no other. Any surplus must be applied toward redeeming the bonds. The supervisors ordered an election for a bridge fund specifying the bridges to be built and their individual costs. It was held that the surplus from one bridge could not be transferred to the fund for another bridge. The case of *Cook County v. McCrea*, supra arose under a statute (Rev. Stat. 1874, chap. "Counties," sec. 39) providing that whenever a tax should be levied for the payment of a specific debt, the amount of that tax collected should be kept as a separate fund in the county treasury, and expended only in the liquidation of that debt. Any surplus after the payment of the debt could be transferred to the common fund of the county. A tax was levied to create a sinking fund to pay off certain "fire bonds." It was held that the county board could not compel the treasurer to invest this fund in bonds to build a courthouse. The decision, however, seems to depend on the fact that the investment in the new bonds would not be readily convertible into money. In *Adams v. Helms*, 95 Miss. 211, 48 So. 290, it was held that where a courthouse was destroyed by fire, and insurance was collected for the building, the insurance money became a trust fund for the erection of a new courthouse, and that a creditor whose claim should be paid out of the general county fund could not be paid out of the insurance proceeds.

In *State v. Mikkelsen*, 24 N. D. 175, 139 N. W. 525, construing a statute (R. C. 1905, § 1832, as amended by Session Laws 1907, p. 127) providing that the drain tax should be collected by the county treasurer and all

moneys so collected should be credited to the drain fund to which they belonged, it was said that the drain fund became a trust fund, and that any diversion thereof would render the county liable. In *Davis v. Muscatine County, Morris (Ia.) 161*, there was involved a fund created by an act of Congress, by which certain lands were granted, the proceeds from the sale thereof to be used to pay the current expenses of a county. The court said: "The counties availing themselves of this right become trustees of the fund, and are bound to carry out the trust which is undertaken. They take the grant upon the condition specified, and no act of the counties, or of the board of county commissioners (their agents and representatives of the counties in fiscal transactions) could divest them of the liability to perform the trust, or divert this fund from the object to which the grantor and grantee intended it; much less can individuals do so. It is admitted by the plaintiffs in error that the debt was contracted for and on account of funds arising from the sale of lands pre-empted under the act of Congress referred to. Now if the plaintiffs in error can be allowed to set off county orders, which are issued to pay the usual expenses of the county; for instance, for the payment of the per diem allowance of the commissioners, or their clerk, or that of the sheriff for attending court, it would put it out of their power to appropriate the fund to the objects for which those orders were issued, and thus wholly defeat the object of the grant. . . . The principles at law which apply to cases where a trust is created for the benefit of individuals, apply to this case. In these cases it has never been contended that the indebtedness of the person who is to be benefited by the trust could be made the means of defeating the trust; but on the contrary, in most cases the insolvency of the person thus to be benefited by it, or the apprehension of such insolvency, is in most cases the reason for creating the trust. To permit the object of the grant to be defeated in this way, would be virtually saying that the grantor shall not do what he will with his own." In *People v. Auditor, 30 Ill. 434*, there was involved an article of the Illinois constitution providing as follows: "There shall be annually assessed and collected, in the same manner as other state revenue may be assessed and collected, a tax of two mills upon each dollar's worth of taxable property in addition to all other taxes, to be applied as follows, to wit: the fund so created shall be kept separate, and shall annually, on the first day of January, be apportioned and paid over pro rata, upon all such indebtedness, other than the canal and school indebtedness, as may for that purpose be presented by the holders of the same, to be entered as credits upon and

to that intent, in extinguishment of the principal of said indebtedness." By virtue of an act of the general assembly, the auditor transferred to the general revenue fund the remainder of the fund realized from the two mill tax. This transfer was held to be unconstitutional and void. The court said: "The fifteenth article of the constitution is plain and explicit, not a doubtful or ambiguous expression in it, and it is peremptory to the legislature. It contains, in no part of it, nor by reference to any other article or clause of the constitution, the slightest suggestion or intimation that the consent of the holders of state indebtedness, to call for and receive the funds when collected, was indispensable, or any other condition, to the assessment and collection of this tax, and to the creation of this fund. . . . However honest may have been the motives of the legislature—and we do not question them—however praiseworthy may be the desire to relieve the people from a heavy and apparently an unnecessary tax, and however obligatory it may be so to legislate, the injunction of the constitution should be a consideration above them all."

On the other hand, it has been held that where a fund has been raised for a specific purpose, other funds cannot be diverted to that purpose. *Tippecanoe County v. Cox, 6 Ind. 403*.

Where a fund is raised for a special purpose, it cannot be temporarily used for another purpose, even though it will be returned before needed for the original purpose. Thus, in the case of *In re State House Fund, 19 R. I. 393, 33 Atl. 870*, it appeared that at an election, bonds were voted for \$1,500,000, so much thereof as might be necessary to be applied to the purchase of a site for and the erection of a state house. The surplus was to be used for other purposes. It was held that before the completion of the building, the amount necessary would not be determined, and that, therefore, no part of the fund could be used temporarily for general state purposes even though the amount borrowed would be returned before needed for the state house. The court said: "The proposition submitted to the people, by which authority was given for the issue of the state house bonds, was as follows: 'Shall the general assembly be authorized and directed to provide for the issue of state bonds in an amount not to exceed the sum of \$1,500,000, so much of said money as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new state house?' Pub. Laws R. I. cap. 1093, of May 19, 1892. It thus appears that, by the note of the people adopting that proposition, so much of the money received from the bonds as was necessary for the purchase of a site for a new state house and its erection and completion

was to be devoted to that specific purpose. The surplus only, which may remain after this purpose has been accomplished, can be devoted to other uses. It is impossible to determine in advance what, if any portion of the moneys, the proceeds of these bonds, will not be needed for the purpose for which they were authorized. This being the case, and no authority having been conferred, by vote of the people, on the general treasurer, or any general officer, or on the general assembly, to divert so much of the fund as may be required for the specific purpose for which it was voted, and there being no inherent authority known to us in any general officer or the legislature to do so, we feel constrained to answer the first two questions propounded in the negative, notwithstanding the moral certainty, amounting almost to absolute certainty, that the money can be returned with interest to the state house fund, before it will be needed by the state house commissioners, from the regular income of the state to come in during the next eight months. The fund is analogous to a trust fund, and cannot be legally applied to any other purpose than that for which it was created, except by the consent of the people by whom it was created." Similarly, in *Weik v. Wausau*, 143 Wis. 645, 128 N. W. 429, the statute under consideration (Stat. 1898, § 925-142a) provided that the common council should have power to levy annually such sum or sums of money as might be sufficient for the several authorized purposes and to apportion the same into such funds for city or ward purposes as they might provide by ordinance or resolution. It was held that this did not give a city council the power to divert a special fund temporarily even though the money would be replaced upon the collection of the next tax levy. In *Park v. Candler*, 113 Ga. 647, 39 S. E. 89, it was held that an appropriation could not be diverted temporarily, even though it was idle, and though it would be returned as soon as a tax already levied could be collected. A constitutional provision (P. 1, sec. 13, art. 7) involved in the case was to the effect that "the proceeds of the sale of the . . . railroads held by the state, and any other property owned by the state . . . shall be applied to the payment of the bonded debt of the state, and shall not be used for any purpose whatever, so long as the state has any existing bonded debt." The reasons for the decision were given as follows: "The public property fund is set apart by the constitution for a particular purpose, and it is distinctly declared that it must be applied to no other, and that purpose is the discharge of the public debt of the state. When the time arrives for the public debt, or any part thereof, to be discharged, this fund must be intact, so that it may be used for

that purpose. That the setting apart of this fund for a number of years when it is not needed to discharge the public debt, and during a time when other demands due by the state must be discharged by taxation, which demands could be temporarily met by the use of the public property fund, is an unwise policy and bad financiering, is an argument which cannot be considered in the face of a plain and unambiguous provision in the constitution declaring that the fund can be used only in a given way. . . . The use of the public property fund in the discharge of any obligation or demand due by the state, other than the public debt or some portion thereof, would be a violation of the constitution; and this is true whether the fund, or such portion thereof as is so used, is or can be replaced by funds arising by taxation and in the treasury before the public property fund is needed for any purpose for which it may be lawfully used under the constitution."

Where the purpose for which a special fund is raised has been accomplished the fund may sometimes be diverted to other purposes. Thus, in *Queens County v. Phipps*, 35 App. Div. 350, 54 N. Y. S. 946, it was held that where bonds were issued to create a fund for the improvement of a certain road, an unexpended balance might be applied to the cost of erecting a jail house in the county, that balance being the property of the county. The court said: "The purpose for which the fund, of which this is a part, was created, had been fully accomplished. The improvement was made, and no more money was necessary for that purpose. Consequently, the money was the money of the county; and as the purpose for which it had been raised had been accomplished, and the balance left, the rule which finds application to special funds and particular objects, and forbids appropriation for any other purpose, either expressly or by implication, has no application, as in the present case it could not be applied to the purpose for which it was created, as that purpose was accomplished. This, as it appears to us, leaves the bare question, untrammelled by other considerations, as to whether money, the property of the county and in its hands, can be used for the payment of its obligations created in accordance with law. We think the question must be answered in the affirmative."

But where it is permissible to transfer the surplus of a special fund, the change cannot be made until the original purpose has been accomplished. *Lee County v. Robertson*, 66 Ark. 82, 48 S. W. 901. Thus, in *Crocker v. Wolson*, 30 Cal. 663, it appeared that a county treasurer had on hand about \$13,000 in a special fund. By statute it was provided that if after paying the July interest there should be as much as \$2,000 in the fund, some

of the bonds should be redeemed. The treasurer sought to transfer the excess to another fund by virtue of a statute (Stat. 1863, p. 515, § 38). It was held that the transfer could not be made until all the bonds presented for redemption should be redeemed, and a transfer prior to that time would be an unauthorized diversion of moneys. In *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254, 11 N. W. 307, the statute involved (Act of Feb. 15, 1877) provided "that the board of county commissioners of the several counties of the state might appropriate to the county general fund any sinking fund in the county treasury not levied for the payment of the bonded indebtedness; also any county moneys from whatever source, . . . that remained on hand in the county treasury, and were no longer required for the purposes for which the same were levied." It was held that the sinking fund would be needed for the purpose for which it was raised until the debt was paid and up to that time it could not be transferred. In *People v. Hummel*, 215 Ill. 71, 74 N. E. 78, the statute under consideration (Act of Feb. 13, 1863, §§ 13, 32) provided that all funds derived from the sale of certain water loan bonds, or from water rents, or otherwise for the waterworks of the city, should be used exclusively for purposes pertaining to the water supply of the city, nor should the same, or any part thereof, be used for any other purpose. It was held that the city council could not transfer to the corporate fund any of the water fund which was left after the payment of the current expenses of the waterworks.

WILSON ET AL.

v.

CRAIG ET AL.

Washington Supreme Court—August 4, 1915.

86 Wash. 465; 150 Pac. 1179.

Wills — Testamentary Capacity — Person Partly Paralyzed.

One who knows his property, his relatives and heirs at law, and what disposition he desires to make of his estate and informs the scrivener of his wishes has testamentary capacity, though he is suffering from a paralytic stroke depriving him of the use of a part of his body, and so affecting his speech as to cause him to speak with difficulty, though he can be understood.

Sufficiency of Execution — Signature by Mark.

A testator who signs his will by mark, while another has written his name, signs and executes the will himself, within Rem. &

Bal. Code, § 1320, providing that every will shall be in writing, "signed" by testator, and section 1321, providing that every person who shall sign testator's name to any will by his direction shall subscribe his own name as a witness and state that he subscribed testator's name at his request, applies only to a case in which the name of testator is subscribed by another at testator's request and testator himself does no act, by making his mark or otherwise, to sign the will.

[See note at end of this case.]

Appeal from Superior Court, Pierce county: CLIFFORD, Judge.

Action by Thomas Wilson et al., plaintiffs, against William Craig et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

Jas. J. Anderson and *Wesley Lloyd* for appellants.

Burdick & McQuesten for respondents.

[465] CROW, J.—On August 20, 1913, John Wilson, a bachelor sixty-seven years of age, died in Pierce county. On August 23, 1913, an instrument purporting to be his last will and testament was admitted to probate by the superior court, and Anna Craig was duly appointed and qualified as executrix. By the terms of this will, the testator devised and bequeathed one-fourth of his estate to each of the following persons: William Craig, Anna Craig his wife, Joe McKnight and Maggie McKnight. The record shows, that all of these [466] legatees except Anna Craig were heirs at law of the decedent, William Craig and Joe McKnight being nephews, and Maggie McKnight being his niece; that he left other heirs at law for whom he made no provision, as follows: Thomas Wilson, a brother, Eliza Watts and Jane Hilton, sisters, Thomas Craig, Samuel Craig, and John Radcliff, nephews, who, upon January 7, 1914, by petition, commenced this action to set aside the will and vacate the order of probate. The grounds upon which they seek to set aside the will are, (1) want of testamentary capacity, and (2) that the alleged will was not executed in the manner required by law.

The trial court found, that the will had been duly admitted to probate; that at the time of its execution, the decedent was partially disabled by a stroke of paralysis, received on August 17, 1913, the previous day; that his right side, arm, and leg were so paralyzed as to deprive him of their use; that his power of speech was so affected as to cause him to speak with difficulty, although he could speak with sufficient distinctness to be heard and understood by those

around him; that the will was written by one G. Dowe McQuesten, an attorney, who read it to the testator; that the testator requested Mr. McQuesten to write the testator's name to the will, which he did, writing the name "John Wilson" and the words "his mark;" that the testator thereupon made his mark as the same appears on the will; that the witnesses to the will thereupon, at the request of the testator, in the testator's presence and in the presence of each other, signed their names as witnesses; that Mr. McQuesten did not state in his certificate as such witness that he wrote the name of the testator at the testator's request; that on August 18, 1913, the day on which the will was executed, John Wilson was of sufficiently sound mind and memory to comprehend and understand the nature and effect of his acts in making the will and to dictate the terms thereof; that he was competent to make distribution of his estate, and that he was not acting under duress or undue influence of any person whomsoever. Upon [467] these findings, a decree was entered sustaining the will and dismissing the petition. The contestants have appealed.

Appellants' first contention is that the decedent did not have testamentary capacity. On this question we have carefully examined the evidence and conclude that, by a clear preponderance, it sustains the findings of the trial judge. The only persons present with the testator, at the time the will was drawn and executed, were Mr. McQuesten, decedent's attorney, and J. W. Burgan, cashier of a Tacoma bank, a particular friend of the testator. They signed the will as witnesses, and their testimony clearly shows, that the decedent had complete testamentary capacity; that he knew his property, knew his relatives and heirs at law, knew what disposition he desired to make of his estate, and informed Mr. McQuesten of his wishes in that regard. The will was signed and executed in the following form:

"In witness whereof, I have hereunto set my hand and seal this 18th day of August, A. D. 1913.

his
"John + Wilson
mark

"The foregoing was signed, sealed, published and declared by the above named testator, John Wilson, as and for his last will and testament in the presence of us who at his request and in his presence and in the presence of each other, have subscribed our names as attesting witnesses thereto this 18th day of August, A. D. 1913.

"G. Dowe McQuesten,
"Residing at Tacoma, Washington.
"J. W. Burgan,
"Residing at Tacoma, Washington."

The evidence shows that, after the will was drawn and had been read to the testator by Mr. McQuesten, the testator said he could not write as his right arm was "no good;" that he requested Mr. McQuesten to write his name, which he did; that the testator then took the pen in his left hand and made his mark on the will and that Mr. McQuesten and Mr. Burgan, [468] in his presence and in the presence of each other, witnessed it.

Section 1320, Rem. & Bal. Code, provides: "Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 1321 provides:

"Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request."

Appellants' second contention is that, as Mr. McQuesten signed the testator's name to the will at the testator's direction, he should not only have subscribed his name as a witness, but should have stated that he subscribed the testator's name at his request; that he failed to do so; that by reason of such omission, the will was not executed in the manner provided by law; that all formalities required by the statute are mandatory and must be strictly construed, and that the will, for want of such strict compliance, is void. In support of this contention, appellants cite the following cases from Missouri, decided under a statute substantially identical with Rem. & Bal. Code, § 1321, supra; McGee v. Porter, 14 Mo. 612, 55 Am. Dec. 129; St. Louis Hospital Assoc. v. Williams, 19 Mo. 609; Northcutt v. Northcutt, 20 Mo. 266; St. Louis Hospital Assoc. v. Wegman, 21 Mo. 17; Simpson v. Simpson, 27 Mo. 288; Catlett v. Catlett, 55 Mo. 330.

There is no question but that these cases, predicated on a similar statute, sustain appellants' position. For reasons hereinafter stated, we cannot yield our assent to the rule therein announced, being convinced that it is not well founded in reason and is contrary to elementary principles. It will be noticed that, in the earliest case, McGee v. Porter, upon which all the others are directly or indirectly based, the [469] name of the testator was signed by his wife at his request, and that, although witnesses testified she then carried it to him and he dotted over his name, the court says: "The record shows nothing more than a mere subscription of the name, no mark, no dot; the testator's name is written as if he had written it himself." With the will executed in this manner, no mark of any kind being made by the testator, the statute invoked might well be applied

and the will held void. In the next case, however, *St. Louis Hospital Assoc. v. Williams*, supra, it appeared that, after the name of the testator had at his request been written by another, he made his mark as in the case now before us, and the Missouri court, following the *McGee* case, held the will void for noncompliance with the statutory requirements. The *McGee* case, followed by the later cases cited, does not sustain or authorize this holding. Appellants also cite *Pool v. Buffum*, 3 Ore. 438, in which a statute similar to *Rem. & Bal. Code*, § 1321, was construed, and in which the will was executed by the testator in the same manner as the will now before us. The Oregon court, however, while apparently yielding its consent to the doctrine of the Missouri cases, fails to follow them, as it sustains the will, and in the course of its opinion said:

"If making one's mark is a signing within the law, it may be doubted, whether the writing of the name by another at the same time is a signing within the meaning of the statute."

In the later case of *Moreland v. Brady*, 8 Ore. 303, 34 Am. Rep. 581, which appellants do not cite, the Oregon court sustained a will executed in the same manner, and said:

"It is claimed by the appellant that the will of Bernard Brady is void, because it appears that he signed it by making his mark, and that some other person signed his name to the same without stating that he signed the testator's name at his request, and as a witness, as required by the statute of Oregon. The manner in which the will was signed by the testator, and attested by the subscribing witnesses, was in substantial compliance with the requirements of the statute [470] in that respect, as was held by this court in *Pool v. Buffum*, 3 Ore. 438, to which we refer as decisive of this point."

As above stated, *Rem. & Bal. Code*, § 1320, provides that a will may be signed by the testator. If in legal contemplation he does so sign when he makes his mark, there is no occasion for complying with the requirements of that portion of § 1321 upon which appellants now rely. Authorities are numerous to the effect that a testator by making his mark meets the requirements of a statute requiring him to sign his will, and that his mark is such a signature. Cases may be found where a mark alone has been held sufficient, where a mark added to the testator's name written by another has been sustained, and where a mark added to the testator's name incorrectly written has also been approved; the courts in each and every instance holding the mark to be the signature of the testator. *Jarman, Wills* (6th ed.) p. 106, § 79; *Greenleaf, Evidence* (16th ed.) § 674; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *In re Flan-*

nery, 24 Pa. St. 502; *In re Guilfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L.R.A. 370; *In re Mullin*, 110 Cal. 252, 42 Pac. 645; *Stephens v. Stephens*, 129 Mo. 422, 31 S. W. 792, 50 Am. St. Rep. 454; *Rook v. Wilson*, 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163; *Thompson v. Thompson*, 49 Neb. 167, 68 N. W. 372.

In *Upchurch v. Upchurch*, supra, the court said:

"A literal adherence to the words of the statute would operate harshly, and exclude all persons unable to write their names, as witnesses, to wills, however worthy of credence. A more liberal construction will as effectually accomplish the ends of the statute, and not violate its language, nor render invalid a paper proved, as we think this is, beyond all reasonable doubt, to be the last will of the testator by the requisite number of witnesses, whose names were subscribed, though by another, in their presence and at their request. In this conclusion, we are supported by direct authority in a case arising under the statutes of Virginia respecting wills, where the same mode of authentication is required. (6th Grattan's Report, 57.)"

[471] Many other citations might be made in support of the proposition that, by making his mark, a testator himself signs his will. We call attention to an Arkansas case, *In re Cornelius*, 14 Ark. 675, which is directly in point and in which the will was signed and executed by the testator in identically the same manner as the will now before us. Section 4 of the Arkansas statute, as stated in the opinion, provides that every will "must be subscribed by the testator at the end of the will, or by some person for him, at his request." The succeeding section 5 reads as follows:

"Every person, who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to such will, and state that he signed the testator's name at his request."

It will be noticed that these sections are substantially the same as *Rem. & Bal. Code*, §§ 1320, 1321, supra. The *Cornelius* will was assailed in the same manner, and for the same reasons, that appellants now assail the will of John Wilson. The Arkansas court held the will had been signed by the testator, and that it was properly executed. The case is well considered and founded on supporting authorities cited in the opinion. The conclusion of the court is tersely stated in the following words:

"And we think we are giving full effect to the 5th section above quoted, by holding that when the testator's name is signed to a will by his direction, and he does nothing more, thereby adopting such signature as his subscription, in such case the person, so signing

for the testator, must also write his own name as a witness, and state that he signed the testator's name at his request, and that it ought not to apply to a case where the testator does himself sign though by making his mark."

The substance of this holding, which we adopt, is that, when the testator signs by making his mark, he signs and executes the will himself, although his name may have been subscribed by another at his request. This conclusion is in line with the authorities above cited, to the effect that a testator [472] may sign by making his mark. In the later case of *Guthrie v. Price*, 23 Ark. 396, a vigorous attempt was made by counsel to prevail upon the Arkansas court to overrule the *Cornelius* case, but the court, at page 403, said:

"The court, in giving the first and fourth instructions, moved by the petitioners, and in refusing the instruction asked by the defendants, ruled directly contrary to the decision of this court in *In re Cornelius*, 14 Ark. 675, where it was held, that where the testator's name was written to the will by another person, and he made his mark, it was a valid subscription within the meaning of the statute. The counsel for the petitioners have asked us to review the opinion in that case, criticizing, with much ingenuity, the words of the statute, to show that the opinion is not well founded. But the decision is supported by adjudications upon statutes similar to ours, and by the standard text books, and we think it should not be disturbed."

Our conclusion, from a consideration of our statutes in the light of the authorities which we have carefully examined, is that we cannot follow the early Missouri cases cited by appellants; that when John Wilson, the testator himself, made his mark, he signed the will in compliance with Rem. & Bal. Code, § 1320, although the witness, at the testator's request, had previously subscribed the testator's name, and that the requirements of § 1321, upon which appellants rely, apply only to a case in which the name of the testator is subscribed by another at the testator's request, and the testator himself does no act, by making his mark or otherwise, for the purpose of signing the will.

The judgment is affirmed.

Morris, C. J., Fullerton, Ellis, and Main, JJ., concur.

NOTE.

Sufficiency of Signature of Testator to Will with Respect to Manner of Signing.

Scope of Note, 874.

Signature by Mark, 874.

Signature by Initials, 875.

Signature by Wrong or Assumed Name, 876.

Sealing as Signing, 876.

Adoption of Previous Signature as Signing, 876.

Misspelled Signature, 877.

Scope of Note.

In the case of *Bradford's Succession*, 124 La. 44, 18 Ann. Cas. 766, the court discussed the sufficiency of a testator's signature under the civil law, and held that a misspelled signature to a holographic will was not insufficient. This note presents the recent decisions on the question what is a sufficient signature by a testator to a will with reference to the form or manner of signing. It excludes the question of the proper place in the will for affixing the signature, which is considered in the notes to *Matter of Seaman*, 2 Ann. Cas. 726; *Sears v. Sears*, 11 Ann. Cas. 1008; and *Matter of Field*, Ann. Cas. 1913C 842. It also excludes the question whether "attestation" includes "subscription," which is treated in the note to *International Trust Co. v. Anthony*, 16 Ann. Cas. 1087; and the question whether the testator must sign before the witnesses sign, which is discussed in the notes to *Lane v. Lane*, 5 Ann. Cas. 462, and *In re Horn*, 20 Ann. Cas. 1364.

Signature by Mark.

Under statutes requiring that a will shall be signed or subscribed by the testator, it is well settled that the requirement of the statute is satisfied, if the signature of the testator is made by his mark. *In re Dombrowski*, 163 Cal. 290, 125 Pac. 233; *In re Clark*, 170 Cal. 418, 149 Pac. 828; *Ahnert v. Ahnert*, 98 Kan. 768, 160 Pac. 201; *Simpson's Will*, 2 Redf. (N. Y.) 29; *Matter of Foley*, 55 Misc. 162, 106 N. Y. S. 474; *Matter of Klinzner*, 71 Misc. 620, 130 N. Y. S. 1059; *Matter of McCabe*, 75 Misc. 35, 134 N. Y. S. 682; *In re Corcoran*, 145 App. Div. 129, 129 N. Y. S. 165; *Matter of Irving*, 153 App. Div. 728, 138 N. Y. S. 784; *In re Hersperger*, 245 Pa. St. 569, 91 Atl. 942; *Points v. Nier*, 91 Wash. 20, 157 Pac. 44; *Momberg v. Jones*, 32 West. L. Rep. (Manitoba) 513, 9 West. W. Rep. 270, 25 Dominion L. Rep. 768. And see the reported case. See also *Holam's Estate*, 108 L. T. N. S. (Eng.) 732; *Lamoureux v. Craig*, 49 Can. Sup. Ct. 305, reversing 22 Quebec K. B. 252, 19 La. Rev. de Jur. 443, 14 Dominion L. Rep. 399, which reversed 42 Quebec Super. Ct. 385, 2 Dominion L. Rep. 148; *Campbell v. McGuiggan* (N. J.) 34 Atl. 383.

When the testator signs the will by making his mark, he signs and executes the will himself, although his name is subscribed by

another at his request, or the mark is made with assistance. *Travis v. Straus*, 170 Cal. 418, 149 Pac. 826; *Points v. Nier*, 91 Wash. 20, 157 Pac. 44. And see the reported case. See also *Campbell v. McGuiggan* (N. J.) 34 Atl. 383.

In California a statute (Civ. Code Cal. § 1276) provides among other requisites to the execution of a written will other than holographic as follows: "It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto." Another statute (§ 1278) contains the following provision: "A person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will." It has been held that a signature by mark to a will was sufficient where it appeared that the testatrix was, by reason of illness, unable at the time to write her name and requested her legal adviser and one of the persons named as executors to write her name, which he did, adding the words "her mark," and the testatrix then made a cross (x) in the space left between her given name and her surname, and the three witnesses signed the attestation clause and also signed their names under the words "witnesses to mark," also written by her legal adviser, who did not, however, write his own name on the paper as witness or otherwise. In *re Domkowski*, 163 Cal. 290, 125 Pac. 233.

In a case wherein it appeared that a testator signed his name to the will, and acknowledged it before the attesting witnesses, who subscribed it as such, and the testator then placed a mark between his Christian name and surname, it was held that the placing of the mark was wholly unnecessary. *Sechrest v. Edwards*, 4 Metc. (Ky.) 163.

Signature by Initials.

In *Pilcher v. Pilcher*, 117 Va. 356, 84 S. E. 667, L.R.A.1915D 903, the validity of a holographic will, at the end of which the writer, in order to authenticate the paper, had attached his initials by way of signature instead of his full name, was upheld. The court said: "Va. Code, 1904, sec. 2514, reads as follows: 'No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in

the presence of the testator, but no form of attestation shall be necessary.' It will be observed that the statute makes no distinction in the character of the signature, or what constitutes a sufficient signature, between holograph and attested wills. It gives precisely the same force and effect to the former that it accords to the latter. By force of the statute one is made the equivalent of the other, though the manner of proving the two kinds of instruments is different; nevertheless, each possesses the same authenticity. Now, all the authorities, English and American (including the quære in *McBride v. McBride* [26 Grat. 476]), agree, that if this will had been attested, it would have been well signed under the English statute. Therefore, being holograph, it must follow that it is well signed under the Virginia statute, since that statute does not require attestation in such case. Nor does the Virginia statute define what shall constitute a 'signature,' but only prescribes that the will shall be signed 'in such manner as to make it manifest that the name is intended as a signature.' . . . No dictionary, so far as we are advised, restricts the meaning of 'signature' to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor. Whatever symbol is employed, it must appear that it 'is intended as a signature.' Although, as remarked, there is no decision of this court directly in point, authority in this country is abundant for the proposition that the use of his initials by a testator *animo signandi* is a sufficient signing of his name. . . . Adverting for a moment to the facts: We have before us a paper which, though exceedingly brief, is distinctly testamentary in character and terms, and by which the disposition of the property, in the circumstances, was a natural one. Testator was a lawyer in full possession of his mental faculties, and there is no question that the paper was wholly written by him, and signed with his initials at the appropriate place for his signature—the end of the instrument. Immediately before the paper was written, testator said to his wife and her sister, Mrs. Woods, 'I am going to make my will,' and after it was written, holding the paper up, he said: 'Girls, this is my will. I have left Allie everything I have.' In response to Mrs. Woods' comment on the brevity of the document, he remarked, 'The shorter, the better.' When she called attention to the use of his initials, he replied, 'Why, that is as good a will as any man can make; that will hold in any court—almost a mark will go, Bell.' He then said to Mrs. Woods, 'I want you to preserve this. That is my will. I have left

everything to Alice. I want you to see that she takes care of it.' This evidence, and it is uncontradicted, plainly establishes testamentary intent and that the initials were used *animo signandi*. . . . We entertain no doubt, either from the standpoint of reason or authority, that the writing in controversy was executed in substantial compliance with the statute, and, as the chancery court held, is the true last will and testament of Edwin Pilcher, deceased."

Under an English statute (Wills Act, s. 21) providing that interlineations or alterations made in a will are not valid unless executed in the same manner as is required for the execution of a will, and that a will with alterations as a part thereof will be deemed to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin, it has been held that where two interlineations were introduced into a will after execution and attestation, and the testatrix signed with her initials in the margin against the interlineations, and the witnesses subscribed their initials in attestation of this signature of the testator, the signature and subscription by initials only were sufficient. *In re Blewitt*, L. R. 5 P. D. (Eng.) 116, 49 L. J. P. 31, 4 L. T. N. S. 329, 28 W. R. 520, 44 J. P. 768.

In the case of *In re Severance*, 96 Misc. 384, 161 N. Y. S. 452, it appeared that at the foot of the printed form of will used by the testator there was a dotted line, followed by the letters "L. S." in brackets, and intended for his signature. But instead of signing it, the testator, near the end of the line and partially covering the initials "L. S.," affixed a wafer seal, printed in colors and containing the inscription "Merry Christmas. American Red Cross. 1912 Happy New Year," and wrote on this seal the inscription "C S Seal C S." The court said: "If the testator intended this holiday seal with his inscription upon it as a signature, and adopted it as such, I think it satisfies the requirements of the statute that a will must be subscribed by the testator. It is well settled that a subscription by making a mark and without any written name is a compliance with the requirements of the statute (*Jackson v. Jackson*, 39 N. Y. 153), and it would seem logical to say that a signature by initials is entitled to as much respect as a signature by mark. . . . It is a debatable question, incapable of exact solution, whether the testator intended to adopt this seal with this inscription as his signature, or whether he intended it as a seal only and neglected to sign his name. The disposition which the testator has attempted to make of his property is such a natural one, and the proofs are so clear that he intended this document as a testamentary disposition of

his property, that I feel that the surrogate should not be astute to search for reasons for rejecting this will, but, on the other hand, should strive to sustain it, especially where the interested parties all being of full age raise no objections. I therefore hold that the testator adopted this seal and his indorsement upon it as a signature."

Signature by Wrong or Assumed Name.

In a case wherein it appeared that a will was in proper form as a noncupative testament by public act, it was held that the testator's signature by an assumed name was a sufficient *descriptio personae*, he having assumed the name by which he signed the will for political reasons, and being generally known in the city in which he resided by that name. *Balot y Ripoll v. Moríña*, 12 Rob. (La.) 552, 14 Prob. Rep. Ann. 402 note.

In the case of *Ex p. Walker*, 15 Quebec Pr. 15, it was held that a holographic will, which was signed "mother," and which will and the signature thereto were alleged in the petition for probate to be in the true and actual handwriting of the decedent, was valid and should be admitted to probate.

Sealing as Signing.

It has been held that the impress of his notarial seal by a testator who was a notary public was a sufficient signature to his will. *In re Wilson*, 19 Dominion L. Rep. 698. And see the case of *In re Severance*, 96 Misc. 384, 161 N. Y. S. 452, cited *supra*, in the subdivision, *Signature by Initials*.

Adoption of Previous Signature as Signing.

Under the New Jersey statute (4 Comp. St. 1910, p. 5867, pl. 24) a distinction is drawn between the act of the testator and the act of the subscribing witnesses. He must sign, while they must subscribe their names. And the construction put on the word "signed" by the courts is the original meaning of a *signum* or sign, rather than the derivative meaning of a sign manual or handwriting. Thereunder, it has been held that a will was signed as the statute requires, where it appeared that the testator, after he had signed the will and had made an interlineation to effect a bequest, published the will and acknowledged his signature in the presence of the witnesses, who thereupon subscribed their names as witnesses. The court held that the acknowledgment by the testator of his own sign manual amounted to a signing. *In re Bullivant's Will*, 82 N. J. Eq. 340, Ann. Cas. 1915C 72, 88 Atl. 1093, 51 L.R.A.(N.S.) 72. To the same effect, see *Matter of Engler*, 56 Misc. 218, 107 N. Y. S. 222.

[1917] A. C. 38.

Misspelled Signature.

In a case wherein it appeared that the testator omitted the "n" in his signature in writing his first name, Emanuel, on one of the sheets of the will, it was held that this fact in no wise affected the validity of the will, for there was no contention even that he did not intend to and that he did not sign the will, but the whole testimony on that point showed that he did intend to and did sign it. *Boone v. Boone*, 114 Ark. 69, 169 S. W. 779.

**COMMISSIONERS FOR EXECUTING
OFFICE OF LORD HIGH ADMIRAL
OF UNITED KINGDOM**

v.

OWNERS OF STEAMSHIP AMERIKA.

England—House of Lords—December 19,
1916.

[1917] A. C. 38.

Ships and Shipping — Damages Recoverable for Collision — Death of Human Being.

In a proceeding on behalf of the Crown against persons negligently causing the sinking of a naval vessel, no recovery can be had for the value of pensions paid by the Crown to the dependents of sailors and officers whose deaths were caused thereby.

[See note at end of this case.]

[39] Appeal from an order of the Court of Appeal in so far as it affirmed an order of the President of the Probate, Divorce, and Admiralty Division [1914] P. 167.

On October 4, 1912, His Majesty's submarine B 2 was run into and sunk in Dover Strait by the steamship *Amerika*, and all the crew of the submarine, except one officer, were drowned, namely, an officer and fifteen sailors of the Royal Navy.

In an action for damage by collision instituted by the appellants, the Commissioners for executing the office of Lord High Admiral of the United Kingdom, against the respondents, the owners of the steamship, in the Probate, Divorce, and Admiralty Division, the respondents admitted that the *Amerika* was alone to blame for the collision, and agreed to pay to the appellants 95 per cent of their damages, to be assessed by the Admiralty Registrar assisted by merchants. Among the items of damage claimed by the appellants was a sum of 5140*l.* representing the capital-

ized amount of pensions and grants payable to the relatives of the men who were drowned. These pensions and allowances were granted under statutory authority according to scales authorized by Orders in Council and prescribed by the King's Regulations.

The Assistant Registrar disallowed the claim, but assessed at 4100*l.* the sum which the appellants ought to recover if the claim was recoverable at law.

The report of the Assistant Registrar was affirmed upon this point by the President, and the order of the President was affirmed, so far as regards the question under appeal, by the Court of Appeal (Buckley, L.J., Kennedy, L.J., and Scrutton, J.) on the principle laid down by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493, that "in a civil court the death of a human being could not be complained of as an injury."

Sir George Cave, S.-G., Laing, K.C., Sir John Simon, K.C., and Robertson Dunlop for appellants.

Inskip, K.C., and Arthur Pritchard for respondents.

Treasury Solicitor, solicitor for appellants.

Pritchard & Sons, solicitors for respondents.

[41] **EARL LOREBURN.**—My Lords, in my opinion this appeal fails. It is far too late for this House to disturb the rule expressed by Lord Ellenborough in *Baker v. Bolton*, 1 Campb. (Eng.) 493, even were we of opinion that the common law ought originally to have been differently interpreted, of which I am by no means persuaded. When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it. I also think that the damages sought are not in any way recoverable, because they represent sums of money which the appellants were not legally required to pay.

Your Lordships have been interested in ascertaining the origin of Lord Ellenborough's decision. I share in that interest, but I cannot throw any light on the subject beyond what may be derived from the opinions of Lord Parker and Lord Sumner, both of which I have had the advantage and the pleasure of reading.

LORD PARKER OF WADDINGTON.—My Lords, I agree. There are in my opinion two sufficient reasons why this appeal cannot [42] succeed. The first is that the items of damage which the appellants desire to be allowed are too remote. The second is that no sufficient case has been made for overruling Lord Ellenborough's decision in *Baker v. Bolton*, 1 Campb. (Eng.) 493, to the effect that in a civil court the death of a human being cannot be complained of as an injury. I will deal with each of these reasons separately.

The items of damage which the appellants desire to have allowed consist of certain pensions and allowances, particulars of which will be found at pp. 39-42 of the appendix. These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage. No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased. But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Passing to the second of the reasons above mentioned, I may point out that the correctness of the ruling in *Baker v. Bolton*, 1 Campb. (Eng.) 493, has since been accepted, not only by all Courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it. It was, it is true, severely criticized by Lord Bramwell in *Osborn v. Gillett*, L. R. 8 Exch. (Eng) 88. It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider [43] what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A. whereby he is prevented from fulfilling his contractual obligations to B. should confer on B. a right of action only where these obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss,

whether arising out of inability to perform a contract or otherwise.

This House, however, is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision. The appellants have accordingly attempted to show that Lord Ellenborough's ruling was erroneous, as being based either (1.) upon a misconception of the limits within which the maxim *actio personalis cum persona moritur* is applicable, or (2.) upon the mistaken notion that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, precluded such civil remedy altogether, or (3.) upon doctrines of Roman law which ought not to be applied at all. It is to be observed that Lord Ellenborough gave no reasons for his ruling: he treated the proposition he laid down as a well-known proposition of law, and the reasoning on which the proposition was based must therefore be found, if at all, in the earlier authorities. The only earlier authority to which your Lordships' attention was called was the case of *Higgins's Case*, Noy (Eng.) 18, Yelv. 89. This was an action in trespass by a husband for wrongful injury causing his wife's death. The action was dismissed. If it were looked on as an action in right of the deceased wife, the maxim *actio personalis, &c.*, was clearly applicable. If on the other hand it were looked on as an action by the husband in his own right, then the trespass was "drowned in the felony." Obviously the limits within which the maxim mentioned is applicable were already well known when [44] *Higgins's Case*, Noy 18, Yelv. 89, was decided, and Lord Ellenborough with that case in his mind can hardly have fallen into the error suggested. Nor can I find any reason to suppose that any weight has ever been given in the Courts of this country to the Roman law on the subject. It remains, therefore, to consider whether the reason given in *Higgins's Case*, Noy (Eng.) 18, Yelv. 89, that the trespass was drowned in the felony can be rejected as erroneous. It was contended that the reason must be rejected as a misconception of the rule of public policy above referred to. Whatever may have been thought in the early part of the seventeenth century, or even in Lord Ellenborough's day, it is now quite clear that the rule only suspends and does not require the destruction of the civil remedy. There can therefore, it is argued, be no drowning of the trespass in the felony, and if the reason given for the decision in *Higgins's Case*, Noy (Eng.) 18, Yelv. 89, be bad, there is, it is contended, no reason why that case should stand, or why Lord Ellenborough's

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ruling, which was dependent on it, should not now be overruled by this House.

My Lords, before proceeding to deal with this point I should like to call the attention of the House to certain historical considerations which appear to me to be of considerable materiality. I do this with some diffidence, as I cannot lay claim to any special knowledge. I have, however, read a good deal of history in connection with this case, for it is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth.

If we carry our minds back to a period prior to the development under the influence of the Statute of Westminster the Second (13 Edw. 1, c. 24) of the action on the case, we find that the law of contract based on the doctrine of consideration had not yet taken shape. The basis of society was still status rather than contract, and the King's Courts had not yet invented any procedure for the enforcement of simple contract obligations. Nevertheless, among the writs which had become *de cursu*, there were several writs which a master could obtain from the Chancery in respect of wrongs done to his servant. Fitzherbert in his *De Natura Brevium* mentions (1.) a writ of trespass for taking away an apprentice or servant, and (2.) a writ of trespass for injury done to a servant *per quod* [45] *servitium amisit*. These writs are in all respects analogous to the writs of trespass for taking away a wife or child, or for injury done to a wife or child *per quod* *consortium* or *servitium amisit*, and also to the writs of trespass for debauching a wife, daughter, or female servant. The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract. This would appear to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an injury whereby B. is unable to perform his contract is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical.

Further, during the period in question the writ of trespass was the only remedy for wrongs such as those we are considering. According to Professor Maitland, trespass was a remedy for acts of violence not amounting to a felony. Certainly no writ of trespass can be found in which the acts of which the plaintiff complains necessarily amount to a felony. In some cases they may or they may not. Take for example the writ for breaking into the plaintiff's house and taking away

his money. The acts complained of do not constitute burglary or larceny. There may be a burglary or larceny, according to whether certain additional facts be or be not proved, but the defendant cannot plead these additional facts: *Lutterell v. Reynell* (1670) 1 Mod. (Eng.) 282. He cannot set up his own felony by way of defence. The facts alleged in the writ are wrongful and actionable, whether these additional facts be proved or otherwise. It is not the felony which is made the subject of complaint. It should be remembered that for felony there was the appeal, and that, to use Professor Maitland's expression, the writ of trespass may be called "an attenuated appeal" dealing with acts of violence for which the appeal did not lie. It arose out of the appeal, and was a criminal as well as a civil proceeding, leading not only to the plaintiff recovering damage, but to the defendant being fined or imprisoned.

My Lords, during the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly [46] intentional homicide or homicide through negligence was felonious. It follows that the death of a human being occasioned by an act of violence on the part of the defendant could not be the ground of complaint in an action of trespass. It could not be alleged without alleging felony, and for felony trespass would not lie. If the writ alleged only an injury *per quod* *servitium* or *consortium* or *consortium amisit*, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only. If the injured person had been killed on the spot the action would fail altogether. The plaintiff's remedy, if he had any, would be the appeal.

My Lords, if for the reasons above suggested trespass did not lie on the part of a master for an injury causing the death of his servant, it is easy to see how this fact would influence the subsequent development of the action on the case. The writ-making powers of the Chancery, which for a time had fallen into disuse largely because they were thought to infringe on the legislative function of Parliament, received in 1285 A. D. a new impulse by the passing of the Statute of Westminster the Second, and began to be again used, as they had been originally used, to meet the needs of a growing civilization by providing legal remedies for grievances which, however much they might be recognized as such by the general sense of the community, were not yet actionable in the King's Courts. Consider for a moment the following examples: First, A's servant, in the course of serving A., negligently throws a beam of wood on to a highway, and in so doing injures B.'s servant. Under these circumstances B.'s servant had a writ of tres-

pass against the wrong-doer, and B. also had a writ of trespass (*per quod servitium amisit*), but neither of them had any remedy against A., for trespass was in fact a criminal proceeding, and according to the common law no one could be called upon to answer in a criminal proceeding for another's crime. Nevertheless, the general sense of the community demanded such a remedy, and this was supplied by giving B. and B.'s servant an action on the case against A. By this means the modern law as to a master's liability for the acts of his servant was enabled to develop. The remedy of B's servant against A's servant was always confined to an action in trespass: see *Holmes v. Mather* (1875) L. R. 10 Exch. (Eng.) 261, 268, per Lord Bramwell. Secondly, suppose A's servant, in the course [47] of serving A., placed a beam of wood on the highway and negligently left it there, so that B's servant fell over it and was injured. Under these circumstances neither B's servant nor B. himself had any remedy in trespass, for A's servant had committed no act of violence, for which alone a writ of trespass could be obtained from the Chancery. Nevertheless, the general sense of the Community demanded a remedy, and such a remedy was again supplied by giving both B. & B's servant an action in case against both A's servant and A.

If in the first of the two examples I have given B's servant had been killed and not injured only, A's servant would have committed a felony and no action against him would lie in trespass. In developing the principle of respondeat superior it may well have been thought that A's liability for the act of his servant ought not in any case to be greater than the liability of the servant himself. Again, if in the second of the two examples B's servant, in falling over the beam, had broken his neck, it may well have been thought that neither A's servant nor A. himself ought to incur, by reason of mere non-feasance, a liability greater than would have been incurred by actual violence. These considerations may well account for the doctrine that the death of a human being could not be complained of as an injury in an action on the case any more than it could in an action of trespass.

My Lords, I will now return to the case of *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, and I desire to suggest that it was not really based on any rule or supposed rule of public policy, but merely on the nature of an action in trespass. The declaration was by a husband for an injury to his wife. *Prima facie*, therefore, what was complained of was a trespass, but the declaration proceeded to state that the wife died of the injury. What was *prima facie* a trespass thus became a felony for which no action in trespass lay. The tres-

pass was drowned in the felony. "For the King only is to punish felony, except the party brings an appeal." *Noy* (Eng.) 18. If the case had turned on a rule of public policy, such rule would have been applicable to a writ in trespass for breaking into the plaintiff's house and taking away his money, where what had been done in fact amounted to burglary or larceny. I cannot discover that it was ever so applied. On the contrary [48] *Markham v. Cob* (1625) *Latch* (Eng.) 144, *Noy* 82, decided in 1625, and *Dawkes v. Cove-neigh* (1652) *Style* (Eng.) 346, decided in 1652, are authorities that in such a case the trespass is not drowned in the felony, so as to preclude an action for the trespass, provided the requirements of public policy are first satisfied. These cases were quoted with approval by Sir Matthew Hale (1 Hale, *Pleas of the Crown*, p. 546) and it cannot be disputed that they are good law. Lord Ellenborough himself acted on them in *Crosby v. Lang* (1810) 12 *East* (Eng.) 409, without any apparent hesitation, though *Baker v. Bolton*, 1 *Campb.* 493, had been decided by him only a few years previously, namely, in 1808. It is true that neither *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, nor *Baker v. Bolton*, 1 *Campb.* (Eng.) 493, were cited in argument. Of course, this may have been due to carelessness in examining the authorities, but it is quite possible that counsel did not consider that they had any bearing on a question of public policy.

The case of *Gimson v. Woodfull* (1825) 2 C. & P. 41, 12 E. C. L. 20, strikes the first discordant note. This was in 1825, and in 1827 the matter was discussed in the case of *Stone v. Marsh* (1827) 6 B. & C. 551, 13 E. C. L. 249, Lord Tenterden using language which might be construed to favour the view taken in *Gimson v. Woodfull* (1825) 2 C. & P. 41, 12 E. C. L. 20. The point was left open in *White v. Spettigue* (1845) 13 M. & W. (Eng.) 603, though that case overruled *Gimson v. Woodfull* (1825) 2 C. & P. 41, 12 E. C. L. 20, on other grounds.

In *Wellok v. Constantine* (1863) 2 H. & C. (Eng.) 146, decided in 1863, the plaintiff sought to recover damages for rape. Of course, if she had consented to the act alleged, there could be no civil remedy. If, on the other hand, she had not consented, she was in fact complaining of a felony, for which an action in trespass at any rate would not lie. Willes, J., being of opinion that no civil action would lie for a felony, intimated that he would direct a verdict for the defendant, and the plaintiff thereupon consented to a nonsuit. The case, therefore, appears to resemble *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, and has no necessary reference to public policy, though Pollock, C.B., in discharging a rule for a new trial,

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seems to suggest that public policy was the real ground of decision. This also appears to have been the view of Blackburn, J. in *Wells v. Abrahams* (1872) L. R. 7 Q. B. (Eng.) 554, for he disapproves *Wellock v. Constantine*, [49] 2 H. & C. (Eng.) 146, on the ground that public policy demands only the suspension and not the destruction of the civil remedy, thus approving the earlier authorities to which I have referred. He obviously disagreed with the ruling of Willes, J. that no civil action would lie for a felony, for, though he expressly approves the case of *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, he says it is a mistake to suppose it was decided on that ground. Unfortunately he does not suggest on what grounds he thought the decision could be supported.

That the rule of public policy only suspends and does not destroy the civil remedy is also shown by the subsequent cases of *Ex p. Ball* (1879) 10 Ch. D. (Eng.) 667, and *Midland Ins. Co. v. Smith* (1881) 6 Q. B. D. (Eng.) 561.

It should be noticed that *Baggallay, L.J.*, in laying down in *Ex p. Ball* (1879) 10 Ch. D. (Eng.) 667, the propositions resulting from the authorities, says that a felonious act *may* (not that it *must*) give rise to a civil action. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings.

My Lords, it was in this state of the law as to public policy that *Baker v. Bolton*, 1 Campb. (Eng.) 493, came up for consideration before the Court of Appeals in *Clark v. London Gen. Omnibus Co.* [1906] 2 K. B. (Eng.) 648, 6 Amer. Cas. 198, and if that case be referred to it is quite apparent that neither the counsel who argued it nor the judges who were party to the decision considered that public policy had anything to do with the matter. Not one of the cases on the latter subject to which I have referred was so much as mentioned. Under these circumstances it seems impossible to suppose that the decision in either *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, or *Baker v. Bolton*, 1 Campb. 493, depended on a misconception of the rule of public policy. I think it more probable that this misconception, which at one time no doubt prevailed but which has been now dispelled, was itself due to a mistake as to the meaning of what was said in *Higgins's Case*, *Noy* (Eng.) 18, *Yelv.* 89, that case itself merely deciding that felony could not be

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[50] made a ground of complaint in trespass, a decision which in *Baker v. Bolton*, 1 Campb. (Eng.) 493, was extended to cover all civil proceedings.

Perhaps I ought to add one word on the case of *Smith v. Selwyn* [1914] 3 K. B. (Eng.) 98. That case resembled *Wellock v. Constantine*, 2 H. & C. (Eng.) 146. The statement of claim alleged and complained of a felony. There was an application to stay further proceedings or dismiss the action on the ground that it was based on a felony for which there had been no prosecution. Liberty was given to amend the claim by alleging only a wrong less than felony; otherwise the action was ordered to be stayed pending criminal proceedings. The question whether a felony could itself be made a ground of complaint in a civil action, quite apart from any rule of public policy, does not appear to have been considered, and supposing the statement of claim had been amended in the way suggested, it would still seem that, under the authorities I have cited, public policy would, if there had been an actual felony, demand a stay until the plaintiff had done her duty by prosecuting the felon.

My Lords, under these circumstances I do not think the appellants can be said to have advanced any sound reasons why your Lordships' House should disturb a rule of law which has been so long recognized in our Courts, and which, however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds.

I agree that the appeal fails.

LORD SUMNER.—My Lords, this appeal has been brought principally to test the rule in *Baker v. Bolton*, 1 Campb. (Eng.) 493, that "in a civil court the death of a human being cannot be complained of as an injury," a rule which has long been treated as universally applicable at common law. Some attempt was made to contest it only in its application to the case of master and servant. I will discuss both the narrower and the wider proposition, but it is clear that the action was not brought for the loss to a master of the services of his employee, but for the respondents' bad navigation, which sank the Crown's submarine, and the item of damage now in dispute, namely, pensions and allowances to dependents of seamen who were drowned, was claimed merely as one of the natural consequences of [51] the tort, which consisted in sinking the ship. No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment

that it may be questioned whether in any case an action per quod servitium amisit could have been brought at all.

My Lords, never during the many centuries that have passed since reports of the decisions of English Courts first began has the recovery of damages for the death of a human being as a civil injury been recorded. Since Lord Ellenborough's time the contrary has been uniformly decided by the Court of Exchequer and by the Court of Appeal. In addition to the weight of Lord Ellenborough's name (no mean authority even when sitting at nisi prius in spite of Lord Campbell's sneer), the rule has been definitely asserted by Lord Selborne (*Clarke v. Carfin Coal Co.* [1891] A. C. (Eng.) 412, 414, Lord Bowen (*The Vera Cruz* (1884) 9 P. D. (Eng.) 96, 101) and Lord Alverstone and Lord Gorell (*Clark v. London General Omnibus Co.* [1906] 2 K. B. (Eng.) 648). It has been accepted as the rule of the common law by the Supreme Court of the Dominion of Canada (*Monaghan v. Horn* (1882) 7 Can. Sup. Ct. 409) and the Supreme Court of the United States of America (*The Corsair* (1892) 145 U. S. 335, 12 S. Ct. 949, 36 U. S. (L. ed.) 727).

That the rule has also received statutory recognition appears to me to be abundantly plain. I agree that the preamble to the first section of Lord Campbell's Act should be read as applying to the particular defect in the existing law which it was passed to remedy, namely, the disadvantageous position of widows and children, and not to the limited rights of masters and employees, though only Bramwell B.'s intrepid individualism could dismiss it as a "loose recital in an incorrectly drawn section of a statute, on which the Courts had to put a meaning from what it did not rather than did say." *Osborn v. Gillett*, L. R. 8 Exch. (Eng.) 95. Still I think that the view taken by the Legislature in 1846 is clear. Sect. 6 of Lord Campbell's Act provides that "nothing therein contained shall apply to that part of the United Kingdom called Scotland." Why? Because Scotch [52] law differed from English law in the very point in question, and in this respect is for once illogical. The rule, says Lord Watson in *Clarke v. Carfin Coal Co.* [1891] A. C. (Eng.) 418, and again in *Wood v. Gray* [1892] A. C. (Eng.) 576, 581, which allows "actions for solatium and damages . . . at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent . . . does not rest upon any definite principle . . . but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other ratio to support it." "Lord Campbell's Act," says Turner, L.J. with the concurrence of Knight Bruce, L.J. in *Glaholm v. Barker* (1865) L. R.

1 Ch. (Eng.) 223, 227, "first introduced into the law of this country a remedy in case of injuries attended with the loss of life; the law up to the time of the passing of this Act having stood thus—that in case of death resulting from injury the remedy for the injury died with the person." It provided a new cause of action and did not merely regulate or enlarge an old one. It excluded Scotland from its operation because of sufficient remedy already existed there when in England none existed at all. So much seems to me to be indubitable. It did not deal with the case of master and servant as such, presumably because the Legislature found nothing in the common law rule in this regard which called for reconsideration. I think the observation of Pigott B. in *Osborn v. Gillett*, L. R. 8 Exch. (Eng.) 93, was perfectly just. "We are not at liberty to disregard the law thus established so long ago and expressly recognized by the Legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act." It is worthy of observation that the passing of Lord Campbell's Act was followed shortly afterwards by similar legislation in the States of New York in 1847 and 1849 and of Maryland in 1852, and statutes similar in effect have since been passed in most of the older States of the Union where the common law prevails. Massachusetts has already dealt with the matter, though only tentatively, by direct enactment (c. 81 of 1786) which made the township as the highway authority liable in certain cases, when death was caused on highways, and by an Act of 1840, which provided that a railway company, whose negligence had caused a fatal accident, should be liable on indictment to payment of a fine to the use of the personal representative of the [53] deceased for the benefit of his family. Plainly it was, and long had been, the general opinion among students of the common law that the rule was as stated by Lord Ellenborough. "The authorities are so numerous and so uniform to the proposition," said the Supreme Court of the United States in 1877 in *Union Pac. Ins. Co. v. Brame* (1877) 95 U. S. 754, 756, 24 U. S. (L. ed.) 580, "that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question." Since the early part of the last century the subject has been learnedly discussed on many occasions in the United States, both in connection with claims for the death of a servant and claims for the death of a relative. The re-argument in *Hubgh v. New Orleans*, etc. R. Co. (1851) 6 La. Ann. 495, is particularly valuable for its contrast of the common law with the old French law and with the effect of art. 1382 and art. 2294 of the Code Napoléon, as repeatedly interpreted in the Cour

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de Cassation. So much for this rule as a proposition of general application.

My Lords, I think that, as the appellants have argued this case as if the action had been brought by a master for the loss of a servant's service, it is better to deal also with this aspect of it. The point was concluded against the appellants in the Courts below by *Osborn v. Gillett*, L. R. 8 Exch. (Eng.) 88, and *Clark v. London Gen. Omnibus Co.* [1906] 2 K. B. (Eng.) 648, 6 Ann. Cas. 198. The question is whether there is any ground of principle of which your Lordships ought to overrule decisions of such authority and long standing. The case is put thus: "It is admitted that a master has an interest in his servant's life, such as to support an action if the servant is maimed; how can it be right that the tortfeasor should escape if instead of maiming the servant he kills him? Is the general rule of liability for tortious injury to the servant's health subject to an exception in relief of the tortfeasor if death ensue?" Some most learned writers have expressed dissatisfaction with the rule. It has been even suggested that Lord Ellenborough was "the victim of a confusion of ideas" and that the rule arose from a misunderstanding of the principle that a right of action for a tort, where the act done was felonious, is suspended till the tortfeasor has been prosecuted. The hope—perhaps a faint one—was long [54] ago expressed that some day your Lordships might overrule *Baker v. Bolton*, 1 Campb. (Eng.) 493.

I think it is clear that the relation of master and servant presents in this matter some peculiar features. What is the right in the master which the tortfeasor infringes, or the duty towards him which he disregards? Ordinarily an action of tort is given to defend rights of property or rights of personal safety, personal freedom and personal reputation. The latter must be confined to the person of the master, and in the person of the servant he has no property. Here is the beginning of anomaly.

I do not know, and doubt if it can now be ascertained, when or pursuant to what theory this special right of the master in relation to his servant was first established. The inquiry belongs to history rather than to positive law. *Tindal C.J.* in *Grinnell v. Wells* (1844) 7 M. & G. 1033, 1041, 49 E. C. L. 1033, 1041, observes of the most artificial aspect of this cause of action "the foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter, has been uniformly placed, from the earliest times hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right of interest. . . . It is

the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter." So nearly did the wrong, which is the subject of this cause of action, approximate to wrongs to his property that a count for debauching the plaintiff's daughter could be joined with a count for breaking and entering his house: *Woodward v. Walton* (1807) 2 B. & P. N. R. (Eng.) 476; and a man could join with a count for an assault on himself another for an assault on his wife "per quod consortium uxoris for three days amisit:" *Guy v. Livezey* (1618) Cro. Jac. (Eng.) 501. Thus it is that the tortfeasor is liable to another's servant if he beats him, for the act is actionable per se; but he is only liable to the master of the servant if the beating interferes with the service, for at the master's suit it is only actionable per quod: [55] *Marys's Case* (1612) 9 Rep. 113a. They are two separate causes of action in two different persons in respect of the same act. Again, where there is no capacity for service, as in the case of an infant of tender years, the father's action per quod servitium amisit will not lie: *Hall v. Hollander* (1825) 4 B. & C. 660, 10 E. C. L. 436. If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant who is under notice, I take it likewise that the action would not lie. It is the loss of service which is the gist of the action and loss of service depends upon right to the service, and that depends on the contract between the master and the servant. The contract of service being purely personal determines with the servant's death. As he dies, eo instanti the master's right is extinguished. A cause of action, which essentially depends on the present existence of a right to services, cannot be asserted in respect of a state of things which is inconsistent with the existence of such a right. It cannot be changed from an action for injury to the right (for in tort the wrongful act of the defendant and an invasion of the right of the plaintiff must concur) into an action for damage arising upon an event, otherwise an action would lie for causing the death of one's cestui que vie. A similar explanation is applicable to the case of a husband's action for injury to his wife per quod consortium amisit. The right is not in the life but in the service or consortium during life. "Death following instantly upon the act complained of," says the Supreme Court of the United States in *Lucas v. New York Central R. Co.* (1855) 21 Barb. (N. Y.) 245, "there was no time during her life when it could be said that the husband

had lost the services of his wife in consequence of the injury complained of." Such an explanation was offered by the Court in *Monaghan v. Horn*, 7 Can. Sup. Ct. 409, and it has the approval of Sir Gorell Barnes P. in *Clark v. London General Omnibus Co.* [1906] 2 K. B. (Eng.) 648, 6 Ann. Cas. 198. For my own part I think it is sound in this sense, that whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it at any rate provides, though somewhat imperfectly, an intelligible basis for the existing rule sufficient to prevent [56] your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

Mr. Solicitor urged that such a principle is highly technical and that, if a minor hurt to a servant gives a cause of action to a master, a fortiori must the major hurt which results fatally, and he reminded your Lordships that this House in the case of *Mills v. Armstrong* (1888) 13 App. Cas. (Eng.) 1, overruled *Thorogood v. Bryan* (1849) 8 C. B. 115, 65 E. C. L. 114, a case of long standing, and exhorted your Lordships to take heart and do likewise. This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined. Again, an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful. The explanations given of the rule in question are singularly varied. Hale (*Pleas of the Crown*, vol. 1, p. 477) says that a man shall forfeit his goods, though the verdict be *quod interfecit per infortunium et non per feloniam*, "because the King hath lost his subject and that men may be the more careful." Certainly the idea of liability for breach of a duty to use care towards one's fellow-subjects was of slow growth. Again, Parke B. says in *Armstrong v. Southeastern Ry. Co.* (1847) 11 Jur. (Eng.) 758, 759, that the rule had two reasons, "first, because the law provides remedies for such mischiefs only as affect legal rights; and a man has not such legal right in the life of his parent as he has in his own." while, secondly, "it was considered impossible to form an estimate of the value of human life either to a man himself or to others connected with him." Whether, as some have thought, the Roman law affected the matter in the distinction which it drew in various connections between the value of a slave's life and that of a free man it is probably impossible now to tell. The true explanation and the

basis may be, as in our law they often are, purely historical. As is well known, it was long part of English law, when civil injuries and criminal offences had not been clearly distinguished, that among emendable offences there was included homicide, for which payment of wite to the King, [57] or in some cases to the lord, and of bot to the kinsfolk constituted satisfaction. The elaboration of this tariff and the heavy burden of the payments for which it provided in the case of various injuries seem to have been the cause of the disappearance of this system. It passed away very rapidly, partly through the rise of criminal jurisdiction over offences against the King's peace and partly through the attraction of the new action of trespass. The change had taken place before records of decisions begin. Thereafter, while damages were recoverable by the injured man in his lifetime for trespass to his person, homicide became punishable upon indictment, and in Bracton's day was regarded as felonious. Those homicides which were due to negligence could be and were dealt with by the exercise of the King's mercy. On the one hand homicide, which deserved punishment, ceased to be emendable; on the other personal torts, actionable in trespass, were compensated in damages; the intermediate case of an act, tortious but not heinous, causing death was dealt with by the Royal mitigation of the punishment naturally attaching to homicide. There was, I imagine, in early times no actual decision in which it was held that in a civil court the death of a human being could not be complained of, still less was an legal theory advanced in justification of such a rule. Following the development of law through the modification and development of procedure, the system of making satisfaction for homicide by payment of wite and bot died out after the twelfth century; it was dealt with as a punishable felony, with or without mitigation of punishment, in proceedings on the King's behalf. Relatives, who in the time of Henry I. would have been paid by the manslayer in accordance with the rank of his victim, in the time of Edward I. had lost that right and yet could not bring trespass, and this by a process of procedural change and not, so far at least as is known, on any analysis of the nature of the cause of action. Doubtless lawyers as familiar with fatal accidents due to mere negligence as we are would have analysed the injury and have distinguished fully between killing with intent to kill, killing by an intended act without intent to kill but in breach of a duty towards the victim, and killing without either intent or breach of duty by mere misadventure; but in days when negligence causing death was probably rare as compared with our day, and the guilty party more often [58] than not had

[1917] A. C. 38.

nothing with which to pay damages, men acquiesced without discussion in a procedure by which the Royal justice dealt with homicide of all kinds, and actions of trespass did not deal with homicide at all. No doubt it is the tradition of this change that was preserved in the language of Tanfield, J. in *Higgins v. Butcher*, Yelv. (Eng.) 89, "the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony," to which the report in Noy, p. 18, adds, "for the King only is to punish felony except the party brings an appeal." Though no longer in accordance with the formal law as stated by Cockburn, C.J. in *Wells v. Abrahams*, L. R. 7 Q. B. (Eng.) 554, and by Baggallay, L.J. in *Ex p. Ball*, 10 Ch. D. (Eng.) 674, this was historically not far from the truth.

Parallel with the respective proceedings in trespass and on the case and on indictment there remained the right of appeal. For many years an appeal was more common than an indictment in cases of homicide, and the judges were careful to preserve the relatives' private right to the appeal and to secure that they should not be prejudiced by the course taken by or in the name of the Crown. The liability of the manslayer to punishment might be discharged by the King's pardon, or by the appellant's release, but in case of the former the appellant's right was saved, so that the King's pardon could not be pleaded to defeat the appeal. Out of this there arose the practice of using the appeal as an engine of compulsion, by which the slayer was driven to make compensation in order to obtain the appellant's release. In the appeal there were risks on both sides, for if the appeal failed the appellee had his action on the case for a false and malicious appeal. Down to the end of the fifteenth century appeals were nevertheless common, but the statute 3 Hen. 7, c. 1, after reciting that in appeals "the party is oftentimes slow, and also agreed with . . . also he that will sue any appeal, must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue," enacts that indictments should no longer be held back "so that the suit of the party may be saved," but are to be proceeded with at once. Eventually appeals fell much into disuse; but they are mentioned from time to time, and a reported instance occurs, which is instructive, [59] in 1 Croke's Eliz. (Eng.) (1599) pp. 632 and 682, *Shackborough v. Biggins*. Here in a widow's appeal for murder, in which the act was held to have only been manslaughter, the Queen's pardon was relied on. It was decided, with some difference of opinion, that the pardon did not get rid of the appellee's liability to be burnt in the hand, it being the suit of the party and not an information in the Star

Chamber, which was the suit of the Queen. On this the appellee promptly paid the appellant forty marks, and the suit was discontinued. There is little subsequent record of similar cases. In 1770 in *Bigby v. Kennedy*, (1770) 5 Burr. (Eng.) 2643, it is stated that there had been no such case for nearly half a century, and, as eventually the appellant did not appear and a nonsuit was entered, no doubt the appellee had satisfied her demands. In *Ashford v. Thornton* (1818) 1 B. & Al. 405, 457, in 1818, the case which led to the abolition of appeals by 59 Geo. 3, c. 46, s. 1, Bayley, J., observes: "This mode of proceeding, by appeal, is unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his controul. It ought, therefore, to be watched very narrowly by the Court; for it may take place after trial and acquittal on an indictment at the suit of the King; and the execution under it is entirely at the option of the party suing, whose sole object it may be to obtain a pecuniary satisfaction." In this sense down to 1819 the death of a human being could be complained of in a civil court, for the appeal, though "a vindictive action," was on the civil side of the Court, but it could not be complained of "as an injury," and the rule as stated by Lord Ellenborough stands untouched.

My Lords, I think the history of the disappearance of wergild and the persistence of the appeal for homicide, which is to be found in full in the works of Hawkins, Fitzjames Stephen, and Pollock and Maitland, proves, if proof were needed, that Lord Ellenborough's cannot correctly states the law and is one which is now susceptible of expansion of judicial interpretation. There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such [60] action at law been possible, for it was long a form of legalized blackmail.

The historical explanation of the absence of such an action at the suit of relatives applies equally to the case of a master's claim for the death of a member of his familia, for example, a servant. It is equally incapable of judicial creation. Indeed, what is anomalous about the action *per quod servitium amisit* is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

The canon in question has often been classified under the maxim *actio personalis moritur cum persona*, and ill-advised arguments have

sometimes suggested that, even as applied to the case of master and servant, it has something to do with the abatement of actions. The maxim itself has many critics; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin: *Finlay v. Chirney* (1888) 20 Q. B. D. (Eng.) 494, 502; it has been suggested to be a mistake for *actio poenalis* (Poste's *Gaius*, 2nd ed. p. 493), whence it is sometimes insinuated that it is bad law; and it has been peevishly described as "a wretched saw" and as "a purely identical proposition:" Austin's *Jurisprudence*, 3rd ed. vol. 2, p. 1013. Of course reliance on the maxim in this connection leads to the effective retort that the person who has the action is the master and he is alive and sues just because some one else, his servant to wit, is dead. If, however, this maxim is put aside, since in the present case it is irrelevant, I think that the argument that your Lordships should discover under this ancient form of action some principle hitherto undetected is really an appeal to this House in its legislative and not in its judicial capacity.

My Lords, apart from the question of civil liability for the death of a human being, there is another aspect of this case. Injury is the gist of any action of negligence; if the negligence does no damage no action lies. In the present case the sums claimed were paid to widows and other dependents of the drowned men under Admiralty Regulations (pars. 1974 A1 and 2011A), which expressly declare that these are compassionate payments, and granted of grace and not of right, both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money [61] claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it. The collision was the *causa sine qua non*; the consequent drowning of the men was the occasion of the bounty; but the *causa causans* of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon

an accident policy (*Bradburn v. Great Western R. Co.* (1874) L. R. 10 Exch. (Eng.) 1, and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but I think it fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

Death of Human Being as Element of Recovery in Civil Action between Third Persons.

While many courts have confessed their inability to find a satisfactory reason for the rule, it is established beyond controversy that at common law no action will lie to recover damages for the death of a human being caused by the negligence or wrongful act of another, however clearly the death may have involved pecuniary loss to the plaintiff. See 8 R. C. L. tit. *Death*, p. 719. That doctrine which had its origin in the decision of Lord Ellenborough in *Baker v. Bolton*, 1 Campb. (Eng.) 493, is authoritatively established as the law of England by the decision of the House of Lords in the reported case. As is pointed out in that case it has the sanction of the court of last resort in Canada (*Monaghan v. Horn*, 7 Can. Sup. Ct. 409) and in the United States (*Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 U. S. (L. ed.) 580; *The Corsair*, 145 U. S. 335, 12 S. Ct. 949, 36 U. S. (L. ed.) 727). In *Mobile L. Ins. Co. v. Brame*, supra, the rule was stated and the decisions of the state courts discussed, the court saying: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found. In *Hilliard on Torts*, p. 87, sec. 10, the rule is thus laid down: 'Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages.' The most of the cases upon the subject are there referred to. *Baker v. Bolton*, 1 Campb. (Eng.) 493; *Connecticut Mut. L. Ins. Co. v. New York*, etc. R. Co. 25 Conn. 265; *Kramer v. San Francisco Market St. R. Co.* 25 Cal. 434; *Indianapolis*, etc.

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R. Co. v. Keely, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Shields v. Yonge, 15 Ga. 349; Peoria Marine, etc. Ins. Co. v. Frost, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are Cross v. Guthery, 2 Root (Conn.) 90; Plummer v. Webb, Ware 69 [19 Fed. Cas. No. 11,234] and Ford v. Monroe, 20 Wend. (N. Y.) 210. They are considered by the New York court of appeals in Green v. Hudson River R. Co. 2 Keyes (N. Y.) 294, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated."

The foregoing rule is given a somewhat novel application in the reported case wherein it is held that a person who negligently caused the sinking of a naval vessel and the death of sailors thereon was liable to the Crown for the value of the vessel but not for the value of the pensions paid by the Crown to the dependents of the deceased.

The decision thus goes beyond the settled rule that there can be no common-law recovery directly for death, and holds that a person not in privity of estate with the deceased is not entitled to reimbursement for expenditures which the death has imposed on him. In the United States the law with respect to such an application of the doctrine seems to be unsettled. The court in the reported case bases its decision in part on a proposition of indubitable validity, i. e., that the pensions in question were voluntary and not compulsory payments. But respecting compulsory payments the American decisions are somewhat in conflict. The holding of the reported case finds support in *Mobile L. Ins. Co. v. Brame*, supra, wherein it was held that a life insurance company which had paid the amount of a policy was not entitled to recover against a person whose negligence caused the death of the insured. To the same effect see *Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co.* 25 Conn. 285, which overruled the early case of *Cross v. Guthery*, 2 Root (Conn.) 90, 1 Am. Dec. 61, wherein doctrine of *Baker v. Bolton*, supra, was repudiated.

A somewhat analogous situation is presented by the cases passing on the right to recover, independent of a statute, for medical expenses and funeral expenses against a person whose negligence caused the injury and death from which those expenses arose. The English rule appears to be that no such recovery can be had. *Clark v. London Gen. Omnibus Co.* [1906] 2 K. B. (Eng.) 648, 6 Ann. Cas. 108. That doctrine has found some support in the United States. See *Jackson v. Pittsburgh, etc. R. Co.* 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192. But in at least one jurisdiction a right of recovery independent of statute is recognized. *Philby v. Northern Pac. R. Co.* 46 Wash. 173, 13 Ann. Cas.

742, 89 Pac. 468, 123 Am. St. Rep. 926, 9 L.R.A.(N.S.) 1193.

A like conflict exists on the closely related question whether an employer whose servant has been killed by the negligence of a third person may recover from that person the amount which he has been compelled to pay to the servant under a Workman's Compensation Act. In *Turaquist v. Hannon*, 219 Mass. 560, 107 N. E. 443, a recovery over for the amount paid to the dependents of a servant killed by the negligence of a third person was allowed on the principle of subrogation. In New Jersey, however, the right to recover reimbursement is denied. *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91; *Inter-State Telephone, etc. Co. v. Public Service Electric Co.* 86 N. J. L. 26.

DEVINE

v.

BRUNSWICK-BALKE-COLLENDER COMPANY.

Illinois Supreme Court—December 22, 1915.

270 Ill. 504; 110 N. E. 780.

Coroners — Inquest — Validity of Statute.

Coroner's Act (Hurd's Rev. St. 1913, c. 31), § 14, making it the duty of coroners' juries to inquire how, in what manner, and by whom or what dead bodies came to their death, and of all other facts of and concerning the same, together with all material circumstances in any wise related to or connected with the death, and to make up and sign a verdict and deliver it to the coroner, is not unconstitutional as investing the coroner's jury with judicial power in violation of Const. art. 6, § 1, by which all judicial powers are vested in the courts, as "judicial power" is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws, and this power involves, not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such proceedings, and the power to hear without the power to adjudicate and determine the rights of the parties is not judicial power, as that term is used in the constitution.

Same.

As no rights, property or otherwise, are fixed or established by a verdict of a cor-

oner's jury, under Coroner's Act, § 14, that section is not void as depriving persons of property without due process of law.

Evidence — Admissibility of Coroner's Verdict.

In an action for the death of a person struck by defendant's automobile truck, a verdict of a coroner's jury, in which it was stated that in the opinion of the jurors the driver of the truck was blameless, is properly admitted, as the finding of a coroner's jury is admissible in evidence, and the question whether the driver was blameless was an essential matter before the jury for its investigation, and properly included in its verdict.

[See note at end of this case.]

Same.

Where, in an action for the death of a person struck by an automobile truck, a verdict of the coroner's jury, exonerating the driver of the truck, is admitted in evidence, it is error to charge that this verdict was not conclusive, but that the jury should consider it in determining whether or not the driver was guilty of the negligence charged in the declaration, since, while the verdict was competent evidence, its weight was for the jury, and the court had no right to invade the province of the jury and tell them, or attempt to tell them, what weight should be attached thereto, and the instruction was equivalent to a statement that the court regarded such verdict as very strong evidence.

[See note at end of this case.]

Same.

Such instruction is also objectionable, as it was no more the duty of the jury to consider such verdict than to consider any other competent evidence, and their attention should not have been particularly directed to such verdict.

[See note at end of this case.]

Master and Servant — Liability to Third Person — Care and Skill of Servant.

In an action for the death of a person struck by an automobile truck, an instruction that if the driver of the truck was a person of ordinary and reasonable skill in the business in which he was engaged, and if he exercised the ordinary judgment and skill of a reasonably careful and prudent driver at and just before the time of the injury, the jury should find defendant, the driver's employer, not guilty, is proper.

Presumption as to Competence and Care of Servant.

There is no presumption one way or the other as to the skill or want of skill of the driver of a vehicle, when all of the facts and circumstances out of which a charge of negligence arose are before the jury, and whether the driver of the vehicle was a reasonably careful and skilful driver, and exercised that degree of care and skill which an ordinarily careful and skilful driver would have exercised under the circumstances, is a matter of proof, and hence, in an action for the death of a person struck by defendant's

automobile truck, it is error to charge that the law presumed, in the absence of evidence to the contrary, that the driver of the truck was a reasonably careful and skilful driver, and that if plaintiff had failed to prove that he was not a reasonably careful and skilful driver, defendant was entitled to the presumption that he was reasonably careful and skilful in such work.

Automobiles — Negligence in Operation — Instructions.

In an action for the death of a person struck by an automobile truck, an instruction that if, as the driver of the truck approached the place where deceased was injured, there was no apparent necessity appearing for him to stop or slacken the speed of the truck in order to prevent injury to deceased, then the law did not require him to stop or slacken its speed is erroneous, as the question was not whether there was an apparent necessity for stopping or slackening the speed of the truck, but whether or not the driver was operating the truck with that degree of care and skill which an ordinarily prudent and skilful driver would have exercised, having due regard to the location, circumstances, and surroundings.

Error to Superior Court, Cook county:
POMEROY, Judge.

Action by John F. Devine, administrator, plaintiff, against Brunswick-Balke-Collender Company, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. **REVERSED.**

Earl J. Walker for plaintiff in error.

Frank M. Cox and *R. J. Fellingham* for defendant in error.

[505] CRAIG, J.—This is an appeal by John F. Devine, administrator of the estate of Stanley O. Thompson, deceased, from a judgment of the superior court of Cook county in favor of the defendant in error, the Brunswick-Balke-Collender Company, in an action on the case brought against it to recover damages for negligently causing the death of the plaintiff's intestate. It appears that the plaintiff's intestate, a child, in attempting to cross Milwaukee avenue, in the city of Chicago, was struck by an automobile truck driven by a servant of defendant in error and sustained injuries from which he died. A coroner's inquest was held, resulting in [506] a finding exonerating the driver of the truck from all responsibility.

On the trial of this case the verdict of the coroner's jury was introduced in evidence over the objection of plaintiff in error, and the jury were instructed, with respect to said evidence, as follows: "You are further instructed that the coroner's verdict in evidence is not conclusive, but you should con-

sider the verdict of the coroner's jury in this case in considering whether or not defendant's truck driver is guilty of the negligence charged in the declaration or any count thereof." The admission of the coroner's verdict in evidence and the giving of this instruction are the principal errors relied upon for reversal.

It appears from the evidence that Milwaukee avenue runs in a northwesterly and southeasterly direction through the northwestern part of the city of Chicago. Two street car tracks are laid along this street, and at the time the accident occurred the street was torn up on account of certain repairs that were being made. The accident happened between four and five o'clock in the afternoon of October 25, 1911, and was witnessed by several persons. The evidence on the part of the plaintiff in error tends to show that Sebastian W. Foy, an employee of defendant in error, was driving the truck of defendant in error in a northwesterly direction along the east street car track, and that there was another wagon some three hundred feet ahead of the truck, going in the same direction; that plaintiff's intestate, a boy of the age of about six years, with three other boys,—two about his own age and one about five years his senior,—came down Milwaukee avenue and jumped on the rear of a wagon going southeast, on which they rode a short distance before they were ordered off by the driver, and that they then crossed to the east side of the street, where they remained from a minute to a minute and a half and then started to re-cross the street. At this time the wagon on which they had been riding was about one hundred and fifty [507] feet southeast of them and the automobile truck considerably farther away. Plaintiff's intestate was the last child to attempt to cross the street, and at the time he stepped upon the first rail of the car track the automobile truck was from fifty to one hundred feet distant, traveling at the rate of from twenty to twenty-five miles per hour, and was going at about that rate when plaintiff's intestate was struck by the left front wheel or bumper of the truck and knocked down and sustained the injuries from which he died. The evidence on the part of defendant in error tends to show that the automobile truck was proceeding at the rate of from four to six miles per hour at a distance of from fifteen to thirty feet behind the wagon which was ahead of it. Another wagon was proceeding in a southeasterly direction on the opposite track towards the city, and just as the horse's head was about even with the front of the automobile truck the boys suddenly came out from behind this wagon on the other track and attempted to cross in front of the automobile truck, resulting in the accident in

question. As soon as the driver saw the first boy come from behind the wagon he applied his brakes, including the emergency brake, but was unable to bring his vehicle to a stop until after it struck the plaintiff's intestate, who was picked up about five feet west of the automobile truck, and the same did not travel more than from ten to forty feet from the time the first boy came into view until it was brought to a full stop.

The finding of the coroner's jury introduced in evidence was as follows: "An inquisition was taken for the People of the State of Illinois at 2850 North Spaulding avenue, in the city of Chicago, in said county of Cook, on the 26th day of October, A. D. 1911, before me, Peter Hoffman, coroner in and for said county, upon view of the body of Stanley O. Thompson, Jr., then and there lying dead, upon the oaths of six good and lawful men of said county, who being duly sworn to inquire on the part of the People of the [508] State of Illinois into all the circumstances attending the death of said Stanley O. Thompson and by whom the same was produced, and in what manner and when and where the said Stanley O. Thompson came to his death, do say upon their oaths, as aforesaid, that the said Stanley O. Thompson, now lying dead at 2859 North Spaulding avenue, in said city of Chicago, county of Cook and State of Illinois, came to his death on the 25th day of October, A. D. 1911, in the office of Dr. Hannig, 2812 Milwaukee avenue, from injuries received by being struck and thrown to the ground by an auto-supply car owned by the Brunswick-Balke-Collender Company and driven by one Sebastian W. Foy on Milwaukee avenue between Sawyer avenue and Diversey street at about 4:45 P. M., October 25, 1911. From the testimony presented, we, the jury, believe the aforesaid Sebastian W. Foy was blameless for this unfortunate occurrence, and we therefore recommend his discharge from further custody."

Plaintiff in error objected to the introduction of the verdict of the coroner's jury in evidence, and urged in support of his objection that the Coroner's act, and particularly section 14 of that act, is unconstitutional and void. The objection was overruled. He thereupon made a motion to strike out the last paragraph of the verdict, which motion was also overruled, and it was introduced in evidence, as above stated, and taken by the jury to the jury room. By appropriate assignment of error the constitutionality of this section of the statute is raised in this court, and it is by reason of such assignment of error that the appeal has been prosecuted direct to this court.

Section 14 of the Coroner's act is as follows: "It shall be the duty of the jurors, as sworn aforesaid, to inquire how, in what

manner, and by whom or what, the said dead body came to its death, and of all other facts of and concerning the same, together with all material circumstances in anywise related to or connected with the said death, and [509] make up and sign a verdict, and deliver the same to the coroner." (Hurd's Stat. 1913, p. 560.)

The particular objections urged to the constitutionality of this section are, first, that it invests the coroner's jury with judicial power, in violation of section 2 of article 6 of the constitution of this State, by which all judicial powers are vested in the courts; and second, that it deprives a person of his property without due process of law, in violation of the provisions of article 2 of the constitution of this State and of sections 4 and 14 of the amendments of the constitution of the United States, in that it permits one to be deprived of his property by a proceeding of which he has no notice and in which he is not allowed to participate and examine and cross-examine the witnesses produced at such hearing. In our judgment neither of these positions is well taken. No definition of the term "judicial power," as the term is used in the constitution, is given by that instrument. On the contrary, it is there used to designate one of the three great branches or departments into which the powers of government are divided and by which its affairs are to be administered, viz.: The legislative department, which makes, alters and repeals the laws; the judicial department, which interprets, construes and applies the laws; (Cooley's Const. Lim.—6th ed.—108;) and the executive department, which executes and compels obedience to the laws. (Witter v. Cook County, 256 Ill. 616, 100 N. E. 148.) Generally speaking, there is no great difficulty in distinguishing between the different departments and the duties and functions of each, but in the practical application of those various functions to the affairs of State it is often difficult to determine to which of these three departments the duties and functions of many officers properly belong. This arises from the fact that in the practical administration of State affairs there is often such a blending and admixture of the different powers of government that instances will occur in which officers are charged with functions [510] and duties which partake of the nature of all three of these departments. As said in *State v. Illinois Cent. R. Co.* 246 Ill. 188, on page 231, 92 N. E. 814: "Administrative and executive officers are frequently called upon, in the performance of their duties, to exercise judgment and discretion, to investigate, deliberate and decide, and yet it has been held that they do not exercise judicial power, within the meaning of the constitutional pro-

vision. (*Land Owners v. People*, 113 Ill. 296; *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091; *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L.R.A. 801.) The power exercised is ministerial or executive, but as an incident to it the official is called upon to perform acts which are in their nature judicial,—very nearly akin to those exercised by the courts. Such powers, when conferred upon other officials than judges, are often termed *quasi-judicial* or *discretionary*. They are said to 'lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct, but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs but after a discretion in its nature judicial, the function is termed *quasi-judicial*.' Bishop on Non-Contract Laws, secs. 785, 786; Mecham on Public Officers and Agents, sec. 637." Judge Cooley, in his work on Constitutional Limitations (6th ed. p. 109), defines judicial power as follows: "The power which adjudicates upon and protects the rights and interests of individual citizens and to that end construes and applies the laws." This general definition of the judicial power has been adopted and approved by this court in the following among other cases: *Land Owners v. People*, supra; *People v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L.R.A. 105; *People v. Simon*, supra; *State v. Illinois Cent. R. Co.* supra. The power involves not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties [511] to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights, in controversy in such proceedings. (*O'Brien v. People*, 216 Ill. 354, 3 Ann. Cas. 966, 75 N. E. 108, 108 Am. St. Rep. 219.) The power to hear without the power also to adjudicate and determine the rights of the parties to such proceedings cannot be said to be the exercise of the judicial power as that term is used in the constitution of this State. The duties and functions of a coroner and the coroner's jury are of this character. While the duties and functions of such jury are of a judicial nature to the extent that they are authorized to inquire into and investigate how, by whom and in what manner the deceased came to his death and of all the facts and circumstances connected with or in any manner related to or connected with such person's death, and may subpoena and examine witnesses under oath for that purpose, they have no power, on such hearing, to adjudicate and

determine the rights and liabilities of the parties growing out of the matter under investigation by them, and their finding has none of the attributes of a judgment or decree. No rights or liabilities, either civil or criminal, are established or fixed by it. A person exonerated from all liability by the coroner's jury is still subject to be indicted by the grand jury for causing the death of the person of which he was exonerated by the coroner's jury, and he may be tried and convicted of such act as a criminal offense notwithstanding the verdict of the coroner's jury exonerating him; and the same is true with respect to the civil liability growing out of such occurrence. Their powers, then, are not judicial, but, at most, are only quasi-judicial in their nature, and the statute in question is therefore not invalid as a delegation of the judicial power of the State.

For the same reason the act is not void as depriving a person of his property without due process of law, as no rights, property or otherwise, are fixed or established by the verdict rendered in such a proceeding. At most the [512] finding of a coroner's jury is but a public document containing *prima facie* evidence of the facts properly before the jury for investigation,—that is, as to the person and the manner in which such person came to his death,—and as such, as held in *U. S. Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L.R.A. 65, their finding is admissible in evidence. In the *Vocke* case, on pages 566 and 567, it is said: "We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by the law, and when it is returned into court and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered." This holding has since been approved in the following among other cases: *Grand Lodge, etc. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Stollery v. Cicero, etc.* St. R. Co. 243 Ill. 290, 90 N. E. 709; *Foster v. Shepherd*, 258 Ill. 164, Ann. Cas. 1914B 572, 101 N. E. 411, 45 L.R.A.(N.S.) 167. The admissibility in evidence of the finding of a coroner's jury is now too well established by the authorities to be longer considered an open question in this State. The question as to whether or not Foy was blameless of the accident was an essential matter before the coroner's jury for their investigation and a proper matter to be included in their verdict and as such to go to the jury. For the reasons

given we think the court did not err in admitting the coroner's verdict in evidence.

As to the instruction calling the attention of the jury to the verdict of the coroner's jury and directing them to consider it in determining the question of defendant's negligence, we are of opinion it should not have been given. The verdict of the coroner's jury, like any other public document, was competent evidence tending to prove any matter of fact properly appearing on the face of the inquisition, [513] but its weight as evidence, like any other document or other evidence in the case, was for the jury, in connection with all of the other facts and circumstances proven on the trial. (*Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. 622.) The court had no right to invade the province of the jury and tell them, or attempt to tell them, what weight should be attached to such finding of the coroner's jury. The instruction is also objectionable in directing the jury's particular attention to the verdict of the coroner's jury, and telling them that they should consider it in determining whether or not defendant was guilty of the negligence charged in the declaration or some count thereof. It was no more the duty of the jury to consider the evidence on that question than it was their duty to consider all of the other competent evidence in the record bearing upon that question. In *Rumbold v. Supreme Council Royal League*, 206 Ill. 513, 69 N. E. 590, we held it was error to give an instruction which told the jury that the coroner was a public officer acting under the sanction of an official oath in the discharge of his duties, and that the inquisition was competent evidence tending to prove the cause of death which appears upon the face of the inquisition, and that they should consider the finding of the coroner's jury, together with all the other facts and circumstances in the case, in determining whether or not the deceased committed suicide, but that "the finding of the coroner's jury or inquest is, however, not conclusive upon you in determining the cause of death," and we there said, on page 518: "All that was admitted in evidence was the verdict of the coroner's jury, and while it would have been proper to have told the jury, by an instruction, that the verdict of the coroner's jury could be considered by them in determining the nature and cause of death, it should have stated that in very simple language, and have coupled with it the statement, not that it was not conclusive, as is the conclusion of the instruction here, but that it was simply evidence that might be considered with other evidence. As we interpret the instruction, [514] it in effect tells the jury that while the verdict is not conclusive, it comes under the sanction of the official oath

of an officer in the discharge of his duty and is of a very high class of evidence. We think the court had as well said to the jury that while the law does not make the verdict of the coroner's jury conclusive upon the question before them, the court regards it as very strong evidence of the matters contained in it. The vice of the instruction is not relieved by telling the jury that they should consider it in connection with the other evidence, facts and circumstances in the case." What is there said with respect to the use of the word "conclusive" in the instruction is equally applicable to the instruction given in the case at bar. It was error to give this instruction.

Complaint is made of the giving of other instructions, all of which have been considered. Two of them are of such a character as to demand consideration at this time.

By the sixth instruction the jury were told that if they believed, from the evidence, that the driver of the defendant's truck was a person of ordinary and reasonable skill in the business in which he was engaged, and that he exercised the ordinary judgment and skill of a reasonably careful and prudent driver in driving the truck at and just before the time of the injury complained of, then they should find the defendant not guilty. This instruction, standing alone, was proper.

The seventh instruction was as follows:

"The law presumes, in the absence of any evidence to the contrary, that the driver of the truck in question was a reasonably careful and skillful driver of auto trucks; and in this case, if you believe, from all the evidence, plaintiff has failed to prove that the driver of the truck in question was not a reasonably careful and skillful driver of automobile trucks, then the defendant is entitled to the presumption that the said driver was reasonably careful and skillful in such work."

[515] The last instruction should not have been given. There is no presumption, one way or the other, as to the skill or want of skill of the driver of a vehicle, whether horse-drawn or propelled by mechanical power, when all of the facts and circumstances out of which the charge of negligence arose are before the jury. When negligence is charged and there is evidence in support of such charge, the fact that the driver of the vehicle was a reasonably careful and skillful driver and that he exercised that degree of care and skill which an ordinarily careful and skillful driver would have exercised under the circumstances was a matter of proof by the defendant. The instruction should not have been given.

The court also gave at the instance of defendant in error the following instruction, numbered 17:

"If you believe, from all the evidence in this case, that as the driver of the defendant's truck at the time and place in question approached the place where the deceased was injured there was no apparent necessity appearing for the driver of said truck stopping or slackening the speed of the truck in order to prevent injury to the deceased, then the law did not require the driver of the truck to stop or slacken the speed of the truck."

This instruction was clearly erroneous. It is not a question as to whether or not, in approaching the place in question, there was no "apparent necessity appearing for the driver of said truck stopping or slackening the speed of the truck in order to prevent injury to the deceased," but whether or not the driver was operating the car with that degree of care and skill which an ordinarily prudent and skillful driver would have exercised under the circumstances, having due regard to the location, circumstances and surroundings in which the driver was operating his car at the time. The evidence on the question of negligence was close and conflicting, and in this condition of the record [516] it was essential that the jury should have been clearly and accurately instructed as to the law of the case.

For the errors indicated in giving the instructions complained of, the judgment of the superior court must be reversed and the cause remanded for a new trial.

Reversed and remanded.

NOTE.

Admissibility of Coroner's Verdict as Evidence in Subsequent Proceedings.

Introductory, 892.

In Criminal Action, 893.

In Action on Insurance Policy:

Generally, 893.

As Part of Proofs of Loss, 895.

In Action for Damages for Death:

Generally, 897.

Rule in Illinois, 898.

On Question of Survivorship, 899.

On Question of Testamentary Capacity, 899.

Introductory.

The earlier cases discussing the admissibility of the verdict of a coroner's jury as evidence in subsequent proceedings are reviewed in the notes to *Boehme v. Sovereign Camp*, etc. 4 Ann. Cas. 1019, and *Cox v. Royal Tribe*, 95 Am. St. Rep. 752. This note presents the recent cases on the subject.

The authorities are in conflict, as is stated in the previous note. At common law the verdict of a coroner's jury was admissible in

evidence on the ground that the proceedings of the coroner's inquest were judicial in their nature, and hence the verdict was a judicial finding in rem, and as such, conclusive. And in a few jurisdictions the courts have followed the common-law rule and admitted the verdict of a coroner's jury as competent evidence of the cause of death. In Illinois it is provided by statute that the verdict of a coroner's jury, when filed with the clerk of the proper court, is a public record of the county, and as such, it has been held that it is competent, though merely *prima facie* and not conclusive evidence, to be considered as tending to prove any matter properly before the coroner, which appeared at the inquest. *Stollery v. Cicero*, etc. St. R. Co. 243 Ill. 290, 90 N. E. 709, *affirming* 148 Ill. App. 499; *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411, Ann. Cas. 1914B 572, 45 L.R.A. (N.S.) 167, *reversing* 164 Ill. App. 199; *Armour v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Novitsky v. Knickerbocker Ice Co.* 276 Ill. 112, 114 N. E. 545; *Variety Mfg. Co. v. Landaker*, 129 Ill. App. 630; *Devine v. Rothschild*, 178 Ill. App. 13; *Devine v. Johnaton*, etc. Co. 189 Ill. App. 556. And see the reported case. In most jurisdictions, however, the verdict is not deemed to be a record and has no evidentiary value.

In Criminal Action.

In a prosecution for homicide, it is well settled that the proceedings before the coroner, including the verdict of the coroner's jury, are inadmissible in evidence. *State v. Row*, 81 Ia. 138, 46 N. W. 872; *State v. Turner*, *Wright (Ohio)* 20; *Whitehurst v. Com.* 70 Va. 556; *Hedger v. State*, 144 Wis. 279, 128 N. W. 80. See also *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372. Likewise, a copy of a certificate of death, purporting to be made by the coroner, is inadmissible. *State v. Garth*, 164 Mo. 553, 65 S. W. 275. In *Whitehurst v. Com.* supra, the court said: "As to the branch of it (the exception) which relates to the refusal of the court to admit the proceedings and verdict of the coroner's jury, it may be observed that these proceedings are usually conducted in this state, in the absence of the accused, without the aid of counsel, and often in the absence of the most material witnesses, both for the prosecution and the defense. To admit those proceedings, and a verdict thus arrived at, to be used as evidence upon the trial, to influence, perhaps to control, the verdict of the jury, would, in our judgment, lead to the subversion and final overthrow of the jury system; whilst in nearly every case the rights of either the commonwealth or the accused would be inevitably prejudiced." In *Smalls v. State*, 101 Ga. 570, 28 S. E. 981, 40 L.R.A. 369, it was

said that the verdict of a coroner's jury was merely advisory to the officers charged with the execution of the public law, and might make it the duty of the coroner to issue a warrant for the arrest of the person suspected of the homicide, but that further than that, it was without effect, and that the verdict itself had no probative effect as evidence, and was binding on no one as evidence.

In *Louisiana*, however, the coroner's certificate or proces verbal which gives the name of the deceased and states the cause of death is admissible in evidence in a prosecution for the murder of the person over whose body the inquest was held. *State v. Hopkins*, 118 La. 99, 42 So. 660.

On an information for libel, it has been held that a coroner's inquisition, on paper, which charged the prosecutor with the murder of a person, was admissible on proper evidence showing that an inquest had been held, that the person on whom it was held had been murdered, and that the person murdered was called by a certain name. *Reg. v. Gregory*, 8 Q. B. 508, 55 E. C. L. 508, 15 L. J. M. C. N. S. 38, 10 Jur. 387, 115 Eng. Rep. (Reprint) 966.

In Action on Insurance Policy.

GENERALLY.

In a few jurisdictions in an action on an insurance policy, where the defense is suicide or death resulting from a cause precluding liability on the part of the insurer, the verdict of a coroner's jury is admissible, and, together with the other evidence, is for the consideration of the trial jury in determining the cause of the death of the insured. *Zimmerman v. Masonic Aid Assoc.* 75 Fed. 236; *Sharland v. Washington L. Ins. Co.* 101 Fed. 206, 41 C. C. A. 307; *Hassencamp v. Mutual Ben. L. Ins. Co.* 120 Fed. 475, 56 C. C. A. 625; *Rumbold v. Supreme Council Royal League*, 206 Ill. 513, 69 N. E. 590; *Knights Templars' etc. L. Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066, *affirming* 110 Ill. App. 648; *Peckham v. Modern Woodmen of America*, 151 Ill. App. 95; *Lundholm v. Mystic Workers*, 164 Ill. App. 472; *Genna v. Continental Casualty Co.* 167 Ill. App. 413; *Miles v. Court of Honor*, 173 Ill. App. 187; *Mittelstadt v. Modern Woodmen of America*, 143 Ia. 186, 121 N. W. 803, 136 Am. St. Rep. 765; *Tomlinson v. Sovereign Camp*, etc. 160 Ia. 472, 141 N. W. 950; *Boeck v. Modern Woodmen of America*, 162 Ia. 159, 143 N. W. 999. *Compare U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567. In *Tomlinson v. Sovereign Camp*, etc. supra, the following instruction was approved as being as favorable to the defendant as it was entitled to: "The verdict of the coroner's jury as to the inquest held upon the body of

Ralph V. Collier at the time of his death, has been offered in evidence upon the trial of this cause. This evidence is competent and should be considered by you as bearing upon the question of whether the death of Ralph V. Collier was by accidental or suicidal means. This verdict, standing alone, would be prima facie evidence that his death was caused by suicidal means, but such verdict is not conclusive; and the actual manner in which he did meet his death may be inquired into by you, and determined by a preponderance of the evidence before you, bearing in mind also the presumption of his death being accidental, together with all the other facts and circumstances surrounding the manner of his death by all the evidence introduced upon the trial of this cause."

But it has been held that the verdict of a coroner's jury is not conclusive. *Rumbold v. Supreme Council Royal League*, 206 Ill. 513, 69 N. E. 590; *Mittelstadt v. Modern Woodmen of America*, 143 Ia. 186, 121 N. W. 803, 136 Am. St. Rep. 765; *Tomlinson v. Sovereign Camp*, etc. 160 Ia. 472, 141 N. W. 950. In *Rumbold v. Supreme Council Royal League*, supra, it was held to be error to give an instruction which told the jury that the coroner was a public officer acting under the sanction of an official oath in the discharge of his duties, and that the inquisition was competent evidence tending to prove the cause of death which appeared on the face of the inquisition, and that they should consider the finding of the coroner's jury together with all the other facts and circumstances in the case, in determining whether the deceased committed suicide, but that "the finding of the coroner's jury or inquest is, however, not conclusive upon you in determining the cause of death." The court said: "All that was admitted in evidence was the verdict of the coroner's jury, and while it would have been proper to have told the jury, by an instruction, that the verdict of the coroner's jury could be considered by them in determining the nature and cause of death, it should have stated that in very simple language, and have coupled with it the statement, not that it was not conclusive, as is the conclusion of the instruction here, but that it was simply evidence that might be considered with other evidence. As we interpret the instruction, it in effect tells the jury that while the verdict is not conclusive, it comes under the sanction of the official oath of an officer in the discharge of his duty, and is of a very high class of evidence. We think the court had as well said to the jury, that while the law does not make the verdict of the coroner's jury conclusive upon the question before them, the court regards it as very strong evidence of the matters contained in it. The vice of the instruction is not relieved by telling the jury that they should

consider it in connection with the other evidence, facts and circumstances in the case." In *Supreme Lodge, etc. v. Beck*, 181 U. S. 49, 21 S. Ct. 532, 45 U. S. (L. ed.) 741, affirming 94 Fed. 751, 36 C. C. A. 467, it was said: "The plaintiff in her proofs of loss stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this matter the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained and the jury were satisfied that the death did not arise from suicide, she was not concluded by this declaration. We see no error in this ruling." To the same effect, see *Hassencamp v. Mutual Ben. L. Ins. Co.* 120 Fed. 475, 56 C. C. A. 625. The presumption against suicide and in favor of death from natural causes is not overcome by the introduction at the trial of the verdict of a coroner's jury. *Mutual L. Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295. And in *Peckham v. Modern Woodman of America*, 151 Ill. App. 95, it was held that a coroner's verdict, while competent to be considered in connection with the other evidence pertaining to the issue, was not sufficient to establish prima facie the fact that the insured committed suicide; and that an instruction that, notwithstanding such verdict, it was necessary for the defendant to prove by a preponderance of the evidence that the insured committed suicide before the defendant could under its defense of suicide defeat a recovery by the plaintiff, stated the law correctly.

In a few recent instances the verdict of a coroner's jury has been received in evidence without any objection as to its admissibility and the court without passing on its admissibility proceeded to discuss its weight as evidence. See *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 15 So. 388, 49 Am. St. Rep. 348, 24 L.R.A. 589. See also *Puls v. Grand Lodge, etc.* 13 N. D. 559, 102 N. W. 165, wherein the court said: "The respondent was not present and had nothing to do with the post mortem examination or the coroner's inquest. Consequently neither the report of death nor the verdict of the coroner's jury were in the nature of admissions by the beneficiary. As neither of the documents was objected to, we express no opinion as to their admissibility. It is clear that neither of the documents was conclusive evidence against the plaintiff, but had only such evidentiary weight as the circumstance attending the making of them entitled them to."

In the majority of the jurisdictions the rule is that coroner's inquisition proceedings are not judicial in their nature, and hence,

in an action on an insurance policy, the verdict of a coroner's jury, while competent to be received in evidence as part of the proof that the death of the insured occurred, is inadmissible as original, substantive evidence of the cause of the insured's death. *American Nat. L. Ins. Co. v. White* (Ark.) 191 S. W. 25; *Craig v. Modern Woodmen of America*, 40 Ind. App. 279, 80 N. E. 429; *Ætna L. Ins. Co. v. Milward*, 118 Ky. 716, 4 Ann. Cas. 1092, 82 S. W. 364, 68 L.R.A. 285, 26 Ky. L. Rep. 589; *Pacific Mut. L. Ins. Co. v. McCabe*, 157 Ky. 270, 162 S. W. 1136; *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651; *Walden v. Bankers' L. Assoc.* 89 Neb. 546, 131 N. W. 962; *Mut. L. Ins. Co. v. Schmidt*, 40 Ohio St. 112, *affirming* 6 Ohio Dec. (Reprint) 901, 8 Am. L. Rec. 629; *Dougherty v. Pacific Mut. L. Ins. Co.* 154 Pa. St. 385, 25 Atl. 739; *Chambers v. Modern Woodmen of America*, 18 S. D. 173, 99 N. W. 1107; *Metropolitan L. Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120; *Texas Mut. L. Ins. Co. v. Brown*, 2 Tex. Unrep. Cas. 160; *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L.R.A. (N.S.) 404. See also *Fey v. I. O. O. F. Mut. L. Ins. Soc.* 120 Wis. 358, 98 N. W. 206. *Compare* *Grand Lodge, etc. v. Banister*, 80 Ark. 190, 96 S. W. 742; *Mutual L. Ins. Co. v. Hayward* (Tex.) 27 S. W. 36. In *American Nat. L. Ins. Co. v. White* (Ark.) 191 S. W. 25, the court said: "The next assignment of error presents the question of whether the verdict of the coroner's jury was admissible as original evidence of the cause of the insured's death. This question has never been decided by this court. . . . 'The law gives such high credit to an inquisition of death, found before a coroner, that anciently the judges would not receive a verdict acquitting a person of the death of a man found against the accused by the coroner's inquest, unless the jury finding such acquittal had also found what other person did the act, or by what other means the party came to his death, because it appeared by the coroner's view, on record, that a person was killed.' 2 Bac. Abr. 431. Under our statute the coroner's jury makes an ex parte investigation of supposed crime resulting in homicide for the purpose of aiding in the administration of the criminal laws of the state. Other persons having property interests depending upon the cause of the death are not allowed to participate in the hearing before the coroner's jury with the view to establish rights by the verdict. While the coroner's inquest is made on behalf of the state and a record of it is required to be made and kept it cannot, on any well-grounded principle of American common law, become evidence in another suit as to the

cause of the death investigated. There is no good reason why a stranger to the proceedings should be in any wise bound by the verdict, or that it should be evidence against him of the cause of the death. If such verdict be admissible as evidence, it follows from its very nature that it might also constitute proof of the main fact and of every essential fact in issue. It might not only show the fact of death by violent and external means within a day covered by the policy, but might also find that the person slaying the insured was justified or was not justified in killing him. In either event a property right of one or the other litigants would be determined by a verdict of which no notice was given to him, and without an opportunity to cross-examine the witness whose oaths established it. He would be deprived of his property without due process of law; for the first verdict might be sufficient to maintain the action or sustain the defense, as the case might be, if it was the only evidence offered or obtainable, and thus the verdict of the trial jury would be merely a formal ratification of the coroner's verdict. We cannot see any well-grounded reason why such a verdict should be evidence against a stranger to the proceedings."

AS PART OF PROOFS OF LOSS.

When by the terms of an insurance policy or the by-laws of the company the record or verdict of a coroner's jury is required to be attached to the proofs of death made by the beneficiary, a verdict so attached is admissible in evidence on the trial of a case on the ground that it contains admissions of the beneficiary against his interest as to the cause of death. *American Nat. L. Ins. Co. v. White* (Ark.) 191 S. W. 25; *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651; *Northwestern Mut. L. Ins. Co. v. Maguire*, 10 Ohio Cir. Dec. 562, 19 Ohio Cir. Rep. 502; *Dougherty v. Pacific Mut. L. Ins. Co.* 154 Pa. St. 385, 25 Atl. 739; *Metropolitan L. Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120; *Bachmeyer v. Mutual Reserve Fund L. Assoc.* 82 Wis. 255, 52 N. W. 101 (*reversed* on other grounds, 87 Wis. 325, 58 N. W. 399); *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851. See also *Krogh v. Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L.R.A. (N.S.) 404. In *Metropolitan L. Ins. Co. v. Wagner*, *supra*, the court said: "Ordinarily the verdict of a coroner's jury is inadmissible in this state to prove the cause of death (*Boehme v. Sovereign Camp, etc.* 98 Tex. 376, 4 Ann. Cas. 1019, 84 S. W. 422); but when, as in this case, it is expressly provided by the policy that proofs of death 'shall contain the record and verdict of the

coroner's inquest, if any be held,' and 'the proofs of death shall be evidence of the facts therein stated in behalf of . . . Company,' a different question is presented. The undisputed evidence shows that a coroner's inquest was held over the insured's dead body; that a record of the proceedings was made, and that it was expressly found by the coroner: "That some time during the 1st day of December, 1904, the said Frederick Wagner, with suicidal intent, in said county and state, did cut himself on the bend of the right elbow, inflicting a wound two and one-half inches in length, which probably caused a severance of the ulnar artery, and (11) distinct punctures within an area of two inches in the region of the left nipple, all apparently made by a penknife, from the effects of which said wounds the said deceased died at the time and place hereinbefore stated," which was certified to as well as proved by the depositions of the coroner himself; and that neither the record nor verdict was attached to the proofs of death furnished by the plaintiff to the defendant. In view of these facts the record and verdict of the inquest, when offered in evidence by the defendant, should not have been excluded upon the objection of plaintiff that the proceedings were ex parte. There can be no doubt that the record of such proceedings, which were duly proved and attested, was evidence of the fact that the inquest was held and a record of the proceedings was preserved. This, in connection with the proofs of death furnished by plaintiff, would have conclusively shown that such proofs were not made in compliance with the provisions of the policy, and there can be no question as to its admissibility as evidence to establish such fact. But in view of the stipulation in the policy referred to, if it were shown that plaintiff knew of such proceedings and could have obtained the record and wilfully refused to attach it to the proofs of death, we would not be prepared to hold that the record of such proceedings was not evidence of the fact that deceased came to his death by his own hand. If the record had been attached to the proofs of death, as was required by the express terms of the policy, it would under the agreement between the insurer and assured have been evidence for the former of such fact. And we are not inclined to hold that the beneficiary in the policy, by wilfully omitting from the proofs the record of the proceedings, in violation of its express terms, can deprive the defendant of evidence that was expressly agreed upon by the parties to the contract."

It has been held that a report of an inquest was admissible in an action on an insurance policy for the purpose of enabling the jury to decide whether the report, with the other information obtained by the direc-

tors, ought to have satisfied them that the cause of death was an accident within the terms of the policy, where the policy expressly required that satisfactory proof of the external, violent and accidental means of death should be furnished to the directors. *Nichols v. Commercial Travelers' Eastern Acc. Assoc.* 221 Mass. 540, 109 N. E. 449.

In *Fisher v. Fidelity Mut. L. Assoc.* 188 Pa. St. 1, 41 Atl. 467, it appeared that in the "claimant's statement," filed as "proof of death," to which a copy of the coroner's inquest and the testimony given thereon were attached, the plaintiff entered the following protest: "I have been informed the verdict was suicide, but I decline to be bound by it." It was held that while by attaching a copy of the verdict and depositions the plaintiff admitted their existence, their force as admissions by him was very much weakened, if not wholly overcome, by his protest, wherein he expressly declined to admit the truth of the facts which the defendant company sought to prove by them.

In *Craiger v. Modern Woodmen of America*, 40 Ind. App. 279, 80 N. E. 429, while recognizing the foregoing rules, the court said: "The beneficiary in this case was required by the by-laws of the company to submit a duly authenticated and duly certified copy of the coroner's proceedings, all evidence, and the verdict. Compliance with such requirement amounted to an admission that an inquest was had; that certain evidence was heard, and a certain verdict rendered, but it could not, by any stretch of imagination, be taken as an admission of the truth of the testimony or the accuracy of the verdict. So that the quality essential to the introduction of the coroner's verdict and proceedings, as evidence of the truth of the facts therein recited, was wholly lacking. It has been heretofore held by this court that the coroner's verdict is not admissible in evidence. . . . The mere fact that such record was furnished to appellant by appellee can in nowise change either the reason for the rule or the rule itself. In this case the proofs themselves show that appellant refused to admit the truth of the facts found by the coroner, but explicitly announced her disbelief in their truth. She cannot be held to have admitted the truth of the fact which she expressly denied."

The rule does not apply where the coroner's verdict is furnished by the company's agents, as nothing they do without the knowledge or consent of the plaintiff or beneficiaries can be received as admissions against them; and in such a case, the verdict of the coroner's jury is properly excluded. *Krogh v. Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L.R.A.(N.S.) 404. And see *Brotherhood of American Yeomen v. Hickey* (Tex.) 191 S. W. 162, wherein the court held that

the certificate of the coroner, furnished to the defendant with the proofs of death by the plaintiff under the terms of the policy, and offered for the purpose of showing the cause of the death of the insured and as admissions of the plaintiff, was inadmissible, since there was no condition in the policy that the proofs of death furnished under the terms of the policy should be evidence of the fact in a trial on behalf of the defendant.

No such rule of evidence obtains, moreover, and the verdict of a coroner's jury is inadmissible, where the terms of the policy or the by-laws of the company do not require the verdict or the record of the coroner's inquest to be furnished to the company as part of the proof of death, as in such a case the proof of death is made in an effort to settle the loss without a suit, and has no connection whatever with the trial, when the company has refused to make payment. *American Nat. L. Ins. Co. v. White* (Ark.) 191 S. W. 25; *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651. Nor has the rule any application when a copy of the verdict at the coroner's inquest is not furnished as a part of the proofs of death, pursuant to the requirements of the policy, but merely as a voluntary act in an effort to secure a settlement. *American Nat. L. Ins. Co. v. White* (Ark.) 191 S. W. 25; *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651. Thus, where the conditions of the policy required the representative to make legal proof of the death and cause of death, as a condition precedent to liability, and he voluntarily sent to the company as part of the proofs the coroner's inquest and examination, it was held that the finding at the coroner's inquest was admissible as evidence of the compliance of the representative of the deceased with the terms of the contract, and that the statements made in them might be used as admissions against the representative, but that he was not estopped by such statement to show the facts. *Northwestern Mut. L. Ins. Co. v. Maguire*, 10 Ohio Cir. Dec. 562, 19 Ohio Cir. Rep. 502.

The admission resulting from the inclusion of a coroner's verdict as part of the proofs of loss is *prima facie* only and may be rebutted. *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651; *Northwestern Mut. L. Ins. Co. v. Maguire*, 10 Ohio Cir. Dec. 562, 19 Ohio Cir. Rep. 502; *Dougherty v. Pacific Mut. L. Ins. Co.* 154 Pa. St. 385, 25 Atl. 739. See also *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L.R.A. (N.S.) 404.

In Action for Damages for Death.

GENERALLY.

In an action for death due to negligence, it has been held that the record and verdict of
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a coroner's jury is not admissible, for the purpose of proving the cause of death, as it cannot in any way affect the rights of private parties, not parties to the coroner's proceeding. *Central R. Co. v. Moore*, 61 Ga. 151; *Olwell v. Milwaukee St. R. Co.* 92 Wis. 330, 66 N. W. 362. So, where it was admitted that the deceased died from the injury, and the only purpose of the offer of the verdict of the coroner's jury was to prove negligence, the verdict was held to be inadmissible, since the opinion of the jury on the question of negligence was but hearsay; and even viewing it as a judicial proceeding, the inquest could not bind the defendant, who was not a party to it. *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760. In *Fleming v. Canadian Pac. R. Co.* 11 Ont. W. Rep. 982, wherein Meredith, C. J., said: "With regard to the other point, the reception of the finding of the coroner's jury, it may be that for some purpose—the finding of the death of the man or something of that kind—the finding may be admissible, but it is a new proposition, as it occurs to me, that it is admissible as evidence against some one who may not have been at the inquest, to fix him with civil liability for the death of the person whose death was the subject of the inquiry. I am of opinion that the learned trial judge properly rejected the finding as evidence for that purpose."

The report of a coroner has also been held to be inadmissible to prove the cause of death. *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082, wherein the court said: "It is simply a report made to the auditor by the coroner as a part of the vital statistics of the state, under the provisions of the act creating the state board of health, and, as said by the court in *Sovereign Camp, etc. v. Grandson*, 64 Neb. 39, 89 N. W. 448: 'It is a mere police regulation, and is not intended for supplying the public at large with information upon which reliance may be placed in the business affairs of the community. We do not think the record is of such a character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation.'"

A coroner's death certificate is inadmissible in an action for damages for death by wrongful act to show what caused the death of the intestate, nor can it be made evidence indirectly by requiring the coroner to identify it and then state what reason was assigned by him as the cause of the death. *District of Columbia v. Washington*, 44 App. Cas. (D. C.) 120, 43 Wash. L. Rep. 722, L.R.A. 1916C 379.

In *Massachusetts*, in an action for damages for death by wrongful act, the report of the inquest is not admissible as substantive evidence. *Jewett v. Boston El. R. Co.* 219 Mass. 528, 107 N. E. 433; *Carney v. Boston El. R. Co.* 219 Mass. 552, 107 N. E. 411.

RULE IN ILLINOIS.

In Illinois, under a statute providing that the verdict of a coroner's jury is a public record when filed and therefore is competent but not conclusive evidence in another proceeding as tending to prove any matter properly before the coroner which appeared at the inquest, it has been held that a coroner's verdict is admissible as evidence in an action for damages for death due to negligence. *Stollery v. Cicero*, etc. St. R. Co. 243 Ill. 290, 90 N. E. 709, *affirming* 148 Ill. App. 499; *Foster v. Shepherd*, 258 Ill. 164, Ann. Cas. 1914B 572, 101 N. E. 411, 45 L.R.A. (N.S.) 167, *reversing* 164 Ill. App. 199; *Novitsky v. Knickerbocker Ice Co.* 276 Ill. 112, 114 N. E. 545; *Variety Mfg. Co. v. Landaker*, 129 Ill. App. 630; *Devine v. Rothschild*, 178 Ill. App. 13; *Newell v. Cleveland*, etc. R. Co. 179 Ill. App. 497; *Novitsky v. Knickerbocker Ice Co.* 180 Ill. App. 188; *Devine v. Johnston*, etc. Co. 189 Ill. App. 556. And see the reported case. See also *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Callaway v. Spurgeon*, 63 Ill. App. 571. In *Stollery v. Cicero*, etc. St. R. Co. *supra*, it was held that the verdict of a coroner's jury, which found that the deceased came to his death by being caught and crushed by a coal conveyor, was admissible, though the coroner's name and seal were attached. In *Foster v. Shepherd*, 258 Ill. 164, Ann. Cas. 1914B 572, 101 N. E. 411, 45 L.R.A. (N.S.) 167, it appeared that the verdict of the coroner's jury, which was admitted in evidence, was as follows: "In the matter of the inquisition on the body of Ralph M. Foster, deceased, held at Lovington, Illinois, on the 20th day of August, 1909, we, the undersigned jurors, sworn to inquire of the death of Ralph M. Foster, on oath do find that he came to his death by reason of a gunshot wound in the right shoulder and ranging downward through the heart. The said wound was caused from a bullet fired from a gun held in the hands of Homer Shepherd, who fired the shot thinking Ralph M. Foster was a burglar on watch while other burglars were trying to enter his home, and that said Homer Shepherd fired the shot in protection of his home and in our opinion was justified in the act." The trial court thus instructed the jury: "Court instructs the jury that you should entirely disregard the following portion or part of the verdict of the coroner's jury which has been admitted to evidence, to wit: 'Who fired the shot thinking Ralph M. Foster was a burglar on watch while other burglars were trying to enter his home, and that said Homer Shepherd fired said shot in protection of his home and in our opinion was justified in the act.' And you are further instructed that it will be highly improper for you to consider the above and foregoing portion of the verdict

of the coroner's jury." The appellate court said: "The verdict of a coroner's jury in an inquest over a dead person is required by the state to be sealed up and returned to the clerk of the circuit court, where it shall be filed and preserved. It thus becomes a public record of the county, and as such is competent evidence to be considered in another proceeding as tending to prove any matter properly before the coroner which appears on the fact of the inquest. . . . It is contended by defendant in error that the part of the coroner's verdict excluded by this instruction was not a proper finding to be made, and that it was therefore properly excluded. By section 14 of the Coroner's Act it is made the duty of a coroner's jury to inquire how, in what manner and by whom or what the dead body came to its death, and to make up and sign a verdict and deliver the same to the coroner. The principal object of an inquest is to determine whether a crime has been committed. It is further by section 23 of the act made the duty of the coroner, if any person is implicated by the inquest as the unlawful slayer of the deceased or as an accessory thereto and is not in custody, to apprehend and commit to the county jail such person so implicated or cause him to be apprehended or committed, there to remain until discharged by due process of law. Under these provisions of the coroner's act the finding that 'the said wound was caused from a bullet fired from a gun held in the hands of Homer Shepherd, who . . . in our opinion was justified in the act,' was a necessary and proper part of the verdict. That Homer Shepherd fired the shot in the protection of his home, thinking the deceased was a burglar, was merely the finding of an evidentiary fact and might properly have been stricken as surplusage. The instruction as given was too board."

But the verdict of the coroner's jury is only *prima facie* proof of the various circumstances therein stated and is not conclusive, and hence the trial jury, after considering the evidence as a whole, may, from the preponderance of the evidence, find any fact differently from the way in which it is stated in the coroner's verdict. *Grant v. Chicago*, etc. R. Co. 176 Ill. App. 292; *Novitsky v. Knickerbocker Ice Co.* 180 Ill. App. 188. And see the reported case.

In the reported case, an action for damages for the death of a child caused by the negligence of the driver of an automobile truck, a servant of the defendant, it is held that the verdict of a coroner's jury stating that they, the jurors, believed that the driver was blameless, was properly admitted in evidence, as the question whether he was blameless was an essential matter for investigation by the coroner's jury, and a proper matter to be included in their verdict.

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v.

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168 N. Car. 16; 84 S. E. 21.

But, as a coroner is given no power or authority by the Illinois statute to make a finding on the question of the negligence of either the deceased or of his employer, with a view to fixing or defeating personal liability against the employer for his death, it has been held that a verdict imputing negligence to the defendant is not admissible in evidence against the defendant in an action for damages for such death. *Roloff v. Luer Bros. Packing, etc. Co.* 158 Ill. App. 614. To the same effect, see *Novitsky v. Knickerbocker Ice Co.* 276 Ill. 112, 114 N. E. 545. And see *Casey v. Chicago*, 189 Ill. App. 188, an action against a city for the death of a child owing to a defect in the street, wherein it was held that that part of a coroner's verdict which found that the condition of the street was the cause of the accident, was incompetent. In *Callaway v. Spurgeon*, 63 Ill. App. 571, it was held that a finding in a coroner's verdict admitted in evidence, that death was not occasioned by negligence of a character sufficient to support an action at law for civil damages, was extra-judicial and void.

Under the Illinois Workmen's Compensation Act, the rule is regarded as settled that the inquest of the coroner and the verdict of the jury are competent evidence in an inquiry as to the cause of death in a case arising under the statute. And while the verdict is not conclusive, yet it is to be regarded as *prima facie* evidence tending to prove the cause of death. *Armour Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173.

On Question of Survivorship.

It has been held that the verdict of a coroner's jury which did not purport to contain a statement of any facts within the knowledge of the coroner, or any juror, as to the time or manner of the death of two persons, who were murdered on the same occasion and whose bodies were burned in their house, was inadmissible on the question of survivorship, as being a matter of mere opinion and hearsay. *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

On Question of Testamentary Capacity.

In proceedings to contest the probate of a will, wherein it appeared that both the testatrix and the testatrix's mother had committed suicide, it was held that the verdict of a coroner's jury in an inquisition on their bodies was inadmissible on the issue of lack of testamentary capacity by reason of the insanity of the testatrix. In *re Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

Justices of the Peace — Invalid Judgment — Procedure for Vacation.

Where judgment is rendered by a justice of the peace on insufficient service, defendant's remedy is by motion to vacate before the justice who tried the case.

Process — Service — Reading to Defendant over Telephone.

Under Revisal 1905, § 439, providing that summons shall be served by the sheriff or other officer reading the same to the party or parties named as defendant and such reading shall be a legal and sufficient service, service cannot be made by the officer reading the summons to the defendant over the telephone, though the officer may recognize defendant's voice and know he is talking to the proper person.

[See note at end of this case.]

Appeal from Superior Court, Anson county: SHAW, Judge.

Action by S. Lowman and Company, plaintiff, against T. J. Ballard, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[17] Motion to set aside judgment, heard on appeal from a justice's court.

On the hearing it appeared that in 1911 plaintiff instituted an action on account against defendant, before a justice of the peace in said county, and on 16 March, 1911, recovered judgment for \$173.75, defendant not appealing at this time; that defendant instituted a civil action against plaintiff to set aside said judgment, claiming that he owned plaintiff nothing and that he had never been served with summons in said cause, and, for many months after its rendition, he had no notice or knowledge of the existence of the judgment or of any suit against him by plaintiff.

Judgment in that cause was entered in favor of the present plaintiff, and, on appeal, judgment was affirmed, the court being of opinion that, on the facts presented in that record, defendant could only proceed by motion before the justice to set aside the judgment. See case, *Ballard v. Lowry*, 163 N. C. 487, 79 S. E. 966. Pursuant to that intimation, defendant, on notice duly served, made the present motion to set aside the judgment before the justice, J. H. Benton, Esq., and on the ground, among others, that the summons

in the action had been originally served by telephone, the sheriff being at Wadesboro and defendant at Morven, 9 miles distant.

On the hearing the justice found that the sheriff had "read the summons by telephone to defendant, and, recognizing that it was defendant, by conversation had between them at the time he had made the return on the process served," etc. The justice being being of opinion that there had been a valid service, refused to set aside the judgment, and on appeal to Superior Court this ruling was affirmed, the material portion of his Honor's judgment being as follows: "The court finds as a fact that J. T. Short was a deputy sheriff of Anson County on 27 February, 1911, and read the summons issued in said cause by said justice of the peace to the defendant T. J. Ballard over the telephone line connecting Wadesboro and Morven, and that the said deputy sheriff was well acquainted with said defendant and recognized his voice over the telephone in the conversation between them at said time, whereupon said deputy sheriff made the return and indorsement upon the summons. Upon these facts the court finds that, as a matter of law, said service and reading of said summons over the telephone was a legal and valid service of said summons over the telephone was a legal and valid service of said summons, and the court so holds. From this judgment the defendant excepts and appeals to the Supreme Court."

Lockhart & Dunlap for appellant.
Gulledge & Boggan for appellee.

[18] HOKE, J.—On the facts appearing of record, and in like case whenever the remedy is available to him, the procedure open to defendant is by motion before the justice who tried the cause. This was virtually held on a former appeal between the parties, 163 N. C. 486, and the position is in accord with our decisions on the subject. *Thompson v. Lynchburg Notion Co.* 160 N. C. 519, 76 S. E. 470; *Clark v. Deloach Mills Mfg. Co.* 110 N. C. 111, 14 S. E. 518; *Whitehurst v. Merchants'*, etc. *Transp. Co.* 109 N. C. 342, 13 S. E. 937; *McKee v. Angel*, 90 N. C. 60.

In *Thompson v. Lynchburg Notion Co.* supra, that being a case where service had been regularly made by publication and defendant had neither appeared nor answered, the decision was made to rest on section 1401 of Revisal, which allowed an appeal to be taken in such cases within fifteen days after personal notice of the rendition of the judgment, but Associate Justice Allen, in his well considered opinion, is careful to note that, in case of "defective process, or where there is the appearance of service when in fact there was none, the remedy by motion before the justice is properly available."

Both in the Superior and justices' courts the statutory limits as to time within which motion of this character shall be made are cases where the proceedings are in all respects regular, and do not apply in cases when there is defective service of process or an entire absence of it. *Massie v. Hainey*, 165 N. C. 174, 81 S. E. 135; *McKee v. Angel*, 90 N. C. 60 supra.

Authority here is also to the effect that where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. *Martin v. Bufaloe*, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679; *Smith v. Smith*, 119 N. C. 314, 25 S. E. 878; *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780; *McKee v. Angel*, supra.

This, then, being proper procedure, and the only service of the original process in this cause having been by means of the telephone, "the sheriff being at Wadesboro and defendant at Morven, 9 miles distant," the question chiefly and directly presented by this appeal is whether, in this jurisdiction, there can be a valid service of original process by means of the telephone. Our statute on the subject (Revisal, sec. 439) provides that the summons "shall be served, in all cases except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service."

This method of serving process was established by the Legislature of 1876 and 1877, and at the time the telephone as a general system of communication was not in existence. An interesting account of its origin and development will be found in 126 U. S. Reports, the volume being devoted to a report of the telephone cases, from which it appears that the patents were applied for in 1876; that the litigation concerning [19] them was continued for something over eleven years, and it was not until 1887 that decision was made declaring the rights in dispute to be in Professor Bell and his associates, and although the active development of the system was immediately and successfully entered upon, the telephone, as now operated, did not come into very general use and application until about the beginning of the present century, or a short period preceding that date.

At the time, therefore, when this legislation was enacted, the only method of service contemplated or provided for was by reading the summons in the personal presence of the party, and we are of opinion that this is and should continue to be the correct interpretation of the statute as it is now written. This service of original process by which courts of justice acquire jurisdiction over the rights of person and of property of the citizen has al-

ways been, and properly, regulated with circumspect care. In the Code of '68 it could only be done by leaving a copy of the summons under the court seal; later, in '76 and '77, the seal was omitted when the process ran to the county of the officer who issued it and, at the same session, a service by reading by the sheriff or some officer was established; both of these changes, it will be noted, being by legislative enactment. And this method of service, by reading in the personal presence of the party, affording as it does to the sheriff a more satisfactory and certain means of identifying the person on whom the service is made and giving assurance to the litigant of the true import of the act by present exhibition of the process, giving him better opportunity, too, to ascertain the position and authority of the officer, and being the method contemplated and described by the statute at the time it was passed, and the only one recognized for twenty years thereafter, should not be altered, if at all, save by express provision of the statute law.

The only valid objection to be made to this position is that it may, at times, make for the inconvenience of the officer; but, even as to him, the proposed change is of doubtful benefit. We know that a sheriff or other officer having a process of this character in charge is properly held to a strict account as to the verity of the service. If he makes a false return, he and his bondsmen may be subjected to serious penalties, and, looked at only from the officer's point of view, there is grave question if in the effort to perform this important duty he should be subjected to the additional uncertainties, sure to arise by recognizing the proposed manner of service.

On authority the question does not seem to have been very much discussed in the courts. The nearest case we have been able to find on the subject is in *Ex p. Terrell* (Tex.) reported in 95 S. W. 536. That case was an attachment for contempt against a defaulting witness, their statute requiring service of subpoena by "reading [20] same in the hearing of the witness," and it was held that service by telephone was no valid service; and the position derives some support in a New York case of *Gilpin v. Savage*, 201 N. Y. 167, Ann. Cas. 1912A 861, 94 N. E. 656, 34 L.R.A. (N.S.) 417, to the effect that presentment of a note and demand for payment must be by actual exhibit of the instrument, and that a demand made by telephone was insufficient.

We are aware that in a number of cases it has been held that, under regulations requiring service of notices to be in writing, service by means of a telegram, written out by the agent and delivered, has been upheld; but these were generally in instances where the parties had voluntarily adopted that method of communication. And where the principle

has been approved in reference to court process, the statute did not require that service be made by any particular or designated person, and the party being charged with the duty of having the notice served, the Court has held that such party could make the company his agent to write the notice, within the meaning of the law. Such was the case presented in *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 16 L.R.A. 933, a case to which we were cited.

On service of writs of certiorari the statute required that the applicant should cause written notice of its proper sanction to be served on his opponent, and service by telegram was upheld, on the ground that, as the statute required the party to cause notice to be served and did not designate by whom, the plaintiff could designate the company as his agent, and the notice so written out would be considered a sufficient compliance with the law. Even in that aspect the case seems to have caused the Court much perplexity, and one of the judges dissented.

Again, there are cases in which notices of injunction were served by telegram and the service was sustained, but these decisions were in application of the principle declared by the English chancellors, to the effect that, under certain circumstances, if a party in an injunction proceeding knew of the existence of the order, and intentionally violated it or knowingly or intentionally acted so as to render the same of noneffect, he could be held for contempt. *Vansandau v. Rose*, 2 Jac. & W. (Eng.) 264; *Hearn v. Tenant*, 14 Ves. Jr. (Eng.) 136; *Rulings by Lord Chancellor Eldon*, the first referred to in *Cape May*, etc. *R. Co. v. Johnson*, 35 N. J. Eq. pp. 422-425, and the second in *Davis v. Champion Fiber Co.* 150 N. C. 87, 63 S. E. 180, erroneously printed in this last citation as *Lord Erskine*. But, while this ruling may be upheld in proceedings of that character, the exigency of the case at times requiring the recognition of such a principle, it should not be allowed to prevail in reference to the service of original process where, as in this case, the statute, as heretofore stated, at the time it was enacted contemplated and provided for a service by reading the writ in the personal presence of the party, and involving, too, the necessary exhibition of the process to the litigant.

[21] On the facts in evidence, we are of opinion, and so hold, that there has been no valid service of process shown, and this will be certified, that the judgment of the justice's court be set aside and defendant allowed to answer.

Reversed.

CLARK, C. J. (*dissenting*).—Revisal, 439, provides that the summons shall be served by the officer "reading the same to the defend-

ant, and such reading shall be a legal and sufficient service." *All this has been done in this case.* Unless the court can legislate by putting into the statute what the Legislature has not yet thought proper to put therein, this is "a legal and sufficient service." The summons, it is found as a fact, was read by the sheriff to this defendant, and indeed there is no question as to that fact or as to his being sheriff or as to the identity of the defendant. What more can be necessary? Whether or not there might be greater or less certainty as to the identity of the defendant, in service by phone, when he is brought to the phone by an agent of the sheriff, or the sheriff recognizes him, is a matter for the Legislature, if that body should find that the law needs amendment.

As to the identity of the sheriff, that is a matter for the court on the service of every process which is authenticated by his signature. As to the identity of the defendant, the officer takes that risk, whether he sees him (for he may not know him personally except by information) or phones him. The sheriff is under the highest obligations to be certain as to the identity of the defendant, for he is acting under the oath of his office and is also liable under a heavy penalty for making a false return.

The law does not require that the sheriff shall "leave a copy" with the defendant. That was long since dispensed with. Nor has it ever required that he should see the defendant. There can be no question that a nearsighted sheriff or deputy could serve process, the identity of the defendant being in all cases a matter of which the officer must assure himself under liability to a penalty. If there is a mistake as to the identity of the defendant, he can avail himself of it equally whether the sheriff is immediately present, or is blind, or speaks over the phone. In the Trojan War Stentor made his summons to surrender to the enemy on the walls of Troy at a good distance, out of the reach of arrows, and the service was sufficient. In fact, in former days the heralds of opposing armies served their summons at a good distance by trumpet.

There is no statute and no decision that requires that the defendant shall see the paper, or read it himself, or that he shall know the identity of the officer. The court knows its own officers, and the defendant takes the risk if he does not recognize the officer's authority. The officer takes the risk under his oath, and under a penalty, if he mistakes the identity [22] of the defendant. Whether the service is on a defendant who was personally present or who is at the end of a phone, these principles apply.

In this day there is an urgent demand that courts shall reduce the time and expense of proceedings. Why should an officer ride all

night over bad roads, and in bad weather, at great expense, to read a summons or a subpoena to a party who is needed in court next morning, when he can read the paper as intelligently to the party over the phone and with as much certainty of his identity as if he went to the locality and hunted him up. Indeed, when the service is made by phone the officer will take even greater precautions, because he cannot reach the party in that way unless he is brought to the phone, at his request by some agent of the sheriff, or voluntarily remains at the phone till the reading is completed.

It is suggested that "service by phone is not safe." Millions of dollars in contracts are made every day over the phone, often at a long distance, between parties who do not see each other, but who are satisfied of each other's identity, by taking proper precautions. The great transportation systems of the country find it safe to use the telephone in controlling the movements of trains on which depend the safety of thousands of lives and millions of property daily. Great armies, on whose movements rest the destiny of nations and the lives of thousands of men, are risked, every day, on the use of the telephone. Over the phone doctors give prescriptions on which the lives of patients depend, and lawyers give advice on which rest the disposal or transfer of property. Yet we are asked to say that it is unsafe for this officer to notify this defendant to appear before a magistrate in a small action involving a few dollars when it is found as a fact that this defendant was the proper party, that the officer was duly authorized, and that he fully read this summons to this defendant as required by the statute!

Why should the courts alone be deprived of the advantages of modern improvements, and retain every antiquated method as to service or as to pleadings, on the ground that it was "not thus done under the Saxon Heph-tarchy?" It is a great saving of useless expense and of time to use this method of summoning jurors and witnesses and parties over the phone, of which bank officials, business men, railroad officers, and everybody else avail themselves. Indeed, there is less risk of imposition as to identity in the service of a summons or subpoena than in any of the other businesses of life, for the reason that the officer being under a penalty for making an erroneous return, will take extra care in that regard. Besides, the party who is served can rarely, if ever, have any motive to assume to be the defendant when he is not. Moreover, he waives any other service, as this defendant did, by remaining at the phone until the entire summons is read to him.

[23] If an officer should read a summons to a man on the other side of a screen, or of a curtain, or in another room, and his identity

is certain, as is found in this case, and his hearing it is not denied, this surely would be sufficient. The invention of the phone has merely extended the range of the voice of the officer and of the hearing of the defendant.

The statute does not require that the officer should return that he "saw the defendant and read the summons to him." But it only requires "reading the same to defendant, and such reading shall be a legal and sufficient service." For the Court to add the requirement that the officer "saw the defendant" is legislation by the Court, and will make a very considerable addition of trouble and expense to the officers which the Legislature has not placed upon them.

Whether the officer sees or does not see the defendant, it is a defense that he was not an officer, or that there was a mistake of identity as to the defendant, or that the summons was not read to him. These defenses are in no wise affected by the circumstance that the summons was read over the phone, or at a distance, or to one in another room. The statute does not require the immediate presence of the defendant.

A captive with the Indians who received a letter told the chief its contents and from whom it came. The chieftain took the letter. He looked at it and saw nothing on it to that purport. He put it to his ears and heard nothing. He smelt of it and perceived nothing. He said that his captive was either a liar or a witch, and in either event he ought to be burned, and burned he was. The chief knew no other than oral means of communication.

When the invention of the telescope vastly extended human vision, Galileo, gauging the starry depths, announced that the world revolved around the sun, and not the sun around the world. The ignorant priests condemned him to be burned, and he only escaped by taking it back.

The most ignorant man in North Carolina now knows that by the invention of the telephone the range of the human voice and of human hearing has been lengthened. When this summons was read to the defendant by the officer over the phone (all of which are found as facts), it was the officer's voice and not a substitute—as in the case of a telegram or letter—which the defendant heard, and the officer truly reported, as is found, that he had "read" the summons to him. The statute requires nothing more, and there is no reason that it should. A few years ago it might have been asserted that thus reading a summons to a man 9 miles off was a physical impossibility, and therefore on its face untrue. But modern invention has made it an ordinary occurrence. A conversation over the phone is competent in evidence; why not the "reading" of a summons, when the identity of the party is found as a fact?

[24] This system of serving summonses and subpoenas is a great saving of expense and of time. It has been much resorted to in the courts, and now to hold it illegal may jeopardize the validity of many legal proceedings which have been based upon such service. In a practical age there is no reason why the courts should not avail themselves of the same conveniences which business men and indeed all others customarily use and have found to be safe and reliable as well as convenient. No statute forbids it, and the courts, in actual practice, have recognized and used it.

Allen, J., concurs in dissenting opinion.

NOTE.—The General Assembly being in session, at once passed chapter 48, Laws 1915, authorizing service over the phone of subpoenas for witnesses and in summoning jurors, leaving still without legislation only the service of summons for defendants, which, however, is probably only about one-twentieth of the business, as witnesses and jurors are thus notified in both criminal and civil cases. [Rep.]

NOTE.

Validity of Service, Notice, or Other Transaction by Telephone.

In General, 903.

Service, Notice, Application or Order in Judicial Proceeding, 903.

Oath or Affidavit, 905.

Notice or Demand Other than in Judicial Proceeding, 906.

Contract, 907.

In General.

It has been held repeatedly that with respect to its admissibility in evidence a conversation by telephone stands on the same footing as an ordinary conversation. See the notes to the following cases: McCarthy v. Peach, 1 Ann. Cas. 801; Gzowski v. Forst, 20 Ann. Cas. 704; Carroll v. Parry, Ann. Cas. 1916E 971. Consequently, the mere fact that a transaction inter partes is had by telephone would not seem to affect its validity. With respect to notices and the like in judicial proceedings, however, the use of the telephone is ordinarily unauthorized. See the cases cited throughout this note.

Service, Notice, Application or Order in Judicial Proceeding.

The rule supported by the weight of authority is that where a notice is required to be served and the manner of service is not provided for, personal service is requisite. See the note to Haj v. American Bottle Co.,

Ann. Cas. 1915A 220. It is also a general rule that wherever notice is required or authorized by law in any judicial proceeding the notice must be in writing, although not in terms required to be written. See the note to *McPhail v. Denver*, Ann. Cas. 1916E 1143.

Accordingly it is held that process cannot be served by telephone. *Sharpless Separator Co. v. Brillhart* (Md.) 98 Atl. 484; *Ex p. Terrell* (Tex.) 95 S. W. 536. And see the reported case. Thus in the case first cited, it was said: "We cannot give our sanction to service of process by reading the writ over a telephone. It is the duty of an officer to whom it is directed to serve it in person, and it would open the door for fraud, confusion, and misunderstandings, if the officers of the law be permitted to so serve process. It may be true that generally a familiar voice can be recognized over the telephone, but an officer in the performance of such duties is often called upon to serve process upon strangers, or those whose voices he is not familiar with. One desiring to escape service might have some one answer for him, and then contend he was not summoned, or he might truthfully say that he did not know the voice of the officer, or did not understand what he said. In *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 107 Md. 556, 571-573, 69 Atl. 405, 411, 16 L.R.A.(N.S.) 746, we considered the use of telephones in business transactions, and we sanctioned the use of them to the extent therein stated, but we added: 'As it is a character of evidence that might be used improperly, courts should be careful in the application of the rule.' The use of them by an officer for serving process is far more objectionable. The presumption in favor of the truth and correctness of the officer's return would necessarily have to be at least modified, and if the service was questioned, it would oftentimes be difficult for a conscientious officer to sustain his return. Without deeming it necessary to give further reasons for not sanctioning it, we must emphatically register our disapproval of it. In many cases no harm would result, as those summoned would raise no question, but even one mistake might prove to be costly to the officer or very injurious to the public." In *Ex p. Terrell* (Tex.) 95 S. W. 536, it was held, under a statute providing for the service of a subpoena by reading the same in the hearing of the witness, that service of a subpoena by reading it to the witness over the telephone was insufficient. The court said: "It is urged that service by phone is within the letter and spirit of our statutes on the subject of serving process. If this were clearly true, then the law might be applied to the new invention, or the new invention applied to the law. But we do not think so. In such case service by phone, the party served being without the

view, could only be identified by the voice of the party on whom the service should be made, and this could only apply to but few cases, only to such as the officer making the service could know and recognize the voice, and this would be a rather unsatisfactory method of identification at best. The best means of identification would be recognition of the person on whom the service was made; such recognition based on personal view of the witness by the officer. Accordingly, we hold that service by phone is not contemplated or embraced within our statutes on the subject of service of subpoena by an officer on a witness."

Under a statute requiring all notices to be in writing it has been held that orders of court based on applications, notices of which were given by telephone, could not be sustained. *Ex p. Apeler*, 35 S. C. 417, 14 S. E. 931.

In *Friscoville Realty Co. v. Police Jury*, 124 La. 589, 50 So. 590, it was held that an application by telephone in the district court for a suspensive appeal could not be made the basis of a mandamus to compel the granting of the appeal, where the proceedings in the district court were required to be in writing.

Under a statute requiring a written order to adjourn a court it has been held that the court was not adjourned by an order sent by telephone. *Schofield v. Horse Springs Cattle Co.* 65 Fed. 433.

In *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, an affidavit for attachment by the plaintiff's attorney was verified on the information and belief of the affiant, he stating in his affidavit that his information was based on statements received by telephone from the plaintiff and his attorney in another city. In holding the affidavit to be insufficient the court said: "There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice; or if it had appeared, in some satisfactory way, that he knew it was the plaintiff who was speaking with him. None of these facts, however, were averred. There was absolutely nothing, upon which the judge could pass, to show that it was the plaintiff who was speaking and not some undisclosed person, who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection to which the invention of the telephone has been brought, has immediately facilitated the intercommunication of individuals at distant points, and inasmuch as the voice of the speaker is heard in most, not in all, cases the identification of the speaker should be possible. The very facility of communication and of identification permits and therefore imposes a duty

upon the party, who invokes judicial action upon the strength of information so received, to state his knowledge, or his grounds for believing, that it actually came from the party required to furnish it. To authorize an attachment to issue, upon the affidavit furnished here, was in disregard of the rule which requires that the source of information shall be disclosed in such a way as to enable the court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts. Judicial action upon such a source of information, as was here disclosed, was justified, below, by analogy with telegraphic communication. The analogy is incomplete. If the information comes through the telephone, it is quite possible to identify the speaker. Then, too, there is not, in the case of a telephonic communication, any record, like the message, which, in the case of the use of the telegraph, remains for reference and verification."

In *State v. Nelson*, 19 R. I. 467, 34 Atl. 990, 61 Am. St. Rep. 780, 33 L.R.A. 599, it was held that a jury in a criminal case was improperly dismissed by the trial judge on information received by an officer in attendance on the court by telephone that a juror was sick and unable to proceed with the trial.

Oath or Affidavit.

An oath cannot be administered by telephone. *Carnes v. Carnes*, 138 Ga. 1, 74 S. E. 785; *Matter of Napoli*, 169 App. Div. 469, 155 N. Y. S. 416; *Sullivan v. Flatonia First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421. Thus in *Carnes v. Carnes*, supra, in holding to be insufficient a verification to a petition for a writ of ne exeat the court said: "The plaintiff and one of her attorneys made oath that she called up the notary over the telephone and told him she was swearing to a petition for alimony against her husband, and that the attorney would bring it to the notary for his signature, and he said, 'All right.' The attorney further made affidavit that he carried the paper to the notary and told him that it was such, and the notary answered: 'Yes, she called me and told me she was swearing to same.' The notary made affidavit that the plaintiff called him up by telephone and said she had just 'signed a paper' in the case of herself against her husband for alimony, ne exeat, etc., and wanted him 'to sign the same as a witness for her,' and that her attorney would bring it to him to sign, and that the attorney brought the paper, and the notary signed it, without ever seeing the plaintiff about the matter. If the evidence of the notary be taken as correct, there was not the slightest effort to administer an oath, but a mere statement over a telephone wire that the plaintiff had signed a paper,

and desired the notary to sign as a witness. If the testimony of the plaintiff and her attorney be taken as correct, there was still no legal making of an affidavit. In order to make an affidavit, there must be present the officer and affiant and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long distance swearing is not permissible. Telephonic affidavits are unknown to the law. A moment's thought will show a sound reason for this. An officer hears a voice coming through the receiver of a telephone. For identification, he must rely on recognition of the voice (if he knows it) and the statement of the person as to who he or she is. Reference is made to some paper, more or less fully described. Later a third person presents to the notary a paper as being the one sworn to. How does the notary know, except by hearsay, that the paper presented is the identical paper mentioned? If this is an oath, when is it taken—when the telephone message is sent, or when the paper is later presented by the third person? Where is it taken—at the place where the affiant is, or that where the officer is? Suppose they should be in different counties, where would be the jurisdiction of a prosecution for perjury, if the oath were untrue? It will be seen that great confusion might easily arise from such a system." And in *Sullivan v. Flatonia First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421, it was held to be proper for the trial court to refuse to consider an application for a continuance which was sworn to over the telephone. The appellate court said: "Now it may be true that one can be certainly identified by the sound of his voice, but that is not enough for the purpose of the rule in such a case. It may be true that the officer when he takes the affidavit of one well known to him might recognize his voice over the telephone and therefrom be able to testify that he took the oath and made the affidavit in issue. But it must be borne in mind that the law does not require the clerk or notary to be acquainted with one who becomes an affiant before them. A stranger may appear, sign an affidavit, and demand that the officer swear him and affix his jurat. In that case the officer certifies and can swear to no more than that the man who affixed the name to the affidavit swore to its truth. The name he signed may have been fictitious, but the individual swore to it as the clerk or notary certified, and he would be subject under that name or his true one to a prosecution for perjury. Now if the contention of appellant is sound the rule must be laid down broadly, and whoever might demand the official jurat by his personal presence might also demand it over the telephone. Had it not so happened

in this case that the clerk was acquainted with Sullivan and identified him by his voice, he could have done no more than certify that a man whom he did not know, but who represented himself to be Sullivan, authorized the name of Sullivan to be signed to the affidavit and swore its contents were true. The clerk could not possibly identify him as the one making the affidavit if the question should afterwards arise. In a prosecution for perjury such testimony on the part of the clerk would not even raise an issue against the unknown affiant. So we hold that not only is the personal presence of the affiant required to the end that by appropriate form and ceremony his conscience may be bound, but that it is required also to the end that the officer may see and know that the man who signs also swears." In *Matter of Napolis*, 169 App. Div. 469, 155 N. Y. S. 416, an attorney was severely censured for administering an oath by telephone to a person making an affidavit.

For a discussion of the validity of an acknowledgment by telephone, see the note to *Wester v. Hurt*, Ann. Cas. 1912C 329.

Notice or Demand Other than in Judicial Proceeding.

It has been held that notice by telephone of the dishonor of a note is sufficient under a statute authorizing a verbal or written notice of dishonor. *American Nat. Bank v. National Fertilizer Co.* 125 Tenn. 328, 143 S. W. 597. Compare *Thompson, etc. Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933, wherein it was held that notice of dishonor by telephone to the indorser of a promissory note was not sufficiently shown where the person giving the notice testified that he telephoned to the office of the indorser and notified the person answering of the dishonor, but was unable to say whether the person answering was the indorser or his bookkeeper. It was however said in that case by way of dictum: "Following comparatively recent decisions of the highest courts in several states, and on principle, we do not hesitate to hold that . . . notices over the telephone are as binding as if the telegraph or mails are used, etc."

It has been held that a demand of payment on the maker of a note by telephone is insufficient to charge an indorser, on the ground that it requires personal attendance at the place of demand with the note, in readiness to exhibit it if required and to receive payment and surrender it if the debtor is willing to pay. *Gilpin v. Savage*, 201 N. Y. 167, Ann. Cas. 1912A 861, 94 N. E. 656, 34 L.R.A. (N. S.) 417, reversing 132 App. Div. 948, 118 N. Y. S. 1108 which affirmed 60 Misc. 605, 112 N. Y. S. 802.

A demand on a carrier by telephone for the delivery of goods transported by it may be

shown. *Rock Island, etc. R. Co. v. Potter*, 36 Ill. App. 590; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

In *Reed v. Burlington, etc. R. Co.* 72 Ia. 166, 33 N. W. 451, 2 Am. St. Rep. 243, in holding that a railroad company was charged with knowledge of a defect in a car which caused an injury to an employee where notice of the defect was communicated by telephone, the court said: "It appears from the evidence of one Montgomery, who was a switchman in the yards at Cedar Rapids, and who had charge of the switch crew in making up trains, and under whose supervision the train in question was made up, that he discovered that there was no follow plate on the back part of the draw-bar, and that the draw-bar would shove back until its rim would strike the deadwood. He further testified that, upon making the discovery, he went to a switch shanty in the yards, in which there was a telephone used for the purpose of communicating with the general office and shops, and he called the general office, and stated to some one who answered his call that the bar was in bad order, and the person answering his call inquired, 'In what way?' and the witness told him that the back plate was gone, and received the reply, 'If she will hold together, send her off.' It is claimed that the testimony as to the communication by telephone should have been excluded, because it was with some unknown person, and ought not to bind the defendant. It appears that the telephone was placed in the yards for the very purpose of communicating with the office. It was the means of communication provided by the defendant; and, in the absence of any showing that some officious intruder had taken up quarters in the office, and assumed to transact the business of the company, it ought to be presumed that the communication was made with one having authority to give directions as to the matter inquired about."

In *Second Pool Coal Co. v. People's Coal Co.* 188 Fed. 892, 110 C. C. A. 526, affirming 181 Fed. 609, a suit in admiralty was brought against a coal company to recover damages for injuries to the libellant's steamboat alleged to have been caused by the negligence of the libelee in failing to mark a sunken flat which the coal company had cut adrift from a float while in its possession to save the float and other boats. A lock keeper testified that he had called the libellant's office on the telephone and communicated the fact that the flat had been sunk in the channel. It did not appear who was the person that answered the telephone nor did it appear that the communication was delivered to any employee or officer of the libellant. It was held that the evidence was insufficient to show knowledge of the sunken flat.

For a discussion of the necessity for personal service of notice in the absence of an express requirement as to the manner of service, see the note to *Haj v. American Bottle Co.* Ann. Cas. 1915A 220. And for a treatment of the necessity that a notice required or authorized by law other than in a judicial proceeding shall be in writing, see the note to *McPhail v. Denver*, Ann. Cas. 1916E 1143.

Contract.

Waiving a consideration of the effect of a statute requiring certain contracts to be in writing, it is no objection to a contract that it is made by a telephonic conversation. *Yolo Bank v. Sperry Flour Co.* 141 Cal. 314, 74 Pac. 855, 65 L.R.A. 90 (dictum that contract by telephone is deemed to have been made at place where offer of one party is accepted by other); *Tung v. Converse*, 180 Mich. 195, 146 N. W. 629; *Star Bottling Co. v. Cleveland Faucet Co.* 128 Mo. App. 517, 109 S. W. 802; *St. Louis Maple, etc. Flooring Co. v. Knost*, 148 Mo. App. 563, 128 S. W. 532; *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525, (holding that the mere fact that the conversation between the plaintiff's agent and the defendant's agent was by means of the telephone did not put on the plaintiff any greater burden of proof than that involved in establishing any oral contract made through an intermediary). See also *Cuozzo v. Maine Cent. R. Co.* 112 Me. 580, 91 Atl. 1006; *Kansas City Star Pub. Co. v. Standard Warehouse Co.* 123 Mo. App. 13, 99 S. W. 765. Thus in *St. Louis Maple, etc. Flooring Co. v. Knost*, supra, it was said: "A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between parties standing face to face and carrying on the conversation which culminates in the contract." And in *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629, it was said "an offer may be accepted by telegram or by telephone."

In *Cox v. Cline*, 147 Ia. 353, 126 N. W. 330, the joint purchasers of a stallion were sued on a note given for the purchase price, the defense to the action being fraud and rescission of the contract therefor. It was held that a rescission of the contract was sufficiently shown by evidence that the agent of the purchasers called up the seller by telephone and notified him of their election to rescind the contract, the seller abruptly putting an end to the conversation by hanging up the receiver before the ground for the rescission was stated.

But in *Young v. Seattle Transfer Co.* 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L.R.A. 988, an action against a transfer

company to recover the value of a trunk alleged to have been stored with the defendant, the testimony relied on to show the receipt of the trunk by the company was that the plaintiff called up the defendant's office by telephone and notified it to send for the trunk and that the trunk was thereafter taken away by an unknown expressman. It also appeared that the plaintiff did not identify the voice of the person answering the telephone call. It was held that the testimony was insufficient to support a verdict for the plaintiff. In *Kimbark v. Illinois Car, etc. Co.* 103 Ill. App. 632, wherein the testimony showed that he was unable to identify the principal by his voice, it was held that the authority of an agent to accept the modification of a contract could not be shown by his testimony of a telephone conversation with his principal giving him the authority.

MANGRUM AND OTTER, INCORPORATED,

v.

LAW UNION AND ROCK INSURANCE COMPANY.

California Supreme Court—April 19, 1916.

172 Cal. 497; 157 Pac. 239.

Fire Insurance — Cancellation — Necessity of Return of Unearned Premium.

Under a fire insurance policy in the New York standard form providing that it might be canceled at any time at the request of the insured, or by the insurer, by giving five days' notice of such cancellation, and that if the policy should be canceled as provided the unearned part of the premium actually paid should be returned on surrender of the policy or last renewal, the insurer retaining the customary short rate, except that on a cancellation by it by giving notice it should retain only the pro rata premium, the giving of the five days' notice was sufficient to cancel the policy, and the return of or offer to return the premium is not an essential element of the cancellation.

[See note at end of this case.]

Appeal from Superior Court, City and County of San Francisco: PLUMMER, Judge.

Action by Mangrum and Otter, plaintiff, against Law Union and Rock Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Goodfellow, Eells, Moore & Orrick for appellant.

J. F. Riley for respondent.

[497] MELVIN, J.—Defendant appeals from an adverse judgment, and from an order denying its motion for a new trial.

The suit was upon a policy of fire insurance. On February 19, 1907, defendant issued the policy insuring plaintiff's property for one year in the sum of two thousand dollars. The premium, which was paid, was \$120. Shortly after the issuance of the policy defendant, being dissatisfied with the rate charged, demanded an additional payment of \$20. This demand was not complied with and on September 26, 1907, defendant sent plaintiff a letter with the statement that if the sum of \$20 was not paid as an additional consideration for the policy by noon of October 3d, the contract would be canceled, pursuant to a power conferred by the terms of the instrument itself. The provision in the policy under which [498] the defendant acted was as follows: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium."

On October 4, 1907, defendant sent plaintiff a notice that the policy was canceled, null, and void, and that the insurer would admit no further liability under it. With this notice was a check drawn in favor of plaintiff for \$31.30 which was tendered as the amount of the unearned premium. Soon thereafter this check was returned by one of plaintiff's officers who stated that the corporation which he represented had not theretofore received any demand for the additional payment of \$20 and that \$31.30 was not the correct return premium. On October 8th, defendant again sent to plaintiff the check for \$31.30 which was again returned by plaintiff's representative with the objection that it was not drawn for the proper amount. The check was again sent to plaintiff but it was not presented for payment and was produced by plaintiff at the trial. Both parties to this suit concede that defendant should have proffered \$45.07 instead of \$31.30 as return premium. The property covered by the policy was destroyed by fire on December 26, 1907, and the judgment below was for the full amount of two thousand dollars specified in the contract.

Appellant contends that the giving of the five days' notice was sufficient to cancel the

policy without the return or offer to return the unearned portion of the money previously paid on the execution of the contract, and we find this the only contention which we need discuss. This is a matter of first impression in California, so far as this court is concerned, but there is abundant record of adjudication in other jurisdictions, some courts holding that the return of the unearned part of the premium is one of the indispensable parts of the cancellation of such a policy, and others that the prescribed notice is all that is required to accomplish that result.

The policy used in the transactions between the plaintiff and the defendant is of the kind known as the "New York [499] standard form," and the New York court of appeals has interpreted it to mean that cancellation of a policy by the insurer may only be accomplished by giving the prescribed notice and by restoring the unearned premium. The opinions of that distinguished court always command great respect, and when they deal with the law of the Empire state and the proper interpretation of a contract drawn under a sanction of that law, such opinions are clothed with peculiar authority; but we find that other courts of great dignity, including the United States circuit court for the southern division of New York, have held a different view of this contract or of policies not essentially differing from it, and that some of the learned judges of the New York court of appeals have dissented from the interpretation of the agreement given by the majority of their associates. Our own examination of the subject has impelled us to accept the doctrine of the courts that hold the return of the premium not an essential element of the annulment of the policy.

And first examining the language of the policy quoted above, without reference to decided cases, we cannot see that the repayment of a part of the premium is made an essential to the cancellation of the contract. The first sentence provides a complete scheme of cancellation by the assured or by the company: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." If the paragraph ended there, no question could be raised. But the contract goes further and properly provides for a return of a just proportion of the premium. The very opening words of that part of the policy so providing indicate that cancellation may precede repayment. "If this policy shall be canceled as hereinbefore provided . . . the unearned portion shall be returned on surrender of this policy." If the return of the money is one of the necessary elements of the cancellation the last five words of the quotation are meaningless. Even upon the broad principle which authorizes the interpretation of a contract formulated by the insurer to be

most favorable to the insured, we cannot convince ourselves that this plain, and to us unambiguous, language may be disregarded. The last proviso of the paragraph does not contradict the requirement that the return of the policy should be made before repayment of the proportionate share of the premium. It simply [500] provides a regular *pro rata* compensation for the period of actual assurance when the contract has been terminated by the insurer as contradistinguished from the higher "short rate" which the insured must pay if he chooses to cancel the agreement. The history of this part of the New York standard policy in the courts of New York is interesting. In *Nitsch v. American Cent. Ins. Co.* 152 N. Y. 635, 46 N. E. 1149, the New York court of appeals without handing down an opinion affirmed a judgment against the defendant insurance company. In *Tisdell v. New Hampshire F. Ins. Co.* 155 N. Y. 163, 40 L.R.A. 765, 49 N. E. 664, it was determined by a divided court, upon the authority of the *Nitsch* case, that cancellation of a policy to be effective must be accomplished by a tender of the return premium as well as by the giving of the prescribed notice. The prevailing opinion written by Judge Bartlett contains no argument regarding the basis of the rule. The opinion is founded upon the rule as settled by the previous decision. A vigorous dissenting opinion was delivered by Chief Judge Parker. In it he pointed out the fact that the affirmance in the *Nitsch* case did not rest alone upon the ground taken by the lower court that a tender of the unearned premium must be made as a part of the process of cancellation, but upon the broader reason that the notice of cancellation sent out by the insurance company was *subsequently waived*. Discussing the meaning of that portion of the contract which we have quoted, he said, among other things: "The language is unambiguous. It admits of no debate and requires no construction. Words more apt to accomplish the cancellation of a policy by the giving of the five days' notice cannot well be imagined. Having provided for a cancellation of the policy, either by the request of the insured or upon notice given by the company, the next clause of the agreement proceeds to make disposition of the unearned premiums, in the event of the exercise of the option to cancel by either of the parties. . . . The policy having been put an end to by cancellation, at the insistence of one party or the other, then the situation of the parties is such that the company has in its possession certain premiums which it has not earned, and which it does not desire to earn, and the other party has in his possession the policy of insurance, no longer, of course, of use to him, and of no particular value to the company, except that when it finally [501] comes

into the company's possession it of itself furnishes evidence that the unearned premiums have been paid to the insured. With this situation, then, the agreement undertakes to deal, and it provides that upon the surrender of the policy the unearned premium, whether at short rate or *pro rata* premium, depending upon which party brought about the cancellation, shall be returned to the insured. Practically, it says to the insured: You return the policy to the place where you got it from and the company will at once turn over the unearned premium to which you are entitled under this contract. This agreement is so clearly expressed that there does not seem to be opportunity for insisting that the language means something quite different from what is suggested to the mind upon the first reading. And still other readings will not prompt the thought that there is possibly any ambiguity."

Later the court of appeals of New York affirmed the *Nitsch* and *Tisdell* cases, but held (Judge Bartlett writing the prevailing opinion from which two of his associates dissented) that where the holder of the policy, in response to the notice of cancellation, surrenders his contract he thereby waives his right to a return of the unearned fraction of the premium as a necessary part of the annulment of the policy. Judge Vann expressing the views of the dissenters said that he could not see how a mere return of the policy by mail, in response to a notice by which the insurer promised a return of the premium "when" the policy should be surrendered to said insurer, could possibly amount to a waiver of payment as a necessary part of the process of annulment. We have found the same difficulty in reconciling the doctrine of that case—*Buckley v. Citizens' Ins. Co.* 188 N. Y. 399, 13 L.R.A. (N.S.) 889, 81 N. E. 165—with the two earlier decisions of that court. The United States circuit court for the southern district of New York construing the same form of contract in *Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co.* 115 Fed. 653-656, said:

"It was unnecessary for the defendant to return or tender the unearned premium to accomplish a cancellation. The condition is carefully expressed to require the return of the premium only upon the surrender of the policy by the insured to the insurer. (*Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752; *Norris v. Hartford F. Ins. Co.* 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765.) The decision of the [502] court of appeals of New York holding the contrary in respect to a similar condition is entitled to great consideration (*Tisdell v. New Hampshire F. Ins. Co.* 155 N. Y. 163, 49 N. E. 664, 40 L.R.A. 765), but is not controlling upon this court; and the view of the minority of the court, ex-

pressed in the dissenting opinion, commends itself to me as presenting the better reasoning."

In *Vance on Insurance*, page 494, after quoting the portion of the New York standard policy which we have been discussing, the learned author uses the following language:

"The cancellation clause of the standard form of policy seems so clearly worded that one is surprised to see that disputes have arisen as to its construction. It is held by the better authority that, after the expiration of the five days' notice required in case the cancellation is by the company, the insurance is deemed to be terminated and inoperative, without further act on the part of the insurer, or any actual cancellation of the policy. . . .

"By the weight of authority, the repayment of the unearned premium is not, under the standard policy, a condition precedent to the termination of the insurance by the insurer. Such repayment becomes due only upon surrender of the policy. The New York Court of Appeals has, however, in a very unsatisfactory opinion, adopted the contrary rule."

Professor Richards, in his work on *Insurance Law* (section 288 of the third edition) while admitting that "by the current of authority" up to the date of his writing the duty is laid upon the insurer "when seeking cancellation under the standard policy, to accompany the notice of cancellation with payment or actual tender of the return premium in order to make the notice operative," makes this comment: "It is indeed difficult, however, to escape the conclusion of the dissenting judges in the New York Court of Appeals, voiced by the chief justice, that this is by interpretation to substitute a new contract in place of unambiguous terms adopted by the legislature."

We feel impelled, however, to follow that which seems to us the meaning expressed by the unambiguous language of the contract rather than even the "current of authority" which would substitute a judicially manufactured agreement for the one made by the contracting parties. In addition to the authorities which we have noted above in support of the [503] view which we take of the meaning of the quoted portion of the standard policy of New York, we wish to cite, *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752-755; *Webb v. Granite State F. Ins. Co.* 164 Mich. 139-142, 129 N. W. 19; *Davidson v. German Ins. Co.* 74 N. J. L. 487, 12 Ann. Cas. 1065, 13 L.R.A. (N.S.) 884, 65 Atl. 996; *El Paso Reduction Co. v. Hartford F. Ins. Co.* 121 Fed. 937; *Schwarzschild, etc. Co. v. Phoenix Ins. Co.* 124 Fed. 52, 53, 59 C. C. A. 572; *Phoenix Mut. F. Ins. Co. v. Brecheisen*, 50 Ohio St. 542-548, 35 N. E. 53; *Parsons v. Northwestern Nat. Ins. Co.* 133 Ia. 532, 110 N. W. 907; *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230-235.

Among the cases which announce the other doctrine—that cancellation does not precede payment—are *Peoria Marine, etc. Ins. Co. v. Botto*, 47 Ill. 516-519; *Hartford F. Ins. Co. v. McKenzie*, 70 Ill. App. 615-618; *Peterson v. Hartford F. Ins. Co.* 87 Ill. App. 567-572; *Kinney v. Rochester German Ins. Co.* 141 Ill. App. 543-549; *Kinney v. Buffalo German Ins. Co.* 148 Ill. App. 260; *Kinney v. Caledonia Ins. Co.* 148 Ill. App. 256; *Continental Ins. Co. v. Daniel (Ky.)* 78 S. W. 866; *Chrisman, etc. Banking Co. v. Hartford F. Ins. Co.* 75 Mo. App. 310-315; *Taylor v. Insurance Co. of North America*, 25 Okla. 92-94, 138 Am. St. Rep. 906, 105 Pac. 354; *Hartford F. Ins. Co. v. Cameron*, 18 Tex. Civ. App. 237, 45 S. W. 158; *Polemanakos v. Austin F. Ins. Co. (Tex.)* 160 S. W. 1134; *Niagara F. Ins. Co. v. Mitchell (Tex.)* 164 S. W. 919.

In spite of this array of decisions in opposition to our views, we are convinced that our reading of the policy is the correct one.

Because of our interpretation of the contract of insurance, it is not necessary for us to review the interesting questions discussed in the briefs touching the sufficiency or insufficiency of the tender, made by the insurer, of an amount mistakenly supposed to be the proper return premium.

The judgment and order are reversed.

Henshaw, Shaw, Sloss and Lorigan, JJ., concurred.

Rehearing denied.

NOTE.

Necessity of Return or Tender of Unearned Premium to Effect Cancellation of Fire Insurance Policy by Insurer.

Under New York Standard Policy.

The holding in the reported case, while contrary to the rule laid down in *German Union F. Ins. Co. v. Fred G. Clarke Co.* 116 Md. 622, Ann. Cas. 1913D 488, and contrary to what seems to be the weight of authority, is, however, in accord with the view maintained in *Davidson v. German Ins. Co.* 74 N. J. L. 487, 12 Ann. Cas. 1065, that under the cancellation clause of the so-called New York standard fire insurance policy the return or tender of the unearned premium is not a condition precedent to the cancellation of the policy by the insurer. The following recent decisions, either as cases of first impression or following and reaffirming a rule previously laid down in the jurisdictions in which they arose, are in accord with the view taken in the majority of the earlier cases that payment or tender of the unearned premium is a prerequisite to the cancellation of a fire insurance policy under the terms of the cancellation clause of what is known as the New York

standard policy. *Hartford F. Ins. Co. v. Stephens* (Ariz.) 161 Pac. 684; *National Hotel Co. v. Merchants' F. Assur. Corp.* 183 Ill. App. 71; *C. A. Smith Lumber Co. v. Colonial Assur. Co.* 172 App. Div. 149, 158 N. Y. S. 198; *Polemanakos v. Austin F. Ins. Co.* (Tex.) 160 S. W. 1134; *Niagara F. Ins. Co. v. Mitchell* (Tex.) 164 S. W. 919. In *Hartford F. Ins. Co. v. Stephens*, supra, it appeared that the appellee insured property with the appellant for a period of one year and paid the full premium. Some months thereafter the appellee was notified by the appellant as follows: "In accordance with a clause in the insurance policy 'we hereby give you five days' notice of cancellation of this policy.'" Ten days after that notification the insured building was destroyed. The court said: "The dispute or controversy is as to the meaning that should be given to the above-quoted clause of the policy, it being the contention of the appellant that after five days from the date appellee received the notice the policy was canceled, and that it was not necessary for it to do any other thing or act than to give notice in order to effect a cancellation of the policy. Whereas, the appellee contends that the insurer, being the moving party, should not only have given the five days' notice of the cancellation, but should, on or before the expiration of the five days, have returned to the insured the pro rata of the premium then unearned. . . . The policy is what is known as 'The New York Standard Policy,' and this particular clause of the policy, under the same facts that we have here, has many times been before the courts and by them construed. The courts have not agreed as to the meaning of the cancellation clause in the standard form, and it is very difficult to determine upon which side the weight of authority is to be found, although we think more courts of equal eminence and learning have adopted the construction contended for by appellee. . . . This form of policy is prescribed by statute in New York, and the courts of that state are the first courts that passed upon and construed the cancellation clause thereof, which is identical with the cancellation clause that we have, and it was therein held that the return of the unearned premium or a tender thereof was a prerequisite to the cancellation of the policy. *Nitsch v. American Cent. Ins. Co.* 152 N. Y. 635, 46 N. E. 1149 (affirming without opinion 83 Hun 614, 31 N. Y. S. 1131). There has been considerable criticism of this decision, because it is said that the appellate courts assigned no reason for their judgment, but the opinion which was rendered by Judge Bartlett at the trial does assign reasons, which we here give: 'The equivalent of a requirement to refund or tender the unearned premium, as a condition of an effective can-

cellation by the insurer, may readily be discovered in the standard policy. The whole paragraph on the subject must be read together; and the last clause must not be overlooked. That clause provides that "when this policy is canceled by this company, by giving notice, it shall retain only the pro rata premium." This language plainly imports that the company cannot make the notice effective and at the same time retain the whole premium. The word "shall," in the last clause of the paragraph, in reference to the cancellation of the policy, is just as mandatory as the word "shall" in the first clause. The policy shall be canceled by the company by giving five days' notice, but, when so canceled (that is, at the time the notice takes effect), the company shall retain only the pro rata premium; the latter requirement is as imperative as the former, and can only be complied with by actually returning the unearned premium or offering to return it to the insured. Reading the entire provision as a whole, I am clearly of the opinion that it makes the actual payment or tender of the unearned premium essential to a cancellation of the policy by the company. This construction involves no hardship to the insurer, while that which the court is asked by the defendant to adopt would involve decided hardship to the insured.'" In *Polemanakos v. Austin F. Ins. Co.* (Tex.) 160 S. W. 1134, the court said: "The policies in question are what are known as the New York standard policies, and the general rule formulated in the consideration of the provision as to cancellation hereinbefore copied is that, unless waived, the repayment of the proper proportion of the premium is essential to a valid cancellation and notice without such repayment or a tender of the amount is ineffectual. . . . There are some authorities that hold to the contrary view, consisting of three federal court decisions, a New Jersey case, and an Ohio and Illinois case. We prefer that interpretation of the cancellation clause given by New York courts and followed by a great number of the states, not only because it is reasonable, but on the grounds stated in a Pennsylvania case (*Gosch v. Firemen's Ins. Co.* 33 Pa. Super. Ct. 496) . . . as follows: 'Turning, then, to the language of the agreement, in which the parties have undertaken to state their respective rights and duties, if we find it susceptible of two constructions, one in harmony with, the other in opposition to, those general principles already referred to, a sound discretion would seem to invite us to accept the former and reject the latter just as, in ascertaining the true meaning of a doubtful clause in a will, the courts incline to that construction which would vest the estate rather than leave it contingent, which would give it to the heir rather

than to the stranger. Taking up, then, the provision of the policy on this subject, and looking at it as a whole, we may confidently say that it contemplates a complete and effective destruction of the contractual relation at the instance of either party, and that to accomplish this end the party moving must do two distinct and separate things; the object in view undeniably being that, when the cancellation shall have been completed, both parties will have been restored, as far as possible, to the conditions existing before the contractual relation began.'"

A valid cancellation of a policy may, however, be made without payment or tender of the unearned premium where the insured agrees to waive the provisions of the policy giving him the right to demand such a return or tender. See *Polemanakos v. Austin F. Ins. Co. (Tex.)* 160 S. W. 1134; *Westchester F. Ins. Co. v. McMinn (Tex.)* 188 S. W. 25. In the foregoing decisions the existence of such an agreement was held to be a question of fact to be determined by the jury and not a question of law for the court. The material facts in *Westchester F. Ins. Co. v. McMinn*, *supra*, were set out by the court as follows: "The witness Davidson testified that he, as local agent, received a telegram from the general agent of the company directing him to make cancellation at once of the two policies, and that he showed the telegram to appellee and advised him that the company desired immediate cancellation of the policies, and that appellee said, 'All right,' and went to the back of the store and got the two policies, and handed them to the witness. The local agent then, as he says, wrote on the policies, 'Canceled January 12, 1915,' and also entered the cancellation on his policy register. The appellee, though, denies this testimony." The court said: "A policy of insurance may be canceled at any time before loss, by agreement between the parties, and there may be cancellation by consent of the parties, independent of the terms of the policy; and in such case an immediate payment of the unearned premium may not be required in order to make valid the agreed cancellation."

To work a cancellation of a policy by a tender of the unearned premium the offer to repay must be made in legal tender, but the insured may waive his right in that regard. *Niagara F. Ins. Co. v. Mitchell (Tex.)* 164 S. W. 919. In that case it appeared that the insured refused to accept from the agent of the insurance company a check for the amount of the unearned premium at the time the agent gave notice of cancellation, but that he did retain an express money order accompanying a subsequent notice of the cancellation for a period of eighteen days, during which time the insured building was destroyed. It was held that there was no waiver

of the requirement that the offer to repay should be made in legal tender, the court saying: "Another contention of appellant is that the retention by appellee of the express order, without notifying appellant that he would not accept anything but money in payment of the unearned premium, estopped him from claiming that there was no legal tender of the unearned premium. We do not think the proposition sound. When a check was offered to appellee by the agent at the time the first notice was given, he told the agent that he would not accept any check in payment of the unearned premium, not because the check was not good, but because he wanted the money. No tender of money was made. . . . There is nothing in the case evidencing the waiver of a legal tender, unless it was the retention of the express order until after the fire, and we do not think that was sufficient to show a waiver, when appellee had distinctly informed appellant that he would not accept any check for the unearned premium."

Under Other Forms of Policy.

The view has been taken that payment or tender of the unearned premium is a condition precedent to the cancellation of the policy in recent cases wherein the cancellation clauses of the policies before the court were not the same as that of the New York standard policy. *St. Paul F. etc. Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 117, and *Nakata v. Dominion F. Ins. Co.* 9 Alberta L. Rep. 47, 31 West. L. Rep. 136, 8 West. W. Rep. 343, 21 Dominion L. Rep. 26. In the case first cited it appeared that the policy issued by the defendant insurance company contained the following provisions: "This entire policy shall be void at the election of the company, . . . if the property or any part thereof be or become encumbered by lien, mortgage or otherwise. . . . This policy may be canceled by either party. If upon request of the company, by returning to insured the pro rata unearned premium, if it has been paid or if not by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to insured." The insured property having been mortgaged before loss occurred, it was contended by the insurer that the policy was void from the date the mortgage was given and that no recovery could be had thereon. The court however took the contrary view, holding that the policy did not become void by the giving of the mortgage unless the company elected to declare it so and that it could not cancel the policy until a tender of the amount of the unearned premium was made to the insured. In *Nakata v. Dominion F. Ins. Co.* 9 Alberta L. Rep. 47, 31 West. L. Rep. 136, 8 West. W. Rep. 343, 21 Dominion L.

Rep. 26, it appeared that the policy in suit provided as follows: "The insurance may be terminated by the company by giving notice [five days if personal, ten days if by mail] to that effect and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice." It was held that under that provision a mere notice of cancellation was insufficient if unaccompanied by a tender of or offer to account for the unearned portion of the premium.

STATE

v.

CATHOLIC.

Oregon Supreme Court—March 23, 1915.

75 Oregon 367; 147 Pac. 372.

Fish and Game — Regulation of Salmon Fishing — Validity.

L. O. L. §§ 5293, 5298, regulating fishing for salmon, sturgeon, or other anadromous fish in the waters of the state, is not class legislation within the prohibition of Const. art. 1, § 20, providing "no law shall be passed granting to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens," since the statute protects the right of all persons possessing the requisite qualifications who pursue the salmon fishery under similar circumstances and conditions.

Same.

L. O. L. § 5298, regulating fishing for salmon, etc., in the waters of the state, is not in violation of Const. U. S. Amend. 14 (9 Fed. St. Ann. 392), providing that no state shall make a law to abridge the privileges and immunities of citizens of the United States, since a business, to be protected from interference by state legislation under such amendment, must be a calling which any person can pursue anywhere in the United States as of common right, while the qualified ownership of roving fish in navigable waters within the state is in that sovereignty in trust for its citizens alone.

States — Concurrent Jurisdiction of Boundary Waters — Offenses — Identity of Prohibition.

Where defendant was convicted of fishing for salmon in the Columbia river without a license, under L. O. L. § 5298, denouncing such an offense committed in any of the waters of the state, and where the statutory provisions of the state of Washington, on the same point, in the exercise of its concurrent jurisdiction with Oregon over the Columbia river, contain practically the same pro-

visions, the emphasis being upon the fact of fishing without a license, conviction here is proper under the federal rule that, in cases of concurrent jurisdiction, the statutory provisions of the two states must be practically identical to have a conviction in either.

[See note at end of this case.]

Fish and Game — Fishing without License — Employment by Licensed Person.

That the defendant, convicted under L. O. L. § 5298, regulating fishing for salmon, etc., in the waters of the state, of fishing for salmon in the Columbia river without a license, was employed by one properly licensed, is not a defense.

Criminal Law — Harmless Error — Punishment Imposed Appropriate to Valid Portion of Verdict.

Where defendant was convicted, under L. O. L. §§ 5293, 5298, regulating fishing in the waters of the state, of two offenses, first, in having fished without a license, and second, as having fished without being a resident of the state, and where the punishment in each case was the same, although the defendant should have been convicted under the charge of fishing without a license alone, his conviction can be upheld under Const. art. 7, § 3, as amended, providing that if the supreme court shall be of opinion that the judgment of the court appealed from was such as should have been rendered, it shall be affirmed, notwithstanding any error committed during the trial.

Appeal from Circuit Court, Clatsop county: EAKIN, Judge.

Criminal action. Orazio Catholic convicted of fishing illegally in Columbia river, and appeals. **AFFIRMED.**

[368] Two informations were filed in a justice's court of Clatsop County, Oregon, the charging part of one being as follows:

"Orazio Catholic is accused by this complaint of the crime of fishing for salmon, being a nonresident at said time, committed as follows: The said Orazio Catholic, on the 1st day of July A. D. 1914, in the county of Clatsop and State of Oregon, then and there being, did then and there willfully and unlawfully fish for and take and catch salmon fish, with a gill net, in the waters of the Columbia River, in said Clatsop County, State of Oregon, he, the said defendant, Orazio Catholic, not being or having been a bona fide resident of the State of Oregon, or the States of Washington or Idaho for the period of six months, but he, the said Orazio Catholic, being then and there a citizen and bona fide resident and inhabitant of the State of California, contrary to the statute in such cases made and provided, [369] and against the peace and dignity of the State of Oregon."

The other information, omitting the title of the court and cause, the signature of the prosecuting officer and the verification, reads:

"Orazio Catholic is accused by this complaint of the crime of fishing without a license, committed as follows: The said Orazio Catholic, on the 10th day of July, 1914, in the county of Clatsop and State of Oregon, then and there being, did then and there take and fish for salmon fish and sturgeon in the waters of the Columbia River, in the said County of Clatsop and State of Oregon, with a gill net, without first having obtained a license therefor, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Oregon."

Pleas of not guilty having been interposed, the causes were tried upon agreed statements of facts. The detailed specification thereof as to the charge first hereinbefore set forth is, in substance, as follows: That at all the times stated therein the defendant was and now is a citizen of the United States and a bona fide resident and inhabitant of the State of California, and not a citizen of Oregon, Washington or Idaho; that he was and is by occupation a fisherman, and on May 1, 1914, came to Oregon to embark in that business on the Columbia River; and that on July 1, 1914, he engaged in fishing for salmon in that stream in Clatsop County, Oregon, with a gill net and caught such fish therewith.

In respect to the second charge the stipulation is to the effect that W. E. Tallant is, and all the times stated therein was, a citizen of the United States and of the State of Oregon, and had been a bona fide resident thereof for more than 10 years; that on May 1, 1914, he duly obtained a license authorizing him to operate a [370] gill net and to engage in fishing for salmon in the Columbia River until March 31, 1915; that he was the owner of a gill net and a fishing boat, and had complied with all the requirements of law necessary to enable him by such means to take and catch salmon; that on July 10, 1914, he employed the defendant to operate such boat and net, and the latter then took entire possession thereof, and therewith engaged in catching salmon in the Columbia River within Clatsop County, Oregon, which fish when so taken were delivered to Tallant; that at all the times the defendant had charge of such boat he had no license to operate a gill net on the Columbia River; and that he managed such boat and net as the employee of Tallant.

Based on such agreed statements of facts, the defendant was convicted on both charges, and from the judgments so rendered he appealed to the Circuit Court of the State of Oregon for Clatsop County, where the causes were tried, without a jury, upon the same statements of facts which the court adopted

as its findings, and, predicated thereon, the defendant was again adjudged to be guilty as charged in each case. From these latter judgments he appeals to this court.

George C. Fulton for appellant.

C. W. Mullins and *Andrew M. Crawford* for appellee.

MOORE, C. J. (after stating the facts).—

The printed abstract, referring to the trial in the Circuit Court and to the agreed statements of facts, [371] contains the following recital: "That there was no other testimony or evidence offered or received by either party." A stipulation was filed with our clerk, to the effect that each party might offer in evidence in this court such laws of the State of Washington as might be desired, which enactments should be considered in the same manner as if they had been received in evidence at the trial in the Circuit Court and incorporated in the bill of exceptions. In another stipulation it was agreed that the two causes should be consolidated.

1. Section 5293, L. O. L., enacted to protect food fishes, reads:

"It shall be unlawful for any person or persons to take or fish for salmon fish or sturgeon in any of the waters of this state, or in any of the waters upon which this state has concurrent jurisdiction, by any means whatever, except with hook and line, commonly called angling, without first having obtained a license therefor, as in this act hereinafter provided."

Another clause of the statute is as follows:

"It shall be unlawful for any person to take or fish for salmon, sturgeon, or other anadromous fish in any waters of this state unless such person be a citizen of the United States, or has declared his intention to become such, and has been a bona fide resident of the State of Oregon, or the States of Washington or Idaho, for the period of six months; provided, that a license issued by the State of Washington, such state having concurrent jurisdiction on the Columbia River with this state shall be deemed valid as to gill nets, and as to gill net fishermen, for use on the Columbia River, as though issued by the fish warden of this state. Any person desiring to fish for salmon, sturgeon, or other anadromous fish in any such rivers or waters, may go before any county clerk of any county in this state and furnish satisfactory evidence of his citizenship, or of [372] the fact that he has declared his intention to become such one year prior thereto, and file his own affidavit and the affidavit of two other persons to the effect that he is and has been for six months prior thereto an actual bona fide resident of this state, and thereupon such recorder or clerk shall issue to him a certificate briefly reciting

these facts, and thereafter in any prosecution against such person for a violation of the provisions of this act, such certificate or duly authenticated copies of the record in the office of the clerk or recorder relative thereto, shall be prima facie evidence of his citizenship and residence as in this act required. But in all prosecutions under this act the burden of proof shall be on the defendant to establish the facts of his citizenship and residence." Section 5293, L. O. L.

It is maintained that the latter enactment, thus attempting to exclude nonresidents of Oregon from the right to take or fish for salmon in the Columbia River with a gill net, violates section 20 of Article I of the Organic Act of this state, which reads:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

This clause of the fundamental law was evidently designed to protect the rights of citizens of Oregon only. The section of the statute last quoted guarantees to each resident of Oregon, who is also a citizen of the United States, the right to fish for salmon in the waters of this state upon making the required proof and securing the necessary license, and, this being so, there is no discrimination as to such citizens. The evident object of the enactment was to protect Oregon fishermen from men engaged in that business who came to this state when the season opened, pursued their calling, and [373] when the season closed returned to their homes to ply their occupation in other waters, thereby rapidly depleting the supply of a valuable food product which, if properly cared for, could be reasonably conserved to the advantage of resident fishermen. The statute complained of affects alike all persons, possessing the requisite qualifications, who pursue the same business under similar circumstances and conditions, and for that reason it is not class legislation: In re Oberg, 21 Ore. 406, 28 Pac. 130, 14 L.R.A. 577; State v. Randolph, 23 Ore. 74, 31 Pac. 201, 37 Am. St. Rep. 655, 17 L.R.A. 470; State v. Frazier, 36 Ore. 178, 59 Pac. 5; State v. Thompson, 47 Ore. 492, 84 Pac. 476, 8 Ann. Cas. 646, 4 L.R.A. (N.S.) 480; State v. Muller, 48 Ore. 252, 11 Ann. Cas. 88, 85 Pac. 855, 120 Am. St. Rep. 805; State v. Baker, 50 Ore. 381, 92 Pac. 1076, 13 L.R.A. (N.S.) 1040; Churchill v. Albany, 65 Ore. 442, 133 Pac. 632, Ann. Cas. 1915A 1094.

2. It is insisted that Section 5298, L. O. L., trenches upon a clause of the Fourteenth Amendment of the Constitution of the United States (9 Fed. St. Ann. 392) in that the statute is an attempt upon the part of the State of Oregon to make a law which, if enforced, would abridge the privileges and immunities

of citizens of the United States. Before such privileges can be infringed it must satisfactorily appear that the authority of a person to take and catch salmon in the Columbia River is a right which is guaranteed to, and may be exercised by, every citizen of the United States, though he may be a nonresident of the State of Oregon and Washington. The business which is protected from interference by state legislation must be a calling which any person can pursue in any place in the United States as of common right, subject, however, to such reasonable regulations as the state may impose, in respect to the time, or manner of [374] enjoyment, in order to promote the greatest good to the greatest number of its citizens.

The qualified ownership of roving fish in navigable waters within a state is in that sovereignty in trust for its citizens alone: State v. Hume, 52 Ore. 1, 5, 95 Pac. 808. Therefore, a state in exercising a measure of its police power may, by an enactment, protect such fish by prohibiting for a time their taking, or it may impose upon their catching such reasonable regulations as may be deemed proper, and for that purpose it may wholly exclude persons who are not residents from catching or taking fish in its waters by any means. In Barbier v. Connolly, 113 U. S. 27, 32, 28 U. S. (L. ed.) 923, 5 S. Ct. 357, 360, Mr. Justice Field, discussing the restriction of the Fourteenth Amendment of the Federal Constitution as to the facts of that case, says:

"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

To the same effect, see Jones v. Union County, 63 Ore. 566, 575, 127 Pac. 781, 42 L.R.A. (N.S.) 1035, where will be found a number of cases deciding this question in the same manner. Nonresidents of Oregon who may be citizens of the United States and of another state have no inherent right to take or catch migratory fish in the navigable waters of Oregon after a statute has been enacted by this state prohibiting the exercise of the privilege. Hence Section 5298, L. O. L., does not contravene the amendment of the Federal Constitution invoked to annul it.

3. It is asserted that since the State of Washington has equal jurisdiction with Oregon over the Columbia [375] River, and since the legislature of Washington has not concurred in enacting any statute similar to Section 5298, L. O. L., that provision is void, and an error was committed in not discharging the defendant. In Nielsen v. Oregon, 212 U. S. 315, 29 S. Ct. 383, 53 U. S. (L. ed.) 528, the plaintiff in error was found guilty in a

justice court of Clatsop County, Oregon, of maintaining a purse net in the Columbia River in violation of a statute of this state, and, the conviction having been ratified by the Circuit Court of Oregon for that county, the latter judgment was affirmed by this court: State v. Nielsen, 51 Ore. 588, 95 Pac. 720, 131 Am. St. Rep. 765, 16 Ann. Cas. 1113. An agreed statement of facts upon which the cause was tried showed that Nielsen was an actual bona fide resident and inhabitant of the State of Washington and a citizen of the United States; that he had duly obtained from the proper authority of that state a license authorizing him to maintain in the Columbia River a purse net; and that he was engaged in operating such net within the limits of the State of Washington at the time he was arrested and prosecuted in the courts of Oregon. The law of this state, which he was charged with violating, was, as far as material, as follows:

"It shall hereafter be unlawful to operate or maintain within any of the rivers of this state or of the Columbia River, . . . any purse net or other like seine for the purpose of catching or taking salmon."

By another section of the act any person convicted of violating any of its provisions was guilty of a misdemeanor and subject to a prescribed penalty: Gen. Laws Ore. 1907, p. 154. The law in force in the State of Washington at the time Nielsen was thus convicted, as far as important, reads:

[376] "The use of . . . purse nets . . . for catching salmon is hereby authorized in all the waters of this state . . . subject to the regulation and license hereinafter provided for or otherwise required by law:" Sess. Laws Wash. 1899, p. 194.

The laws of Oregon then in force prohibited the use of such a net. The judgment rendered by this court against Nielsen was reversed by the Supreme Court of the United States, which held that where two states have concurrent jurisdiction over the same territory, which is partly located in one state and partly in the other, one state cannot prosecute a person for an act *malum prohibitum* by its own laws, and which was committed within the other state by authority of the latter, and that a person who held a purse-net license from the State of Washington could not be prosecuted for using such net on the Washington side of the Columbia River in the courts of Oregon for violating the statutes of the latter state prohibiting the use of a net of that kind.

In the case of *In re Mattson*, 69 Fed. 535, the petitioner for a writ of habeas corpus in the Circuit Court of the United States for the District of Oregon showed that he was imprisoned upon a conviction in the Circuit Court of the State of Oregon for Clatsop

County of fishing for salmon in the Columbia River on Sunday, within the territorial limits of the State of Washington, in violation of the laws of the State of Oregon, which enactment established a weekly close season for that river and made the taking of such fish in that stream on the first day of the week a misdemeanor: Section 5237, L. O. L. The laws of the State of Washington in force when Mattson was imprisoned permitted the catching of salmon in the Columbia River upon Sunday. Based upon such statement of facts the petitioner was discharged [377] by Judge Bellinger who, in referring to the concurrent jurisdiction of the States of Oregon and Washington over the Columbia River, the channel of which formed their common boundary, said:

"It is clear, therefore, that this right in each state is not subject to control or regulation by the other, unless there is mutual agreement to that end."

In *Ex p. Desjeiro*, 152 Fed. 1004, each petitioner had been convicted in a Justice's Court for Clatsop County, Oregon, of unlawfully fishing for salmon in the Columbia River without first having been a bona fide resident of the States of Oregon, Washington, or Idaho for a period of six months prior thereto, and in violation of what is now practically Section 5298, L. O. L. The facts disclosed at their trial were that Desjeiro was, at the time, charged in the complaint upon which he was convicted an actual resident and inhabitant of the State of California and a subject of the King of Italy. Furia was an actual resident of the same state and a naturalized citizen of the United States. The laws of the State of Washington, then in force, authorized the issuance of fishing licenses. Another clause of the statute of that state then and now in force, reads:

"No license shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become such one year prior thereto, and is and has been for one year immediately prior to the time of the application for license an actual resident of the State of Washington. . . . Provided, licenses issued by the State of Oregon shall be deemed valid as to gill nets for use on the Columbia River as though issued by the fish commissioner of this state:" Laws Wash. 1899, c. 117, § 2; Pierce's Wash. Code, 1912, tit. 191, § 65.

[378] Based on these facts, Judge Wolverton, referred to a clause of B. & C. Comp., which is now incorporated in L. O. L. as Section 5298, says:

"If the act was void as it respects a citizen of the State of Washington, being general, it is void as to every other citizen, whether of the State of Washington or California, or elsewhere. It is the act of concurrence be-

tween the two states, in the exercise of legislative authority, that validates the act and gives it the force of law, and unless there is a concurrence or assent by both states to the enactment, it cannot have that force. This is the doctrine of the Mattson case, and it has directed application to the case at bar. Now, Section 4092, as amended, makes it a misdemeanor for any person not a resident of the state for the period of six months preceding to take or fish for salmon fish in any of the waters of the state. This is a specific offense within itself. An examination of the laws of the State of Washington will disclose the fact that there is no such offense established within that state, and hence there is no concurrence in the laws of the two states as to the offense. In each state, however, it is required that parties desiring to fish with gill nets shall take out a license, and in each a violation of any of the provisions touching the occupation of fishing within the waters thereof is made a misdemeanor, so that it may be said, perhaps, that the states have legislated concurrently upon that subject. By the Washington act a person must be a resident of the state for one year next preceding before a license can be issued to him; in Oregon the time is fixed at six months; but this is a matter of minor importance, and it may be said that the laws in that regard are in all material respects concurrent. But it is not the offense of fishing without a license that is complained against. It is the offense of fishing without being a resident of the state; and, the State of Washington not having concurred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson case:" 69 Fed. 535.

[379] The catching of salmon in any of the waters of Oregon by a person who was not a citizen of the United States, or had not declared his intention to become such and had not been an actual resident of the state for six months immediately prior to the time of engaging in that business was first made a misdemeanor by an act approved February 20, 1891: Laws Ore. 1891, p. 129. This statute created a substantive offense and prescribed a penalty for a violation thereof. That act was repealed by another, approved October 18, 1898. Section 12 of the latter act made it unlawful for any person to fish for salmon in any of the waters of Oregon, or in any of the waters upon which this state has concurrent jurisdiction, without first having obtained a license therefor. Section 16 of that enactment stipulated that any person desiring to secure such license should make written application therefor to the fish commissioner, accompanied by his affidavit that he was a citizen of the United States, or had

declared his intention to become such, that he was and had been for six months preceding his application a bona fide resident of the State of Oregon, and that by his paying the required fee a license should thereupon be issued to him. Section 36 provided that any person violating any of the provisions of such act was to be deemed guilty of a misdemeanor and upon conviction should be punished, etc.: Laws Ore. 1898, p. 37. It will thus be seen that the offense of catching salmon in the Columbia River by a person who was not a bona fide resident of the State of Oregon was expressly repealed and another act was substituted in lieu thereof, making the taking of such fish from that stream by a person without first having obtained a license a misdemeanor.

Sections 12 and 16 of the act last referred to were amended by Sections 31 and 32 of the act of February [380] 28, 1901: Laws Ore. 1901, p. 328. These amended sections were incorporated in B. & C. Comp. as Sections 4092 and 4093, respectively. Section 4089 of that compilation made it unlawful for any person to fish for salmon in any of the waters of this state, or in any of the waters upon which Oregon has concurrent jurisdiction, by any means whatever, except with hook and line, without first having obtained a license therefor. Section 4092 asserted it to be unlawful for any person to fish for salmon in any of the waters of this state unless he was a citizen of the United States or had declared his intention to become such and had been a resident of Oregon for six months. A license issued by the State of Washington was proclaimed to be valid as to gill-net fishermen for use on the Columbia River. Section 4093 provided that any person desiring to obtain such a license should present a written application, accompanied by his affidavit, to the fish warden, showing that he was a citizen of the United States or had declared his intention to become such and had been for six months a resident of Oregon. A corroborative affidavit of three freeholders was also required, upon the presentation of which and the payment of a fee a license was to be issued to the applicant. Section 4113 provided that a violation of any of such provisions constituted a misdemeanor, and any person convicted thereof should be punished, etc.

Construing together Sections 4089, 4092, 4093 and 4113 of B. & C. Comp. shows that the offense of catching salmon by a person who did not possess the requisite qualifications of citizenship and residence was merged into the crime of taking such fish from the waters specified without first having obtained a license therefor.

[381] Section 4092, B. & C. Comp., was amended by Laws Ore. 1901, page 339, Sec-

tion 31; Laws Ore. 1903, page 218; Laws Ore. 1907, Chapter 73, page 128; Laws Ore. 1909, Chapter 234, page 466, Section 2. The last amendment is incorporated in L. O. L. as Section 5298. Section 4093, B. & C. Comp., was amended by Laws Ore. 1903, page 218, Section 2, whereby the previous method of securing a license by the applicant making the requisite proof of citizenship and residence was omitted. That section was again amended by Laws Ore. 1905, page 115, Section 1, but no material change was made in the last preceding enactment, nor was the applicant for a license required to submit an affidavit to substantiate his citizenship or residence. Section 4093, B. & C. Comp. appears to have been omitted from L. O. L., though we have been unable to find an express amendment or repeal thereof. In the table of comparative sections in the later compilations reference is made to the section last noted, and attention is called to Sections 5299 and 5310, L. O. L. The first section thus referred to relates to the application for a license to operate a salmon cannery. The second declares that the word "person" or "persons," where used in the act, shall be deemed to include partnerships and corporations.

In selecting and arranging the parts of L. O. L., the compilers evidently thought the amendment of Section 4092, B. & C. Comp., made February 25, 1909, impliedly repealed the next section, and for that reason they did not include in the later work Section 4093, B. & C. Comp. But however this may be, it is believed that the unlawful fishing for salmon in the waters of Oregon is the gravamen of the offense, and not the fishing in such waters by a person who is not a resident of the state.

[382] A careful examination of the statutes of this state, relating to the taking of salmon, leads to the conclusion that the offense charged in one case of unlawfully taking such fish without being a resident of Oregon is not specific within itself, but that the characteristic crime, denounced by the enactment, is the unlawful catching of salmon without first having secured a license, which authority cannot be granted to a person who is not a citizen of the United States, or who has not declared his intention to become such and has not been for the requisite period a resident of the State of Oregon.

The law of the State of Washington in force when this action was instituted, as far as essential to a consideration of this cause, reads:

"That no fishing appliances shall be constructed, operated or maintained upon any of the waters of this state or the Columbia River or its tributaries by any person whomsoever, without such person shall have first obtained a license so to do from the fish commissioner of this state, who is hereby au-

thorized to issue said license under the regulations provided by law. . . . No license shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become such one year prior thereto, and is and has been for one year immediately prior to the time of the application for license an actual resident of the State of Washington:" Section 2.

"Any person violating any of the provisions of this act, . . . shall be deemed guilty of a misdemeanor, and shall upon conviction therefor for each and every offense, be subject to a fine" Section 20, Laws Wash. 1899, p. 194.

Although the State of Washington in its sovereign capacity holds the title to salmon swimming in the Columbia River in trust for its own citizens, if no law of that state prohibited the catching of such fish, it is [383] probable that any nonresident, whether or not he was a citizen of the United States, might lawfully engage in that business. Without such legislation, the defendant in this action might well have insisted at his trial, and urged on this appeal that he was fishing in a stream over which the State of Washington had concurrent jurisdiction, and, such being true, the State of Oregon could not legally punish him for pursuing a lawful business, though he was catching salmon without the borders of the latter state. In its legislation the State of Washington has concurred in the enactments of this state, prohibiting the catching of salmon in the Columbia River without a license. There is a mutual agreement to that end. That the laws of the State of Washington demand a longer residence in that state, as a condition precedent to obtaining a license to catch such fish in the Columbia River, than is demanded by the statutes of Oregon in order to secure a similar authority, is unimportant. Each state has concurred with the other in its legislation on this subject.

If, however, the catching of salmon by means of a gill net in the Columbia River by a person who is not a resident of Oregon be regarded as constituting a distinct offense, upon a conviction for which a penalty may legally be imposed, it is believed that the judgments rendered herein can be sustained, though the statute of Washington prohibits the taking of such fish by a person without first having obtained a license, and also makes a residence in that state for one year a condition precedent to securing such authority. With respect to the statutes of these states, assuming that our enactment is as last hereinbefore stated, there would be a diversity as to the essential facts constituting the crime, the time of residence in the respective states, and possibly as to the degree of punishment [384] that might be inflicted. There would be, however, a unity of prohibiting, for the

term of six months at least, the catching of salmon in that river. Thus it appears that the act charged is condemned alike by the laws of Oregon and of Washington. There is no grant of authority for it by the latter state. Our sister commonwealth having promulgated a rule on the subject which measurably conforms to our own, the defendant cannot claim immunity through any lack of legislation on either side of the boundary. We conclude, therefore, that the rule announced in *Ex p. Desjeiro*, 152 Fed. 1004, is not controlling herein.

4. Section 4093, B. & C. Comp. originally read in part:

"Any person desiring to obtain a license to take or catch salmon fish or sturgeon in any of the waters of this state, in any manner whatever, either working upon as employer or employee of any . . . gill net, . . . whether such person is the owner of such application or otherwise, shall present in writing to the fish warden his application."

This section was amended February 24, 1903, and the words, "either working upon as employer or employee," etc., were omitted: *Laws Ore.* 1903, p. 218. A further amendment of the section was made February 10, 1905, but the words so omitted were not reincorporated: *Laws Ore.* 1905, p. 115. Notwithstanding the exclusion of the words referred to, we believe the language is reasonably implied in Section 5293, L. O. L., which makes it unlawful for any person to take or fish for salmon without first having obtained a license therefor, and that this provision of the statute applies to the person in charge of a fishing boat and a gill net used for that purpose, though the owner of such appliances may have secured a license authorizing him to [385] pursue such business. We conclude, therefore, that the defendant was guilty as charged of catching salmon without first having obtained a license.

5. It will be kept in mind that he was also convicted of unlawfully taking such fish from the Columbia River, within Clatsop County, Oregon, without being a resident of this state. It is believed that such charge should have been made by an allegation of unlawfully fishing without a license. Since the offenses as averred in the complaints and admitted in the agreed statements of facts were committed on different days, they constitute separate misdemeanors, and as the fines imposed in each instance were identical, the judgment in the case of unlawfully fishing without being a resident of this state can be upheld by invoking Section 3 of Article VII of the Constitution of Oregon.

It follows that the judgment in each case should be affirmed, and it is so ordered.

Affirmed.

NOTE.

The reported case applies the rule laid down in *Nielsen v. Oregon*, 212 U. S. 315, 29 S. Ct. 383, 53 U. S. (L. ed.) 528, that in the exercise of the concurrent jurisdiction of two states over waters forming a state boundary a person cannot be punished in one state for an act committed on the boundary waters but within the territorial jurisdiction of the other state, unless the act is prohibited with substantial uniformity in both states. Reviewing the statutes of Oregon and Washington regulating salmon fishing in the Columbia river the court holds that they are so far similar that a person fishing without a license in that river but within the territorial jurisdiction of the state of Washington may be convicted thereof in Oregon. The cases treating of the concurrent jurisdiction of states over water forming state boundaries are reviewed in the notes to *State v. Nielsen*, as reported in 16 Ann. Cas. 1113, 131 Am. St. Rep. 765, and *State v. Cunningham*, Ann. Cas. 1914D 182.

BURKE ET AL.

v.

NORTHERN PACIFIC RAILWAY COMPANY.

Washington Supreme Court—June 10, 1915.

86 Wash. 37; 149 Pac. 335.

Judgments — Vacation — Judgment Affecting Infant.

In the absence of fraud or collusion, minors properly represented in an action are bound as fully as persons of full age by a judgment rendered therein. The only grounds for vacating such a judgment are the grounds which are sufficient to vacate a judgment affecting an adult.

[See note at end of this case.]

Infants — Appointment of Guardian Ad Litem — Effect.

Where a guardian ad litem for an infant party to an action has been duly appointed, the infant is properly in court for all purposes.

Judgments — Vacation — Constructive Fraud.

Where a consent judgment was entered in favor of infants in an action in which they were represented by a guardian ad litem, who appeared and was examined by the court as to the benefit of the compromise to the infants, the failure of the guardian to call other witnesses to testify as to the circum-

stances of their father's death, which were fully known to the guardian ad litem, is not constructive fraud which authorizes the setting aside of the judgment.

Proof of Fraud.

Fraud which will justify the vacating of a judgment or decree must be actual and positive, not merely constructive, and the proof of fraud must be clear and satisfactory.

Infants — Consent Judgment — Presumption.

In the absence of a showing to the contrary, it will be presumed that a judge who entered a consent judgment on the compromise of an infant's claim made the inquiry as to its benefit to the infant which his duty required.

Appeal from Superior Court, Spokane county: HUNEKE, Judge.

Action by John Burke et al., plaintiffs, against Northern Pacific Railway Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

Cannon, Ferris & Swan for appellant.

A. O. Colburn and Luby & Pearson for respondents.

[37] MORRIS, C. J.—This is the same case reported in 80 Wash. 188, 141 Pac. 364, wherein a motion to dismiss the appeal was denied; the appeal being from an order setting aside the first judgment. But little need be added to the statement [38] of facts contained in the first opinion for a proper understanding of the questions upon which this appeal hinges. The lower court found that the amount to be paid having been agreed upon, Mrs. Burke, accompanied by her attorney and the attorney for the railroad company, appeared before the court in the department of Kennan, J., and made a statement to the court touching the controversy. The record shows, in addition to this finding, that Mrs. Burke was called to the stand and interrogated by the court as to her knowledge of the facts upon which the action was based, her attitude towards the proposed settlement, and her judgment as to whether or not it conserved the best interests of the minor children; and the court, upon hearing the statements and evidence of Mrs. Burke, made findings and entered judgment. The proceeding to vacate the judgment so entered was had before Huneke, J., and the finding upon which the conclusion of constructive fraud was made is that,

"The attention of the court was not called to all the facts pertaining to the matter, in that one Frank Weston, who was personally present and conversant with the facts involved in the accident resulting in and causing the death of said Edward Burke, was not pro-

duced, nor were such facts otherwise called to the attention of the court, though the knowledge of such witness as to these facts was well known to the said Bertie Burke and her attorney, and though the presence and testimony of said witness could have been readily secured and that the testimony of said witness, had it been produced, would have substantially supported the allegations of the complaint and established *prima facie* negligence on the part of the defendant contributing to the injury and death of said Edward Burke, and was material to the issue of compromise, and should have been produced." Weston was produced at this hearing and testified to facts within his knowledge. It appears that, at the time of the accident, he was upon the platform of the caboose with a brakeman named Brown. This fact was known to Mrs. Burke at the time of the hearing upon the settlement, and she testified she indicated the fact to her attorney. Weston [39] now testifies that, shortly after the accident, he called upon the attorney for Mrs. Burke and indicated to him the facts concerning the accident within his knowledge. The brakeman, Brown, had also called at the office of Mrs. Burke's attorney, who obtained from him a statement of the facts within his knowledge. This statement is now produced. It does not differ materially from the facts testified to by Weston, so that it is clear, at the time of the settlement, that Mrs. Burke and her attorney knew all of the facts concerning the accident in so far as Brown and Weston could relate them.

Brushing aside a number of technical errors suggested by appellant, such as that the parties in this action are not the same as those in which the judgment was entered, that all the parties in the former action are not made parties in this action, the statute of limitations and other so-called infirmities, we will determine whether or not these facts support the judgment. It may be said, first, that, in the absence of fraud or collusion, minors properly in court are bound as fully as persons of full age, and when properly represented, are bound by the knowledge of those who represent them. The law recognizes no distinction between a decree in favor of or against infants and a decree to which adults only are parties. The same invalidating vice must be found in the one case as in the other. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L.R.A. 671; *English v. Savage*, 5 Ore. 518; *Savage v. McCorkle*, 17 Ore. 42, 21 Pac. 444; *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L.R.A. 703; *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 85 S. W. 1023; 1 Daniel, Chancery Practice, § 164.

Speaking to this point, it is said in *Thompson v. Maxwell Land Grant, etc. Co.* 168 U. S. 451, 18 S. Ct. 121, 42 U. S. (L. ed.) 539:

"It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the [40] proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compromised their claims. If such a rule ever comes to be recognized, it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal, shall be held as binding upon them as similar actions taken by adults."

No question is raised but that the infants were properly in court in the suit in which this judgment was entered. Our practice provides for the appointment of a guardian *ad litem* to represent infant parties, and when so appointed, the infant is properly in court for all purposes, and the same procedure is applicable in such cases as in cases where all parties are of full age. *State v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L.R.A. (N.S.) 72.

The lower court has only found constructive fraud based upon the failure of the guardian *ad litem* to produce the witness Weston. This does not seem to us sufficient to vacate the judgment. Fraud which will justify the setting aside of judgments and decrees must be actual and positive, and not merely constructive, and the proof relied upon must be clear and satisfactory to successfully assail judgments regularly entered. It must be something more than a suspicion. *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 507; *Ross v. Wood*, 70 N. Y. 8; *Markell v. Hill*, 64 App. Div. 191, 69 N. Y. S. 537, 71 N. Y. S. 924; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Lieber*, 239 Mo. 1, 143 S. W. [41] 458; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514; *Ohio, etc. Mortg. etc. Co. v. Carter*, 9 Kan. App. 621, 58 Pac. 1040; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *U. S. v. Throckmorton*, 98 U. S. 61, 25 U. S. (L. ed.) 93; *Parham v. Burns*, 135 App. Div. 884, 120 N. Y. S. 142; *McElroy v. Board of Education*, 158 App. Div. 219, 142 N. Y. S. 1090; *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024; 1 *Bigelow*, *Fraud*, pp. 87, 88.

The failure of the guardian *ad litem* to produce a known witness is not such fraud as will justify vacating a judgment in favor of herself and the minors when it appears, as this record shows, that the judgment was granted upon a hearing, the guardian *ad litem* sworn and examined by the court, and the court advised of the facts and circumstances before entering judgment. Cases are numerous where compromise settlements in behalf of minors have been set aside where such settlements have been made by parents, next friends, and guardians *ad litem*. The reasoning generally advanced for such a rule is that the persons assuming to effect the compromise had no power without authority of court to compromise or settle any cause of action in favor of the infant, or some flaw has been found which convinced the court that the infants were not properly represented. No such flaw appears in this case. The guardian *ad litem* was regularly appointed; a reputable attorney was employed to investigate the accident and wage action against the railway company; the settlement agreed upon was submitted to the court, with the statement of the circumstances giving rise to the controversy; the court made inquiry into the facts, examined witnesses, and after such a hearing, made findings to the effect that the best interests of the minors was conserved by the compromise, and entered a regular judgment. Under such circumstances the better reasoning supports the finality of the judgment. *Tripp v. Gifford*, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530; *Missouri Pac. R. Co. v. Lasca*, 79 Kan. 311, 17 Ann. Cas. 605, 99 Pac. 616, 21 L.R.A. (N.S.) 338.

[42] While Judge Kennan, who entered this judgment, had no special recollection of the proceedings before him, he testified fully as to the course always pursued by him in entering judgments of this character, and as to the inquiry made in order to satisfy himself that the proposed settlement was for the best interests of the minors. As is said in *Thomson v. Maxwell Land Grant, etc. Co.* supra:

"Ordinarily, indeed, a court before entering a consent decree will inquire whether the terms of it are for the interests of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed in the absence of any showing to the contrary, that it has performed its duty. . . . The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree providing for a settlement whose terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge."

The judgment is reversed, and remanded with instructions to dismiss the petition.

Holcomb, Mount, Chadwick, and Parker, *4J.*, concur.

NOTE.

Vacation of Judgment Affecting Infant Duly Represented.

The question considered in this note is whether there is a peculiar infirmity in an infant which exempts him from the obligatory character of a judgment affecting him, in spite of his representation in the action by a guardian. In other words, the question is whether the law in its conception of infancy recognizes some inability or disadvantage incident to the peculiarly inexperienced condition of infancy, even though legally represented, which privileges an infant to vacate a judgment acquired affecting him or permits such judgment to be set aside on slighter grounds than those required to upset a judgment against an adult. In all cases wherein the question has been raised the courts have held uniformly that an infant is as much bound by a judgment rendered in an action wherein he has been duly represented as an adult, and that the only grounds for vacating such a judgment are fraud, collusion, mistake or other grounds which will vacate a judgment affecting a person of full age.

England.—Morgan v. Thorne, 9 Dowl. Pr. Ct. 228, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 400; Gregory v. Molesworth, 3 Atk. 626, 26 Eng. Rep. (Reprint) 1160.

Canada.—Ricker v. Ricker, 27 Grant Ch. (U. C.) 576.

United States.—Thompson v. Maxwell Land Grant, etc. Co. 168 U. S. 451, 18 S. Ct. 121, 42 U. S. (L. ed.) 539; Gillespie v. Pocahontas Coal, etc. Co. 162 Fed. 742, judgment reversed 163 Fed. 992, 91 C. C. A. 494, on other point. See also Kansas City, etc. R. Co. v. Morgan, 76 Fed. 429, 47 U. S. App. 1, 21 C. C. A. 468.

Alabama.—Waring v. Lewis, 53 Ala. 615.

California.—Welsh v. Koch, 4 Cal. App. 571, 88 Pac. 604.

Florida.—Day v. Hurchman, 65 Fla. 186, 61 So. 445.

Georgia.—Cuyler v. Wayne, 64 Ga. 78.

Iowa.—Ralston v. Lahee, 8 Ia. 17, 74 Am. Dec. 291.

Kentucky.—Abernathy v. Ross, 20 S. W. 222, 14 Ky. L. Rep. 282; Weakley v. Middleton, 99 S. W. 288, 30 Ky. L. Rep. 571.

Louisiana.—Boudreaux v. Lower Terrebonne Refining, etc. Co. 127 La. 98, 53 So. 456.

Mississippi.—Dunlap v. Petrie, 35 Miss. 590; Cocks v. Simmons, 57 Miss. 183.

Missouri.—Smith v. Perkins, 124 Mo. 50, 27 S. W. 574; Fiene v. Kirchoff, 176 Mo. 516, 75 S. W. 608.

Nebraska.—McCreary v. Creighton, 76 Neb. 179, 107 N. W. 240; Sutphen v. Joalyn, 93 Neb. 34, 139 N. W. 1016.

New York.—Phillips v. Dusenberry, 8 Hun 348; Matter of Wood, 70 App. Div. 321, 75 N. Y. S. 272; O'Donoghue v. Smith, 85 App. Div. 324, 8 N. Y. S. 398, affirmed 184 N. Y. 365, 77 N. E. 621. See also Wood v. Martin, 66 Barb. 241.

North Carolina.—Grantham v. Kennedy, 91 N. C. 148.

Oregon.—English v. Savage, 5 Ore. 518; Savage v. McCorkle, 17 Ore. 42, 21 Pac. 446.

Pennsylvania.—Mercer v. Watson, 1 Watts 330.

South Carolina.—Bulow v. Witte, 3 S. C. 308, followed in McCrosky v. Parks, 13 S. C. 90; Baggott v. Sawyer, 25 S. C. 405; Owings v. Hunt, 53 S. C. 187, 31 S. E. 237.

Tennessee.—Grimstead v. Huggins, 13 Lea 728; Vaccaro v. Cicalla, 89 Tenn. 63, 14 S. W. 43; Hurt v. Long, 90 Tenn. 445, 16 S. W. 968; Crawford v. Woodward, 1 Tenn. Ch. App. 274; Oody v. Roane Iron Co. 53 S. W. 1002.

Texas.—Cannon v. Hemphill, 7 Tex. 184; Miller v. Foster, 76 Tex. 479, 13 S. W. 529; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426; Johnson v. Johnson, 38 Tex. Civ. App. 385, 85 S. W. 1023; Deering v. Hurt, 2 S. W. 42.

Vermont.—Robinson v. Swift, 3 Vt. 283.

Virginia.—Zirkle v. McCue, 26 Grat. 517; Harrison v. Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L.R.A. 703; McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944. See also Brown v. Armistead, 6 Rand. 594.

Washington.—Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L.R.A. 671. And see the reported case.

West Virginia.—Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.

Thus in Ralston v. Lehee, 8 La. 17, 74 Am. Dec. 291, it was said: "An infant defendant is as much bound by a decree in equity against her as a person of full age; therefore, if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might dispute it, as fraud, collusion, or error."

In Cocks v. Simmons, 57 Miss. 183, advertising to the particular facts in that case, the court said: "It has been shown that the plaintiffs were parties to that proceeding, and that they were represented by a guardian ad litem. If in fact they had rights as heirs of their father, which they could have asserted in opposition to the enforcement of the vendor's lien, it should have been asserted in that proceeding. They were as much bound to set up their rights, if they had any, under that deed, as they were to assert payment, or any other affirmative defense. They were before the court, were bound by its decree, which

gave them no right under said deed, and they are concluded by it in all collateral proceedings. That they were infants and incapable of making their defense makes no difference in this respect. Beyond the rights, reserved to them by law, of proceeding to have decrees reviewed within one year after they attain their majority, and their exemption from the operation of the statute of limitations, barring writs of error and appeals, they have no further claims to impeach decrees rendered against them than are accorded to adults. If their guardians have not made proper defenses it is their misfortune. Society undertakes, in view of the incapacity of minors to manage their own affairs, to furnish them suitable guardians to protect their interests; but it does not undertake to guarantee in them perfection and infallibility."

In *Fiene v. Kirchoff*, 176 Mo. 516, 75 S. W. 608, the court in answer to the objection of infancy raised against the judgment in that case said: "The fact that these plaintiffs were minors and defended by a guardian ad litem, after being personally served with process, is immaterial. Freeman on Judgments (4th ed.) vol. 1, § 151, says: 'The general tendency is to regard the plea of infancy as a personal plea which may be waived. And whether such plea is interposed or not, a judgment or decree against an infant, properly before the court, is as obligatory upon him as though he were an adult, except in cases where he is allowed time, after coming of age, to show cause against a judgment or decree. If an absolute decree is made against an infant, he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult.'"

In *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 85 S. W. 1023, the court laid down the same rule, and reviewing the facts said: "The plaintiff in this case pleaded fraud on the part of appellant, by fraudulently misrepresenting the facts to the guardian ad litem and which deceived him, and paid him \$25 in order that the evidence and law of the case might be withheld from the court, and thereby procured said judgment. The guardian ad litem testified that he agreed to the compromise after he had made a full investigation of his ward's defense and concluded that he could not recover; that his action was not influenced or controlled by J. K. Johnson, and that his ward consented to the compromise. It seems from the evidence that the guardian ad litem acted in good faith and the only ground for setting aside the former judgment is the bare fact that all the evi-

dence relating to the transaction was not introduced on the trial of that case. A minor can inquire into a judgment rendered against him during minority within a reasonable time after reaching his majority, and can have the same set aside when fraud or collusion is shown in procuring its rendition, or when it is shown that he had a good defense which was not presented. A judgment or compromise by a guardian ad litem is not void; and to set it aside it must be shown that it was inequitable and unfair to the minor. The court's charge in effect states that if said agreement to compromise was made and the guardian ad litem failed to present his defense, said judgment would not be rendered after a 'fair and just investigation' and trial of the title to the land. This is not sufficient to set aside a judgment, but the proof must show that the minor had a good defense which was not presented. The court, before rendering the judgment, heard some evidence, and it is not clear that a different judgment would have been rendered had all the evidence been heard. Again, the terms 'fair and just,' used by the court, may have conveyed to the minds of the jury that fraud or collusion was perpetrated, and further that no judgment would be binding on a minor unless all the evidence practicable should be heard by the court. Such is not the law. Where the court has heard evidence sufficient to support his judgment in such a case, in order to set it aside it must be clear that had he heard all the evidence, a different result should have followed. In other words, in order to set aside a judgment against a minor where service is regularly had on him and he is represented by a guardian ad litem, it must be shown that fraud, collusion, or error was committed in procuring it. The error must be such that, if carried to an appellate court, it would cause a reversal, or show that other facts have been discovered that show the decree to be wrong."

It has been held that a judgment taken against an infant would not be set aside because of the fact that neither the minor nor the next of kin had notice of the application of the guardian ad litem for his appointment. *Manayunk Trust Co. v. Platt*, 221 Pa. St. 248, 70 Atl. 721.

In *Butler v. Winchester Home for Aged Women*, 216 Mass. 567, 104 N. E. 451, it was held that an infant was bound by the acts performed in good faith by his solicitor or counsel in the course of proceedings, to the same extent as a person of full age.

In *Lieserowitz v. West Chicago St. R. Co.* 80 Ill. App. 248, it was held that a judgment consented to by a minor's next friend was not binding on the minor.

IN RE WEDGWOOD.

ALLEN

v.

WEDGWOOD.

England—Court of Appeal—October 29,
1914.

[1915] 1 Ch. 113.

Charities — Gift for Benefit of Animals.

A devise in trust "for the protection and benefit of animals" is a valid charitable trust. [See note at end of this case.]

[113] Appeal from a decision of Warrington, J.

By her will, dated June 26, 1913, the testatrix Frances Julia Wedgwood appointed the plaintiff and the defendant Cecil Wedgwood to be executors and trustees thereof and, after giving certain pecuniary and other legacies and annuities and making a devise of her freehold house, devised and bequeathed all the residue of her real and personal estate upon trust for conversion and upon further trust (subject to the payment of certain sums therein mentioned and to the setting aside of sums to secure certain annuities) for the defendant Cecil Wedgwood absolutely.

The testatrix died on November 26, 1913, without having revoked or altered her will save by two codicils which are not material to be stated, and the said will and codicils were duly proved by the plaintiff and the defendant Cecil Wedgwood.

Doubts having arisen as to whether the testatrix had not given her residue to the defendant Cecil Wedgwood upon certain secret trusts, which might or might not be validly created, an originating summons was taken out by the plaintiff against the defendant Cecil Wedgwood, Bertram Hensleigh Wedgwood, one of the testatrix's next of kin, and the Attorney-General, for the determination of: the questions (1) whether under the circumstances the gift of the residue to the defendant Cecil Wedgwood was an absolute gift to him beneficially or was subject to any secret trust. (2) If the said gift was subject to any secret trust, whether such trust was a good and valid charitable trust or not, [114] and, if not a good charitable trust, whether such secret trust was validly created or was too vague and uncertain, and had consequently failed for uncertainty.

It appeared from the evidence of the defendant Cecil Wedgwood that he and the testatrix were both interested in the question of the

protection of animals, and that in 1908 she had asked him to act as her executor in conjunction with the plaintiff, and also wished him to undertake a further trust, which was to apply the residue of her estate for the protection and benefit of animals. She subsequently told him that her lawyer had suggested that, if she could trust him (the defendant) to use her residue for the purpose she intended, she should leave the residue to him absolutely, and to that proposal he agreed. They discussed the purpose to which the residue should be applied and the witness suggested that he might help forward the movement for the humane slaughtering of animals and also the movement to provide municipal abattoirs where animals could be properly and decently slaughtered; and the testatrix agreed that those were the sort of purposes, among others, which she would like to have forwarded. She wished to leave him an absolutely free hand to use his judgment as cases arose where he thought he could be of use to animals.

Warrington, J., held that the defendant Cecil Wedgwood was entitled to the residue absolutely, and not subject to any secret trust, and declined to consider the question of the validity of the trust on the hypothesis that its existence had been established.

From this decision the defendant B. H. Wedgwood appealed, on the ground that the gift of the residue was subject to a secret trust, and that such trust was not a good or valid charitable trust, but was void for perpetuity and/or uncertainty. There was a cross-appeal by the Attorney-General, who contended that the secret trust was a good and valid trust for charitable purposes.

The appeal came on for hearing on October 14, 1914, when the Court held, reversing the decision of Warrington, J., that the defendant Cecil Wedgwood took the residuary estate, not beneficially but subject to a secret trust for the protection and benefit of animals. The question then arose [115] whether that trust was a good and valid trust for charitable purposes.

H. Terrell, K.C., and Salter for appellant.
Austen-Cartmell for Attorney-General.

Clauson, K.C., and Harman for defendant executor.

Solicitors: *Waterhouse & Co.; The Solicitor to the Treasury.*

[116] LORD COZENS-HARDY, M.R.—It having been decided that Cecil Wedgwood takes the residuary estate not beneficially but upon a secret trust, it remains to consider what is the trust and whether it is charitable. The terms of the trust are "for the protection and benefit of animals." The movement for the humane slaughtering of animals and the [117] pro-

vision of municipal abattoirs were mentioned as the sort of purpose the testatrix would like to have forwarded. The word "charity" has a much wider meaning in law than it has in popular speech. The Courts have held that the particular objects mentioned in the Statute of Elizabeth, namely, [1891] A. C. 531, relief of the poor, [1898] 1 Ir. R. 446, religion, 1 De G. & J. 72, education, are not exhaustive. By analogy a large class of other objects have been included. Lord Macnaghten's judgment in *Special Income Tax Com'rs v. Pemsel* [1891] A. C. 531, is perhaps the leading authority. But I am content to adopt what was said by FitzGibbon, L.J., in *In re Cranston* [1898] 1 Ir. R. 446: "Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow creatures (including, under decided cases, animals) and which will confer the supposed benefit without contravening law or morals, will be charitable." It may be, and indeed I think it is, true that there has been a tendency to enlarge the meaning of the word charity, and that gifts have within the last fifty years been supported as good charitable gifts which 150 years ago would not have been supported. The authorities are very numerous. I need only refer to a few. In *London University v. Yarrow*, 1 De G. & J. 72, it was held that a trust for the benefit of animals useful to man was good, and there was a clear intimation of opinion that the limitation to domestic animals was not necessary. In *Tatham v. Drummond* (1864) 4 De G. J. & S. 484, the establishment of a slaughter-house for horses was held to be charitable, though the gift failed as it involved the purchase of land. The Society for the Prevention of Cruelty to Animals, the Society for the Abolition of Vivisection, and a Home for lost dogs are instances in which the doctrine has been extended.

In my opinion it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty. In the language of Holmes, L.J., in *In re Cranston* [1898] 1 Ir. R. 457, [118] "gifts the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable. . . . If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty." I desire also to mention the judgment of Chatterton, V.-C., in *Armstrong v. Reeves*, 25 L. R. Ir. 325, especially the passage at p. 341, where he points out that objects of gen-

eral mercy to animals of all kinds, whether useful to man or not, are charitable.

There must be a declaration that the trust in the terms which I have mentioned is a good charitable trust. The selection of the particular mode of applying the fund, both principal and income, will rest with Mr. Cecil Wedgwood during his life. The costs of all parties of this appeal must be provided for out of residue, as in the Court below.

KENNEDY, L.J.—In this case the Court has already pronounced its decision that the bequest of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood constituted not an absolute gift to him beneficially, but was subject to a secret trust. The question reserved for further consideration was whether or not such trust was a good and valid charitable trust.

It is a trust for the protection and benefit of animals. We know from the evidence that two objects which, in the opinion of the testatrix, would come within the purview of her generosity were the more humane slaughtering of animals and the establishment of municipal abattoirs.

It was contended by Mr. Terrell and Mr. Salter on behalf of the next of kin that this is too wide, too vague, and too uncertain. A review of the relevant authorities shows, I think, that during the past century there has been a growing tendency to enlarge the area of purposes which will be treated by Courts of Equity as charitable purposes, whilst still in theory only those objects of general public utility are charitable, in the legal sense of the term, which either are included in, or are analogous to, the [119] objects mentioned in the preamble of the Act 43 Eliz. c. 4: see especially the judgment on this point of Rigby, L.J., in *In re Nottage* [1895] 2 Ch. 649, 656. In the course of his judgment in *Special Income Tax Com'rs v. Pemsel* [1891] A. C. 533, Lord Macnaghten took from the argument of Sir Samuel Romilly in *Morice v. Durham* (1805) 10 Ves. Jr. 522, 532, a classification of the objects, within which all charity to be administered in the Court of Chancery must fall, into four divisions, i. e., trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Sir Samuel Romilly, as Lord Lindley (the Lindley, L.J.) points out in *In re Macduff* [1896] 2 Ch. 451, 467, rightly described the fourth division, within which Mr. Austen-Cartmell argues that this trust falls, as the most difficult. "I don't know," said Holmes, L.J., in the Irish case of *In re Cranston* [1898] 1 Ir. R. 446 452, "a better classification, and yet it is obvious that the fourth head is altogether vague and indeterminate." "The essential attributes of a

legal charity," said FitzGibbon, L.J., in the same case, "are in my opinion, that it should be unselfish—that is for the benefit of other persons than the donor—that it shall be public, that is that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be philanthropic or benevolent, that is dictated by a desire to do good." In *Goodman v. Saltash* (1882) 7 App. Cas. 633, Earl Cairns, in the course of his speech, speaking of a condition that the free inhabitants of ancient tenements in the borough of Saltash should have a right of dredging for oysters in the estuary, said that such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say, a public, trust or interest for the benefit of the free inhabitants of ancient tenements. "To be a charity," said Chitty, L.J. (then Chitty, J.) in *In re Foveaux* [1895] 2 Ch. 504, "there must be some public purpose—something tending to the [120] benefit of the community," and he adds a little later in his judgment, "In examining the purposes of any particular trust the Court has taken a liberal rather than a narrow view of the subject." "We have gone much further," said the Master of the Rolls in Ireland in 1898, "than the words of that statute" (the first Irish Poor Law Act of Elizabeth) "and the tendency of late years has been where a testator dedicates part of his property towards an object which is not illegal in itself, to give effect to the intention unless there is some coercive reason to the contrary." In *re Cranston* [1898] 1 Ir. R. 435. It would be easy to cite cases illustrating this attitude of liberality; but, turning now to the decisions on gifts expressed to be, in one way or another, for the benefit of animals, which are the decisions particularly pertinent to the consideration of the question before us, we find, I think, sufficient authority for maintaining, as I hold that we ought to maintain, the validity of the gift, general as its terms are, in the present case. The earlier cases, of which there are several, are cited in the arguments of counsel and the judgment of Chitty, J., in *In re Foveaux* [1895] 2 Ch. 501, 507, to which I have already referred, and it is unnecessary to refer to them at length. It is, however, I think, having regard to the argument addressed to us by counsel for the appellant, material and right to note that the validity of the gift as a charitable gift has not been affirmed only in cases in which the animals for whose benefit the gift was bequeathed were domestic animals or animals useful to man. Gifts to the Royal Society for the Prevention of Cruelty to Animals and to the Society for the Protection of Animals liable to Vivisection have been held good charitable gifts, and in neither case are the purposes of the named

society limited to useful or domestic animals. In the case of *Marsh v. Means*, 3 Jur. (N. S.) 790, and in the case of *In re Vallance*, Seton 5th ed. 1141, both of which are referred to by Chitty, J., the object appears to have been the prevention of cruelty to animals generally. "Cruelty," he adds towards the close of his judgment, "is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but [121] the advancement of morals and education among men." In the Irish case of *Armstrong v. Reeves*, 25 L. R. Ir. 341, Chatterton, V. C., in the course of his judgment said in reference to cruelty to animals, "In my opinion, it is for the benefit of the public that such cruelty shall be prevented; and that any society for the prevention of cruelty to animals, whether domestic animals or not, is within the scope of charitable institutions." In *re Cranston* [1898] 1 Ir. R. 431, 457, which I have referred to, Holmes, L.J., used very similar language: "There is really no difference amongst thoughtful and civilized men on this subject. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty."

It was contended in the argument addressed to us against the validity of this particular bequest as a charitable gift that it fails on account of such vagueness and generality of expression as would justify its application by the trustee to the protection and maintenance of noxious animals, and counsel instances, if I remember rightly, lions and tigers. Now it is quite true, as laid down by Lindley, L.J., in *re Macduff* [1896] 2 Ch. 463, 464, that when we are dealing with general words we must consider whether there is such an indication of purpose or of trust that the Court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. But, at the same time, I can entertain no doubt that if the Court should now be asked to say whether the trustee under this bequest for the protection and benefit of animals was fulfilling his duty in expending the fund upon the preservation of beasts of prey or mad dogs the Court would not find any difficulty as to the answer which is dictated by reason and common sense. There are, I suppose, very few, if any, charities of a wide character, such as, to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination.

In my opinion, the secret trust contained in the will of Miss Wedgwood is a valid charitable trust.

[122] SWINFEN EADY, L.J.—It has already been decided that Mr. Cecil Wedgwood does not take the residue beneficially, but that it is subject to a secret trust. There remains the question whether it has been validly given upon trust, or whether the next of kin have become entitled. The trust was to apply the residue “for the protection of animals,” or “for the protection and benefit of animals,” the testatrix having assented to the suggestion that the movement for the humane slaughtering of animals and the movement for providing municipal abattoirs in the place of ordinary slaughter-houses were the sort of purposes, among others, which she would like to be supported. The object of the trust being thus ascertained and defined, the question arises, is this a valid charitable trust? In my opinion it is. It is a gift for a general public purpose, beneficial to the community. A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. That such purposes are eminently charitable, in the accepted legal sense of that term, is amply established by the cases to which the Master of the Rolls has referred. In *In re Foveaux* [1895] 2 Ch. 501, 507, Chitty, J., decided that certain societies for the suppression and abolition of vivisection were charities within the legal definition of the term charity. He said, “Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community.” Those observations, in which I entirely concur, equally apply to the trust constituted by the testatrix, which in my opinion is a valid charitable trust.

[123] LORD COZENS-HARDY, M.R.—Mr. Austen-Cartmell has been good enough to hand to me the form of order that he proposes, which I will read. “Discharge the order of Mr. Justice Warrington in so far as it declares on the true construction of the testatrix’s will, and in the events that have happened, the gift in the will contained of the real and residuary personal estate to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any charitable trust.” That is right of

course. Then, “And declare that the said gift was not an absolute gift to the defendant Cecil Wedgwood beneficially, but was subject to the trust for the application thereof as to both capital and income for the protection and benefit of animals in such manner as he shall think fit, and that such trust is a good and valid trust for a public and charitable purpose”—that is right. Then, “And the Attorney-General not at present asking for a scheme or for the administration of the testatrix’s estate, and the defendant Cecil Wedgwood by his counsel undertaking to furnish proper accounts of the testatrix’s estate to the Attorney-General and to render to the Attorney-General an annual account and statement of the application of the trust fund and the income thereof, liberty to the Attorney-General to apply for administration or otherwise.”

NOTE.

The reported case sustains as a valid charitable trust a devise in trust “for the protection and benefit of animals.” The cases discussing the question whether a gift for the benefit of animals is a charity are reviewed in the notes to *In re Graves*, 17 Ann. Cas. 137; *In re Coleman*, Ann. Cas. 1915C 682; and *Hoeffer v. Clogon*, 63 Am. St. Rep. 241, 267.

HADACHECK

v.

SEBASTIAN.

United States Supreme Court—December 20, 1915.

239 U. S. 394; 36 S. Ct. 143.

Bricks — Ordinance Prohibiting Manufacture — Validity.

A municipal ordinance enacted in good faith as a police measure, prohibiting brick-making within a designated area, does not take, without due process of law, the property of an owner of a tract of land within the prohibited district, although such land contains valuable deposits of clay suitable for brickmaking which cannot profitably be removed and manufactured into brick elsewhere, and is far more valuable for brick-making than for any other purpose, and had been acquired by him before it was annexed to the municipality, and had long been used by him as a brickyard.

[See note at end of this case.]

Same.

Prohibiting by municipal ordinance the manufacture of brick within a designated area cannot be said to deny the equal protection of the laws to the owner of a brickyard within the prohibited district, where the record does not show that brickyards in other localities within the municipality where the same conditions exist are not regulated or prohibited, or that other objectionable businesses are permitted within the same district.

[See note at end of this case.]

Courts — Decision of State Court — Binding Effect on Federal Supreme Court.

The decision of the highest court of a state that a municipal ordinance which is asserted to violate the Federal Constitution is within the city's charter powers, and is not forbidden by the state constitution, is conclusive upon the Federal Supreme Court on writ of error to the state court.

Error to California Supreme Court.

Habeas corpus proceeding. J. C. Hadacheck, petitioner, and C. E. Sebastian, Chief of Police of City of Los Angeles, defendant. Writ discharged. Petitioner brings error. The facts are stated in the opinion. **AFFIRMED.**

Emmet H. Wilson and *G. C. De Garmo* for plaintiff in error.

Albert Lee Stephens, *Charles S. Burnell* and *Warren L. Williams* for defendant in error.

[404] **McKENNA, J.**—Habeas corpus prosecuted in the Supreme Court of the State of California for the discharge of plaintiff in error from the custody of defendant in error, Chief of Police of the City of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the City of Los Angeles which makes it unlawful for any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him [405] and he was committed to the custody of defendant in error as Chief of Police of the City of Los Angeles.

Being so in custody he filed a petition in the Supreme Court of the State for a writ of habeas corpus. The writ was issued. Subsequently defendant in error made a return thereto supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The Chief Justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to habeas corpus and that petitioner is the owner of a tract of land within the limits described in the ordinance upon which

tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than \$100,000 per acre or about \$800,000 for the entire tract for brick-making purposes, and not exceeding \$60,000 for residential purposes or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.

[406] That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brick yard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the State, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people in the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brick yard an extremely small amount of smoke is emitted from any kiln and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brick yard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the

ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed, [407] signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brick yards or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense and is in violation of the constitution of the state and the Fourteenth Amendment to the Constitution of the United States (9 Fed. St. Ann. 416).

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern and its conduct will not create a nuisance.

There is an allegation that the ordinance if enforced fosters and will foster a monopoly and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons who are his competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of [408] petitioner, and it is alleged that there is another district in which brick yards are prohibited.

There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily or was not offensive to health. And there were affidavits supporting Ann. Cas. 1917B.—59.

the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living at the vicinity.

There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 Cal. 416, 132 Pac. 584, L.R.A.1916B 1248: "The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose."

The court considered the business one which could be regulated and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that [409] petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, overcame the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure and that

it was intended to discriminate against petitioner or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature and that the court, without regard to the fact shown in the return that there was another district in which brickmaking was prohibited, could not sustain the claim that the ordinance was not enacted in good faith but was designed to discriminate against petitioner and the other brick yard within the district. "The facts before us," the court finally said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz., a legitimate regulation, operating alike upon all who came within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many [410] cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago, etc. R. Co. v. Tranbarger*, 238 U. S. 67, 78, 35 S. Ct. 678, 59 U. S. (L. ed.) 1204, 1211. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in *Reinman v. Little Rock*, 237 U. S. 171, 35 S. Ct. 511, 59 U. S. (L. ed.) 900. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property

was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in [411] particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: Granting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it, "and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between *Reinman v. Little Rock* and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive "from a financial standpoint." But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished *In re Kelso*, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L.R.A. (N. S.) 790, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco.

[412] The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership,—viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of." The court expressed the view that the removal

could be regulated but that "an absolute prohibition of such removal under the circumstances," could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clauses of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error;" and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain [413] businesses having mechanical power and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions, and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the

Supreme Court, and we find nothing to justify it.

It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does [414] not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

We do not notice the contention that the ordinance is not within the city's charter powers nor that it is in violation of the estate constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the Supreme Court of the State.

Judgment affirmed.

NOTE.

State or Municipal Regulation of Manufacture of Bricks.

The reported case upholds the validity of an ordinance of the city of Los Angeles declaring it to be unlawful for any person, firm or corporation to establish or operate, or cause or permit to be established or operated, any brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick, whether established prior or subsequent to the passage of the ordinance, within a described district or portion of the city. It is held that the ordinance in question, passed by the city in the exercise of its police power, does not violate the due process of law provision of the Fourteenth Amendment of the Federal Constitution (9 Fed. St. Ann. 416) because the land of the petitioner, containing valuable deposits of clay and structures for the manufacture of brick, would depreciate greatly in value if brickmaking was prohibited thereon; and it is said that it cannot be held that there is a violation of the equal protection of law

clause of the same amendment, because the petitioner's competitors are permitted without regulation to manufacture brick on property similarly situated in all respects and because other kinds of business equally objectionable are permitted to be carried on within the limits of the prescribed district, the determination of those two points depending on an inquiry of fact not within the record.

In *Ward v. Washington*, 4 Cranch C. C. 232, 29 Fed. Cas. No. 17,163; it appeared that the corporation of Washington had passed a by-law providing that "any person who shall, without . . . license, erect or use a brick or lime kiln, shall incur a penalty of ten dollars for every week he continues to use the same without license." The court "was of opinion that the corporation had a right to pass such a by-law, under the power to prevent nuisances, and to superintend the health of the city" but reversed the judgment on the ground that the by-law was so imperfect that it would not support a prosecution in any form. Under the terms thereof no officer was authorized to grant a license, thus making it impossible for the defendant who had been convicted thereunder to obtain one. Therefore it was said: "The by-law . . . in effect amounted to a total prohibition of the erection or use of a brick . . . kiln in any part of the world; for it is not, in its terms, limited to the city of Washington. Such an act would be void for want of power in the corporation."

In *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L.R.A.(N.S.) 898, the relator sought by mandamus to compel the issuance by the defendant as building inspector of the city of Omaha of a permit for the construction of a brick kiln, which permit the defendant refused to issue on the ground that in so doing he would violate an ordinance providing as follows: "It shall be unlawful for any person, persons, firm or corporation to erect or construct within the city of Omaha any kiln or oven to be used in the manufacture of brick." In upholding the defendant's view and in declaring the ordinance to be valid against the relator's contention that the same was "arbitrary, unreasonable, and void, as being an invasion of personal rights and of private property," the court said: "In testing police regulations like the ordinance assailed, the court should inquire 'whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.' . . . Relator was not entitled to a writ commanding defendant to issue a building permit in violation of the ordinance, unless the proofs clearly answer those inquiries in the negative and show that the enactment was an unreasonable and arbitrary invasion of individual

rights under the guise of police regulation.

. . . Relator has not yet constructed his kiln, and the testimony adduced to show that it would not become a nuisance is based largely on observations of existing kilns operated according to the modern method described in his plans and evidence. According to the proofs the volume and character of the smoke will be less objectionable under the new process, but the stack will emit smoke of a light color continually. The fair inference from all the evidence is that black smoke in great volume will escape at intervals under ordinary management of the plant. It is undisputed that clay, excavated on the premises, and coal, ashes and brick, in vast quantities, will be handled there. Teams and men will be required for that purpose. The fact that the wind in this climate will carry dust and soot long distances at times cannot be disproved. On one side of the kiln site an addition to the city is rapidly being occupied by valuable residences and there is no factory in the immediate neighborhood. The proofs show that there are thirteen houses within two blocks of relator's land, and a witness for defendant testified that within five blocks there were twenty or twenty-five families.

. . . Near valuable residences relator intends to build a smoke-stack 130 feet high, and to remove clay to a depth not disclosed by his plans or evidence. The value of residence property in the neighborhood might be damaged by relator's enterprise. These were proper matters for the consideration of the city lawmakers. When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety or welfare, or that it is not a bona fide exercise of police power, or that it amounts to an unconstitutional invasion of relator's individual rights, or that it is arbitrary and unreasonable."

In *Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, 25 L.R.A.(N.S.) 247, there was involved an ordinance of the city of Denver providing as follows: "A brick yard, where bricks are burned within twelve hundred feet of any residence or public school house or park belonging to the city, within the limits of the city of Denver, without permission from the owner or owners of such residence or residences, or the occupants thereof, or without permission from the city, when such brick yard is within twelve hundred feet of a public school house or city park, is hereby defined and declared to be a nuisance." The ordinance was declared to be invalid because of its unreasonableness, and unconstitutional as taking property without due process of law. The court said: "When subjected to the test of reasonableness this ordinance is so manifestly radical, unjust and oppressive,

while upon the question of its constitutionality, its effect is so clearly to take and destroy property without due process of law, that we have no hesitancy in declaring it invalid on both grounds. It is difficult to conceive how a more drastic, radical and extreme municipal law, than the one under consideration, could be proposed. Under its provisions one of the most important, useful and necessary industries known to business life, everywhere recognized as lawful and legitimate, confessedly not a nuisance at common law or inherently, in which thousands of dollars are invested and employed, is arbitrarily driven beyond the city limits and thus largely destroyed, by the mere edict of the city council, upon the occurrence of these two things, first, that such business is either within twelve hundred feet of a single residence house, or of a city park or public school house, and second, in case of the residence that its owner or occupant, and in the case of the park or school that the city, has not consented to such location. To accomplish such result it matters not whether such business is in truth detrimental or obnoxious, or whether it is being conducted in a proper, legitimate and innocent way. The mere statement of the facts upon, and the conditions under which, this ordinance is in effect, as above indicated, is in itself alone a complete refutation of the claim that it is a proper and reasonable one or a valid exercise by the city, of its police power."

In State v. St. Louis Board of Health, 16 Mo. App. 8, it appeared that the relator had been prosecuted in police court under an ordinance providing as follows: "Hereafter no brick kiln shall be located within three hundred feet of any dwelling house built and inhabited before such location, without the consent in writing of the owner and occupant of every such house." He had been acquitted on the ground that his kiln was located and operated before the ordinance or the charter specifically authorizing it were adopted. It was held that the acquittal was not conclusive against the city as to the relator's right to operate the kiln and did not therefore authorize the issuance of a writ of prohibition to prevent the city through its board of health and health commissioners from maintaining proceedings to condemn the kiln as a nuisance under the authority given by charter to abate the same, for in the original proceedings the question of nuisance did not properly arise at all.

BROWN

v.

MITCHELL.

North Carolina Supreme Court—March 3, 1915.

168 N. Car. 312; 84 S. E. 404.

Sales — Parol Evidence of Subsequent Agreement.

Evidence offered by the seller of a mule that after it had been delivered to the buyer, and within half an hour after a written contract of sale had been delivered by the buyer to the seller, and before the seller had handed such paper to a third person who was to keep it for the parties, the buyer agreed that the title to the mule should remain in the seller until payment was made, is admissible if considered as made at the time of the contract as being an agreement to secure payment not inconsistent with the contract, and if made subsequently to the contract the rule excluding parol evidence does not apply.

Chattel Mortgages — Pre-existing Debt.

A pre-existing debt is a sufficient consideration for a parol chattel mortgage.

[See note at end of this case.]

Appeal from Superior Court, Hertford county: **BOND, Judge.**

Action by W. A. Brown, plaintiff, against Wright Mitchell, defendant. Judgment for defendant. Plaintiff appeals. **REVERSED.**

[312] Action begun before a justice of the peace and heard on appeal, its purpose being to recover a mule from the defendant.

The plaintiff testified that on 22 February, 1913, he sold and delivered to the defendant a mule for \$20, and took from defendant a paper-writing in words and figures as follows:

I, Wright Mitchell, promise to pay W. A. Brown the sum of \$20 for one bay mule, if said mule should get well and able to work any time in the limited time of twelve months. If said mule does not get well and able to work in this limited time above mentioned, I am not to pay said W. A. Brown anything.

This 22d day of February, 1913.

Wright Mitchell.

Plaintiff delivered the mule to the defendant and took from defendant above paper. It was agreed that plaintiff should deliver said paper to E. J. Gerock, a merchant at Ahoskie, to keep for said parties.

Plaintiff offered to show that after the mule had been delivered to the defendant, and

within half an hour after said paper had been delivered by defendant to plaintiff, and before plaintiff had handed it to said Gerock, the defendant agreed that title to said mule should remain in plaintiff until payment was made, if same became enforceable. Defendant objected.

[313] As there was no offer to show that any part of the agreement between the parties had been omitted by mistake, and as said alleged parol agreement, in the opinion of the court, assailed the written part thereof; and, further, that if it was a subsequent promise there was no consideration therefor, the evidence was excluded and plaintiff excepted.

Plaintiff offered evidence tending to show that the mule recovered and was able to work within the time fixed by the written contract.

Verdict and judgment for defendant, and plaintiff excepted and appealed.

W. W. Rogers and Winborne & Winborne for appellant.

George Courper and W. D. Boone for appellee.

ALLEN, J.—The evidence offered by the plaintiff to prove that it was agreed that the title to the mule should remain in the plaintiff until payment was made does not come within the rule excluding parol evidence when there is a written contract.

In the first place, if the agreement had been made contemporaneously with the writing, it would fall within the principle that where a part of the contract is in writing and a part not, that the part in parol may be proven, because there is no inconsistency between a promise to pay and an agreement to secure payment (*Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Wilson v. Scarboro*, 163 N. C. 384, 79 S. E. 811), and if made subsequent to the writing, which appears to be the case here, the rule excluding parol evidence would have no application. *Freeman v. Bell*, 150 N. C. 148, 63 S. E. 682; *McKinney v. Matthews*, 166 N. C. 580, 82 S. E. 1036.

In the *Evans* case the Court quotes a section from *Clark on Contracts*, that "Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange some orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract," and comments on the section as follows: "In such a case there is no violation of the familiar and elementary rule we have before mentioned (against varying or contradicting a written agreement), because in the sense of that rule the written

contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing;" and this is approved in the *Wilson* case.

In *Freeman v. Bell*, supra, the Court says: "It is well settled that the rule that parol evidence will not be admitted to contradict or modify a [314] written contract does not apply where the modification takes place after the execution of the contract;" and this was approved in the *McKinney* case.

We are also of opinion that the pre-existing debt is a sufficient consideration to support the agreement. 1 *Jones on Ch. Mort.* sec. 81; 6 *Cyc.* 1013; 5 *Ruling Case Law*, 420; *McMurtrie v. Riddell*, 9 *Colo.* 503, 13 *Pac.* 181; *Louthain v. Miller*, 85 *Ind.* 163; *Close v. Hodges*, 44 *Minn.* 205, 46 *N. W.* 335; *Paine v. Benton*, 32 *Wis.* 491; *Collier v. Tully*, 78 *N. J. Eq.* 557, *Ann. Cas.* 1912C 78, 80 *Atl.* 491; *State v. Surles*, 117 *N. C.* 720, 23 *So. E.* 324.

In the case from Indiana the Court says: "We have no doubt that an antecedent debt is a valuable consideration and that it will support a mortgage or other contract," and in the New Jersey case, after quoting a passage from the opinion of the Vice Chancellor: "This passage from the opinion assumes that in order to make a chattel mortgage good there must be then a present consideration when it is given. It has, however, been held by this Court that a precedent debt is a good consideration for a chattel mortgage;" and further, after citing the case of *Knowles Loom Works v. Vacher*, 57 *N. J. L.* 490, 31 *Atl.* 306, 33 *L.R.A.* 305: "We not only held that a chattel mortgage given for a pre-existing debt was valid, but also that it was entitled to priority over an antecedent conditional sale not recorded."

The New Jersey case is also reported in 24 *Ann. Cas.* 78, and the editor in an extended note cites a great number of cases in support of the position that "The authorities unanimously support the holding of the reported cases to the effect that a precedent debt is a good consideration for a chattel mortgage."

In the citation from *Ruling Case Law* the author says: "There has probably never been any doubt that as between the parties a mortgage given to secure a pre-existing debt is as valid and effective as one given for a debt contemporaneously incurred. Such a mortgage is not without consideration, because the debt affords a sufficient consideration for it."

In the *Surles* case the defendant was indicted for disposing of mortgaged property, and

one of the defenses was that the mortgage was not valid because executed to secure a pre-existing debt, and the Court says of this contention: "In his charge his Honor told the jury that the mortgage rested on a good consideration, whether it was given, as testified by defendant, for a balance due on a former debt, or whether, as testified by the witness Green, for supplies furnished after the date of the mortgage. The defendant excepts, but on what ground it is not clear. His Honor was correct in the ruling."

It was also held in *Potts v. Blackwell*, 57 N. C. 67, a case which has been frequently cited and approved, that a mortgagee for a pre-existing debt is a purchaser for value.

[315] These authorities fully sustain the position that if a written chattel mortgage has been executed that the pre-existing debt would have been a sufficient consideration to support it, and as a chattel mortgage or conditional sale by parol is recognized as valid in this State (*McCoy v. Lassiter*, 95 N. C. 88; *Odom v. Clark*, 146 N. C. 550, 60 S. E. 513), the same effect must be given to it as if it had been in writing.

Being, therefore, of opinion that the evidence offered by the plaintiff was competent, and that there is a sufficient consideration to support the agreement, a new trial is ordered.

New trial.

NOTE.

It is held in the reported case that evidence is admissible to show a subsequent parol agreement between the parties to the sale of a chattel to the effect that title should remain in the vendor until the price was paid. And the court, apparently regarding the subsequent agreement as a chattel mortgage, holds that the pre-existing debt for the purchase price was a good consideration for the mortgage. The cases on this subject are collated in the note to *Collerd v. Tully*, Ann. Cas. 1912C 78.

CITY OF MARINETTE ET AL.

v.

GOODRICH TRANSIT COMPANY.

Wisconsin Supreme Court—April 8, 1913.

153 Wis. 92; 140 N. W. 1094.

Bridges — Injury by Vessel — Liability.

Where a collision occurs between a steamer and a bridge, the absence of such lights on

the bridge as are required by the rules of the lighthouse board, made under authority of act of Congress, throws the burden on the party in default to show that the absence of such lights not only did not but could not have caused the injury.

[See note at end of this case.]

Courts — Decision of Federal Court — Binding Effect on State Court.

Decisions of federal courts arising on questions depending upon acts of Congress are entitled to weight in the state court, if not controlling.

[See Ann. Cas. 1913E 281.]

Bridges — Injury by Vessel — Liability.

In an action by a city for damages to a bridge caused by a steamer running into it, the question whether the absence of lights on the bridge, as required by the lighthouse board was the cause of the injury, is held to be, under the evidence, for the jury, both on a motion for nonsuit and on motion to direct a verdict.

[See note at end of this case.]

Verdict — When Direction Improper.

If there is any credible evidence which, if undisputed, would entitle the jury to find for the plaintiff, a verdict should not be directed for the defendant.

Appeal and Error — Review — Verdict Approved by Trial Court.

A verdict approved by the trial court will not be disturbed unless in case of clear error.

Bridges — Injury by Vessel — Liability.

In an action by a city for damages to a bridge caused by a steamer running into it, evidence examined and held to be sufficient to sustain a finding that the absence of such lights on the bridge as were required by the lighthouse board did not contribute to the collision.

[See note at end of this case.]

Same.

In an action for damages to a bridge caused by a steamer running into it, certain negative evidence examined and held to be sufficient to sustain a finding that the whistles required of the steamer to signal for the opening of the bridge were not blown.

[See note at end of this case.]

Appeal from Circuit Court, Marinette county: HASTINGS, Judge.

Action by City of Marinette et al., plaintiffs, against Goodrich Transit Company, defendant. Judgment for plaintiffs. Defendant appeals. **AFFIRMED.**

[93] The city of Menominee in the state of Michigan, and the City of Marinette in the state of Wisconsin, plaintiffs, maintained the bridge in question across the Menominee river between the said cities. On the morning of July 18, 1907, at about 2:30 a. m., the steamer *Carolina*, owned by the defendant, collided with the bridge in question, damaging it to the extent of \$3,250. There is no dispute as

to the amount of the damages, and this action is brought for the recovery thereof.

The negligence charged in the complaint is in substance that the defendant failed to give warning of the approach of the steamer which collided with the bridge so that the bridge might be opened for the steamer to pass through, and that the said steamer was so negligently and carelessly managed as to run into the bridge and cause the damage complained of.

The defendant answered admitting certain allegations of the complaint and denying the material allegation respecting negligence of defendant, and also set up as a separate defense failure on the part of the plaintiffs to comply with the rules of the United States lighthouse board passed in pursuance of an act of Congress relating to lighting bridges over navigable rivers, and providing that all parties owning, occupying, or operating bridges over any navigable river shall [94] maintain at their own expense from sunset to sunrise throughout the year such lights on their bridges as may be required by the lighthouse board for the security of navigation; and in addition thereto all parties owning, occupying, or operating any bridge over any navigable river shall in any event maintain all lights on their bridge that may be necessary for the security of navigation. And the answer further alleged not only failure to comply with the rules of the lighthouse board, but also failure to maintain any proper lights on said bridge.

Motions for nonsuit and directed verdict in favor of the defendant were denied, and the jury returned the following verdict:

"(1) Were three blasts of the whistle on the Carolina blown in the usual place for signaling its approach to and intent to go through the bridge? A. No.

"(2) Were the red lights on top of the center of the draw, and the two lights at its end on the east side, usually maintained by the plaintiffs, burning at the time the Carolina struck the bridge? A. Yes.

"(3) Was the defendant negligent in so running the Carolina as to permit her to strike the bridge? A. Yes.

"(4) If your answer to the third question should be 'Yes,' then answer this: Was said negligence a proximate cause of the collision with and injury to the bridge? A. Yes

"(5) If your answer to the third and fourth questions should be 'Yes,' then answer this: Did any want of ordinary care on the part of the plaintiffs contribute proximately to the collision with and injury to the bridge? A. No."

The usual motions were made after verdict for change of answers in the special verdict and for new trial, which were denied, and judgment rendered in favor of the plaintiffs, from which this appeal was taken.

Charles E. Kremer and H. L. Frink for appellant.

L. D. Eastman and John O. Miller for respondents.

[95] *KERWIN, J.*—1. It is first insisted by counsel for appellant that the court below erred in overruling defendant's motion for nonsuit made at the close of the plaintiffs' evidence. This contention is based mainly upon the proposition that it appeared from the plaintiffs' showing that the rules of the lighthouse board respecting lights to be maintained upon the bridge under authority of act of Congress were not complied with. It is contended that the regulations of the lighthouse board have the force of a federal statute and must be recognized by the court as the law. It is conceded that the lights prescribed by the lighthouse board were not maintained upon the bridge. Under repeated decisions of the federal courts in admiralty cases it has been ruled that where such lights have not been maintained, and a collision occurs, it is incumbent upon the party in default to show that the absence of such lights not only did not but could not have caused the injury. *Smith v. Shakopee*, 103 Fed. 240, 44 C. C. A. 1; *The Pennsylvania*, 19 Wall. 125, 22 U. S. (L. ed.) 148; *Belden v. Chase*, 150 U. S. 674, 699, 14 S. Ct. 264, 37 U. S. (L. ed.) 1218; *The Martello*, 153 U. S. 64, 14 S. Ct. 723, 38 U. S. (L. ed.) 637. These decisions of federal courts arising on questions depending upon acts of Congress are entitled to weight with this court, if not controlling.

The case was tried in the court below upon the law as laid down in the foregoing federal decisions, as appears from the able opinion of the trial judge in the record. As will be seen from the foregoing decisions, the federal courts have quite uniformly held to a strict adherence to the requirements of the law in relation to lights and signals, and that no exception can be made unless, as is said, "the breach of regulations could not have been a contributing cause of the disaster." But if the default in obeying regulations be not a contributing cause, then such default will not defeat recovery. *The Fannie*, 11 Wall. 238, 20 U. S. (L. ed.) 114.

There is evidence on the part of the plaintiffs tending to show that the captain in charge of the Carolina, at the time [96] of the collision and for many years prior thereto, was familiar with the harbor and with the lights used on the draw; that lights were exhibited on the bridge at the time of the collision, as usual, sufficient to give warning that the bridge was not open; that at the time of the collision the night was clear, so the bridge, could have been seen from the Carolina coming up the river at a distance of from 400 to 500 feet so as to observe

whether the bridge was being opened; that the whistle of the Carolina was not blown as a signal to open the bridge at the proper place, and was not blown at all until immediately before the steamer struck the bridge and not in time so that the bridge could have been opened in time to avoid the collision; that the Carolina collided with the bridge and caused the injury. We think the evidence was ample to carry the case to the jury, therefore the motion for a nonsuit was properly overruled.

2. It is contended that the court erred in denying defendant's motion for a directed verdict at the close of all the evidence. In addition to the point that the absence of lights required by the lighthouse board was ground for a nonsuit, counsel for appellant further insist that upon all the evidence a verdict should have been directed for defendant, and an attempt is made to support this contention on two grounds, which will be briefly referred to.

First, it is said that several witnesses testified that the government lights were much better than those maintained on the bridge, and that the evidence shows that the absence of government lights contributed to bringing about the collision. Second, it is insisted that the evidence on the part of appellant establishes beyond controversy that the whistle on the Carolina was blown as a signal for the opening of the bridge, and that this fact is established by the positive evidence of twelve witnesses, while the evidence on the part of the respondents is negative, therefore there was not sufficient evidence upon the point to carry the question to the jury, but [97] that as matter of law it was established that the whistle was blown.

The first of these propositions as regards government lights we consider the more serious question, but we are convinced that there is sufficient basis in the evidence to warrant the jury in finding that the absence of such lights did not and could not have contributed to the collision.

True, the evidence shows that the government lights were better than those maintained on the bridge; but the evidence also tends to show that the captain in charge of the steamer discovered that the bridge was not open when 200 feet from it, and that he could stop the vessel when going at the rate of two and one-half miles an hour in a distance of 150 feet, and that the steamer was going at the rate of two and one-half miles an hour when within two or three hundred feet of the bridge; that the lookout reported to the captain when about 500 feet from the bridge that it was not open. The mere fact that the government lights were better and would show more plainly the situation is not the important question, but whether the lights

maintained upon the bridge, in connection with the captain's knowledge of the situation and the fact that he knew that the bridge was not open in time to have avoided the collision, were sufficient to warrant the jury in finding that the absence of the government lights did not and could not have contributed to the collision. *Blanchard v. New Jersey Steamboat Co.* 59 N. Y. 292; *The Wenona*, 19 Wall. 41, 22 U. S. (L. ed.) 52; *The City of Washington*, 92 U. S. 31, 23 U. S. (L. ed.) 600.

Under the repeated decisions of this court, if there is any credible evidence which, if undisputed, would entitle the jury to find for the plaintiff, a verdict should not be directed for the defendant.

"The simple question is, whether the evidence in behalf of the plaintiff, had it remained undisputed, and giving it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to justify [98] a verdict in favor of the plaintiff." *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894.

Moreover, we have the decision of the learned trial judge overruling the motion for a directed verdict and passing upon the sufficiency of the evidence. Deference is due to his conclusions involving the sufficiency of the evidence to carry the case to the jury. *Nolan v. Kroening*, 130 Wis. 79, 109 N. W. 963; *Murdock v. Beloit, etc. R. Co.* 147 Wis. 100, 132 N. W. 979; *McCune v. Badger*, 126 Wis. 186, 105 N. W. 667; *Slam v. Lake Superior Terminal, etc. R. Co.* 152 Wis. 426, 140 N. W. 30.

A very vigorous contention is made by counsel for appellant to the point that upon the showing made the jury could not find that the absence of government lights on the bridge in accordance with the regulations of the lighthouse board did not and could not contribute to the collision. We cannot agree with counsel in this position. Under the well established rule of this court, we think the evidence in favor of the plaintiffs, giving it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to support a verdict for the plaintiffs upon this question.

The jury were entitled to find on the evidence that the Carolina ran into the bridge without giving any signal, and that the captain had notice that the bridge was not open in time to have avoided the collision, and in fact had all the notice and knowledge that he would have had had the lights required by the lighthouse board been on the bridge. Under such circumstances it is clear that the motion to direct a verdict for defendant was properly overruled. *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320, 96 N. W. 833; *Goldman v. Fidelity, etc. Co.* 125 Wis. 390, 104 N. W. 80; *Lam Yee v. State*, 132 Wis.

527, 112 N. W. 425; *Ellison v. Chicago, etc. R. Co.* 143 Wis. 603, 128 N. W. 428; *Kersten v. Weichman*, 135 Wis. 1, 114 N. W. 499; *Zentner v. Oshkosh Gas Light Co.* 126 Wis. 196, 105 N. W. 911.

[99] It is further insisted by counsel for appellant that there is no credible evidence before this court sustaining the proposition that the whistle was not blown. Upon this point we think counsel is in error, and we need not repeat the rule of this court before stated on the question of sufficiency of the evidence to carry the case to the jury. The contention of appellant under this head is that respondents' testimony is negative merely, therefore not sufficient to raise a jury question. True, a large number of witnesses who were in position to know testified positively that the whistle was blown, and there is considerable testimony negative in its character on the part of the respondents to the effect that the whistle did not blow. However, there is some testimony on the part of the respondents that cannot be regarded as negative testimony. Edward Berg, who was bridge tender on the night in question, and whose duty it was to watch boats going up and down the river and listen for the blowing of whistles and attend to the lights on the bridge, testified that he was expecting the Carolina in that night, and saw it in the bay just outside the lighthouse and watched it coming in; that he was watching for the whistle, watching for a signal from the Carolina, and watched it until it came up to the bridge and ran into it, and did not hear the boat blow any whistle. He further testified that he never thought the boat was going through the draw, because no whistle was blown.

"I can't tell how fast he was going, as my mind was on the whistle. I was waiting to hear the whistle. . . . If he had been going fast I don't think it would have made any impression in my mind, as my mind was on the whistle. I did not release the lever and unlock the bridge because he did not blow for it, and I did not know he wanted the bridge open until he hit it."

The testimony of Berg, under the well established doctrine of this court, was sufficient to raise a jury question as to whether or not the whistle was blown. *Urbanek v. Chicago, etc. R. Co.* 47 Wis. 59, 65, 1 N. W. 464; *Joannes v. Millerd* [100] 90 Wis. 68, 62 N. W. 916. The evidence of Berg on the question referred to, though negative in form, was really affirmative in essence. *Joannes v. Millerd*, *supra*; *Urbanek v. Chicago, etc. R. Co.* *supra*; *Sobey v. Thomas*, 39 Wis. 317; *Shekey v. Eldredge*, 71 Wis. 538, 37 N. W. 820; *Steinhofel v. Chicago, etc. R. Co.* 92 Wis. 123, 65 N. W. 852; *Brown v. Milwaukee Electric R. etc. Co.* 148 Wis. 98, 133 N. W. 589. The case

last cited is especially in point on the question now under consideration. The point was whether a gong on a street car was sounded. The plaintiff testified that he was listening for the gong and did not hear it. The motor-man testified that he sounded the gong. The question arose on the charge to the jury, and the court held that the evidence was not purely negative, it appearing that there was nothing to interfere with plaintiff's hearing, and that he was in a position where he could have heard he gong if sounded.

We are convinced that the jury were entitled to find from the evidence that the whistle was not blown.

The jury answered the fifth question in the negative, thereby finding that there was no want of ordinary care on the part of the plaintiffs which contributed proximately to the collision with and injury to the bridge. On this question the court below charged the jury, in effect, that the absence of the lights required by the lighthouse board raised a presumption of negligence, and that the law required the jury to find that the plaintiffs were guilty of contributory negligence because they did not have those lights, unless the testimony in the case satisfied the jury that the absence of such lights not only might not but could not in any way have contributed to the collision, and that unless they were satisfied to a reasonable certainty from the evidence that the absence of lights which the law required could not have contributed to the collision, they must answer the fifth question in the affirmative. No objection was made to the form of the verdict and no request made to submit any additional questions, and [101] no exception was taken to the charge. We are satisfied that the answers to the questions submitted in the special verdict are supported by the evidence, and that no error was committed upon the trial.

BY THE COURT.—The judgment of the court below is affirmed.

NOTE.

Liability for Injury to Bridge Caused by Vessel.

In General, 938.

Injuries Caused by Vessel in Tow, 940.

Defenses, 940.

In General.

It is apparently well settled that if a public corporation is put to expense by the act of a third person for the repair of a bridge, it may maintain an action against him for the recovery of the amount expended. 4 R. C. L. tit. *Bridges*, p. 216. It has also been held

that where a bridge erected by lawful authority but constituting private property, is injured by the negligent act of another, its owners have a right of action against the person causing the injury. *Bucki v. Cone*, 25 Fla. 1, 6 So. 160; *Cue v. Breeland*, 78 Miss. 864, 29 So. 850.

Hence where a bridge is injured by a vessel through the negligent act of those in charge of her an action to recover damages resulting from the injury may be brought by the owners of the bridge. *Chico Bridge Co. v. Sacramento Transp. Co.* 123 Cal. 178, 55 Pac. 780; *Chicago v. The Queen City*, 17 Ill. App. 203 (holding that attachment proceeding for injuries to bridge caused by vessel could be maintained against vessel navigating waters of state under statute giving lien on vessels of that class for damages for injuries caused by them, although vessel had its home port in another state); *Cumberland County v. Central Wharf Steam Tow-Boat Co.* 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246; *Highway Com'rs v. Chaffee*, 1 Mich. N. P. 147 (holding that commissioners of highways were proper parties to bring suit for injuries to public bridge); *Multnomah County v. Willamette Towing Co.* 49 Ore. 204, 89 Pac. 389; *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L.R.A.(N.S.) 324, *affirmed* 222 U. S. 191, 32 S. Ct. 42, 56 U. S. (L. ed.) 159, 36 L.R.A.(N.S.) 592, and *overruling* on rehearing 47 Wash. 417, 92 Pac. 334; *Catarauqui Bridge Co. v. Holcomb*, 21 U. C. Q. B. 273. And see the reported case. See also *Steam Canal Boat Tempest v. Lucas County*, 7 Ohio Cir. Dec. 137, 13 Ohio Cir. Ct. 263 (holding that under statute giving right of action against person injuring bridge, boat causing injuries to bridge could be sued by name); *Menasha v. The Portage*, 26 Wis. 534 (holding that action for injury to bridge within corporate limits of village by vessel was properly brought by town). In *Highway Com'rs v. Chaffee*, *supra*, the court, in charging the jury as to the nature of the liability for an injury to a bridge caused by a vessel, said: "The common-law rule is to be here strictly applied, 'whoever, to the injury of another, neglects a duty which he ought to perform by law, becomes liable to compensate the injury or damage.' The test is this: in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property, as a prudent man would employ, under similar circumstances, if he were himself the owner of the property exposed to damage. . . . The time for a party to exercise care and skill is before he puts himself in the very road of casualty. If he fails to do so, it is of no consequence, in the eye of the law, whether he merely misjudges or is obstinately reckless; his act

is not careful, and he is to abide the consequence."

In *Catarauqui Bridge Co. v. Holcomb*, 21 U. C. Q. B. 273, it was held that a case of *prima facie* negligence against the owners of a steamer was made out by proof that the vessel was discovered one morning to have been driven against a bridge. In *Chico Bridge Co. v. Sacramento Transp. Co.* 123 Cal. 178, 55 Pac. 780, it appeared that a toll bridge was injured by a collision therewith of the defendant's barge. In an action by the owner of the bridge to recover damages for the injuries, it was held that the evidence of the plaintiff made a *prima facie* case of negligence and that the finding as to the negligence of the defendant was supported by the evidence as a whole. The court said: "The evidence showed that for several years the river was navigated at all stages of water, passing the bridge once a week, with but a single slight injury to the bridge prior to the one in question, and a few times afterward touching or rubbing it slightly, and in addition there was expert evidence that it could at all times be navigated safely. This, we think, was quite sufficient to justify the court in denying the motion for a nonsuit, and to throw the burden of showing due care upon the defendant. The court found that the injury was caused by defendant's negligence, and appellant contends that said finding is not justified by the evidence. It is true the defendant's agents in charge of the boats, while showing that they had been for many years engaged in navigating the river, and regularly passing the bridge at all stages of water, testified that on the occasion in question they encountered a cross-current that they had never met before or since, and attributed the accident to that current and denied negligence. The credibility to be given these witnesses, and the weight to which their testimony was entitled, it was the province of the trial court to determine; and the finding, as well as the opinion of the court to which we have referred, shows that the court gave it no credence whatever. We cannot, therefore, set aside said finding."

In *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L.R.A.(N.S.) 324, *affirmed* in 222 U. S. 191, 32 S. Ct. 42, 56 U. S. (L. ed.) 159, 36 L.R.A.(N.S.) 592, and *overruling* on rehearing 47 Wash. 417, 92 Pac. 334, it was held that the measure of damages recoverable for injuries to a bridge caused by a vessel was the actual cost of repairing together with a reasonable sum for the loss of net profits during the time the bridge could not be used. And in *Highway Com'rs v. Chaffee*, 1 Mich. N. P. 147, it was held that the measure of damages recoverable for injuries to a bridge by a vessel was the amount re-

quired to repair the injury together with such extra expenses as were necessarily incurred in consequence thereof while making the repairs. But it was held that extra expenses incurred because of the plaintiff's delay in repairing the bridge could not be recovered.

For a discussion of the admiralty jurisdiction of an action to recover damages for injuries to a bridge, see the note to *Cleveland Terminal, etc. R. Co. v. Cleveland Steamship Co.* 13 Ann. Cas. 1215.

Injuries Caused by Vessel in Tow.

It may be stated as a general rule that where a vessel which is in tow and operating under the control of a tug strikes a bridge and injures it by reason of the negligence of those having charge of the tug, the owners of the tug may be required to respond in damages for the injury. See the cases cited throughout this subdivision.

In *Cumberland County v. Central Wharf Steam Tow-Boat Co.* 90 Me. 95, 37 Atl. 887, 60 Am. St. Rep. 248, it appeared that a schooner while being towed through the draw of a bridge veered to one side and struck and injured the bridge. The sheer of the vessel was caused by a movement of the helm in obedience to the orders of the person in charge of the towing operation. It was held that the owner of the tug was liable for the injury, as it was as to third parties, the active directing agent controlling the movements of the vessel it was undertaking to tow; and that the fact that the persons in charge of the schooner also were at fault and that a suit was pending against them to recover damages for the same injury, did not exempt from liability the owner of the tug.

In *Multnomah County v. Willamette Towing Co.* 49 Ore. 204, 89 Pac. 389, an action was brought against a towing company, both the captain and the pilot of a tug boat, and the charterer of a steamer to recover damages for injuries to a bridge owned by the plaintiff caused by a collision therewith by the steamer while she was being assisted by the tug. In determining the liability of the different defendants the court said: "The complaint charges, in substance, that it was negligence for the defendants to attempt to move the Almond Branch through the harbor of Portland at the then stage of the water with only one towboat, and that they were negligent in the management of the vessel after the voyage was commenced, and such negligence was the proximate cause of the injury to plaintiff's bridge. If the voyage was negligent, or such as reasonable prudent men, familiar with river navigation, would not have undertaken, and such negligence was the proximate cause of the injury complained of, then all persons controlling or

participating in such voyage would be jointly and severally liable, and it would be no defense for one joint tortfeasor that another person was also liable. If, however, the voyage was not negligent, and the accident to the bridge was caused by negligence in the navigation after the voyage was begun, the party or parties so negligent would alone be liable. There was no evidence, so far as we can ascertain, connecting the lumber company with any of the negligent acts charged. It was the charterer or hirer of the Almond Branch, but did not have command, possession or control of the vessel, so far as its management or navigation were concerned, except to direct where it should receive its cargo. The vessel was under the sole charge and command of the master employed by and who represented the owners, and not the charterers. By the terms of the charter party, the owners agreed to let, and the lumber company to hire, the vessel 'with a full complement of officers, seamen, engineers and firemen, and in every way fitted for the service to trade' between such ports as the charterer might direct for a period of from three to nine calendar months at the charterer's option; the cargo to be taken or discharged at any dock or wharf the charterer might direct where the vessel could lie safely afloat. The owners agreed to provide and pay for all provisions, the wages of the captain, officers and crew, insurance, engine room stores, and to maintain the vessel in a thoroughly effective state in hull and machinery for service, and that the captain employed by the owner should be under the orders and direction of the charterers as regarded agency and other arrangements, and should prosecute his voyages with the utmost dispatch. The charterer was to provide and pay for fuel, port charges, expenses of loading, and the like, and ten shillings per gross ton register per calendar month. Such a charter party is a mere contract of affreightment, and not a demise of the vessel, and the charterer is not liable for the acts and conduct of the officers and crew in the management of the vessel." It also appeared in the case last cited that the tug was lashed to the steamer for steering purposes only and was under orders from the bridge of the steamer, the steamer proceeding under its own steam, when it struck the bridge belonging to the plaintiff. It was held that the captain and owners of the tug were not liable for the act of the steamer in injuring the bridge.

Defenses.

Negligence of the persons having in charge the care and navigation of a vessel is an indispensable factor in determining the liability for injuries to a bridge caused by the vessel. *St. Louis, etc. Packet Co. v. Keokuk, etc.*

Bridge Co. 31 Fed. 755; Chico Bridge Co. v. Sacramento Transp. Co. 123 Cal. 178, 55 Pac. 780; New Westminster v. Steamship Maagen, 18 British Columbia 441. In St. Louis, etc. Packet Co. v. Keokuk, etc. Bridge Co. supra, in discussing the degree of care required of a person in charge of a vessel to escape liability for injuries to a bridge caused by the vessel, the court said: "The pilot in charge of the boat was not required to exercise the highest degree of care and skill, or even extraordinary care and skill. All that his duty demanded was that he should use ordinary skill and care; and the jury must determine whether or not, in attempting to pass the draw as he did, heading down the river, he came up to this requirement."

So where the negligence of the persons in charge of the bridge is a contributing factor to the accident, an action to recover damages for injuries to the bridge cannot be maintained. Batchelder v. Hecla Transp. Co. 178 Ill. App. 105; New Westminster v. Steamship Maagen, 18 British Columbia 441. Thus in the case last cited, in discussing the liability arising from injuries to a bridge resulting from a collision therewith by a vessel because of the absence of lights on the bridge, the court said: "Quite apart from any statutory regulations as to lights, those who place obstructions across navigable waters, even although lawfully authorized to do so, cannot complain if in the carrying out of their powers damage is done to their works by the fact that a collision occurs owing to a prudent navigator, proceeding with due care, being unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction." In Batchelder v. Hecla Transp. Co. supra, it appeared that a steamer approaching a railroad draw bridge gave the proper signal for the bridge to open, and the signal was heard and understood by those in control of the bridge, but nothing occurred to indicate that the bridge would not open in time to permit the steamer to pass, nor was any signal given that the bridge would not open, it not being provided with any means for giving the signal, although similar bridges located nearby were equipped for that purpose. When the master of the steamer saw that the bridge would not open, it was too late to avert a collision with and consequent injury to it. The appellate court in affirming a finding against the owner of the bridge held that the common-law rules of negligence would govern and that the negligence of the plaintiff barred a recovery of damages for the injuries to its bridge.

But the fact that a bridge does not comply with some statutory requirement is no bar to an action by the owners thereof to recover damages for injuries to it caused by a vessel, where the noncompliance with the statute is

not a contributing cause of the accident. Cumberland County v. Central Wharf Steam Tow-Boat Co. 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246. And see the reported case. Thus in Cumberland County v. Central Wharf Steam Tow-Boat Co. supra, it was held that the fact that the draw of a bridge was somewhat less than the width required by the statute under the authority of which the bridge was built, was no bar to a recovery for injuries to the bridge caused by the negligence of a vessel, where the failure to comply with the statute did not contribute to the injury.

In Toll Bridge Co. v. Langrell, 47 Conn. 228, it appeared that a vessel struck the pier of a bridge which for twenty-five years had been unprotected by piles and during that time had sustained "a suitable and convenient draw" leaving a "free and easy passage" for vessels, and had neither caused nor received injury. It was held that the failure to have the pier protected by piles could not as a matter of law be declared to be a want of ordinary care so as to require the setting aside of a judgment recovered for injuries to the bridge.

In Toll Bridge Co. v. Betsworth, 30 Conn. 380, a recovery of damages for injuries to a draw bridge caused by a sailing vessel in passing through it, was sought on the ground of the violation of a statute requiring sailing vessels to be drawn through the draw of a bridge without the aid of their sails. Evidence was held to be admissible to show that the owners of the draw bridge by their acts extending over a period of years had given a general license to all navigators to pass their draw with sails, since they could waive the statute in so far as it was intended for their benefit.

NORDLUND ET AL.

v.

DAHLGREN.

Minnesota Supreme Court—July 23, 1915.

130 Minn. 462; 153 N. W. 876.

Homestead — Rights of Surviving Spouse.

The rights of the surviving spouse in the homestead vest and become absolute at the death of the deceased spouse. The statutory provisions for setting it apart to him merely prescribe the procedure for segregating it from the remainder of the estate, and the administrator does not become entitled to possession of the homestead although it has

not been so set apart. The homestead of Carrie Walberg, at her death, descended to her husband for the term of his natural life, and his possession thereof was as such tenant for life and not as administrator.

Life Estates — Right of Life Tenant to Recover for Taxes and Improvements.

Where the surviving spouse is tenant for life of the homestead of the deceased spouse and also administrator of her estate, he cannot charge the estate with taxes paid by him upon the homestead nor with the value of improvements placed by him thereon.

[See note at end of this case.]

Homestead — Death of Spouse — Title of Children.

The fee of the homestead vested in the children subject only to the life estate of the surviving husband, and the title of the children to such remainder in fee cannot be waived, impaired or burdened by the surviving husband either as life tenant or as administrator.

Executors and Administrators — Accounting — Claims Not Allowed by Probate Court.

Under chapter 265, Laws of 1899, claims theretofore paid by the administrator without having been allowed by the probate court, may be credited to him in his final account upon proof that such claims were just and existing demands against the estate at the time of payment.

Selection of Personalty on Behalf of Surviving Spouse.

The right of the surviving spouse to select personal property to the value of \$500, if not exercised in his lifetime, may be exercised by his administrator.

Accounting — Rents and Profits of Land.

Where the administrator takes possession of the real estate he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the land.

(Syllabus by court.)

Appeal from District Court, Marshall county: WATTS, Judge.

Matter of estate of Carrie Walberg, deceased. From judgment adjusting account of Frank E. Dahlgren, representative, Peter Nordlund et al., objectors, appeal. The facts are stated in the opinion. REVERSED.

E. O. Hagen and *A. N. Eckstrom* for appellants.

Martin O'Brien, Julius J. Olson and *Rasmus Hage* for respondent.

[464] TAYLOR, C.—Carrie Walberg died intestate May 8, 1892, possessed of 600 acres of land and a quantity of personal property, and left her surviving, her husband, John O.

Walberg, and six small children. At the time of her death and for several years prior thereto, the family resided upon an 80-acre tract of the land owned by her and known as the "home 80;" and after her death her husband continued to reside thereon until his own death in 1910. On June 29, 1892, John O. Walberg was appointed and duly qualified as administrator of his wife's estate; and an order was made by the probate court limiting the time for filing claims and allowing the administrator 18 months in which to settle the estate. In November 29, 1892, Walberg filed an inventory and an appraisement was duly made. On December 31, 1892, claims were allowed aggregating the sum of \$133.32. On January 6, 1893, pursuant to his application therefor, license was granted to Walberg to sell the personal property other than the household goods. In December, 1893, the time in which to settle the estate was extended for a period of 12 months, and in December, 1894, it was again extended for an additional 12 months. No further action was taken by the probate court until after Walberg's death, and he never filed any account, nor made any report of his doings as administrator. On January 6, 1893, Walberg by deed conveyed to the children his interest in all the lands of which Carrie Walberg died seized except the home 80. Notwithstanding this conveyance, he occupied and used all the lands, as if he were the absolute owner thereof, from the death of Carrie Walberg until his own death, a period of nearly 18 years. Much of this land was state school land which had been purchased from the state under contracts giving her a long term of years in which to pay therefor. Walberg made improvements upon the land, paid the taxes thereon, and made the payments to the state required by the contracts. About 18 months after the death of Carrie Walberg, John O. Walberg remarried and with his second wife resided upon the "home 80" until his death on February 4, 1910. There are several children, issue of the second marriage, and Walberg left a will giving all his property to his widow. After his death, the probate court appointed Frank E. [465] Dahlgren as representative of his estate, and Peter Nordlund as administrator *de bonis non* of the estate of Carrie Walberg. Dahlgren as such representative prepared and filed the final account of John O. Walberg as administrator of the estate of Carrie Walberg. Nordlund as administrator *de bonis non* of the estate of Carrie Walberg, and the children of Carrie Walberg, filed objections thereto. The probate court modified the account in some particulars and allowed it as modified. The administrator *de bonis non* and the children of Carrie Walberg appealed to the district court. That court modified the account, as allowed by the probate court,

in several particulars, and approved and allowed it as so modified. A further appeal brings the matter before this court.

The buildings upon the homestead during the lifetime of Carrie Walberg were small log structures of little value. At various times after her death, Walberg erected large and substantial buildings. In the final account, the court credited Walberg with the value of the improvements made upon the real estate and with the amount of taxes paid thereon; and included in the amount allowed for improvements the value of the improvements made upon the homestead, and in the amount allowed for taxes, the taxes paid upon the homestead.

Appellants contend that the court erred in allowing Walberg for taxes paid and improvements made upon the homestead; that as tenant for life it was his duty to pay the taxes himself; and that if he chose to make improvements thereon he could not burden either the remaindermen or the estate with the expense thereof.

It is well settled that a tenant for life of real estate must pay the taxes thereon; and that as a general rule he cannot recover for improvements made while holding such life estate. *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N. W. 657, 32 L.R.A. 756, 60 Am. St. Rep. 444; *Porter v. Osmun*, 3 Ann. Cas. 687, and cases cited in note appended thereto [135 Mich. 361, 97 N. W. 756, 98 N. W. 859]; *Missouri Central Bldg. etc. Assoc. v. Eveler*, Ann. Cas. 1913A 486, and cases cited in note at page 489 [237 Mo. 679, 141 S. W. 877]; *Frederick v. Frederick*, 13 L.R.A.(N.S.) 514, and cases cited in note appended thereto [31 Ky. L. Rep. [466] 583, 102 S. W. 858]. Respondent does not seriously question this rule, but contends that Walberg occupied the homestead as administrator and not as tenant for life. He contends that the estate in the homestead given the surviving spouse by the statute does not vest in such surviving spouse until he has made an application to the probate court to have such homestead set apart to him and the court has made an order setting it apart; and that, as Walberg never made any such application and the court never made any such order, Walberg never possessed a life estate in the homestead. He further contends that the statute authorizing the administrator to take possession of the real estate and to receive the rents and profits thereof until the estate is settled, gives him the right to the possession of the homestead until it has been set apart to the surviving spouse by the probate court. None of these propositions can be sustained. The statute in force at the death of Carrie Walberg (G. S. 1894, § 4470) provided:

"The homestead of the deceased, as such homestead is or may be defined by the statute relating to homestead exemptions, shall descend, free from any testamentary devise or other disposition to which the surviving husband or wife shall not have assented in writing, and free from all debts or claims upon the estate of the deceased as follows: 1. . . . 2. If there be a child or the issue of any deceased child living and a surviving husband or wife, to such husband or wife during the term of his or her natural life, remainder to the child or children and the issue of any deceased child by right of representation."

At the death of Carrie Walberg, a life estate in the homestead vested in her husband by virtue of this statute without any act on his part or on the part of the probate court. *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Holbrook v. Wightman*, 31 Minn. 168, 17 N. W. 280, *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53.

Respondent bases his contention that Walberg occupied the land as administrator upon sections 4493-4496, G. S. 1894. So far as these sections relate to the homestead, we think they merely provide a procedure for segregating the homestead from the other property of the [467] estate. See *Sammons v. Higbie*, 103 Minn. 448, 115 N. W. 265, and *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428. The homestead descends "free from all debts or claims upon the estate." Neither the land nor the rents or profits derived from the land can be used for the purpose of satisfying claims against the estate. For administration purposes, it is not a part of the estate. It descends to the surviving spouse for the term of his natural life, and he, not the administrator, is entitled to the possession of it and to the rents and profits derived from it. *Eckstein v. Radl*, 72 Minn. 95, 75 N. W. 112. But respondent argues in effect that Walberg, by failing to have the homestead set apart to him, waived his right to a life estate therein. On the death of Carrie Walberg, the title in fee to her homestead vested in her children, subject only to the life estate of her surviving husband, and no waiver or other act of his could impair the rights secured to the children by the statute. He could make such disposition of his life term as he saw fit, but he could not convert the homestead into assets of the estate, nor subject the fee which had vested in the children to any burdens whatever. *Mintzer v. St. Paul Trust Co.* 45 Minn. 323, at the bottom of page 326, 47 N. W. 973. It follows that the court erred in crediting Walberg's account with the amount of taxes paid upon the homestead and with the value of the betterments placed thereon. Of course he was entitled to the rents and profits received.

from the homestead and cannot be charged therewith.

As there must be a new trial for the error above mentioned, we shall make only a brief reference to a few of the other questions which have been raised.

The court credited Walberg's account with certain amounts claimed to have been paid by him to creditors of Carrie Walberg upon claims which had not been presented to, or allowed by, the probate court. Chapter 265, p. 308, Laws of 1899, authorized the court to allow such items upon satisfactory proof that the "claims were just and existing demands against said estate at the time of payment." Although this statute was repealed by the revised laws of 1905, such repeal did not affect payments ratified and validated by the statute (section 5505, R. L. 1905), and the court had authority to make the [468] allowance in question. In view of a new trial, we refrain from discussing the evidence tending to establish such claims, and the payment thereof, further than to say that the trial court does not appear to have exceeded its judicial discretion in receiving in evidence the several vouchers offered by respondent.

The statute gave Walberg, as surviving husband, personal property of his wife to the value of \$500 to be selected by him. He made no such selection in his lifetime. His administrator asked to have this amount credited upon his final account and the court allowed the claim. As Mrs. Walberg left sufficient personal property to satisfy this claim, the ruling was correct. *Sammons v. Higbie*, 103 Minn. 448, 115 N. W. 265; *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

It is not questioned that Walberg had possession of the land, other than the homestead, as administrator, and he was therefore properly chargeable with the rents and profits received therefrom, subject to an equitable deduction for the betterments placed thereon. He appears to have kept no records or accounts, however, and, for the lack of any other means of determining the profits received from the land, the court took the rental value thereof as the basis for determining the amount to be charged against him. In the absence of evidence to show the actual profits, the method adopted by the court was proper. But the court proceeded upon the erroneous theory that the homestead was a part of the property which Walberg was handling as administrator, and both the amount charged against him for the use of the land, and the amount allowed him as compensation for his services, were probably affected by this error.

As both the amount to be charged against him for use of the land, and the amount to be credited to him as compensation for his services, will be determined anew from the evi-

dence submitted at the second trial, and the value of the use of the homestead will be excluded from one amount, and the value of Walberg's services in managing and operating it from the other, it is not necessary to determine whether the account as it now stands allows him an excessive amount for such services as contended by appellants.

Order reversed.

NOTE.

In the reported case the court adopts the rule that a tenant for life of real estate must pay the taxes thereon and is not entitled to credit for improvements made during the continuance of the estate. The court applies this rule as against a surviving husband who is by statute vested with a life tenancy in the homestead left by his wife and who also acts as administrator of his wife's estate.

The right of a life tenant to compensation for improvements is fully discussed in the notes to *Porter v. Osmun*, 3 Ann. Cas. 687, and *Missouri Cent. Bldg. etc. Assoc. v. Eveler*, Ann. Cas. 1913A 486. As to the duty of a tenant for life to pay taxes, see the notes to *Cedar Rapids First Congregational Church v. Terry*, 114 Am. St. Rep. 443, and *Peak v. Peak*, 137 Am. St. Rep. 638, 659.

GRAVES

v.

DUNLAP ET AL.

Washington Supreme Court—November 5, 1915.

87 Wash. 648; 152 Pac. 532.

Animals — Wild Animals — "Game."

Animals *ferae naturae*, such as deer, ducks, pheasants, and swans, are denominated "game."

Game — Title in State.

Title to game belongs to the state in its sovereign capacity, in trust for the use and benefit of its people, which, through its legislature, has the right to control the killing, taking, and use of game, so long as the rights guaranteed either by the state or Federal Constitution are not encroached upon.

[See note at end of this case.]

Wild Animals — Right of Property.

While animals *ferae naturae* belong to the state, yet, when they are reclaimed by the art and power of man, they are the subject of a qualified right of property, defeasible if they return to their wild state.

[See note at end of this case.]

Same.

Animals *ferae naturae*, if reclaimed and kept in inclosed grounds, are property, which will pass to the executors and administrators of the one who reclaimed them.

[See note at end of this case.]

Same.

Animals *ferae naturae*, while they are reclaimed, are the subject of larceny.

[See note at end of this case.]

Statutes — Construction — Retroactive Effect.

A statute will not be given a retroactive effect, unless by its terms it is clearly shown that that was the legislative intent.

Animals — Wild Animals — Right of Property.

Game Code (Laws 1913, c. 120), § 21, providing that no person shall acquire any property in, or subject to his control, any of the game birds or animals mentioned in the act, but that they shall always remain the property of the state, and section 33, providing that no person shall have in possession or under control at any time any deer, fawn, etc., if retroactive in operation as against one who had reclaimed certain deer kept on an inclosed area on his farm, and certain swans cared for as domestic fowls, and wood ducks, pheasants, etc., kept in inclosed runways in his poultry yard, violated Const. Wash. art. 1, § 3, and Const. U. S. Amend. 14 (9 Fed. St. Ann. 416), since he had such a property right in them that it could not be taken away without due process of law.

[See note at end of this case.]

Same.

Laws 1897, p. 82, § 1, and Laws 1899, p. 277, § 1, making it unlawful for anyone at a specified season to take or destroy any deer, Laws 1901, p. 279, §§ 1, 2, limiting the number of deer that may be killed, Laws 1903, p. 94, § 1, making it unlawful for any person at a certain season to take or "possess" any deer, Laws 1905, p. 277, providing for licenses, and Laws 1911, p. 396, making it unlawful to take or possess any deer, did not cover the possession of deer which were reclaimed and kept in an inclosure.

[See note at end of this case.]

Same.

Plaintiff, having a property right in the deer which he kept in an inclosure, if necessary in the care and management of the herd, might kill one of them without offending the law.

[See note at end of this case.]

Same.

Where plaintiff in an action to establish his property rights in certain swans, wood ducks, pheasants, etc., which he had cared for as domestic fowl, or kept in inclosed runways in his poultry yard, as against interference by the game warden and the prosecuting attorney, a decree giving him the ownership and right to dispose of them in such manner as he saw fit was too broad, since thereunder he would have the right to kill and sell them during the closed season, and so interfere with the enforcement of the game

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laws of the state, and since the state, for the protection of game birds, has the right to prohibit the killing and disposing of reclaimed game during the closed season.

[See note at end of this case.]

Appeal from Superior Court, Spokane county: WEBSTER, Judge.

Action by Jay P. Graves, plaintiff, against F. G. Dunlap et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. MODIFIED.

John M. Gleeson for appellants.

Graves, Kizer & Graves for respondent.

[649] MAIN, J.—The purpose of this action was to establish the plaintiff's ownership and right to possession of certain game animals and birds, and to restrain the defendants, the game warden, and the prosecuting attorney of Spokane county, from interfering with, or disturbing the plaintiff's ownership and right to the possession of, the animals and birds in question. After the issues were framed, the cause was tried to the court sitting without a jury, and resulted in a judgment sustaining the plaintiff's right to ownership and possession, and restraining the defendants from beginning or prosecuting any criminal action against the plaintiff on account of his possession of the wild animals and birds referred to. From this judgment, the defendants appeal.

The facts are not in dispute, and are, in substance, as follows: The plaintiff, during the year 1901, and prior thereto, and at the present time, owns a farm consisting of several hundred acres of land, a few miles north of the city of Spokane. Upon this farm there has been kept a herd of dairy cattle. During the winter of 1901, a doe with a broken leg [650] came into the herd of cattle upon the farm. This doe, by the respondent, or by the employees upon his farm, was placed in a box stall in the barn and taken care of until she recovered, when she was put into an enclosure. The following season a buck was given to the respondent by one of the men employed by him. To these deer and their increase the respondent occasionally added from outside herds. Because inbreeding causes a herd to deteriorate, on several occasions bucks were exchanged from the herd for bucks in city parks of Spokane and Tacoma.

During the early years of the herd and on two occasions, does from without the state were given to the respondent by friends. The doe and buck first acquired are still living. These, with the increase, and such bucks as have been procured by exchange, and their increase, made up a herd of about twenty deer in the fall of the year 1913. This herd

is kept on the respondent's farm in an enclosure containing fifteen or twenty acres, which is surrounded by a high woven wire fence to which entry can only be gained by gates. During the summer there is sufficient feed in the enclosure to sustain the deer, but in the winter it is necessary to feed them. Workmen on the farm look after them all the year round, and give them the attention that is given to cattle and other animals. The deer are not permitted to be without the enclosure.

The respondent also has certain fowls, including swans, wood ducks, pheasants, etc. Eight of the swans are birds obtained in the year 1902, with their increase. Four of the swans were purchased in the state of Massachusetts for breeding purposes, in the year 1913. These swans have their nesting places around the lakes on the farm, and are fed and taken care of as purely domestic fowls. The remainder of the fowls are kept in enclosed or covered runways in the respondent's poultry yards. These were purchased in various parts of the United States and Canada. For one pair of Reeves pheasants, \$85 was paid. For one pair of Amherst [651] pheasants, about \$100 was paid. The fowls are not used for food nor killed, and none have been sold, though the respondent has given away one or two pairs of pheasants for breeding purposes.

The appellants claim that the respondent has no right to keep the deer and the fowls in the enclosure, and that both the deer and the fowls are subject to the same regulation by the legislature as is the wild game of the state. The respondent claims that he has a property right in the deer and the fowls, and that therefore it cannot be taken away by act of the legislature without due compensation being first made. The question, therefore, is, whether the respondent had acquired a property right in the deer and birds which he was entitled to have protected.

Animals *ferae naturae* are known by the denomination of game. 1 Cooley, Blackstone (4th ed.), p. 758. The respondent's deer and fowls come within the term game, unless, by the fact of their reclamation and confinement, there has been acquired a property right therein which is not recognized in wild game. Without reviewing the early common law upon the subject of game, it may be said that the recognized doctrine is that the title to game belongs to the state in its sovereign capacity, and that the state holds this title in trust for the use and benefit of the people of the state. The state, through its legislature, has the right to control for the common good the killing, taking and use of game, so long as the rights guaranteed either by the state or Federal constitution are not encroached upon. In *Cawsey v. Brickley*, 82 Wash. 653, 144 Pac. 938, it was said:

"Under the common law of England all property right in animals *ferae naturae* was in the sovereign for the use and benefit of the people. The killing, taking and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty and was retained by the [652] states for the use and benefit of the people of the states, subject only to any applicable provisions of the Federal constitution."

See also *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 800, 40 U. S. (L. ed.) 793. Many other decisions to the same effect might be cited; but the multiplication of authorities upon this question is hardly necessary.

While animals *ferae naturae* belong to the state, as indicated, yet, when they are reclaimed by the art and power of man, they are the subject of property, and a property right thereto may be acquired. In 2 Cooley, Torts (3d ed.), p. 838, the author says:

"There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control."

In 2 Kent, Commentaries (14th ed.), p. *348, upon the same question, the author observes:

"Animals *ferae naturae*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner."

See also to the same effect 1 Cooley, Blackstone (4th ed.), p. 743.

It will be noticed from the excerpt quoted from Kent that the author uses the term "qualified property." Many of the decisions which discuss the question use the same term. The appellants contend that, since the property right is a qualified one, the state, in the exercise of its police power, can take it away with impunity. But the qualified property referred to is a property right which is defeasible upon a condition subsequent which may or may not happen. This condition [653] is that, if the animals return to their wild state, the property right ceases. That the property right is a defeasible one is recognized by Blackstone. In 1 Cooley, Blackstone (4th ed.), p. 744, referring to this subject it is said:

"In all these creatures, reclaimed from the wilderness of their nature, the property is

not absolute but defeasible: a property that may be destroyed if they resume their ancient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them."

Animals *ferae naturae*, if reclaimed and kept in enclosed ground, are property which will pass to the executors and administrators of a deceased person. In *Dieterich v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L.R.A. (N.S.) 696, quoting with approval from 1 Halsbury's Laws of England, § 799, it was said:

"Deer, though strictly speaking *ferae naturae*, if reclaimed and kept in inclosed ground, are the subject of property, pass to the executors and are liable to be taken in distress."

Animals *ferae naturae* are also, while they are reclaimed, the subject of larceny. In *State v. Shaw*, 67 Ohio St. 157, 65 N. E. 875, 60 L.R.A. 481, it is said:

"To acquire a property right in animals *ferae naturae*, the pursuer must bring them into his power and control and so maintain his control as to show that he does not intend to abandon them again to the world at large. When he has confined them within his own private enclosure where he may subject them to his own use at his pleasure, and maintains reasonable precautions to prevent escape, they are so impressed with his proprietorship that a felonious taking of them from his enclosure, whether trap, cage, park, net, or whatever it may be, will be larceny."

[654] It would seem that if wild animals when reclaimed will pass to the executors or administrators of a deceased person, or may be the subject of larceny, that the possessor of such animals would have such a right or title thereto that it could not be taken away without due compensation first made. If such property right can be taken away by the act of the legislature, then it does not have the same protection of the law as any other property, which both Kent and Blackstone say it is entitled to.

The appellant cites the case of *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938, as sustaining his contention that the respondent had only a qualified property in the deer and fowls, and that such a property right could be destroyed by the legislature at any time. In that case, the court was considering the status of game which had not been reclaimed.

The question whether the legislature had the power to destroy the property right which exists in reclaimed game animals was not before the court and was not considered in the opinion.

At the legislative session for the year 1913, there was passed what is known as the game code, Laws of 1913, ch. 120, p. 356 (3 Rem. & Bal. Code, § 5395-1 et seq.). Section 21 (3 Id. § 5395-21) of this code provides, that no person shall at any time or in any manner acquire any property in, or subject to his dominion or control, any of the game birds, game animals or game fish mentioned in the act, but that such game animals, fish and birds shall always and under all circumstances remain the property of the state.

Section 33 provides:

"No person shall, within the state of Washington, hunt, catch, take, kill, ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within or without the state, purchase, expose for sale, have in possession with intent to sell, sell to any person or have in possession or under control at any time, any elk, moose, caribou, deer, fawn, mountain sheep or mountain goat, [655] or any part thereof, including the hides, horns or hoofs except as herein provided." 3 Id. § 5395-33.

It will be noticed that this statute provides that no person shall "have in possession or under control at any time" any of the wild animals therein mentioned. It was under this statute that the appellants claimed that the respondent was unlawfully confining the deer and fowls mentioned. It may well be doubted whether, when all of the provisions of the act are considered, that it was intended by the legislature that it should be retroactive in the sense that it should cover game animals and birds reclaimed prior to its passage, and confined as were those of the respondent. It is a rule of construction that a statute will not be given a retroactive effect unless by its terms it is shown clearly that that was the legislative intent. *State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381; *Fowler v. Fairchild*, 3 Wash. 747, 29 Pac. 351. But if the statute were to be given a retroactive construction, it is plain that the respondent had acquired such a property right in the deer and fowls that it could not be taken away without due process of law, as provided in article 1, § 3 of the constitution of this state, and the fourteenth amendment to the Federal constitution (9 Fed. St. Ann. 416).

But the appellants contend that, under the statutes of this state as they existed in 1901, and subsequent thereto, the respondent's possession of the deer and fowls has been at all times wrongful, and that therefore he could acquire no property right therein. By the

Laws of 1897, p. 82, it was made unlawful for any person at a specified season of the year to "hunt, pursue, take, kill, injure or destroy any deer." By the Laws of 1899, p. 277, the same language is used in the legislative enactment passed at that session. By the Laws of 1901, p. 279, while the number of deer that may be killed is limited, the language of the previous statutes relative to hunting, killing, etc., is not amended. By the Laws of 1903, it was made unlawful for any person within the [656] state of Washington, at any time between the 15th day of December and the 15th day of September of the following year, to "hunt, pursue, take, kill, injure, destroy, or possess any deer" (Laws of 1903, p. 94, ch. 71, § 1). In this statute the term "possess" appears for the first time. By the Laws of 1905, p. 277, ch. 147, provision is made for licenses, but otherwise the language of the previous statute does not seem to be altered. By the Laws of 1911, p. 398, it is made unlawful for any person, within a specified portion of the year, to "hunt, pursue, take, kill, injure, destroy, or possess any deer." In these statutes we find nothing which would make the possession of game, such as that exercised by the respondent, unlawful. It is true that both the Laws of 1903 and 1911 use the term "possess." But reading this term in connection with the context, it is plain that the legislature meant to take possession during the prohibited season. In addition to this, the respondent's herd of deer had its foundation some two years previous to the passage of the law of 1903. There can be no question that in none of the laws passed prior to the year 1913 were the terms used sufficiently broad to cover the possession of deer which were reclaimed and kept in an enclosure.

The appellants also complain of certain provisions of the judgment. This judgment provides that the respondent is not entitled to kill the deer, or any of them, during the closed season, except that should any deer become wounded or crippled and it should become necessary to kill it on that account, that this might be done; or if it should become necessary in the care and management of the herd of domesticated animals to kill one or more of them, this might be done. We do not think the decree went too far in this regard. To kill an animal wounded or crippled in a fight, many times becomes a humane act. And since the respondent has a property right in the animals, if necessary in the care and management of the herd, to kill, he may do so without offending the law.

[657] The portion of the judgment relating to fowls, after providing that the respondent shall have the same ownership and right to possession thereof as he is given to the deer, concludes: "And to dispose of them in such

manner as he sees fit." The provision of the decree which gives the right to the respondent to dispose of the fowls in such manner as he sees fit is too broad. Acting thereunder the respondent would have the right to kill and sell such fowls during the closed season. If this may be done it would seriously interfere with the enforcement of the game laws of the state, because of the difficulty of determining whether a fowl killed and possessed during the closed season had been a reclaimed or wild bird. For the protection of the game birds of the state, the state has the power to prohibit the killing and disposing of reclaimed game during the closed season. In *New York v. Hesterberg*, 211 U. S. 31, 29 S. Ct. 10, 53 U. S. (L. ed.) 75, the relator, August Silz, a dealer in imported game, had been arrested and convicted for having in his possession, in the city of New York, one imported golden plover which had been lawfully taken, killed and captured in England during the open season for such game birds there, and thereafter sold and consigned to Silz in the City of New York by a dealer in game in the city of London. He likewise had in his possession the body of one black cock, a member of the grouse family, which was lawfully taken, killed and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York city by the same dealer in London. Such birds were imported by Silz in accordance with the tariff laws of the United States, during the open season for grouse and plover in New York. At the time Silz was arrested under the statutory law of New York, it was unlawful for him to have in his possession birds or fowl of the kind mentioned. The supreme court of the United States sustained the law and the conviction of Silz thereunder. In the course of the opinion, it was said:

[658] "In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. In other states of the Union such laws have been deemed essential, and have been sustained by the courts. [Citing authorities.] It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another state or country. The object of such laws is not to effect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state. We cannot say that such purpose, frequently recognized and acted upon is an abuse of the

police power of the state and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution."

The respondent claims that, since the plaintiff testified upon the trial that he had never killed any of his birds and never expected to, that the question whether or not he would have a right to kill and dispose of the birds under the decree is simply a moot question. The future rights of the respondent under the decree are measured not by the testimony which he gave upon the trial, but by the language of the judgment. Under the judgment as drawn, he plainly would have the right to kill and dispose of any of his birds at any time. He does not claim that his property rights in either the game animals or the birds is beyond the police power of the state. In the course of his brief upon this question it is said:

"If the lower court had thought it proper to decide the moot question of plaintiff's right to kill his expensive birds, we should not have objected and if your honors think it necessary to decide that question we certainly do not object. Indeed, to be of as much assistance as we may, we expressly concede that plaintiff has no right to kill, sell, or have possession of the carcasses of his birds during the time when the law declares it illegal."

[659] It cannot be successfully contended that the provision of the decree which gives the right, whether it is exercised or not, to kill, sell, or have in possession the carcasses of the birds during the closed season covers a moot question. On the other hand, if the question of the right of the respondent to kill and dispose of his birds was not before the court, a provision in the judgment which gives him this right has no proper place therein.

The cause will be remanded with direction to the superior court to eliminate that clause from the judgment which reads as follows: "And to dispose of them in such manner as he sees fit." In all other respects the judgment is affirmed. Neither party will recover costs in this court.

Morris, C. J., Ellis, and Fullerton, JJ., concur.

NOTE.

Right of Property in Wild Animal.

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I. Introductory.

The purpose of this note is to review the authorities discussing the factum and nature of the right of property, state or individual, in wild animals. It confines itself strictly to a consideration of property in live wild animals, excluding the many cases involving the ownership of dead animals. The scope of the treatment is also restricted to the question of the ownership of the animal itself excluding any consideration of the privilege to hunt, kill, or capture as a right of property. Therefore game laws, the right to hunt, the power of the state to regulate hunting, and allied phases of the law of animals, are treated only in so far as they are necessarily incidental to the point of the property right in the animal.

For a comprehensive discussion of the law relating to bees, see the note to Brown v. Eckes, reported post, this volume, at page, 981.

As to the liability for injuries by wild animals, see the notes to Molloy v. Starin, 14 Ann. Cas. 57, and Connor v. The Princess Theatre, Ann. Cas. 1914A 762.

II. State Ownership.

1. IN GENERAL.

The Roman law regarded animals *ferae naturae*, since they have no owner, as belonging in common to all the citizens of the state. Inst. Just. book 2, part 1, cited in State v. Mallory, 73 Ark. 236, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 733. See also Geer v. Connecticut, 161 U. S. 519, 522, 16 S. Ct. 600, 40 U. S. (L. ed.) 793.

By the common law of England, the crown was the owner of wild animals. Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; Harper v. Galloway, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A. (N.S.) 794.

In the United States the ownership of wild animals and fish, not reduced to actual possession by private persons, is in the people of the state in their collective sovereign capacity, or in the state as representing all the people.

United States.—McCready v. Virginia, 94 U. S. 391, 24 U. S. (L. ed.) 248; Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; In re Eberle, 98 Fed. 295.

Arkansas.—Organ v. State, 56 Ark. 267, 19 S. W. 840; Lewis v. State, 110 Ark. 204, 161 S. W. 154.

California.—Ex p. Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; People v. Truckee Lumber Co. 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L.R.A. 581; Ex p. Bailey, 155 Cal. 472, 101 Pac. 441, 132 Am. St. Rep. 95, 31 L.R.A. (N.S.) 534.

Idaho.—Sherwood v. Stephens, 13 Idaho 399, 90 Pac. 345.

Illinois.—Magner v. People, 97 Ill. 320; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684; Meul v. People, 198 Ill. 258, 64 N. E. 1106; Cummings v. People, 211 Ill. 392, 71 N. E. 1031; Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10.

Indiana.—Gentile v. State, 29 Ind. 409; State v. Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52.

Louisiana.—In re Schwartz, 119 La. 290, 44 So. 20, 121 Am. St. Rep. 516.

Maine.—State v. Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544; State v. Peabody, 103 Me. 327, 69 Atl. 273.

Minnesota.—State v. Rodman, 58 Minn. 393, 59 N. W. 1098.

Mississippi.—Ex p. Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700.

Missouri.—State v. Heger, 194 Mo. 707, 93 S. W. 252.

New York.—People v. Bootman, 180 N. Y. 1, 2 Ann. Cas. 256, 72 N. E. 505, affirming 95 App. Div. 469, 88 N. Y. S. 887; Matter of Fishway, 131 App. Div. 403, 115 N. Y. S. 745.

Oregon.—State v. Hume, 52 Ore. 1, 95 Pac. 808.

Tennessee.—Acklen v. Thompson, 122 Tenn. 43, 126 S. W. 730, 135 Am. St. Rep. 851.

Vermont.—State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L.R.A. 290; Zanetta v. Bolles, 80 Vt. 345, 67 Atl. 818.

Washington.—See the reported case.

In Hawaii it has been held that fish in public waters belong to the public. Murphy v. Hitchcock, reported in full, post, this volume, at page 976.

The state owns the fish in tide waters within its jurisdiction, just as it owns the animals *ferae naturae* of the land, i. e., the state in this regard represents the people, and the ownership is that of the people in their united sovereignty. McCready v. Virginia, 94 U. S. 391, 24 U. S. (L. ed.) 248; Organ v. State, 56 Ark. 267, 19 S. W. 840; Ex p. Bailey, 155 Cal. 472, 101 Pac. 441, 132 Am. St. Rep. 95, 31 L.R.A. (N.S.) 534. The state's ownership of fish is not confined to those in navigable waters, but extends to those in all waters, the lands underlying which are not in private ownership. People v. Truckee Lumber Co. 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L.R.A. 581. From other cases it appears that the state owns the fish in all the waters of the state except private ponds privately stocked and not connected with public waters. State v. Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544; State v. Peabody, 103 Me. 327, 69 Atl. 273; Ex p. Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700. In the case last cited, the court said: "Fish are *ferae naturae*. They are incapable, until actually taken, of absolute ownership, except in artificial lakes or in small ponds that are entirely land locked. In all running streams, large lakes, small lakes with outlets into other waters, the right of the state to regulate the time, the manner, and extent of the taking of fish is unquestioned. It is part of the police powers of the state, which has never been parted with and cannot be surrendered. By reason of the migratory habits of fish, their ownership is in the public, and no individual has any absolute property right in them until they have been subjected to his control." In Matter of Fishway, 131 App. Div. 403, 115 N. Y. S. 745, it was held that by virtue of their ownership of fish, it is the right of the people of the state to have fish inhabit the waters of the state and freely pass to their spawning beds and multiply, wherefore no riparian owner has a right to obstruct the free passage of fish up the stream to the detriment of other riparian owners or of the public.

By the decision of the arbitrators in the Behring Sea seal controversy between the United States and Great Britain the common-law rules of ownership of wild animals by individuals were made a part of international law with respect to the ownership of wild animals by nations. According to that decision no nation can have a property right in any wild animal when found outside its territory and territorial waters. See Behring Sea Arbitrator's Decision, 32 Am. L. Reg. & Rev. 901, wherein the author sets forth the effect of the decision, in this regard, as follows: "In the second place, the decision of the Arbitrators practically adopts

the rules of the English common law as to the ownership of wild animals by individuals, and makes them part of international law as regards such ownership by nations. Since no wild animal at all similar to the fur seal ever figured before in an international dispute, it became necessary for our government, in the absence of precedents of this character, to turn to the common law for some principle which would sustain our claim to ownership in the seal herds. Accordingly, it was argued in our behalf that seals in international law were analogous to such animals as bees, or carrier pigeons, at the common law, which as Blackstone said, continued to be the property of their custodian even when flying at a great distance from home, because of their having a fixed intention to return (*animus revertendi*). On the other hand, it was asserted in behalf of Great Britain by Sir Charles Russell, that this *animus revertendi* only conferred the right of property in wild animals at the common law when it was induced by artificial means, such as taming them, or offering them food. Hence, he argued, it involved a confusion of ideas to claim that the seals were American property because they migrated at certain periods to a particular place, since they were led to do this, not by artificial but by natural causes. As they resembled in this respect many other wild animals, there was no reason, he contended, why the same rule of law should not apply to them, and according to that rule of law such animals remain the property of their owner only so long as they continue on his domain. The Arbitrators appear to have been convinced by the reasoning, since they have decided that the United States has no right of property in the fur seals when they are found outside of our territorial waters. The rules and distinctions of the common law on this subject have thus been transplanted into the domain of international law, and the decision of the Arbitrators supports the further inference that there is no such thing in international law as a national right of property in a herd or body of wild animals as a whole, apart from the ordinary right of property in each individual animal inherent in its custodian during the time that his possession of it lasts."

2. NATURE OF OWNERSHIP.

The ownership of wild animals seems to have been assumed by the British sovereigns up to and including King John 1, as a personal prerogative of the crown, until Magna Charta and the charter of the forest, by which the assertion and exercise of those rights were distinctly limited. Since then the ownership of wild animals, so far as vested

in the sovereign, seems to have been uniformly regarded as a trust for the benefit of the people. *State v. Mallory*, 73 Ark. 236, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 773. The crown at common law had a special personal prerogative in whale and sturgeon, as royal fish, and in swans, as royal fowl, which might be exercised as to any such royal fish or fowl the ownership whereof was not known. *Swans' Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435, wherein it was held that all white swans, not marked, which had gained their natural liberty and were swimming in an open and common river, might be seized to the use of the king by his prerogative.

The fundamental principles, on which, at common law, the common property in or the state ownership of wild animals rested, have undergone no change in the United States, but the development of free institutions has led to the recognition of the fact that the power or control lodged in the state is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793. It is therefore universally held in the United States that the state holds the proprietary title to wild animals and fish within its jurisdictions in trust for the whole body of the people of the state; that the ownership is not that of a proprietor but that of a trustee. *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; *In re Eberle*, 98 Fed. 295; *Lewis v. State*, 110 Ark. 204, 161 S. W. 154; *Magner v. People*, 97 Ill. 320; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A.(N.S.) 745, reversing 120 Ill. App. 10; *State v. Shattuck*, 96 Minn. 45, 6 Ann. Cas. 934, 104 N. W. 719; *State v. Hume*, 52 Ore. 1, 95 Pac. 808. Therefore the state's ownership of wild animals is not such a proprietary interest as will authorize a sale thereof, or the granting of special interests or special rights therein, but is solely for the purposes of regulation and preservation for the common use. *State v. Mallory*, 73 Ark. 236, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 733. Compare *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684, wherein it was held that a lease by the Mexican government of the island of Guadalupe, with the right to utilize the wild goats thereon, conferred on the assignee of the lessee the title to such of the wild goats as he selected under the power given by the lease.

But a game statute, declaring the ownership of, and the title to, certain wild animals designed to be protected to be in the state, places the title and ownership in the state as

proprietor rather than as trustee. *Meul v. People*, 198 Ill. 258, 64 N. E. 1106; *State v. Ward*, reported in full post, this volume, at page, 978.

Since the ownership of the state in animals *ferae naturae* is in trust for the whole of the people of the state a municipality cannot claim, for the benefit of that portion of the people of the state constituting its inhabitants, any proprietary interest in the wild animals within the limits of the municipality. *Ex p. Bailey*, 155 Cal. 472, 101 Pac. 441, 132 Am. St. Rep. 95, 31 L.R.A. (N.S.) 534, wherein it was held that a city could claim no proprietary interest in fish in that part of the ocean included within the limits of the city, and that an ordinance of that city forbidding fishing therein less than 100 feet from any wharf, dock, or pier was void as exceeding the legislative power of the city.

It has been held that the property right in wild goats on the island of Guadalupe, a part of the domain of Mexico, was in the republic of Mexico. *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684.

3. REGULATION OF PRIVATE ACQUISITION.

The prevailing view of the nature of the state's ownership of wild animals is that it is only for the purpose of protection, control and regulation. *State v. Mallory*, 73 Ark. 236, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 773; *People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L.R.A. 581.

From times of earliest tradition the state, by virtue of its proprietary right in wild animals, has claimed and exercised the power to control and regulate their reduction to possession and ownership by individuals. *Geer v. Connecticut*, 161 U. S. 519, 522, 16 S. Ct. 600, 40 U. S. (L. ed.) 793.

The law of Athens recognized this power of the state. *Répertoire*, Gen. Journal der Palais, vol. 5, p. 307; *Merlin*, *Répertoire de Jurisprudence*, vol. 4, p. 128, cited in *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793.

In the feudal as well as the ancient law of the continent of Europe, in all countries, the right of individuals to acquire animals *ferae naturae* by possession was recognized as being subject to the governmental authority, and under its power, not only as a matter of regulation, but also of absolute control. *Merlin*, *Répertoire de Jurisprudence*, vol. 4, p. 128; *Pothier*, *Traité du Droit de Propriété*, Nos. 21, 27-28, 32; *Code Napoleon*, arts. 714, 715; *Saint Joseph Concordance*, vol. 1, p. 681 (cited in *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793).

The common law of England, also, basing property in wild animals on the principle of

common ownership, treated the acquisition of ownership by individuals as being subject to governmental authority. 2 Bl. Com. 411; *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; *Harper v. Galloway*, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A. (N.S.) 794.

This attribute of government, to control, by virtue of its proprietary right, the taking of animals *ferae naturae*, an attribute which was recognized and enforced by the common law of England, was vested in the colonial governments of America, where not denied by their charters, or in conflict with grants of the royal prerogative; and that power which the colonies so possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution. *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; *Harper v. Galloway*, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A. (N.S.) 794.

In the United States it is held to be within the police power of the state to regulate the taking and acquisition of property in wild animals and fish by individuals, by placing on it such restrictions and conditions as the state may see fit. *Ex p. Cencinino* (Cal.) 160 Pac. 167; *Harper v. Galloway*, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A. (N.S.) 794; *Sherwood v. Stephens*, 13 Idaho 399, 90 Pac. 345; *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684; *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *State v. Snowman*, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Ex p. Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700; *State v. Heger*, 194 Mo. 707, 93 S. W. 252; *People v. Bootman*, 180 N. Y. 1, 2 Ann. Cas. 226, 72 N. E. 505; *People v. Dextater*, 75 Hun 472, 27 N. Y. S. 481, affirmed 147 N. Y. 723, 42 N. E. 724; *State v. Sutton*, 139 N. C. 574, 51 S. E. 1012; *State v. Hume*, 52 Ore. 1, 95 Pac. 808; *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L.R.A. 290; *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; *State v. Nergaard*, 124 Wis. 414, 102 N. W. 899. See also *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L.R.A. (N.S.) 997. In *Harper v. Galloway*, supra, the court said: "The constitution of the state does not forbid the passage of special or local laws upon the subject of game, and it contains no express provision relative to game; therefore the legislature may by a duly enacted law make any provision within its discretion for the preservation and conservation of the game in the state for the use and benefit of the people

of the state, by regulating the taking or killing and use of certain or all kinds of game in any part of the state and during any periods, where such laws do not deny to anyone having rights in the premises the due process of law or the equal protection of the laws that are guaranteed to all persons by the state and federal constitutions."

In *People v. Bootman*, 180 N. Y. 1, 2 Ann. Cas. 226, 72 N. E. 505, it was said: "For time out of mind and in all jurisdictions, laws passed for the protection of fish and game have been regarded as sanctioned by the police power which belongs to every sovereign state. The game and the fish within the boundaries of the state belong to the people in their unorganized capacity and may be taken by any citizen without fee or license at any time during the open season. It is to the interest of the state that neither should be wasted or destroyed and that both should be carefully protected, especially during the breeding season. Without protection the fish and game will soon disappear and the people thus be deprived of an important source of food supply, as well as a delightful recreation which promotes health and prolongs life. The protection of game falls within the legitimate exercise of the police power, because it is directly connected with the public welfare, which is promoted by the preservation and injured by the destruction of so useful an article of food, free at the proper time to all the people of the state. Laws passed for this purpose do not interfere with private property, for there is no property in living wild animals and only as the law permits their capture is there property in wild animals after they are caught or killed."

It has been held to be within the state's power of regulation and control to prohibit absolutely the acquiring by individuals of property in wild animals, if deemed necessary for their protection or preservation or for the public good. *Ex p. Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129. See also *Ex p. Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700.

It is clear that the state may make regulations restricting the taking and molestation of wild game animals to certain seasons of the year. *Magner v. State*, 97 Ill. 320.

It has been held that this right to regulate may be delegated by the state to local authorities. *Ex p. Cencinimo* (Cal.) 160 Pac. 167.

The state legislature has the right to prevent the taking of fish from the streams of the state, and even from private waters. *Matter of Fishway*, 131 App. Div. 403, 115 N. Y. S. 745. And the state may prevent a landowner from taking fish on his own land. *People v. Doxtater*, 75 Hun 472, 27 N. Y. S. 481, affirmed 147 N. Y. 723, 42 N. E. 724.

Since the state holds the title to the wild animals, fish and game in its borders, in trust for its own people, it may deny to nonresidents and to persons not citizens the right to take and acquire property rights therein, and such discrimination is no denial of the privileges and immunities of citizens of the United States, nor is it a denial of the equal protection of the law. *McCready v. Virginia*, 94 U. S. 391, 24 U. S. (L. ed.) 248; *Com. v. Patson*, 231 Pa. St. 46, 79 Atl. 928; *State v. Ashman*, 123 Tenn. 654, 135 S. W. 325; *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917. In *State v. Ashman*, supra, a law prohibiting nonresidents of the state from engaging in the business of taking pearl mussels or other shell fish without a license was held to be constitutional. The court said: "The common law vests the title of game and fish, not reduced to possession or under restraint, in the sovereign power—in Great Britain, in the King; in the United States, the several states, in trust for their inhabitants. No one has any absolute property right in game or fish while in a state of nature and at large, and the right to take them may be restricted or prohibited, and, when granted or exercised, it is a privilege. It is a property right, and not one of citizenship. *Maney v. State*, 6 Lea (Tenn.) 218; *Peters v. State*, 96 Tenn. 688, 36 S. W. 399, 33 L.R.A. 114; *Magner v. People*, 97 Ill. 333; 2 Black. Com. 394, 410. The rights, privileges, and immunities which are secured by the Federal Constitution to the inhabitants of the several states do not include any rights in the property of the several states held in trust for their own inhabitants, and laws which prohibit them in whole or in part from participating in the benefits of that property do not deprive them of any constitutional rights. The majority of the states have enacted laws prohibiting or limiting the right of nonresidents to take game or fish within their respective boundaries, and, upon the principles above stated, this legislation has been invariably upheld by all the courts."

Similarly the state may make restrictions which discriminate against nonresidents in favor of residents. *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031.

Since, however, the beneficial use of the wild animals in the state belongs to all the people of the state a regulation of the acquisition of property in them which unjustly discriminates against any of the people of the state is a denial of the equal protection of the laws to those discriminated against, and is void. *Harper v. Galloway*, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A. (N.S.) 794; *State v. Peabody*, 103 Me. 327, 69 Atl. 273. In the case last cited, it was held that a municipal ordinance requiring a license to dig for clams and providing that

licenses should not be issued to nonresidents of the municipality was unconstitutional and void as a discrimination against part of the people of the state.

III. Private Ownership.

1. IN GENERAL.

As a general rule, there is no individual property in wild animals or fish so long as they remain wild, unconfined and in a state of nature. *Fines v. Spencer*, 3 Dyer (Eng.) 306b; *Malloche v. Eastly*, 3 Lev. (Eng.) 227; *Sutton v. Moody*, 1 Ld. Raym. (Eng.) 250, 91 Eng. Rep. (Reprint) 1063; *Lonsdale v. Rigg*, 11 Exch. (Eng.) 654; *Blades v. Higgs*, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76; *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52; *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448; *Ex p. Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700; *State v. Heger*, 194 Mo. 707, 93 S. W. 252; *State v. Roberts*, 59 N. H. 484; *People v. Bootman*, 180 N. Y. 1, 2 Ann. Cas. 226, 72 N. E. 505, *affirming* 95 App. Div. 469, 88 N. Y. S. 887; *People v. Doxtater*, 75 Hun 472, 27 N. Y. S. 481, *affirmed* 147 N. Y. 723, 42 N. E. 724; *Matter of Fishway*, 131 App. Div. 403, 115 N. Y. S. 745; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656; *Zanetta v. Bolles*, 80 Vt. 345, 67 Atl. 818; *Murphy v. Hitchcock*, reported in full, post, this volume, at page 976. In *Zanetta v. Bolles*, supra, the court said: "The defendant, an inhabitant of the state, in the close season, shot and killed the plaintiff's duly licensed, registered, and collared dog while, with other dogs, it was worrying and attacking a wild deer on the defendant's inclosed land, and thereby saved the life of the deer. The defendant says that as he was an inhabitant of the state at the time, he had such a qualified property in the deer that he had a right to kill the dog in order to protect it. But that is not so. The wild game in the state belongs to the people of the state in their collective and sovereign capacity, and not in their individual and private capacity, except as far as private ownership may be acquired therein under the constitution, subject to such proper regulations as the legislature may make, the constitution providing that the inhabitants of the state 'shall have liberty in seasonable times to hunt any fowl on the lands they hold, and on other lands not inclosed,' under proper regulations to be thereafter made and provided by the general assembly. It is by virtue of this 'liberty,' and not otherwise, that private ownership is acquired in wild game by an inhabitant of the state on whose inclosed lands it is found; and it is thus acquired because the right to hunt thereon is exclusive in the

inhabitant who holds them. . . . But as the defendant had no right to hunt wild deer on his inclosed land in the close season, a proper regulation of his 'liberty,' he had no property in the deer that entitled him to kill the dog to protect it."

But wild animals become property when removed from their natural liberty, and made subjects of man's dominion. *Swans' Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435; *Davies v. Powell*, Willes (Eng.) 46; *Bellew v. Langdon*, Cro. Eliz. 876, 78 Eng. Rep. (Reprint) 1100; *Blades v. Higgs*, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76; *Hadesden v. Gryssel*, Cro. Jac. (Eng.) 195, sub nom. *Haldesden v. Greail*, Brownl. & G. 208, 123 Eng. Rep. (Reprint) 758, Yelv. 104; *Churchward v. Studdy*, 14 East 249, 104 Eng. Rep. (Reprint) 596; *Bartlett v. Budd*, 1 Lowell 223, 2 Fed. Cas. No. 1,075; *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764; *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 280; *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656; *Liesner v. Wanie*, 156 Wis. 16, 145 N. W. 374, 50 L.R.A. (N.S.) 703. See also *People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L.R.A. 581; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, *reversing* 120 Ill. App. 10. And see the reported case, wherein it is held that the property right which an individual may have in reclaimed wild animals is a property right which cannot be taken away by the state in violation of the Washington Constitution (Art. 1, § 3), and of the Fourteenth Amendment to the United States Constitution (9 Fed. St. Ann. 416).

Since wild animals are property of common ownership any person, in the absence of inhibition by the sovereign, may seize them and make them his property. 2 Bl. Com. 14; *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793; *Lewis v. State*, 110 Ark. 204, 161 S. W. 154; *People v. Bootman*, 180 N. Y. 1, 2 Ann. Cas. 256, 72 N. E. 505, *affirming* 95 App. Div. 469, 88 N. Y. S. 887. In *Lewis v. State*, supra, the court said: "This right which one individual has in common with every other individual in the community to take and use fish and game *ferae naturae* is one that has existed from the remotest times, and, although at one time in England after the Norman conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. 'The rights,' says John, 'which

the barons claimed for themselves they claimed for the nation at large.' Green's History of the English people, vol. 4, pp. 252-4."

However it has been said that individuals may not take animals *ferae naturae* and acquire property in them as of right, but that it is only a privilege granted by the state and exists only so far as granted, not so far as unrestricted. *Magner v. People*, 97 Ill. 320; *People v. Bridge*, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684. See also *State v. Shattuck*, 96 Minn. 45, 6 Ann. Cas. 934, 104 N. W. 719. In *Magner v. People*, supra, it was said: "Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority—not a right inhering in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use, in the future, to the people of the state. But in any view, the question of individual enjoyment is one of public policy, and not of private right." And in *State v. Hume*, 52 Ore. 1, 95 Pac. 808, it was said that the title to fish taken from navigable streams by individuals is held in favor of the state and that no person has the right to acquire such property in any manner he pleases.

The true theory seems to be that, since the state holds the title to animals *ferae naturae* in trust for the people, who are the beneficial owners, the individuals making up the state may seize and take private possession and ownership of those animals, but that in doing so they are subject to such conditions and restrictions as the state in the exercise of its police power may place on that taking. *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098, wherein the court said: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity as the representative, and for the benefit, of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such

game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and, when he acquires such right by reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose. It is upon this principle that laws have been sustained which restricted the use of such game to the people of the state in which it was caught or killed, and prohibited its being shipped out of such state as an article of commerce; the reason being that to permit game to become an article of commerce, even during the open season, would stimulate the killing to an extent leading to its total extermination. In short, the object to be attained is the preservation from extinction or undue depletion of game; and the legislature may pass any reasonable laws to effect that end, even to the extent of restricting the use of, or right of property in, the game after it is taken or killed. All so-called game laws proceed upon that principle, and their constitutionality has rarely, if ever, been successfully assailed."

Where a game statute places the title to certain wild animals designed to be protected in the state as proprietor, not as mere trustee for the people, individuals may no longer acquire ownership by capturing, killing or reclaiming those animals, except in so far as permitted to do so by the statute. *Meul v. People*, 198 Ill. 258, 263, 64 N. E. 1106.

2. NATURE OF PROPERTY RIGHT.

It was a well-settled rule at the common law that, while a private person might acquire property in animals *ferae naturae*, he could not acquire an absolute property therein, but that it was at most only a qualified property. 2 Bl. Gom. 390, 391; *Swans' Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435; *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248. See also *State v. Sumner*, 2 Ind. 377.

This was stated as being still a rule of general application in *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917.

In some cases, however, the courts have appeared to overlook this rule, and to consider animals *ferae naturae* as being the subject of an absolute property. Thus in the cases of *State v. Mallory*, 73 Ark. 236, 244, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 773, and *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10, it was said that, when killed or captured, wild animals become the absolute property of the killer or captor. The explanation of those statements may perhaps be found in the fact that the courts were really advert-

ing to the question of property in dead animals, which has always been recognized as being absolute, and inadvertently mentioned captured animals in that connection.

The distinction between the character of property in live and in dead wild animals was pointed out in the case of *Blades v. Higgs*, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76, wherein it was said: "It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed."

However, the meaning of the term "qualified property", as used with reference to the ownership of wild animals, is not that the ownership has not all the incidents of property rights generally, but simply that it is subject to be defeated by the escape of the animal from its owner, and its reversion to a state of nature in which it can no longer be the subject of property. See *infra*, subdivision 4, *Loss of Property Right*. As is shown by the cases cited in that subdivision, there is a tendency in modern times to relax the rules of the common law as to the loss by escape of property in wild animals. It may be, therefore, that the dicta in *State v. Mallory*, and in *Schulte v. Warren*, *supra*, were influenced by this tendency, and intentionally regarded the law as to the character of property in wild animals as having been changed. In *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656, it was stated unequivocally that when a landowner exercises his right to take wild animals on his land, and reduces them to possession, they become absolutely his property.

3. ACQUISITION OF PROPERTY RIGHT.

a. In General.

Blackstone, in his treatment of property in animals *ferae naturae*, recognized three ways in which they could become the qualified property of man: (1) *per industriam hominis*, i. e. "by a man's reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty;" (2) *ratione impotentiae*, on account of their own inability—"As when hawks, herons, or other birds build in my trees, or coney or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away. For here, as the owner of the land has it in his power to

do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him;" and (3) *propter privilegium*, "That is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases." 2 Blk. Com. 391, 394-395.

In *Swans' Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435, mention was made of two ways in which qualified property in animals *ferae naturae* might be acquired, viz., by industry and *ratione impotentiae*. The *jus privilegii* was also mentioned in that case but it was deemed not to be a right of property as it was classed by Blackstone, but merely a right of privilege.

The ownership of animals *propter privilegium*, that is by reason of the grant by the crown of the privilege to take game, was also recognized in the case of *Blades v. Higgs*, 11 H. L. Cas. 621, 3 Eng. Rul. Cas. 76.

But there is no property in wild animals *propter consuetudinem*, i. e., by reason of the custom of the animal to come on a person's land. So it has been held that a landowner could not claim a right of property in rooks simply because they had a custom of coming on his land and roosting in his trees, he having gone to no trouble or expense to entice them. *Hannam v. Mockett*, 2 B. & C. 934, 10 E. C. L. 280, 4 Dowl. & R. 518, 537, 26 Rev. Rep. 591, wherein it was said: "But has it ever been held that a man has a right in the chance of obtaining animals *ferae naturae*, where he is at no expense in enticing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether, indeed, they will not be a nuisance to the neighborhood? This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds. They, of their own choice, and without any expenditure or trouble on his part have a predilection for his trees and are disposed to resort to them. But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind, the nature and properties of the birds are not immaterial. The law

makes a distinction between animals fitted for food and those which are not; between those which are destructive to private property and those which are not; between those which have received protection by common law or by statute and those which have not. It is not alleged in this declaration that these rooks were fit for food; and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the legislature as destructive in their nature, and as nuisances to the neighborhood where they are. That being so, surely a party can have no right to have them resort to his lands, to the injury of his neighbors; and, consequently, no action can be maintainable against a person who prevents them so doing."

While Blackstone's analysis of the ways in which wild animals may become property is ingenious and logical, the cases have made use of it to a very slight extent and it will be more convenient to analyze the methods in which that property may be acquired as being (1) by reclamation (2) *ratione soli*, and (3) by pursuit, to which may be added the property in the increase of wild animals.

b. By Reclamation.

Such actual possession, or reclaiming, as will convert an animal wild by nature into the personal property of an individual may be effected by taming, domestication or confining. *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 704.

The taming or reclaiming of a wild animal makes it personal property. *Mallocke v. Eastly*, 3 Lev. (Eng.) 227; *Fines v. Spencer*, 3 Dyer (Eng.) 306b; *Morgan v. Abergavenny*, 8 C. B. 768, 65 E. C. L. 768; *Ford v. Tynte*, 2 Johns. & H. (Eng.) 150; *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765 note; *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448; *Dieterich v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L.R.A. (N.S.) 696, 119 App. Div. 315, 104 N. Y. S. 334; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744. And see the reported case.

Young birds of a wild variety, as pheasants, but hatched and still brooded by a common domestic hen, are, until they revert to a state of nature, the personal property of the owner of the hen. *Reg. v. Garnham*, 2 F. & F. (Eng.) 347.

Wild animals are also made personal property by capture and confinement. *Swans' Case*, 7 Coke (Eng.) 15b, 77 Eng. Rep. (Reprint) 435; *Churchward v. Studdy*, 14 East 249, 104 Eng. Rep. (Reprint) 596; *Davies v. Powell*, Willes (Eng.) 46; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10; *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind.

App. 566, 73 N. E. 281, 107 Am. St. Rep. 260; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744; *State v. Shaw*, 67 Ohio St. 157, 65 N. E. 875, 60 L.R.A. 481; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656.

The reclaiming of a wild animal by capture in violation of law, however, vests no property in the captor, even as against a wrongdoer, for the illegal act of capture has not made the animal a subject of property. *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448, wherein it was held that the plaintiff, who had captured a moose in violation of the game laws of the state, could have no recovery against a state game warden for releasing the moose, even though the game warden had acted without authority or warrant. The court said: "Suppose a hunter has his rifle levelled at game in close time and some one shoves it aside so that the game is missed, shall the hunter have damages? He has only been prevented from continuing a criminal act. Suppose lobsters illegally taken are thrown overboard alive, is he who does it a trespasser? Shall the taker of them have damages for his illegal catch? Or suppose one lands a salmon in violation of law, and a by stander, while it is yet alive, throws it back into the water, shall the fisherman have the value of the salmon that the law forbids his having at all? When game is killed, it absolutely becomes property, but when taken alive, only conditionally so; for, when released, property in it is gone. So long, then, as the possession of live game is illegal, qualified property in it is illegal also; and the releasing of such game interferes with no legal right or title of the person illegally holding it captive. The plaintiff's possession of the moose was *prima facie* title; but, when it appears that his possession was gained in violation of law, it cannot be that the same law will say that his illegal act gave him a legal title. And if he had no title to the moose, he has suffered no damages from its being set loose. The plaintiff's illegal act prevented the moose from becoming property at all. Not so with the illegal act of a thief who may have stolen a coat, for the coat was already property, and had an owner, who alone could lawfully take it from the thief. The public, whose servant the defendant was, stands in the place of the owner of the coat; care should be taken, therefore, not to confound the doctrine of this case with the well-settled rule of law, that possession of property is a good title against everybody but the true owner."

But the capture must be completely effected, in order to vest property in the captor. Thus, in *Young v. Hickens*, 6 Q. B. 606, 51 E. C. L. 606, 115 Eng. Rep. (Reprint) 228, it was held that partially inclosing fish in a net, the operation having been not completed, however, was not sufficient to vest a property

in the fish in the owner of the net, so that he had no action against one who interfered and prevented him from taking the fish.

c. *Ratione Soli.*

Every landowner has an exclusive common-law right to kill or capture wild animals on his own land and to make them his property thereby, subject to the limitation that this right must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the common use. *State v. Mallory*, 73 Ark. 236, 3 Ann. Cas. 852, 83 S. W. 955, 67 L.R.A. 773; *Long Point Co. v. Anderson*, 19 Ont. 487, reversed for want of jurisdiction in 18 Ont. App. 401. In *State v. Mallory*, supra, the court said: "By the common law of England the owner of land had no absolute property in animals *ferae naturae*, while at liberty in the wild state, but had a qualified interest or property in such as were found, so long as they remained on his territory, and when killed or captured thereon they became his absolute property. Blackstone's treatment of this subject is not altogether clear, though he seems to have considered the complete ownership of game, in the strictest proprietary sense, to have been in the crown as a personal prerogative, even since Magna Charta. Yet he recognized the right or privilege of one to take game or fish on his own premises without restraint as a substantial and valuable one. 2 Black. Com. 418, 419. Mr. Christian in his learned notes combats, with the approval of Mr. Justice Coleridge, the doctrine apparently laid down by Blackstone to the effect that the sole right to take game rests primarily with the king, and maintains that at common law every person, *ratione soli*, had a right to game on his own land. 2 Black. Com. p. 418, note 8."

This rule applies to fish in waters the soil beneath which is the property of the landowner. *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684, wherein the court said: "Fish, in streams or bodies of water, have always been classed by the common law as *ferae naturae*, in which the riparian proprietor or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in such waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters."

This exclusive right to hunt or fish on his own land so far as not restrained by the state has been frequently held, not only to create a property in the privilege, but to give the landowner a qualified property *ratione soli* in the wild animals themselves, which property lasts so long as the animals remain on the

premises. *Reg. v. Steer*, 6 Mod. (Eng.) 183; *Read v. Edwards*, 17 C. B. N. S. 245, 112 E. C. L. 245, 144 Eng. Rep. (Reprint) 99; *Graham v. Ewart*, 11 Exch. (Eng.) 326; *Lonsdale v. Rigg*, 11 Exch. (Eng.) 654; *Long Point Co. v. Anderson*, 19 Ont. 487, reversed for want of jurisdiction in 18 Ont. App. 401; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656.

However, this property *ratione soli* is not absolute, but is only qualified, being defeasible by the escape of the animal from the land, upon which the property right immediately ceases. *Hinsley v. Wilkinson*, Cro. Car. (Eng.) 387; *Sutton v. Moody*, 1 Ld. Raym. 250, 91 Eng. Rep. (Reprint) 1063; *Graham v. Ewart*, 11 Exch. (Eng.) 326; *Lonsdale v. Rigg*, 11 Exch. (Eng.) 654; *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684.

Therefore, although a landowner who maintains rabbits in his wood has a species of property in them *ratione soli*, this property ceases when they escape and eat on a common, wherefore a commoner cannot maintain an action against the owner of the land from which the rabbits have come, for they are no longer the property of the defendant. *Hinsley v. Wilkinson*, Cro. Car. 387, 79 Eng. Rep. (Reprint) 938.

A riparian landowner does not own absolutely the fish in the stream. His right of property attaches only to those he reduces to actual possession, so that he has no right to kill, or obstruct the free passage of, those not taken by him. *People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L.R.A. 581.

It is certain that, as between the owner of the land and a trespasser, the law recognizes that the landowner has a qualified property in wild animals, enforceable as a civil right, and that trespass will lie for the taking of unreclaimed animals *ferae naturae* from the lands of the plaintiff. *Coney's Case*, Godb. 122, 78 Eng. Rep. (Reprint) 75; *Child v. Greenhill* Cro. Car. 553, 79 Eng. Rep. (Reprint) 1077; *Sutton v. Moody*, 1 Ld. Raym. 250, 91 Eng. Rep. (Reprint) 1063; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10. Thus the owner of a several right of piscary has been held to have a privileged property in the fish therein, for the taking of which trespass would lie. *Child v. Greenhill*, Cro. Car. 553, 79 Eng. Rep. (Reprint) 1077. So in *Read v. Edwards*, 17 C. B. N. S. 245, 112 E. C. L. 245, 144 Eng. Rep. (Reprint) 99, an action against the owner of a dog for damages caused by its entering the plaintiff's wood and there destroying young pheasants reared under domestic hens, objection was made that the plaintiff had no property in the pheasants

because they were game birds. But the court held that even if they were to be deemed *ferae naturae* (which was not decided) the owner of the land had such a qualified property as would sustain his action. In Coney's Case, Godb. 122, 78 Eng. Rep. (Reprint) 75, recovery was granted a landowner, in trespass, for the killing of conies there by the defendant.

This qualified property *ratione soli* is such as will sustain an injunction at the suit of the landowner to restrain invasions of it. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, wherein it was held that a landowner was entitled to injunctive relief against persons fishing in streams navigable in fact but the soil underneath which was the property of the landowner.

When this right, *ratione soli*, is exercised by the owner and he reduces to possession animals *ferae naturae* on his lands, the captured animals belong absolutely to him. Payne v. Sheets, 75 Vt. 335, 55 Atl. 656. See also Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L.R.A. (N.S.) 745, reversing 120 Ill. App. 10.

The right *ratione soli* of a landowner to the animals *ferae naturae* on his land has received statutory recognition. Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Cummings v. People, 211 Ill. 392, 71 N. E. 1031.

In an important English case however it was held that, strictly speaking, the so-called property *ratione soli* is not a property in the animals before capture, but simply a privilege to take them. Blades v. Higgs, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76, wherein it was said: "My Lords, when it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli*, or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentiae*, for these grounds apply to animals which are not in the proper sense *ferae naturae*. Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise an-

ciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil." It was further held in that case that even if wild animals, while living, are to be considered the property of the landowner, they are more in the nature of real property, an appurtenance to the land, than personal chattels. On this point it was said, per Lord Cranworth: "Wild animals whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, as growing fruit was, considered a part of the realty. If a man entered my orchard, and filled a wheelbarrow with apples, which he gathered from my trees, he was not guilty of larceny (see now the Statute 24 and 25 Vict. c. 96, s. 36), though he had certainly possessed himself of my property; and the same principle is applicable to wild animals."

When they become reclaimed and tamed, however, wild animals on a landowner's domain, such as deer in a park, cease to be a part of the inheritance, lose their character as part of the realty, *ratione soli*, and become personal chattels. Ford v. Tynte, 2 Johns. & H. (Eng.) 150.

d. By Pursuit.

(1) Animals Generally.

It has been said that the opinion of Gaius, that one does not become the proprietor of a wild beast which he has wounded, but which he has not effectually taken, prevailed among the Romans and was followed by the Emperor Justinian. Charlebois v. Raymond, 12 L. C. Jur. 55.

Accordingly it is a general rule of both the Roman and the common law that pursuit alone vests in the sportsman no property in the animal pursued, and even pursuit accompanied by wounding is equally ineffectual for that purpose, unless the animal is actually taken. Justinian's Institutes lib. 2, tit. 1, s. 13; Fleta lib. 3, c. 2, s. 175; Bracton lib. 2, c. 1, p. 3, cited in Pierson v. Post, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; Swift v. Gifford, 2 Lowell 110, 23 Fed. Cas. No. 13,696; Buster v. Newkirk, 20 Johns. (N. Y.) 75.

Occupancy of beasts *ferae naturae* was defined by Puffendorf (lib. 4, c. 6, s. 2 and 10) to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this

definition. *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264.

Where, therefore, a hunter had started a fox with hounds and dogs, and had him in full cry, this was held to be insufficient to vest in the hunter any property in the fox, and he was allowed no recovery against one who, in his sight, interfered, prevented him from catching the fox, and himself killed and carried it off. *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264. In that case the court said: "We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation. However uncourteous or unkind the conduct of *Pierson* towards *Post*, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied."

It has been held that no property right was vested in the hunter by the chasing and wounding of a deer, which, however, ran on six miles or more, the hunter abandoning the pursuit overnight and taking it up again in the morning. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75, wherein it was said: "The principles decided in the case of *Pierson v. Post*, 3 Caines (N. Y.) 175 are applicable here. The authorities cited in that case, establish the position, that property can be acquired in animals *ferae naturae*, by occupancy only; and that, in order to constitute such an occupancy, it is sufficient if the animal is deprived of his natural liberty, by wounding, or otherwise, so that he is brought within the power and control of the pursuer. In the present case, the deer, though wounded, ran six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of *N*. He, therefore, cannot be said to have had a property in the animal, so as to maintain the action."

But where a hunted animal has been mortally wounded, and the pursuer has the animal in such a situation that its escape is improbable, if not impossible, this is sufficient reduction to control to vest in the hunter the property right to the animal. Actual manucapture is not essential. *Liesner v. Wanie*, 156 Wis. 16, 145 N. W. 374, 50 L.R.A. (N.S.) 703. In that case it appeared that a hunter had mortally wounded a wolf and

had so followed up the attack as substantially to have the animal in possession, when the defendant interfered, delivered the shot which ended the wolf's life, and then carried the carcass off. Granting recovery against the defendant, the court said: "It is conceded that if the plaintiffs had substantially permanently deprived the wolf of his liberty,—had him so in their power that escape was highly improbable, if not impossible, before defendant appeared on the scene and with his gun pointed so as to reach within some three feet of the animal delivered a finishing shot, it had become the property of plaintiffs and was wrongfully appropriated by appellant. Such is according to the prevailing rule. The instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it. *Ingham, Law of Animals*, 5. Such is the law of the chase by common-law principles, differing from the more ancient civil law which postponed the point of vested interest to that of actual taking. The evidence in this case very strongly tends to establish all the facts requisite to ownership of the wolf by plaintiffs—so strongly that all reasonable doubts in respect to the matter, if any would otherwise have remained, might well have been removed by the superior advantages which the trial court had. In the light of other evidence, all reasonable doubts may well have been removed as to who delivered the shot which so crippled the animal as to cause him to cease trying to escape, thus permitting appellant to substantially reach it with the muzzle of his gun at the instant of delivery of the finishing shot. That, at such instance, the plaintiffs were in vigorous pursuit of the game, the evidence is clear, and that in a few moments, at most, they would have had actual possession, is quite as clear. So we must hold that the verdict was properly directed and the judgment properly rendered thereon." In *Churchward v. Studdy*, 14 East 249, 104 Eng. Rep. (Reprint) 596, it was held that where the plaintiff's dogs hunted and caught, on the lands of the defendant, a hare started on the lands of another, it was held that the property in the hare was in the plaintiff.

The law of France differs, however, in the rule of property by chase, from the law of the Romans, and the common law. According to the French law, as was said by *Cujas* (book 4), a wild animal is the property of him who has wounded it, so long as he continues to pursue it, and it does not belong to him who captures the animal notwithstanding that pursuit. This rule of the law of France has been applied in a Canadian case, *Charlebois v. Raymond*, 12 L. C. Jur. 55, wherein it ap-

peared that the plaintiff had first started the pursuit of a bear, and having wounded it with his dogs, was continuing the chase without interruption and without losing trace of the beast, up to the moment when it was killed by the defendant who did not commence the pursuit until an hour or two later than the plaintiff. On these facts it was held that the plaintiff's pursuit and wounding of the bear had made it his property, of which the defendant could not deprive him by killing it, and the plaintiff was granted judgment for the value of the bear and for costs.

(2) Whales.

There have been a number of cases, English and American, involving the right of property in whales, but most of them have involved the question of the ownership of a whale after it has been killed, and are not, therefore, included in this note.

As to the question of property by pursuit and attack in a whale before it is actually killed, the general custom of whale fishery in the North Sea is that of the "fast and loose rule," according to which harpooning a whale and retaining hold on it until its capture, makes it the property of the one harpooning it, even though other persons are instrumental in actually killing it. But the person harpooning a whale loses a proprietary right therein, if the whale breaks away and he loses his hold on it. This rule has received judicial recognition. *Littledale v. Scaith*, York Lent Assizes, 1788, Thursday, March 13, reported in a note to *Fennings v. Grenville*, 1 Taunt. 243, 127 Eng. Rep. (Reprint) 826; *Aberdeen Arctic Co. v. Sutter*, 4 Macq. H. L. (Scot.) 355, 3 Eng. Rul. Cas. 92.

The report of *Littledale v. Scaith*, *supra*, is as follows: "In an action of trover for a whale, which had been struck first by an harpooner of the plaintiff's ship, and afterwards by an harpooner of the defendant's, the counsel on both sides, and all the parties concerned, agreed the law to be, both by the custom of Greenland, and as settled by former determinations at Guildhall, London, as follows. While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish: and though during that time struck by a harpooner of another ship, and though she afterwards break from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it." In *Aberdeen Arctic Co. v. Sutter*, 4 Macq. H. L. (Scot.) 355, 3 Eng. Rul. Cas. 92, the Lord Chancellor said: "There has prevailed in the northern whale fishery for a considerable period of time, probably ever since the time when these fisheries came into the possession of this country, a rule with regard to the property in whales that are harpooned and captured, which rule has received the technical denomination of 'fast and loose' among the parties engaged in the fishery, and has become the subject of various decisions in English Courts of Justice. The object of the rule was to prevent disputes and quarrels among persons engaged in the capture of whales. The rule is that the person who first harpoons a fish and retains his hold of that fish until it is finally captured, is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons. But the rule also involves this condition, that if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if the fish is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is a 'loose' fish, and becomes the property of the person who first finds it and takes possession of it." In the case last cited it was contended, however, that a local custom of whalers in Cumberland Inlet modified this rule by allowing "drog fishing," a method of whaling adopted from the manner of hunting seal used by the Esquimaux, which consisted of harpooning the whale, attaching a large float to the line, and letting the fish go to wear itself down dragging the float, when the hunters would come up and take it, the property in the whale not being lost by its escape nor even by its subsequent capture by another. It was held, however, that this local custom had not been established by any general assent and was, therefore, not binding on persons who had not agreed to be bound by it, such persons being subject to the general "fast and loose" rule of northern fishery.

In *Fennings v. Grenville*, 1 Taunt. (Eng.) 240, it appeared that a custom of the whale fishery among the Gallipagos islands gave to one who struck a whale with a loose harpoon a right to receive half the produce of the whale from him who killed it, though it did not give him the whole property in the whale. The case turned on the technical ground that one tenant in common could not sue another. The question of the custom was discussed, however, by *Chambre, J.*, on the application for a new trial which appeared to have been contended for "upon the ground that either this was not such a custom of a particular trade as to be binding in law,

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or, if there had ever been such a custom, the verdict was contrary to the evidence of the present practice of the fishery; and the dissent of the captains now frequenting those seas remitted all the parties to their common law right; which was, that possession alone confers property in animals *ferae naturae*, and that the striking with a missile weapon gives no property in them." He said: "I should have been very unwilling to grant a new trial, if the only question had been on the custom. There must of necessity be a custom in these things to govern the subjects of England as well amongst themselves, as in their intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage, which was tried before Lord Mansfield, who was clear, that every person was bound by it, and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither. A few persons may by compact among themselves for a particular season, renounce any advantage and subject themselves to any disadvantages that they please, and this would bind all those who assented to it; but Luce [the captain of the plaintiff's vessel] was no party to this compact."

In a decision of the United States district court however, a usage of the whalers of Massachusetts somewhat similar to that claimed in the foregoing English cases was held to be a valid usage and property rights were determined by it, the usage being to the effect that the first person to harpoon a whale does not lose his property thereon, if his harpoon and line remain attached to the whale, even though the whale escapes and is captured by another, provided the first person pursues it and lays claim to it before it is cut. *Swift v. Gifford*, 2 Lowell 110, 23 Fed. Cas. No. 13,696, wherein it appeared that the crew of the *Rainbow* harpooned a whale, which broke away, carrying iron and line with it, and so far outran its pursuers that they were left out of sight, and the crew of another boat, the *Hercules*, met and captured it without knowing that it had been struck and was being pursued. The *Rainbow* came up, however, before the whale was cut, and the master of the *Rainbow* took the prize by showing his iron in the whale. The owners of the *Hercules* later instituted libel proceedings to establish property in the whale,

and it was held that the usage among the Massachusetts whale fishers whereby "the iron holds the whale" was valid. It was said in that case by Lowell, District Judge: "The rule of the common law, borrowed probably from the Roman law, is, that the property in a wild animal is not acquired by wounding him, but that nothing short of actual and complete possession will avail. This is recognized in all the cases concerning whales cited at the bar, as well as in the authorities given under the first point. Whether the modern civil law has introduced the modification that a fresh pursuit with reasonable prospect of success shall give title to the pursuer, does not seem to be wholly free from doubt, though the ancient commentators rejected such a distinction, for the satisfactory reason that it would only introduce uncertainty and confusion into a rule that ought to be clear and unmistakable. See 16 Poth. Pandecta, p. 550, lib. 41, tit. 1; Gaius, by Thompson & Lemon, p. 270. I do not follow up this inquiry; because it would be impossible for me to say that the crew represented by the respondent, though continuing the chase, had more than a possibility of success. The decision, therefore, must turn on the validity of the usage, without regard to the chances of success which the respondent's crew had when the others came up. It is not disputed that the whalers of this state, who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it. The converse of the proposition is that a whale which is found adrift, though with an iron in it, belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalers in the Northern fishery, as shown by the cases, is, that the iron holds the whale only while the line remains fast to the boat; and the result is, that every loose whale, dead or alive, belongs to the finder or taker, if there be but one such. . . . The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception. . . . The usage being divisible in its nature, it seems to me, that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale and prescribed that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still con-

tinuing, it is reasonable, though merely conventional, and ought to be upheld."

In 1863 it was held in Hawaii that the common-law rules as to property in animals *ferae naturae* by pursuit and capture had no application to cases arising on the high seas and that in the absence of any positive rule of maritime law as to the rights in a whale wounded and pursued by one ship and captured by another, a court of admiralty would regard the whale as the joint prize of both ships and would apportion the proceeds of the whale according to equity and natural right. *Heppingsstone v. Mammen*, 2 Hawaii 707. In that case it appeared that boats of the whale-ship *Oregon* pursued and made fast to a whale; that, after repeatedly harpooning it, they were obliged to cut loose from it, night coming on, to relinquish the pursuit, and to return to the ship; that the next morning a whale was sighted, which later proved to be the same one, and the pursuit was resumed; that the boats of another ship, the *Richmond*, had already started a pursuit of the whale, and succeeded in killing it, though warned by the officers of the *Oregon* that it was probably the whale wounded by the *Oregon* the day before; and that upon finding irons of the *Oregon* in the whale the men of the *Richmond* turned it over to the *Oregon*. The owners of the *Richmond* instituted libel proceedings to recover a share in the whale, and the court held it to be the joint prize of the ships and decreed that to the libelant should be delivered one-half the proceeds in oil and bone. The court said: "The case is a novel one in this court, and somewhat perplexing. The several masters of whaleships who have testified in the cause, concur in saying that they have never known a case precisely like this. According to the English common-law doctrine, exclusive property in animals *ferae naturae*, may be acquired by their immediate manucaption, or by taking and killing them; and also by the wounding of them, by one not abandoning his pursuit, in such a way as to prevent their escape and bring them within his certain control, and by encompassing them with nets and toils, or otherwise intercepting them, so as to deprive them of their natural liberty and render escape impossible. But merely starting and pursuing them gives no right of property; and therefore an action cannot be supported against one who intercepts and kills them in the view of the pursuer, while he is continuing the pursuit. . . . It is argued on behalf of the libelant, that, if the present case is to be governed by the doctrine just referred to, the whale belonged to the '*Richmond*,' because her men found it loose, attacked and killed it. On the other hand, it is contended that the English common-law rule should not be held applicable to

such a case, and even if it were that the whale belonged to the '*Oregon*,' whose men first attacked and wounded and afterwards resumed the pursuit of it, before the '*Richmond*'s' men struck it. If the case were to be decided by the strict rules of the common law, it might be said that the libelant, having voluntarily parted with the possession of the whale to the respondent with a full knowledge of all the facts, had precluded himself from maintaining an action to recover back the proceeds of the whale for himself or the owners. But I am of opinion that the rules of the common law, *eo nomine*, are not applicable to any branch of the case; and it is admitted, on behalf of the libelant, that the doctrine quoted above has been modified to some extent, by the universal usage prevailing in the whaling business, so as to effect the decision of this case on its merits. Further, although the rule of the common law touching animals *ferae naturae* may be considered recognized here, so as to govern cases arising within the Kingdom, the court is not bound to apply that rule to cases arising on the high seas, but in the absence of any positive rule of maritime law, is bound to decide according to equity and natural right. The libelant did not claim the entire whale, but said he considered himself fairly entitled to a half of it, and when he relinquished the possession to the respondent, he did so with an intimation that he intended to assert his claim to that extent upon the return of the ships to port. It would be unjust therefore to debar him from doing so, by a technical rule. It is better that, when such cases occur in the remote regions where the whalemens of different nations pursue their prey, the parties should feel that it is not necessary to maintain what they may conceive to be their rights by resorting to force, but may safely leave the adjustment of those rights to a court of admiralty, whose duty it is in general, as a matter of comity, to judge and administer civil justice in maritime concerns, between the citizens or subjects of any friendly nation, exhibiting a cause within its jurisdiction. . . . It seems to me, that, under all the circumstances of the case, the whale may fairly be considered the joint prize of both ships; and I shall accordingly decree that the respondent deliver to the libelant seventy-five barrels of good bowhead oil and one thousand pounds of whalebone, of at least medium size, and that the costs be equally divided."

e. Increase.

The rule of both the Roman and the English law was that the increase of tame or domestic animals belonged to the owner of the dam or mother, according to the doctrine

"*partus sequitur ventrem.*" And it appears that this rule was equally applicable to tamed or reclaimed wild animals. 2 Blk. Com. 390; 1 Hale P. C. 510, 511.

An anomalous rule, however, governed the ownership of the increase of swans, which, contrary to the general rule, was deemed to belong equally to the owners of the male and of the female parent birds, in common. See Swans's Case, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435, wherein the peculiar rule as to swans was whimsically ascribed to the monagamous habits of that bird. It was said: "And in the same case it is said, that the truth of the matter was, that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cignets between them; and for these cignets the owners did join in one action, for in such case by the general custom of the realm, which is the common law in such case, the cignets do belong to both the owners in common equally, sc. to the owner of the cock, and the owner of the hen; and the cignets shall be divided betwixt them. And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the poet saith; *Dulcor defecta modulatur carmina lingua, cantator, cygnus, funeris ipse sui, etc.*"

4. LOSS OF PROPERTY RIGHT.

The qualified property in a reclaimed wild animal was subject, at common law, to be defeated by an escape of the animal and its restoration to its natural, wild, and ferocious state. When this happened it was deemed that the dominion of man over the animal was at an end and that all property therein was extinguished. 4 Blk. Com. 588; Swans' Case, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435; James v. Wood, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448.

An exception was recognized in the case of the escape of an animal which at the time of the escape had the *animus revertendi*. 2 Blk. Com. 392; Brinckerhoff v. Starkins, 11 Barb. (N. Y.) 248.

The common-law rule as to the loss of property in a captured wild animal by its escape and reversion to a wild state was enforced in the case of Mullett v. Bradley, 24 Misc. 695, 53 N. Y. S. 781, wherein it was held that the escape into the Atlantic ocean of a sea lion captured in the Pacific ocean, took away from its captor and owner the

right of property which he had had in the animal. It appeared that the plaintiff, a dealer in wild animals for exhibition purposes, had a sea lion which had been captured in the Pacific ocean and transported across the continent to New York where it escaped and was later caught by a fisherman in the Atlantic ocean. The plaintiff sued the fisherman to recover the animal, but recovery was not granted. The court said: "It is conceded that sea lions are *ferae naturae*, and that the law applies which holds that only a qualified right of property can be acquired in them, a right which is wholly lost when, escaping from their captor, without any intention of returning, they resume their former freedom. 2 Blackst. Com. 392; 2 Kent's Com. 348; Gillet v. Mason, 7 Johns. (N. Y.) 16; Amory v. Flynn, 10 Johns. (N. Y.) 102; Goff v. Kilts, 15 Wend. 550. Blackstone, referring to animals *ferae naturae*, says that 'these are no longer the property of a man, than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animus revertendi*, which is only to be known by their usual custom of returning.' It is said by Chancellor Kent, 'Animals *ferae naturae* so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. But it is quite unnecessary to multiply citations of authority for a proposition of law so well settled and familiar as this. It is quite apparent that the case under consideration comes directly within it. The sea lion in question was *ferae naturae*, and the right of property which the plaintiff had undoubtedly acquired in it was, so to speak, defeasible and always contingent upon his maintaining his right by actual control when opposed by a disposition on its part to escape and resume its former freedom of action. The evidence not only fails to show that there was any *animus revertendi* on its part, but the inference from the facts proven is quite the contrary. Blackstone states, as we have seen, that an intention to return, where such animals depart from the immediate control of the owner 'is only to be known by their usual custom of returning.' Of course, the evidence here shows that there was no such custom, but that, at the earliest opportunity, the animal broke away from restraint, and had traveled over seventy miles from its place of confinement when it was captured, some two weeks afterwards. The necessary inference, from the history of its movements, is that there was decidedly no intention on its part of returning to its place of captivity, or of

again submitting itself to the domination of the plaintiff. But it is contended on the part of the plaintiff that there can be no return of such an animal to its natural liberty until it has either reached its native place or, at least, a place where the conditions of existence are normal and suitable to its habits and physical requirements. In support of this claim evidence was given tending to show that sea lions of this character are not found on the Atlantic coast, but only on the Pacific, from the bay of San Francisco to St. Nicholas island, or from latitude 30° north to 36° north, and that, for some reasons not fully explained, the conditions along the Atlantic coast are not favorable to their existence here in a wild state. However that may be, I do not think that the rule is subject to any such sweeping qualification. The natural liberty to which the law refers means that which the animal formerly enjoyed, namely, to provide for itself, in the broadest sense in which the phrase may be used. In short, it may be said to have regained its natural liberty when, by its own volition, it has escaped from all artificial restraint and is free to follow the bent of its natural inclination. Such, it seems to us, was the case here."

However where an animal *ferae naturae* has been so tamed that its wild nature is lost and that an escape by it will not restore it to its natural liberty and wildness, such an escape does not deprive the owner of his property in the animal. *Amory v. Flynn*, 10 Johns. (N. Y.) 102. In that case it appeared that certain geese of the wild kind, which had, however, been tamed, strayed away and were caught by two men who pledged them to the defendant for liquor furnished them by him. The defendant refused to deliver them up to their owner, the plaintiff, unless he would pay for the liquor. The plaintiff sued in trover and was granted recovery, without the payment of the pledge. The court said: "The geese ought to have been considered as reclaimed, so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power, or disposition, to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no color for the inference that the geese had regained their natural liberty as wild fowl, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the lien, which he supposed he had acquired by the pledge. This claim was not well founded, for he showed no right in the persons who pawned them for the liquor so to pawn them, and he took them at his peril. Here was clearly an invasion of private right. If the person who took the geese, or who had kept

them, had been put to necessary expense, in securing them, such expense ought to have been refunded; but no such expense was shown, or pretended, and to sanction such a pawn as this would lead to abuse and fraud."

It seems, moreover, that the rigid common-law rule whereby escape deprived the owner of his property in a reclaimed wild animal is being relaxed to some extent in favor of the proprietary right of that owner. Thus it has been held in America, that the owner of a tamed canary bird has such a property in it, even after it has escaped, as will entitle the owner to recover it by a possessory warrant. *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764, wherein it appeared that the plaintiff had a tamed canary, called "Sweet," which knew its name and would answer to call, and that it escaped one day and came into the possession of the defendant. The court, holding that the plaintiff could recover it, said: "Under this evidence, there does not seem to be any question of sufficient possession and dominion over this bird, to create a property right in the plaintiff. To say that if one has a canary bird, mocking bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, that the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold that the traveling organist with his attendant monkey, if it should slip its collar, and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion." So, in *Ulery v. Jones*, 81 Ill. 403, a tamed buffalo bull calf was held to be the subject of such property as would sustain an action of trespass for the killing of it while it had temporarily escaped from its owner's inclosure and was trespassing on the lands of the defendant, and it was held that the action was maintainable without any proof of *animus revertendi* on the part of the buffalo. In that case the court said: "Appellee insists, this animal, being *ferae naturae*, was trespassing on his premises, and he had a right to kill him. He contends, the animal was not in such a condition of subjection to its owner as to give him a property in the animal. He cites that passage, in 2 Blackstone's Com. 389, 390, with which all are familiar, and lays great stress upon the fact that it was not proved the animal, when it had strayed away from the owner's inclosure was accustomed to return to it, and, therefore, being

found wandering at large, he became game for the hunter, and if actually trespassing on a neighbor's inclosure, such neighbor would have the right to shoot him down. The proof on this point is, that once, certainly, the animal, after an absence of some time, returned voluntarily to his owner, but usually, when neighbors made their complaints of his conduct, appellant would send a man and drive him home. The animal was scarcely old enough to have acquired the habit of coming home, nor do our domestic animals of that kind, at certain seasons of the year, make regular returns to their homes, yet they fail not, even after long absences, to return to their master's crib. An ordinary domestic bull, at the early age of two years, would, quite likely, lack the observance of the custom insisted upon as an unerring evidence of domesticity. This animal may be said to have been, at all times, in the keeping and actual possession of his owner, for he was so tame and gentle, there was no trouble in driving him home to his accustomed pasture—as much in his actual possession and keeping as a domestic breachy animal can be who is absent from his home for weeks or months. Who can say, when this young animal should have matured he would not have returned regularly with the herd to their proper home? But, whether or not, it cannot be denied, under the evidence, the animal was so tame and gentle as to render it no longer of a wild nature. It was completely tamed, and, therefore, a subject of property." And in *State v. Crenshaw*, 22 Mo. 457, the court, holding that a tamed buffalo was not within the term "cattle" in a statute making it a crime to kill, maim or wound any cattle of another, said: "We do not think that the legislature meant to include buffaloes under the word 'cattle.' Buffaloes are not cattle yet within the meaning of the statute; and the fact that this buffalo bull was tamed, if it be so, does not bring him within the provision of the law, and while his tribe is left out. Though it be admitted that persons may have buffaloes tamed and domesticated, may lawfully acquire property in them, and can maintain suits for injuries done them, or for the destruction of them, yet the courts must look to the general state of things and to the circumstances attendant on any general legislation, and give such instruction to the words of the law as to enable them to embrace the ideas and notions and designs of the law makers. Although it may prove a loss to the owner, and is of itself a serious outrage, maliciously and wilfully to destroy a domesticated buffalo, yet we are inclined to the opinion that the legislature never meant to embrace those animals under the general word 'cattle.' A tame domesticated buffalo bull is not then under the provisions of this statute. He cannot be brought within the provisions while his family is left out."

5. PARTICULAR ANIMALS.

a. Fish and Oysters.

No person can acquire property in fish running at large in the waters of the state except by taking and reducing them to possession. *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52; *State v. Roberts*, 59 N. H. 484; *People v. Dextater*, 75 Hun 472, 27 N. Y. S. 481, *affirmed* 147 N. Y. 723, 42 N. E. 724; *Matter of Fishway*, 131 App. Div. 403, 115 N. Y. S. 745.

Even after taken possession of, if fish escape and return to the river and are at large, they are lost to private ownership and become public property again. *State v. Roberts*, 59 N. H. 484. See also *Matter of Fishway*, 131 App. Div. 403, 115 N. Y. S. 745.

Fish, until actually taken, are incapable of absolute ownership, except in artificial lakes or in small ponds that are entirely landlocked. *Ex p. Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700. See also *Pollexfen v. Crispin*, 1 Vent. (Eng.) 122.

But fish in such private landlocked ponds are the private property of the owner of the pond. *Hudson's Case*, 21 E. P. C. 611, 612; *Reg. v. Steer*, 6 Mod. (Eng.) 183; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199. *Murphy v. Hichcock*, reported in full, post, this volume, at page 976. In *Reg. v. Steer*, supra, it was said: "If a man has a close pond in which there are fish, he may call them *pisces suos* in an indictment, or he may not do it, at his pleasure, and either way is good; because being in a close pond, the property *ratione loci* in them cannot be lost, because they cannot swim away." In *State v. Roberts*, supra, the court said: "But while the legislature has power to regulate and limit the time and manner of taking fish in waters which are public breeding-places or passage-ways for fish, it has not assumed to interfere with the privileges of the owners of private ponds having no communication through which fish are accustomed to pass to other waters. Such ponds, whether natural or artificial, are regarded as private property, and the owners may take fish therefrom whenever they choose, without restraint from any legislative enactment, since the exercise of this right in no way interferes with the rights of others. The legislature protects the owners of such ponds in the enjoyment of their privileges (Gen. St. c. 251, s. 5), and they are expressly excepted from the statutory restrictions by the third section of the act upon which the indictment in this case is founded. The defendant is in possession, claiming the ownership of North pond. There is no suggestion that the public have any rights in its waters other than as a breeding-

place for the supply of fish to other streams, or a channel for their passage. If, as the defendant claims, the trout are within his control, and there is no communication through which they can pass from the pond to other waters, the indictment cannot be maintained. If, as is claimed in behalf of the state, there is free communication through which trout pass from the pond to the streams leading into it and to the Ammonoosuc river, the indictment can be maintained upon proof of those facts."

But the fact that a pond is entirely enclosed by the lands of a person gives him no property right in the fish therein, if the fish have a passage to and from the pond. *State v. Roberts*, 59 N. H. 484. Where oyster shells are deposited in a river and the germs of oysters floating in the waters attach themselves thereto and form marketable oysters, the oysters are the property of the person depositing the shells, this being no such act of abandonment as will allow another to appropriate them. *Grace v. Willets*, 50 N. J. L. 414, 14 Atl. 559, wherein it was held that an action would lie for the removal and conversion of oysters formed on shells so deposited.

But in an early New Jersey case it was held that oysters planted in a navigable river, where other oysters grow, are abandoned and that the planter has no such property in them as will sustain trover for their conversion. *Shepherd v. Leverson*, 2 N. J. L. 369. Compare, however, the later case of *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347, cited and quoted from *infra*, in subdivision IV. *Wild Animal as Subject of Larceny*, wherein it was held that planted oysters were property and the subject of larceny.

Oysters planted by an individual in a bed clearly marked out and defined in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously at the time, are the property of him who plants them, and the taking them by another person is a trespass, for which an action lies. *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *Decker v. Fisher*, 4 Barb. (N. Y.) 592; *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 586. In *Fleet v. Hegeman*, *supra*, the court said: "The plaintiff had gathered the oysters when small, some two years before the trial, and planted them in a bed in the bay, about 15 rods from the shore; none grew there at the time, nor have any grown since outside of the bed. That a qualified property in the oysters was acquired by the plaintiff is admitted; but it is contended that the planting them in the bay, where a common right of taking them existed, was an abandonment of them to the public use. If

so, it must be by force of law; for the case fully discloses that no such intent in point of fact existed. On the contrary, they were deposited there by the owner, to improve or rather give value to them, and with reference to an ulterior use. As to all inanimate things, an absolute property in possession may be acquired in them—such as goods, plate, money; and if the article in question could be considered as falling within that description, there could be no doubt the defense taken would be untenable, unless there was an abandonment in fact. Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them, no good reason is perceived why it should not be governed, by the rules of law applicable to inanimate things. But, it is contended, they fall within the rules of law applicable to animals denominated *ferae naturae*, the same as deer in the forest, pigeons in the air, or fish in the public waters or the ocean. A qualified property is acquired in these by reclaiming and taming them; or by so confining them, within the immediate power of the owner, as to prevent their escape, and the use of their natural liberty. Deer in a park, hares or rabbits in a warren, or fish in private ponds or trunks, are instances of this description. These, it is said, are the property of a man no longer than while they continue in his keeping or possession. Manucapture is not necessary to acquire, much less to continue, possession of this property. 3 Caines (N. Y.) 178. If a deer or any wild animal reclaimed hath a collar or other mark put upon him, and goes and returns at pleasure, it is not lawful for anyone else to take him; though if he be long absent, without returning, it is otherwise. In all these cases of wild animals reclaimed, the property is not absolute, but defeasible, by the animals resuming their ancient wildness, and going at large—as if the deer escape from the park, or the fishes from the pond or trunk, and are found at large in their proper element, they become *ferae naturae* again, and are fees to the first occupant that may seize them. But while they continue the owner's qualified property, they are under the protection of the law, as much so as if they were absolutely and indefeasibly his; and an action will lie for any injury committed. . . . It is clear, from the principles and cases above mentioned that the right to appropriate property of the description in question does not depend exclusively upon the place where they are found, but upon the fact that they are *ferae naturae* unreclaimed; for though the deer should be found browsing in his own forest, and the pigeon flying in the air, or any of the class reclaimable, at large, if they have been

in fact domesticated and possess the *animus revertendi*, they are not common property, and the occupant who takes them gets no title; and if he takes them, knowing their condition, he becomes a trespasser. This is clear upon well-settled authority. The right of the plaintiff to the oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans, or other water fowl, that may float habitually in the bay. They were distinctly designated according to usage; and besides, the defendants had actual information of the ownership, and they can set up no greater right to take them, because found in their native element, than tame pigeons in the air, or a domesticated deer upon the mountain. If the bed interfered with the exercise of the common right of fishing, or if the oysters are undistinguished among others belonging to the public waters, the interest of the owners in them would undoubtedly be subservient to the enjoyment of the public use. But the exercise of that right in this case was a mere pretense. No oysters of the natural growth of the bay, fit for use, had been found there for years. The bed interfered with no other sort of fishing, for either profit or pleasure. The case presents a deliberate and wanton violation of property acquired by the industry and care of another, under the pretext of exercising a right in common which the defendants knew to be fruitless." In *Decker v. Fisher*, 4 Barb. (N. Y.) 592, the court said: "It is not against the common privilege [of piscary] to say that while any one may fully exercise it, that does not give him the right to take property which another has reclaimed from its native wild state, and confined within his immediate power, so as to prevent its escape. If oysters had previously existed in their native state on this ground, the plaintiffs could not have deprived others of the right to take them by depositing others in the same place. But if there had been none there before, the privilege had been created by the plaintiffs, and had never belonged to the public. The defendant's could not impair the plaintiff's title to the oysters by depositing a few others in the same place, knowing that the plaintiffs had at the time similar property there, and with an intent so to mingle the two together that neither could be identified, and thus enable them to appropriate the property of others to their own use."

However oysters planted in navigable waters, opposite the lands of one other than the planter, the oyster bed not being clearly marked out by stakes or otherwise, do not remain the property of the planter, and he cannot maintain trespass against another for their taking. *Brinckerhoff v. Starkins*, 11

Barb. (N. Y.) 248, wherein the court, distinguishing the case of *Fleet v. Hegeman*, 14 Wend. 42, cited *supra* said: "But, adopting the case of *Fleet v. Hegeman* as an authority binding upon us, which we think we are bound to do, still we do not think that the claim of the defendant in error can be sustained. What were the facts upon which that case was decided? In the first place, it was shown that the oysters had been planted but about two years before the trial; next the bed was distinctly defined, and inclosed by stakes; and lastly, the bed was opposite the plaintiff's land, and must be supposed to have been within his view, and capable of being watched and protected by him. In the case before us, on the contrary, there was no evidence as to the quantity of oysters which had been planted by the defendant in error; they had been planted about five years before the alleged trespass was committed; there had been no stakes, or inclosure, defining the extent of the bed. It is true, that buoys had been placed there at two different times, but they had been carried away, and from the year 1843 to a period shortly before the trial, in 1847, there had been neither buoys nor any other evidence of an assertion of ownership; and, in addition to all this, the oysters were in front of the land of the plaintiff in error. If, upon this state of facts, the plaintiff below was entitled to a verdict, I cannot see why a person, who places oysters in any of the navigable waters of this state, does not acquire the exclusive property in them, and in all oysters which shall be found in the same place, provided he can show that there were none there before, and that he has, at some time, held out some evidence of an assertion of ownership, either to assist in guiding him to the place, or to warn others not to interfere with it. The important evidence of property arising from an inclosure by stakes, or otherwise, was wanting in this case. If such was the character of the bay, that it did not admit of such an inclosure, the conclusion must be, not that, for that reason, such evidence of ownership was unnecessary, but that it is a place where the right of property, asserted in this case, cannot be established."

b. Other Animals.

Property, as a civil right, has been recognized by the courts as existing in the following animals:

—bear, *Charlebois v. Raymond*, 12 L. C. Jur. 55; *Bostock Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 280.

—buffalo, *Ulery v. Jones*, 81 Ill. 403; *State v. Crenshaw*, 22 Mo. 457.

—canary bird, *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764.

—deer, *Davies v. Powell, Willes* (Eng.) 46; *Mallocke v. Eastly*, 3 Lev. (Eng.) 227; *Morgan v. Abergavenny*, 8 C. B. 768, 65 E. C. L. 768; *Ford v. Tynte*, 2 Johns. & H. 150, 70 Eng. Rep. (Reprint) 1008; *Brady v. Warren* [1900] 2 Ir. R. 632; *Dieterich v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L.R.A.(N.S.) 696, reversing judgment 119 App. Div. 315, 104 N. Y. S. 334. And see the reported case.

—dove and pigeon, *Rex v. Brooks*, 4 C. & P. 131, 19 E. C. L. 308; *Reg. v. Cheafor*, 5 Cox C. C. 367, 8 Eng. L. & Eq. 598; *Rex v. Howell*, 2 Den. C. C. 363 note; *Com. v. Chace*, 9 Pick. (Mass.) 15, 19 Am. Dec. 348.

—fox, *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264.

—grouse, *Lonsdale v. Rigg*, 11 Exch. (Eng.) 654.

—hawk, *Fines v. Spencer*, 3 Dyer (Eng.) 306b.

—mocking bird, *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765 note.

—monkey, *Grymes v. Shack, Cro. Jac.* 262, 79 Eng. Rep. (Reprint) 226.

—moose, *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L.R.A. 448.

—musk cat, *Grymes v. Shack, Cro. Jac.* 262, 79 Eng. Rep. (Reprint) 226.

—otter, *State v. House*, 65 N. C. 315, 6 Am. Rep. 744.

—parrot, *Grymes v. Shack, Cro. Jac.* 262, 79 Eng. Rep. (Reprint) 226.

—pheasant, *Reg. v. Garnham*, 2 F. & F. (Eng.) 347; *Read v. Edwards*, 17 C. B. N. S. 245, 112 E. C. L. 245, 144 Eng. Rep. (Reprint) 99.

—rabbit, *Bellew v. Langdon, Cro. Eliz.* (Eng.) 876; *Hadesden v. Gryssel, Cro. Jac.* 195, sub nom. *Holdensden v. Gresil*, 1 Brownl. & Goldes, 208, 123 Eng. Rep. (Reprint) 758, Yelv. 104; *Hinsley v. Wilkinson, Cro. Car.* 387, 79 Eng. Rep. (Reprint) 938; *Churchward v. Studdy*, 14 East 249, 104 Eng. Rep. (Reprint) 596.

—sea lion, *Mullett v. Bradley*, 24 Misc. 695, 53 N. Y. S. 781.

—swan, *Swans' Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435.

—wild cattle, *Davis v. Green*, 2 Hawaii 367.

—wild goose, *Amory v. Flyn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

—whale, see *supra*, subdivision (2) *Whales*.

—wolf, *Liesner v. Wanie*, 156 Wis. 16, 145 N. W. 376, 50 L.R.A.(N.S.) 703.

Since deer in an inclosed park are property they may be distrained as chattels of the owner. *Davies v. Powell, Willes* (Eng.) 46, wherein it was said: "I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *ferae naturae*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of *Swans*, 7 Coke 15b, 16b, 17b, 18b, and in several other books

there cited, it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren, etc. But there are writs in the Register, fo. 102, a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in fo. 102, is 'quare clausum ipsius A. fregit et intravit, & cuniculos suos cepit.' The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general; for the rule in Co. Lit. is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle." In *Mallocke v. Eastly*, 3 Lev. (Eng.) 227, it was held that there is no property in deer in a park unless they are tamed and reclaimed. But in *Morgan v. Abergavenny*, 8 C. B. 768, 65 E. C. L. 768, it was held that deer in a park, though it was an ancient and legal park, might be so tame and reclaimed as to be personal property, which would pass to the executors. The same ruling was made, on the authority of *Morgan v. Abergavenny*, 8 C. B. 768, 65 E. C. L. 768, in *Ford v. Tynte*, 2 Johns. & H. (Eng.) 150, 70 Eng. Rep. (Reprint) 1008, wherein the court said, per Vice Chancellor Sir W. Page Wood: "I do not think it is possible to get over the case of *Morgan v. Abergavenny*, which is precisely in point; indeed, if anything, it was rather a stronger case than this. The area of the park was much more considerable than in the present case, and the evidence of the reclamation of the deer was to this effect: The deer, ordinarily, had the range of the old park, and were attended by keepers and fed in the winter. The deer were watched in the falling season, and the fawns marked. At times certain of the deer were selected from the herd and caught, with the assistance of muzzled dogs, and turned into an inclosure or into pens to fatten. The ordinary mode of killing was by shooting; and some of the deer are described as being very tame, coming close to the keepers when called at feeding times. Witnesses were also called to prove that, of late years, deer had been

commonly bought and sold for profit, like sheep and other animals. Here the deer seem, if anything, tamer still; for the keeper is apparently able to take such as he intends to lock up, without using any special means. It was suggested, as a distinction between the two cases, that, in *Morgan v. Abergavenny*, the deer were bought and sold for profit; but I do not think that is the meaning of the evidence as reported. All that it goes to show is that the purchase and sale of deer for profit was a common practice, not that it was the practice on that estate. In its facts, therefore, the authority is on all-fours with this; and I find Chief Justice Wilde asking what would be a reclaiming of deer in a park, except what was done there; and, in delivering the judgment of the court, Mr. Justice Maule, after stating the substance of the evidence and the finding of the jury that the deer were reclaimed, said not only that the question was rightly left to the jury, but that there were no sufficient grounds for saying that they had come to a wrong conclusion. I must therefore hold that these deer have been reclaimed, and are no longer *ferae naturae*." In *Brady v. Warren* [1901] 2 Ir. R. (Eng.) 632, the evidence was held to support the jury's finding that certain deer were the property of the defendant, it appearing that the deer, which at one time had been confined in a walled deer park in his demesne, broke loose in 1893 through a temporary breach in the wall and only a portion were recaptured, that the remainder had since been wandering about the demesne, breeding, trespassing on the lands of the plaintiff, but always returning to the defendant's demesne, that the defendant shot and allowed others to shoot the deer occasionally for sport, and that he kept a wood ranger, whose duty it was to look after the deer, and whose predecessor had occasionally fed the deer in the winter with hay, laurel, and oats. In *Dietrick v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L.R.A. (N.S.) 696, reversing 119 App. Div. 315, 104 N. Y. S. 334, it was held that domesticated deer, kept in an inclosed ground, were the subject of property, and that a statutory inhibition against the shipping of venison did not apply to venison killed from a private stock of domesticated deer.

In trover for a hawk, the declaration must allege that it was a reclaimed hawk, otherwise no property can be claimed in it. *Fines v. Spencer*, 3 Dyer (Eng.) 306b.

There is no absolute property in grouse, they being *ferae naturae*. *Lonsdale v. Rigg*, 11 Exch. (Eng.) 654.

In *Bellew v. Langdon*, Cro. Eliz. 876, 78 Eng. Rep. (Reprint) 1100, it seems to have been held that rabbits (conies) kept by a landowner, were property, for it was said therein: "Trespass for breaking his close, and

killing there two hundred conies. The defendant justifies, for that he there had common appurtenant to such an house by prescription; and because the conies were there damage feasant, he killed them. And it was thereupon demurred. . . . But all the court, Popham absente, resolved, that the plea was not good, for the cony is a beast of warren, and profitable as deer are, and are not to be compared to vermin; and therefore the keeping of them by the owner of the soil is lawful, and the killing them unlawful, and not justifiable. And it was adjudged for the plaintiff." And in *Hadesden v. Gryssell*, Cro. Jac. 195, sub nom. *Haldesden v. Gresil*, 1 Brownl. & G. 208, 123 Eng. Rep. (Reprint) 758, Yelv. 104, it was also held that the lord of the soil might make burrows in a common and stock them with rabbits, and that a commoner could not justify chasing them there as being damage feasant.

In *Grymes v. Shack*, Cr. Jac. 262, 79 Eng. Rep. (Reprint) 226, it was held that trover would lie for musk cats, monkeys, and parrots.

In *Reg. v. Garnham*, 2 F. & F. (Eng.) 347, it was held that young pheasants, hatched and brooded by a domestic hen, were the property of the owner of the hen, and hence were not "game" within the meaning of a statute against poaching.

At common law, even in the case of swans, which were a royal fowl, there might be an individual property in such as were had within the private waters of an individual, and he might have his suit on writ of trespass for a wrongful taking thereof. *Swans's Case*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435.

It has been held that cattle, descended from domestic cattle carried to Hawaii in 1793 and 1794, but which had for years roamed the mountains and forests of the islands in a state of nature, could not, although in an actual state of wildness, be regarded as animals *ferae naturae*, and were, therefore, property susceptible of grant. *Davis v. Green*, 2 Hawaii 367, 375. In that case it was held that the grantee of unbranded wild mountain cattle had no right to enter the lands of private persons for the purpose of capturing cattle, or to convert the cattle of private owners because found unbranded on lands leased by him, and that the owners of private lands had no right to convert unbranded wild cattle of the King and government found on their lands. The court said: "In our opinion these mountain cattle cannot be legally regarded as animals *ferae naturae*. They do not belong to a species of animals which are ever classed as wild animals by nature, either by writers on law, or on natural history. Nor is their state like that of animals originally *ferae naturae*, which have for a time been brought under the immediate control and do-

minion of man, but have escaped and gone back to their naturally wild state. These cattle are the progeny of the tame cattle landed by Vancouver, which, in the course of time, have become more wild in their habits and appearance than the cattle which range on the lower lands, from the fact that they have been allowed to range at large, and to propagate their race free from the restraints and the management used in the care of the private herds, many of which, however, can only be reduced to manual possession by the same means that thousands of the mountain cattle have been captured, namely, with a fleet horse and a lasso. The difference between the mountain cattle and the cattle of private owners is not a difference of species or of nature, but merely a difference as to the degree of wildness in habit and appearance, superinduced by various causes, and they can no more be regarded as animals *ferae naturae* on that account than the cattle of the plaintiff could be so regarded, if he should see fit to let them breed and range on Waikoloa for several generations without bestowing upon them the customary care and management. In that case the plaintiff's cattle, however wild they might become, would still be his property, and could not be captured and converted by neighboring proprietors as wild animals, even when found upon their own lands."

IV. Wild Animal as Subject of Larceny.

1. IN GENERAL.

The general rule at common law was that there could be no larceny of untamed, unreclaimed wild animals wherein no property, either absolute or qualified, existed. 1 Hale P. C. 510, 511; 4 Bl. Com. 235; 2 East. P. C. 41; *Blades v. Higgs*, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76; *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765 note; *State v. Turner*, 66 N. C. 618; *State v. Krider*, 78 N. C. 481. And there could be no larceny of unreclaimed wild animals on the land of another, wherein the landowner had no property other than the mere qualified *ratione soli*, because, even though they were to be regarded as the property of a landowner, they were not chattels but were in the nature of real property. *Blades v. Higgs*, 11 H. L. Cas. 621, 11 Eng. Rep. (Reprint) 1474, 3 Eng. Rul. Cas. 76. And, even as to wild animals in which a property right had been acquired by reclamation, capture, or otherwise, there could be no larceny if they were of a base nature. 3 Coke Inst. 109; 1 Hawk. P. C. 143; *Rex v. Searing*, R. & R. C. C. (Eng.) 351; *Warren v. State*, 1 G. Greene (Ia.) 106; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339. This distinction was

probably made in *favorem vitae*, at a time when larceny was a capital offense, for Sergeant Hawkins (1 Hawk P. C. 143) says, of the subject of larceny: "They ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner shall never be so highly regarded by the law, that for their sakes a man shall die."

However, there might be larceny of wild animals which had become property, if they were of value and not of a base nature. 2 East P. C. 607; 1 Hale P. C. 511. But it seems that, even then, it was necessary to prove that the person accused knew that the animal had been reclaimed and was, therefore, property, in order to convict him of the larceny thereof. 1 Hawkins P. C. 144, 1 Hale P. C. 511.

The common-law test of value was, strictly, the fitness of the animal for food. It was the subject of larceny if fit for food, otherwise not. 3 Coke Inst. 110; 1 Hale P. C. 511; 2 East P. C. 607; 4 Blk. Com. 235; *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765 note; *State v. Turner*, 66 N. C. 618; *State v. Krider*, 78 N. C. 481. To the general rule that reclaimed wild animals, to be the subject of larceny, must be fit for food, the English courts made, however, an exception in the case of the tamed hawk which was held to be the subject of larceny though unfit for food, because it served to amuse the English gentlemen in their fowling sports. 3 Coke Inst. 109; 1 Hale P. C. 512; 1 Hawk P. C. 143; *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765, note.

It seems that in the absence of statutory modification the rules of the common law as to the larceny of wild animals are still in force. They have been applied in the following cases: *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765, note; *Warren v. State*, 1 Greene (Ia.) 106; *Com. v. Chace*, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *Rex v. Manu*, 4 Hawaii 409.

But it has been held that the common-law distinctions between animals *ferae naturae*, based on their base or generous natures, are inapplicable to American society, and that the test in the United States as to whether a reclaimed animal is the subject of larceny, is not whether it is of a generous nature or even the question of its fitness for food, but is whether it is of value in any way, as food, for its fur, or otherwise. *State v. House*, 65 N. C. 315, 6 Am. Rep. 744, wherein the court said: "An otter belongs to the class of animals known as *ferae naturae*, and therefore it was necessary to allege in the indictment that it had been reclaimed or confined or that it was dead. This is done in the indictment under consideration. It was not suggested that ani-

mals *ferae naturae* are not the subject of larceny, provided they are fit for the food of man and are dead or confined, but we apprehend that his honor acted upon another distinction laid down in the English authorities, to wit: that there is a class of animals which, though they may be reclaimed, are not such of which larceny can be committed, by reason of the baseness of their nature. All of the distinctions as to animals *ferae naturae* and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers. We take the true criterion to be, the value of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is an important one in America, and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals so valuable for their fur, are not the subject of larceny, on account of the baseness of their nature, while at the same time we should be bound to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage."

Birds of a wild variety, but hatched and brooded under a common domestic hen, are, until they are weaned and revert to a state of nature, sufficiently within the dominion of the owner of the hen to be his personal property, and the subject of larceny. Reg. v. Corey 10 Cox C. C. (Eng.) 23; Reg. v. Shickle, L. R. 1 C. C. (Eng.) 158; Reg. v. Head, 1 F. & F. (Eng.) 350. In Reg. v. Corey, *supra*, it was said: "As a matter of law, I have no difficulty whatever in telling you that these pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might have been their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case, but only the question of identity." In Reg. v. Shickle, *supra*, the court sustained a conviction for larceny in the taking of young partridges hatched and reared by a domestic hen, and brooding under her wings at night. The court said: "I am of opinion that, upon the facts stated, the question asked of us must be answered in the affirmative, and that the conviction is right. The case states that 'from their inability to

escape, they were practically in the power and dominion of the prosecutor.' That is sufficient to decide the point. In Reg. v. Cory, 10 Cox C. C. 23, the law on the subject is very clearly laid down by my Brother Channell. He there says, speaking of pheasants hatched under circumstances similar to those here: 'These pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the injury for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity.' In that statement of the law we all concur. The question here is, were these birds the subject of property? They were so when first hatched, and they remained so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner." In Rex v. Head, 1 F. & F. (Eng.) 350, it was held that the stealing of young pheasants, hatched and brooded under a common hen was larceny.

2. PARTICULAR ANIMALS.

Coke enumerates as animals, which, though tamed and property, are not the subject of larceny because of the baseness of their nature, bears, foxes, apes, monkeys, polecats, ferrets, and the like. 3 Coke 109.

Among animals *ferae naturae* which are valuable for food and, therefore, subject of larceny when tamed or confined, the text writers enumerate the following: "Deer, wild bore, conies, cranes, pheasant, partridge, and the like" (3 Coke Inst. 110); "deer, hares, or conies, in a forest, chase, or warren, or old pigeons being out of the house . . . wild pigeons in a dove-house shut up, or hares or deer in a house, or even in a park, inclosed in such a manner that the owner may take them whenever he pleases without the least danger of their escaping, in which case they are as much in his power as fish in a pond, or young pigeons, or hawks in a nest, etc., in taking of which for the like reason, it seems to be agreed, that felony may be committed," (1 Hawk P. C. 144). And East says: "But if they are dead, reclaimed, and known to be so, or confined and may serve for food, it is otherwise even at common law. For of deer so inclosed in a park, which may be taken at pleasure; fish in a trunk or net, or as it should seem in any other inclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges

in a mew; young pigeons, or old ones when shut up; young hawks in a nest, and even old ones, or falcons reclaimed and known by the party to be so; larceny may be committed. The same as to peacocks: so of swans marked and pinioned, or swans unmarked, if tame, kept in a mote, pond, or private river: but if they range out of the royalty, it is no felony to take them though marked, because it cannot be known that they belong to any person." 2 East P. C. 607.

Ferrets, although tame and recognized as being valuable and saleable, have been held, on the authority of 2 East P. C. 614, to be not the subject of larceny. "The jury found the prisoner guilty; but on the authority of 2 East P. C. 614, where it is said that ferrets (among other things) are considered of so base a nature that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be taken thereon. It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for nine shillings. In Easter term, 1818, the judges met and considered this case; they were of opinion that ferrets (though tame and saleable) could not be the subject of larceny, and that judgment ought to be arrested." *Rex v. Searing, R. & R. C. C. (Eng.)* 351.

Young partridges hatched by a barnyard hen and still with her, brooding under her wings at night, are the subject of larceny. *Reg. v. Shickle, L. R. C. C. (Eng.)* 158.

Similarly, young pheasants hatched by a hen and under her care in a coop, are the subjects of larceny. *Reg. v. Corey, 10 Cox C. C. 23; Reg. v. Head, 1 F. & F. 350.*

While it seems that of old swans were not the subject of larceny, the stealing of them did subject the thief to a forfeiture to the owner to be measured by the amount of wheat necessary to cover the swan, hanging by the beak. *Swans's Case, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435*, wherein it was said: "And it hath been said of old time, that he who steals a swan in an open and common river, lawfully marked, the same swan (if it may be) or another swan, should be hung in a house by the beak, and he who stole it shall in recompense thereof be obliged to give the owner so much wheat that may cover all of the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat."

It has been held that a raccoon, being of a base nature, was not the subject of larceny. *Warren v. State, 1 G. Greene (Ia.) 106*, wherein it was said: "The fifth error assigned is, that part of the property averred to have been stolen, a raccoon, is not the subject of larceny. The principle is well settled, that, taking from another's posses-

sion an animal *ferae naturae*, or of a base nature, in contemplation of law, will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, etc., it will evidently apply to coons." That ruling was criticised, however, in *Haywood v. State, 41 Ark. 479, 483, 47 Am. Rep. 765*, note, wherein the court said: "Iowa is credited with the decision (*Warren v. State, 1 G. Greene (Ia.) 106*), that coons are unfit for food, and therefore by the common law, not the subject of larceny, when reclaimed. Among the colored people of the South the coon when fat in the fall and winter, is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste." It may be noticed, however, that the Iowa decision did not purport to turn on the question of fitness for food.

Doves are *ferae naturae* and as such, are not subjects of larceny, except when in the care and custody of the owner. *Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348*, wherein the court said: "It is held in all the authorities, that doves are *ferae naturae*, and as such are not subjects of larceny, except when in the care and custody of the owner; as when in a dovecot or pigeon-house, or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny. The reason of this principle is, that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor, or resting on his bar on other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are killed or caught or carried away from the inclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence the act of killing them, though for the purpose of using them as food, is not felonious."

Tamed pigeons are more like domestic fowl than like wild animals, and are the subject of larceny even though they are not confined but are allowed the liberty of going about in the air as they please. *Rex v. Howell, 2 Den. C. C. (Eng.) 363* note; *Reg. v. Cheafor, 5 Cox C. C. (Eng.) 367, 8 Eng. L. & Eq. 598; Rex v. Brooks, 4 C. & P. 131, 19 E. C. L. 308.*

In the case last cited it was said: "If these pigeons were so far tame that they came home every night to roost in these boxes, after they had been out to feed, I shall hold them to be reclaimed, so as to be the subject of larceny. I know that pigeons being accustomed to pitch on a man's field, would not be sufficient."

A sable caught in a trap in the woods cannot, while it remains in the trap, be the subject of larceny; and therefore it is no slander to charge one with having stolen a sable out of a trap. *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573.

Turkeys, whose remote parents were brought to Hawaii and which have now reverted to a wild state and are not in the custody or control of any person, although not strictly *ferae naturae*, because not of a wild species, are not the property of the landowner and are not subjects of larceny. *Rex v. Manu*, 4 Hawaii 409, wherein it was said: "On the mountain range of this island, back of Waialua, called the Waiannae Mountains, are numbers of turkeys. These birds were brought to this country so long ago that there is no remembrance existing as to the exact time when or by whom they were imported. These birds are now in a wild state, afraid of man, breeding in the unfrequented parts of the mountains and bush country and have been hunted down and caught by devices, precisely as if they were *ferae naturae*. They are not penned or fed, marked by the landowner, nor does he exercise any actual control over them except as he may be able to catch them and reduce them to his possession. It is well known that the domestic turkey is descended from the wild turkey, first found in America, modified by breeding and the care of man, and this perhaps accounts for the tendency to revert to the wild state which is so strongly manifested in them. These turkeys, although 'wild,' are not properly speaking 'wild animals.' Where the phrase 'wild animals' is used, the word 'wild' is used as a generic term to indicate that they are of a species not usually domesticated, and does not refer to their comparative docility or familiarity with man. We consider that these turkeys are not properly speaking animals *ferae naturae*, though partaking of their habits. . . . Are turkeys in the condition and situation of these turkeys the property of the owner of the land on which they range? . . . Now, to say that these turkeys are A's solely because they are on A's land, would lead to the absurdity that they would become B's when they went on B's land. Suppose on a certain night A goes into the woods on his own land and ensnares part of a flock of the so-called 'wild turkeys,' and the rest of the flock, being disturbed, cross over the boundary to the land of B, and the next night

A ensnares them on B's land. On the theory advanced that the place of capture determines the ownership, the latter taking would be larceny. In this case before us, if the owner of the land where the alleged taking of the turkeys took place was able to trace them, as the undisputed descendants of birds owned by him or his grantors, he would thus show title to them. So far from this being the evidence in this case, it is more than probable that these turkeys are not the descendants of a parent stock introduced on this land by one person, but that these birds have received accessions at different times from the tame turkeys of many different individuals. In the absence, therefore, of proof of ownership of these turkeys, by the prosecuting witness, aside from the fact that they were caught on his land, and it being proved that they cannot be distinguished from any other turkeys on contiguous lands, they are not the subjects of larceny."

Oysters planted in public waters by a private person, remain the property of the planter, if planted in a place where oysters do not naturally grow, and if the place is so designated by stakes or other marks that the oysters can be readily distinguished from others in the same waters, and such oysters are the subject of larceny. *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347, wherein the court said: "It is objected that oysters being animals *ferae naturae*, there can be no property in them, unless they be dead or reclaimed, or tamed, or in the actual power or possession of the claimant; and that the want of such averment is a fatal defect in the indictment.

. . . The principle, as applied to animals *ferae naturae*, is not questioned. But oysters, though usually included in that description of animals, do not come within the reason or operation of the rule. The owner of oysters has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his house or person. Unlike animals *ferae naturae*, they do not require to be reclaimed and made tame by art, industry, or education; nor to be confined, in order to be within the immediate power of the owner. If at liberty, they have neither the inclination nor the power to escape. For the purposes of the present inquiry, they are obviously more nearly assimilated to tame animals than to wild ones, and perhaps, more nearly to inanimate objects than to animals of either description. The indictment could not aver that the oysters were dead, for they would then be of no value; nor that they were reclaimed or tamed, for in this sense they were never wild, and were not capable of domestication; nor that they were confined, for that would be absurd. . . . The oysters

in question had once been the property of Hil-dreth. The only question is, whether the planting of these oysters in a public sound, where all the inhabitants have a common right of fishery, was necessarily an abandonment, or a return of the property to the common stock. There was clearly no intention on the part of the owner to abandon his property; on the contrary, they were gathered and planted expressly for the benefit of the owner. If an abandonment is to be presumed, it will be a legal intentment directly against the truth of the case. The casting of property into the sea, with the intention of reclaiming it, is not an abandonment. . . . It was earnestly urged, as an objection to sustaining the conviction in the present case, that the principle recognized by the court will, in effect, authorize the exclusive appropriation of public navigable waters to private purposes, and that it will virtually confer upon every individual who stakes off and plants an oyster bed a right of several fishery in the land thus appropriated, to the exclusion of the public. . . . But does any such consequence necessarily result from the instruction given to the jury? They were expressly told that, if these oysters were planted where oysters naturally grew, or if they could not be readily distinguished from the natural product of the waters by persons engaged in fishing, the defendant could not be convicted. If, then, the oysters interfered in any way with the defendant's right of fishing, or with the right of navigation, or any other right of the public in the waters, it is not claimed that the defendant had not a right to remove or destroy them. Clearly the legislature may, at their pleasure, prohibit the planting of oysters by individuals in navigable waters, or cause them to be removed when planted, whenever they become injurious to the public interest or are regarded as an encroachment upon the public rights. But admitting, as may be done, that the planting of the oysters in the public waters was a clear case of nuisance and encroachment upon the public right, it could give the defendant no right to steal them or appropriate them to his own use. The deposit of wood in the public highway is an encroachment on the right of way, and may and does necessarily prevent any other individual from availing himself of the same privilege upon the same spot. The wood may be removed as a nuisance, but a third party would not be justified in stealing it because it was a nuisance. It is not pretended, in the present case, that the defendant's right of fishing was in the least impaired, or that the oysters were taken in the fair exercise of his lawful right. The case presented is that of a wilful and wanton appropriation of his neighbor's property, with intent to steal."

It seems that the same rule applies to clams. *People v. Morrison*, 194 N. Y. 175, 86

N. E. 1120, 128 Am. St. Rep. 552, reversing judgment 124 App. Div. 10, 108 N. Y. S. 262, rehearing denied 195 N. Y. 116, 16 Ann. Cas. 871, 88 N. E. 21, 133 Am. St. Rep. 780, wherein the court said: "When clams or oysters are reclaimed from nature and transplanted to a bed where none grew naturally, and the bed is so marked out by stakes as to show that they are in the possession of a private owner, they are personal property and may become the subject of larceny. Although in the nature of *ferae naturae*, to which a qualified title may be acquired by possession, when reclaimed and transplanted they need not be confined, for as they cannot move about they cannot get away, even when placed in the water, as they must be in order to live. They and their produce thus cease to be common property and belong exclusively to the one who transplanted them, and whoever takes them from the plat without his permission is a trespasser and it may be a thief." In that case, however, the conviction was not sustained because of lack of evidence to the effect that the bed of clams was properly staked.

Oysters in the water lands belonging to the state are *ferae naturae* and, in the absence of statutory inhibition may be taken by any person. And a statute making certain state tide-water lands oyster reserve lands, does not make them the subject of larceny. *State v. Johnson*, 80 Wash. 522, 141 Pac. 1040.

Fish are the subject of larceny under the same conditions as other animals, and if they are confined in such a way that they may be taken at the pleasure of him who has so appropriated and confined them, they are the subject of larceny. *State v. Krider*, 78 N. C. 481, wherein an indictment charging the defendant with having stolen "five fish," without alleging any of the conditions which would render the fish the subject of larceny, was held to be fatally defective. In *State v. Shaw*, 67 Ohio St. 157, 65 N. E. 875, 60 L.R.A. 481, it was held that fish confined in nets in such a way that, although there was a possibility, there was very little probability, of their escape, were sufficiently reduced to possession to make them property and the subject of larceny. The court said: "In the present case the fish were not at large in Lake Erie. They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was practically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape. The fish that were taken had not escaped, and it does not appear that they would have escaped, or even that they probably would have escaped. They were so safely secured that the owners of the nets could have taken them out of the water at will as readily as the defendants did. The possession of the owners of the nets was so complete and certain that

the defendants went to the nets and raised them with assurance that they could get the fish that were in them. We think, therefore, that the owners of the nets, having captured and confined the fish, had acquired such a property in them that the taking of them was larceny."

An otter, reclaimed, confined, or dead, has been held to be the subject of larceny because of the value of its fur. *State v. House*, 65 N. C. 315, 6 Am. Rep. 746.

3. UNDER STATUTE.

By virtue of a statute in Arkansas (*Gantt's Digest*, sec. 1355; *Kirby's Digest*, sec. 1825) larceny is the taking and removing of any goods or personal chattels of any kind whatever, with intent to steal the same. Under that statute it has been held that a reclaimed and tamed mocking bird was the subject of larceny, since it was personal property. *Haywood v. State*, 41 Ark. 479, 47 Am. Rep. 765 note, wherein the court said: "The reclaimed mocking bird in question was no doubt personal property. The owner could have brought trespass against the thief, who invaded her portico at night, and deprived her of the possession of her songster, which she prized above price; and she could have maintained replevin against the person to whom he sold it, had he refused to surrender it to her. The market value of the bird was, perhaps, more than ten times greater than that of the cage, which was the subject of petit larceny. To hold that larceny might be committed of the cage, but not of the bird, would be neither good law or common sense."

MURPHY

v.

HITCHCOCK ET AL.

Hawaii Supreme Court—July 19, 1915.

22 *Hawaii* 665.

Animals — Wild Animals — Right of Property in Fish.

Where one catches fish in public waters and confines them in a private pond having no outlet to public waters, he becomes the owner of such fish and may recover their value from another wrongfully taking them from his possession.

[See note at end of this case.]

Executions — Sale of Leasehold Interest in Pond — Effect as Passing Title to Fish.

Fish in a private pond, unconnected with public waters, do not pass by sale of a lease-

hold interest in the pond made under execution, the levy and notice of sale being silent as to the fish, and the execution defendant being admitted to be the owner of the fish at the time of the levy and sale.

(Syllabus by court.)

Appeal from District Court of Molokai.

Action by Eugene Murphy, plaintiff, against H. R. Hitchcock et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

E. Murphy for appellant.

D. H. Case and *E. Vincent* for appellees.

[666] **QUARLES, J.**—The plaintiff commenced an action in the district court of Molokai to recover from the defendants \$165, the alleged value of certain fish alleged to have been taken by the defendants from a fish pond called "Kupeke" in December, 1914, alleged to be the property of the plaintiff. The cause was submitted on an agreed statement of facts in writing, wherein it is agreed as follows:

"1. That on the 4th day of November A. D. 1914 judgment was rendered in favor of one Otomatsu Kanayama and against one Akutagawa for the sum of \$876.82.

"2. That at the time of the rendition of the judgment the defendant Akutagawa was the holder of a lease on a pond known as 'Fish Pond of Kupeke.'

"3. That the said pond of Kupeke is a pond enclosed from the sea and into and from which fish cannot enter nor leave, and is used for the purpose of raising pond mullet for the market.

"4. That the Sheriff of the County of Maui in furtherance of the judgment mentioned in paragraph '1' levied on, among other property the leasehold for the said 'Fish Pond of Kupeke.'

"5. That the said leasehold in which the said 'Fish Pond of Kupeke' is situated was sold at public auction on the 12th day of December A. D. 1914 to Otomatsu Kanayama, and that the defendants claim under that sale and claim that the sale of the leasehold conveyed all the fish in the 'Fish Pond of Kupeke.'

"6. That on the 12th day of December A. D. 1914, and shortly after the sale of the leasehold by the sheriff the plaintiff herein purchased all the fish in the said 'Fish Pond of Kupeke' from Akutagawa, who was acknowledged to be the owner thereof, except for the levy and sale of the leasehold.

"7. That the defendants herein knew that the plaintiff herein claimed to be the owner of the fish in the said 'Fish Pond of Kupeke' and were present when plaintiff purchased and paid for the same to Akutagawa.

"8. That the defendants herein claiming to have acquired all the fish under the sale of the said leasehold of the said 'Fish Pond of Kupeke' removed therefrom fish of the value of \$75.00.

"That as a part of this submission of facts, the original lease [667] from Mrs. Buchanan to Akutagawa, and papers in the case, of Omoatsu Kanayama vs Akutagawa as follows:

"1. Sheriffs notice of sale.

"2. Sheriffs bill of sale.

"3. Bill of sale from Akutagawa to Eugene Murphy, purporting to convey the fish in the 'Fish Pond of Kupeke.'"

The district magistrate decided in favor of the defendants and from the judgment the plaintiff has appealed directly to this court upon points of law set forth in his appeal as follows:

"1. That the court erred in rendering judgment for the defendants herein.

"2. That the court erred in holding that the fish in the pond passed to the purchaser of the leasehold at the sale thereof by the sheriff.

"3. That the court erred in holding that the purchase of the fish in the fish pond from the owner thereof did not pass title to said purchaser.

"4. That the court erred in holding that the sheriff could pass title in the fish pond herein involved without selling or levying on the same and giving notice that he offered said fish in the fish pond for sale."

The lease of the pond under which plaintiff's vendor held was made a part of the agreed statement of facts. Said lease runs for a term of five years, but says nothing about fish in the pond and contains no condition as to the growing or removal of fish in or from the pond. The levy and sale under execution was upon the leasehold estate of Akutagawa only. No levy upon the fish in the pond, or sale thereof, as personal property or otherwise is shown to have been made by the sheriff under the execution. The only question before us for determination is, did the levy and sale of the the leasehold carry with it the ownership or title to the fish in the pond? If it did, the judgment of the district magistrate is correct. If it did not, the judgment is erroneous, and under the stipulated facts judgment should have been entered in favor of the plaintiff for \$75 and costs.

[668] Fish in public waters, like animals *ferae naturae*, belong to the public, in which individuals, as such, have no property interests so long as such fish are in public waters. However, when one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them, subject to be divested only by their escape, and *ann. Cas. 1917B.—62.*

other taking them from his possession is liable to him for their value. It is true that fish in a pond, although confined and subjected to the dominion of the one exercising dominion over the pond, are in their natural element. Fish are incapable of existing out of water. This, however, does not make them appurtenant to the pond or place wherein they may be confined, as they may be removed from such pond or other waters without injury to the pond where first confined. And so of animals, wild by nature, confined in a park or close where they find grass and other vegetation upon which to feed, but which they may find elsewhere when removed. The leasehold in question is analogous to a leasehold of a house for mercantile purposes, in which the lessee conducts a store. His stock of merchandise does not become appurtenant to the house or lands upon which situated nor is it appurtenant to his leasehold interest in the realty, and consequently does not pass with such leasehold under an execution sale of the leasehold. In such case the merchant leases the building for certain uses, that is, a place to keep his goods for sale. In case of a levy of an execution upon his leasehold interest, and sale thereof, nothing being said about his stock of merchandise in the building leased, it could not well be contended that such levy and sale carries with it, *ipso facto*, the stock of goods in the building, or that the execution defendant might not within a reasonable time after such sale remove his goods. In the case at bar the pond was leased for certain uses, "the raising of pond mullet for the market." One of the agreed facts is that the lessee who sold the fish to plaintiff "was acknowledged to be the owner thereof, except for the levy and sale." This stipulation negatives the idea that the [669] fish were in the pond at the time of the execution of the lease, as otherwise the lessor would have been the owner of the fish, subject only to the right of the lessee to take the same under his lease (19 Cyc. 989, 990). The natural inference from the agreed facts is that plaintiff's vendor caught the fish and placed them in the pond for the purpose of growing them for market. It is well established that no personal property passes under an execution sale unless it was seized in levying an execution, actually or constructively, under a levy of such execution, and without such seizure a sale under execution does not pass title to the property attempted to be sold under the execution (Ferry v. Hakalau Plantation Co. 21 Hawaii 745). At the common law a leasehold interest was regarded as a chattel, and a levy of an execution upon the leasehold was required to be made as upon other chattels with the exception that the officer making the levy need not take actual possession of the property leased (Freeman on Executions,

3rd ed. § 119; 11 Am. & Eng. Enc. of Law (2nd ed.) p. 653, note and authorities cited; 17 Cyc. 953, and authorities cited in note 50; 8 Enc. Pl. & Pr. 550).

In the case at bar the levy was upon the leasehold and no mention whatever was made of the fish in the levy, notice of sale, or sheriff's bill of sale, all of which merely described the lease of the fish pond. We are of opinion that the execution sale did not pass the title to the fish any more than an execution sale of a peddler's cart would pass the title to goods and wares in the cart not mentioned in the levy, notice and certificate of sale. We think the conclusion inevitable that the fish in the pond did not pass with the execution sale of the leasehold. The fact that mullet in ponds having no outlet to the sea will not propagate is so well known that the court takes judicial notice of such fact. Such ponds are used for the purpose of growing mullet which are taken in the sea while young. The fish are thus reclaimed and become private property, and as such the owner thereof is protected in his usufruct. It is not a privilege of fishing or taking fish from a pond that was granted by the [670] lease in question, but an estate for years in the realty, and in this particular the case at bar is unlike those cases where a right of fishery is an appurtenant or an easement to an estate in land, absolute or limited, and, as such, necessarily passes with the dominant estate. A grant or license to take fish from private owners is not uncommon, and, by custom, rights of fishery may be appurtenant to an estate in lands. A case that has frequently occurred is where a riparian owner leases lands through which a non-navigable stream runs, the lease carrying with it the exclusive right of fishery belonging to the riparian owner unless there is in the lease a reservation of such right to the lessor. The reported cases involving the question whether the right to take fish passes with the lease of lands apply to cases where the fish propagate in the waters upon said lands and not to a case like the one at bar where the pond is used for the purpose of growing fish caught in the sea.

We are of opinion that under the agreed statement of facts that the fish in the pond leased to the vendor of plaintiff did not pass by the execution sale and that the judgment should have been in favor of the plaintiff for \$75, the agreed value of the fish appropriated by the defendants.

In arriving at this conclusion we do not desire to be understood as holding that plaintiff was not under the duty of removing the fish from the pond within a reasonable time—with reasonable promptness—after the execution sale, or as holding that he could burden the purchaser at such sale with the keeping of the fish in the pond. Under the agreed

facts the defendants took the said fish from the pond within a period of from one to nineteen days, and we are unable to say that the plaintiff abandoned the fish and thereby lost title.

The judgment is reversed and the cause remanded to the district court of Molokai with instructions to enter a judgment in favor of the plaintiff for the sum of \$75 and costs.

NOTE.

The opinion in the reported case discusses the right of private property in fish, and holds that where a person catches fish in public waters and confines them in a private pond whence they have no outlet to public waters, he becomes the owner of them, and may recover their value of one wrongfully taking them from his possession. For a full consideration and review of the right of property in wild animals, including fish, see the note to *Graves v. Dunlap*, reported ante, this volume, at page 944.

STATE

v.

WARD.

Iowa Supreme Court—May 8, 1915.

170 Iowa 185; 152 N. W. 501.

Animals — Wild Animals — Right to Kill Deer — Justification.

One charged with killing deer in violation of Code Supp. 1913, §§ 2551a, 2551b, making it unlawful for any person other than the owner or person authorized by the owner to kill any deer, except when distrained as provided by law, may show in justification that the deer, when killed, was on his premises, destroying his property.

[See note at end of this case.]

Wild Game — Title in State — Construction of Statute.

The purpose of Acts 34th Gen. Assem. c. 118, as amended by Acts 35th Gen. Assem. c. 206, declaring that the ownership of and title to all wild game shall be in the state, and that no wild game shall be killed unless the person so doing shall consent that the title shall remain in the state, etc., is to establish title in the state to all wild game, dead or alive.

[See note at end of this case.]

Appeal from District Court, Pottawattamie county: WOODRUFF, Judge.

Criminal action. L. C. Ward convicted of unlawfully killing deer and appeals. The facts are stated in the opinion. **REVERSED.**

Turner & Cullison for appellant.

George Coason and Wiley S. Rankin for appellee.

[186] EVANS, J.—The record herein strongly suggests a purely moot case. As is usual in such a case, the arguments are more formal than zealous. There is much in the record to indicate that the alleged criminal act was committed for the very purpose of presenting a case and taking judicial opinion thereon. Needless to say, the courts are not friendly to moot cases. They are kept sufficiently busy with bona fide controversies. In view of the fact, however, that the defendant is under statutory punishment, we do not feel justified in wholly forsaking him at this stage of his experiment.

In the judgment of the district court was included the following finding:

"It appears that this case was brought as a test case to determine whether this defendant has a right to kill deer that are injuring and destroying his corn. It appears from the evidence that in the neighborhood of defendant's farm there are from 150 to 200 deer which range up and down the country adjacent to defendant's premises, and that for years they have eaten up and trampled down more or less of the defendant's standing grain and his corn after it has been cut and shocked, even when piled up in his barn lots; that defendant [187] has many times driven them away, but they have come back and have destroyed his crops to the amount of hundreds of dollars, and at last he shot one, not for the purposes of food or out of wantonness, but to have the question determined by the highest judicial tribunal of this state whether he is obliged to submit to the continuation of such damage. It appears from his own testimony that he has never asked the game warden of this state to kill or capture any of such deer as provided in Chapter 206 of the Laws of the Thirty-fifth General Assembly. It is the opinion of the court that the defendant had no right to kill the deer in question before he had asked protection from the game warden as seems to be afforded by such statute. Therefore and also for the purpose of having the matter determined the defendant is found guilty."

The defendant was prosecuted under Secs. 2551-a and 2551-b of the Code Supplement. Such sections are as follows:

"2551-a. That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law.

"2551-b. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period not exceeding thirty days or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

It will be noted that the prohibition of this statute is absolute and unqualified in its terms. The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it in another way: Is it open to the defendant to justify an admitted killing by showing a reasonable necessity in defense of person or property?

The following, from the brief of counsel for the state, is [188] a sufficient indication of the circumstances of the killing complained of:

"This action is brought as a test case on stipulation as to facts in justice court. Defendant pleaded not guilty but admitted that he killed the deer. He alleged that the killing was done of necessity for the protection of his property.

"These deer, which are the property of the state, have selected the southwestern part of Iowa, particularly Pottawattamie County and vicinity, for their herding and living purposes for a number of years. There seems to be anywhere from 150 to 200 or more of them and they roam about at will. No ordinary lawful fence, such as the owners of property put up for their protection and the enclosure of their animals, is sufficient to keep this magnificent herd of deer off their farms. There is no question but that they go where they please and eat of such crops as they like. They will go up to an ordinary fence, and without any noticeable effort whatever, lift themselves gently and gracefully, and apparently glide over the highest fence and wander off into a field as if there had been no impediment whatever.

"Defendant, it seems, had driven off these animals several times but they came back into his yard and began eating fodder which had been stacked up near his place. The record shows conclusively that the deer which was killed by defendant attempted to harm no person; that it was simply eating of the fodder which is conceded to have been the property of defendant. Defendant claims that he was acting in his own right to protect his property and to keep the deer from injuring and destroying it."

It will be noted that the deer was killed not only while upon the defendant's premises but while he was actually engaged in the destruction of the defendant's property. Giving the testimony the fullest credence, the deer was one of great voracity. He was

capable of doing and was threatening to do great injury to defendant's property.

[189] By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of person and property is a constitutional right (Art. 1, Sec. 1, Constitution of Iowa), and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing. *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339.

We do not presume to pass upon the weight of the evidence tending to prove the fact of reasonable necessity. It is sufficient to say that the evidence would have sustained such a finding if made by the trial court. The case was tried below on the theory that such defense was not available.

It will be noted that the act of killing, as contended by defendant, was wholly defensive and preventive. Whether a deer may be lawfully killed today by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought or threatened by other deer, are questions not involved herein, and we do not purport to pass on them.

II. The conclusion of the trial court was based in part upon the provisions of Chapter 206, 35 G. A. If there was in fact any violation of such statute by the defendant, it was not charged in the information. Furthermore, we see nothing in such statute which interposes any obstacle in the way of defendant's justification. Such statute is amendatory to Chapter 118, 34 G. A. Such Chapter 118, 34 G. A., as amended by Chapter 206, 35 G. A., is as follows:

"Sec. 1. The ownership and title of all wild game, animals, and birds, found in the state of Iowa, except deer in [190] parks and public and private preserves the ownership of which has been acquired prior to taking effect of this act and all fish in any of the public waters of the state, including all ponds, sloughs, bayous or other waters adjacent to any public waters, which ponds, sloughs, bayous, and other waters are stocked with fish by overflow of public waters, is hereby declared to be in the state, and no wild game, animals, birds, or fish shall be taken, killed, or caught in any manner at any time or had in possession, except the person so catching, taking, killing or having in possession, shall consent that the title to said

wild game, animals, birds, or fish, shall be and remain in the state of Iowa for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, or killing.

"Sec. 2. The catching, taking, killing, or having in possession, wild game, animals, birds, or fish at any time, or in any manner, or by any person, except as provided in section one hereof shall be deemed a consent of said person that the title of the state shall be and remain in the state for said purpose of regulating the use and disposition of the same and said possession shall be consent to such title in the state.

"Sec. 3. When it shall become necessary in the opinion of the state game warden or his deputies to kill or capture any deer now running at large within this state, it shall be done under the authority and direction of the state fish and game warden, who shall distribute such deer so killed or captured within this state and the expense of said killing or capture and distribution shall be paid by the person receiving such deer."

The purpose of the foregoing was to establish title in the state to all wild game whether dead or alive. This title was fully recognized by the defendant at every step. No attempt was made by him to appropriate or conceal the carcass of the slain deer. On the contrary, he immediately notified the public authorities and tendered the carcass to the appropriate officer.

[191] We think, therefore, that the defendant was entitled to make an issue of fact on the question of justification as already indicated. The judgment of conviction must therefore be

Reversed.

Deemer, C.J., and Preston and Salinger, JJ., concur.

NOTE.

It is held in the reported case that a statute vesting the title to wild animals and game in the state, and declaring that the killing thereof shall be under the authority and direction of the state fish and game warden, does not prevent a property owner from killing deer in the defense of his property against their trespass, if he recognizes the property right of the state in the carcasses. For an extended review of the authorities discussing the ownership of wild animals, and the power of the state to regulate and control the acquisition by individuals of property therein, see the note to *Graves v. Dunlap*, reported ante, this volume, at page 944.

BROWN

v.

ECKES ET AL.

New York—City Court of Yonkers—July 10,
1916.

160 N. Y. Supp. 489.

Animals — Bees.

Bees are "ferae naturae."

[See note at end of this case.]

Same.

Where a swarm of bees leaves the owner's premises, his title to them is not destroyed by their alighting on another's land.

[See note at end of this case.]

Same.

If the act of reducing to possession wild animals, such as bees, is done by a trespasser, he gets no title, which vests in the owner of the soil, and the wrongdoer is liable to the owner for the trespass and for conversion.

[See note at end of this case.]

Same.

The qualified property of an owner of a swarm of bees, which flies from the hive, continues so long as he in person or by agent can keep them in sight and possesses the power to pursue them.

[See note at end of this case.]

Matter of arbitration of Kenneth W. Brown, plaintiff, against Fred Eckes et al., defendants. The facts are stated in the opinion. JUDGMENT FOR PLAINTIFF.

Clarence Alexander for plaintiff.

William A. Walsh for defendants.

[490] BEALL, J.—This is a common-law arbitration, had before this court, wherein the parties stipulate to abide by its decision as to the title of and right of possession to a hive of bees. It appears from the evidence that the complainant, Brown, hived certain bees on Hamilton avenue in this city; that one of the hives swarmed and left Brown's place; that the defendant Eckes was doing some work on the house of a man named Deane, and, seeing a swarm of bees in the air, pounded upon tin and brought them down upon the Deane property, where they located upon a grapevine; that Mr. Deane did not wish any bees, and required Eckes to remove them; that Eckes upon that evening met the defendant Stevens, who claimed that he had lost a swarm of bees; and that Eckes delivered the bees to Stevens.

It has come to the hand of this court to decide all sorts of questions about all sorts of animals, reptiles, and insects. Cases of men, women, and children are constant; cases of those who have wronged others and of those

who unjustly contest matters. Horses and their condition, habits, and relationship to their owners and strangers are perpetually with us. We are seldom lonely for the want of a dog case, and have expounded that law at great length, while matters of cats, goats, wild deer, pigeons, birds, including the usefulness of the highhold, otherwise known as the flicker, and as to whether he is a song-bird, and of hens and roosters and robins, and as to which of them chiefly annoys the tired man at dawn, are things with which the court is thoroughly familiar. But this is the first time it has had to dive into the interesting question of the law of bees. It is to be presumed that ultimately we shall have to deal with ants and flies and other varieties of insects. The law of snakes we know.

It is not the intention of the court to review the history of bees, of their origin in Asia, and of how they have followed man in the development of civilization, and have been tamed and used by him, and have contributed to his comfort and welfare, although it is an interesting study and one to be recommended. We shall pass without comment the fact that the claimant to these bees is a lawyer, and that no lawyer needs bees to assist him in stinging. The thing really turns on the question of identity, and at the preliminary hearing, when the courtroom was nearly filled with lawyers, I offered to appoint any one of them a referee to make personal examination of these bees for marks of identification, which offer they unanimously rejected, the [491] first time in my experience with the law that a lawyer has refused to accept a reference.

The original proceeding was to determine whether or not the defendants here were guilty of larceny under that section of the Code which required a man to advertise lost property, and it was even contended that it was the duty of the finder to return this property to the owner—as one should keep a rattlesnake for a pet and allow it to stroll upon another's property, and that other be guilty of larceny unless he returned it; as one should house a tiger which might escape on another's domain, and hold that other guilty of larceny unless he returned it. The court refused to entertain the charge of larceny, and the parties hereto were generous enough to submit the question of ownership to the court as arbitrator.

The custom in London with respect to the trial of men charged with cruelty to animals is this: They are brought to a court, where there is a large yard, and a special judge examines the animals to determine their condition. I have followed the same custom, and nearly always examine the horses where men are brought before me for cruelty to them. The rule of this court for many years has

been, in cases involving the ownership of dogs, to take the claimants into my big office, station them at opposite ends of the room, and allow the dog to choose his master. The ownership of pigeons and of chickens we have determined by releasing them at the roosting time and permitting them to decide upon their homes. But in this case I decline to deal personally with the subject-matter of this action, and, together with the lawyers, refuse to make any personal or private inspection of them.

Extensive research has been made into this question of bees by both counsel for the contentants and by the court, and I admit that the subject of the law of the busy bee is a fascinating one. It is admitted by both sides that bees are *ferae naturae*, and as to the law of them Blackstone classifies them with wild animals; but Blackstone's law was taken from the Greeks and from the Romans, and, curiously enough, there has been practically no change in that law since the days of Plato, and an uninterrupted line of decisions through Greek, Roman, English, French, the Netherlands, and the English common law, down to late decisions in Iowa, are practically to the same effect—the probable reason for this set policy being the danger of touching the subject. For instance, it has been pointed out to me that Gaius, whose Commentaries are supposed to have been written 160 A. D., states it thus:

"In those wild animals whose nature or custom it is to go away and return—as pigeons, bees, and deer, which habitually go into the forest and return—our rule is laid down that only the determination of the intent of returning marks the end of the property in them, and the property in them is acquired by the next one who take (or occupies) them; it is said that when their habit of returning ceases, their intent (or instinct) of returning also ceases."

And in Justinian's *Corpus Juris Civilis* it is put as follows:

"Bees are wild by nature; and so, if a swarm alight on your tree, it is not to be considered yours, until you have hived it, any more than the birds [492] which build their nests there; and hence, if it be hived by another, it becomes his property. . . . A swarm which has flown from your hive is considered yours as long as it is in your sight, and not difficult to be pursued; otherwise, it belongs to the next person who takes it."

While Domat said:

"As we may possess living creatures, which it is not always possible to have in our power and custody, so we retain possession of them whilst we shut them up, whilst we have them under the care of a keeper, or if, being made tame, they return home without a keeper, as bees to their hives, and pigeons to their dove

houses." Civil Law, I, bk. 3, pt. 1, subd. 7, § 2133.

Puffendorf, in his *Law of Nature*, expresses it thus:

"Yet bees are no doubt wild by nature, since their custom of returning to their hive doth not proceed from their familiarity with mankind, but from their own secret instinct; they being in all respects utterly unteachable. It is nevertheless one of Plato's laws—who-soever shall pursue the swarms which belong to others and by striking upon the brass shall draw them with the delightful sound to fix near himself, let him make restitution for the damage. Where he seems to presuppose that the owner of the bees did not follow them when they left his hives, Pliny will have the bees to be neither wild nor tame; others divide them into both kinds. But that, so long as they return to our hives, they are properly our own and cannot be hurt without our loss or damage, is very laboriously proved in that declamation of Quintilian, entitled 'The Poor Man's Bees.'" Volume 4, c. 6, § 5.

Of course, if the bees were Brown's, his title to them was not destroyed by the fact that they alighted on Deane's land, and there are pointed out to me many authorities in favor of this. Thibaut (*Syst. des Pandekten Rechts*) accepts it as the general law of the civilized world. The Code Napoléon (section 564) makes it the law of France and of Algiers. Louisiana, adopting the French Code, adopts it. Section 519, La. Code Civile. Bracton (liber 2, c. 1) recognizes man's qualified property in them both by the natural law as well as the civil law. See also Preuss, *Allgemein Landrecht*, I, 9, § 118 f. Oesterr; *Gesetzbuch*, § 384; Duranton, *Cours de Droit*, IV. No. 56; Ortolan, *Expliq. des Inst.* No. 357; Toullier, *Cours de Droit*, 4, No. 50; Pand. 33, 7, 12, § 13; also Fr. *Lois Usuelles*. 4 Anvril, 1889, § 2, subd. 9:

"The proprietor of a swarm has the right to reclaim and repossess them so far as he can see them and follow them; otherwise, the swarm belongs to the owner of the land upon which they affix themselves."

See 3 Kent Comm. 348; Wallis v. Mease, 3 Bin. (Pa.) 546; Bl. Comm. IV, 236, note 18; *Merrills v. Goodwin*, 1 Root (Conn.) 209; *State v. Repp*, 104 Ia. 305, 73 N. W. 829, 40 L.R.A. 687, 65 Am. St. Rep. 463; *Case of Swans*, 7 Coke 15b, 77 Eng. Rep. (Reprint) 435.

The act of reducing to possession wild animals must not be wrongful, and if it is done by one who is a trespasser he gets no title, which vests in the owner of the soil, and the wrongdoer is liable to the owner for the trespass and for conversion. *Harper v. Gallo-way*, 58 Fla. 255, 51 So. 226, 26 L.R.A. (N.S.) 794, 19 Ann. Cas. 235; *Com. v. Chace*, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; *Lonsdale v.*

Rigg, 11 Exch. (Eng.) 654; *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. Pl. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615, 3 Eng. Rul. Cas. 76.

"A mere temporary escape of the bees does not divest the title of the owner per industriam. They remain his property. A stranger cannot acquire [493] title if they intend to return, or the owner promptly pursues or reclaims or can identify them, although they may flee to and alight upon the land of another, where the owner cannot get them without becoming a trespasser himself." *Merrills v. Goodwin*, supra; *Case of Swans*, 7 Coke (Eng.) 15b; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

In a larceny case it was held:

"To acquire a right in an animal so that it may become a subject of larceny, the pursuer must bring it into his ownership and control, so that he may subject it to his own use at his pleasure, and must so maintain his possession and control as to indicate that he does not intend to abandon them again to the world at large; but in cases where larceny is charged, the law does not require absolute security against the possibility of escape."

And one who asserts a legal title to them once they have swarmed must have kept them in sight until they settled.

"If a swarm [bees] fly from a hive of another, his qualified property continues so long as he can keep them in sight, and possess the power to pursue them. Under these circumstances, no one else is entitled to take them." 2 Bl. Comm. 393; 2 Kent Com. 394.

We moderns may wonder at the completeness of the law of bees, and at the attention and time that has been expended upon what we regard as a trivial subject. Nothing is trivial that involves human rights. Besides, it may be remembered that, in the days of those whom we term the ancients, the bee occupied a much more important place in the economy of the state than it does now. In Greece, in Egypt, in Judea, and to a somewhat less extent in the Roman provinces, honey was a most important article of commerce.

Upon the whole, I take it that the case turns upon the question of identity, and of whether the owner, and I shall take the liberty of enlarging the doctrine to include an employee of the owner, kept the bees in sight during the swarm until they alighted; this being really part of the question of identification. I determine that Brown has established the ownership of these bees, and is entitled to recover them, passing without comment the fact that this queen bee occasioned all of us a great deal of trouble by organizing the swarm. I make acknowledgment to counsel in the case, William A. Walsh on the one hand and Clarence Alexander on the other,

for the ability and thoroughness with which they have briefed the case and helped me to this decision.

NOTE.

Law of Bees.

Introductory, 983.

Bees as Property, 983.

Bees as Subject of Larceny, 987.

Injuries by Bees, 988.

Keeping Bees as Nuisance, 991.

Tithes of Bees, 991.

Introductory.

The purpose of this note is to consider in its various aspects the law relating to bees and, incidentally, to the honey and wax produced by them. For a comprehensive discussion of the right of property in wild animals other than bees, see the note to *Graves v. Dunlap*, reported ante, this volume, at page 944.

Bees as Property.

Blackstone, in his commentaries (2 Blk. Com. 392), gives the following comprehensive though brief discussion of the law of property in bees, enunciating principles generally followed in the cases: "Bees also are *ferae naturae*; but when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. Puff. l. 4, c. 6, sec. 5. And to the same purpose, not to say in the same words, with the civil law, speaks Bracton: l. 2, c. 1, sec. 3, occupation, that is, hiving or including them, gives the property in bees; for though a swarm light upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon, and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath also been said, Bro. Abr. tit. propertie, 37, cites 43 Edw. III, 24, that with us the only ownership in bees is *ratione soli*; and the charter of the forest, 9 Hen. III, c. 13 which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found."

Bees are *ferae naturae*, 2 Blk. Com. 392, 38; *State v. Murphy*, 8 Blackf. (Ind.) 498. And see the reported case.

But it has been said that bees, while generally classed as *ferae naturae*, are so useful and common as to be all but domesticated. *Parsons v. Manser*, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L.R.A. 132. And in another case it was said that although it may be proper still to class the bee among animals *ferae naturae*, it must nevertheless be regarded as coming very near the dividing line. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630.

A qualified property may be acquired in wild bees by reclaiming them, hiving and inclosing them. 32 Bl. Com. 392; *Goff v. Kilts*, 15 Wend. (N. Y.) 550. See also *Idol v. Jones*, 13 N. C. 162.

This qualified property in wild bees can be acquired only by reducing them to possession, and where two persons have an equal right to take certain bees into possession, they become the property of the one who first reduces them to possession. *Gillet v. Mason*, 7 Johns. (N. Y.) 16; *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; *Adams v. Burton*, 43 Vt. 36. In *Gillet v. Mason*, supra, the facts appeared as follows: "Mason proved, that previous to bringing this suit, he had found a tree, containing a swarm of bees, standing on the land of Timothy Gillet, lately deceased, father of the defendant; that he marked the tree with the initials of his name, A. M.; that the defendant had cut down the tree, and taken and carried away the bees and honey; and that the tree contained a large swarm of bees, and a large quantity of honey, of the value of ten dollars. It was admitted by the plaintiff, that the land where the tree stood, belonged to Timothy Gillet; but it was denied that the defendant was his heir, or had any possession of the land. It was admitted that the defendant was a son of Timothy Gillet. The justice, in charging the jury, put the cause on the point, which of the parties first reclaimed the bees from a wild state; and the jury found a verdict for the plaintiff below, for nine dollars." Holding that the plaintiff had acquired no property in the bees, the court said: "Bees are considered . . . as *ferae naturae* but when hived and reclaimed a qualified property may be acquired in them. Occupation of them, according to Bracton, that is, hiving or inclosing them, gives the property in bees. In the present case, it appears the bees were not hived before they were discovered by the defendant in error, and the only act he did was to mark the tree. The land was not his, nor was it in his possession. Marking the tree did not reclaim the bees, nor vest an exclusive right of property in the finder, especially in this case, against the plaintiff in error, who, as one of the children of Timothy Gillet, (who does not appear to have made a will), must be considered as

one of the heirs, and, as such, a tenant in common in the land. Blackstone (vol. 2, p. 393) inclines to the opinion, that under the charter of the forest, allowing every free man to be entitled to the honey found within his woods, a qualified property may be had in bees, in consideration of the soil whereon they are found, or an ownership, *ratione soli*. According to the civil law (Just. Inst. lib. 2, tit. 1, s. 14) bees which swarm upon a tree are not private property, until actually hived; and he who first incloses them in a hive becomes their proprietor." In *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519, it appeared that Miller had discovered a bee tree on the land of Jenkins, had marked it, and had, as he claimed, obtained a license from Jenkins to cut the tree, though Jenkins did not remember this at the trial. It further appeared that Ferguson had traced the same bees to the same tree, had removed the initials of Miller and marked the tree with his own initials, and, paying the landowner 50 cents for a license so to do, had cut the limb containing the bees. Miller thereupon brought an action of trespass against Ferguson for cutting the bee tree. Holding that Miller had acquired no property in the bees, the court said: "Admit the fact that Jenkins gave Miller liberty to cut the tree and take the bees—that did not give him a title to the bees till he had taken possession of them. The license was without consideration, and liable to be revoked at pleasure. Suppose Jenkins, himself, had cut the tree and taken the bees: can it be pretended that the plaintiff could have maintained an action against him? The plaintiff had neither the ownership nor the possession. The utmost extent of his right, was, that he had it in his power to become the owner, by taking possession. The defendant had the same, and, perhaps, a greater right; as the license to him may have been a revocation of the former license. But suppose it was not, then the two parties stood on an equal footing; and he who first reduced them to possession became the owner." In *Adams v. Burton*, 43 Vt. 36, it appeared that both the plaintiff and the defendant found a bee tree on the land of Ira Burton and that they both obtained of him permission to cut it, but that the plaintiff went to the tree and began to cut it first, and that the defendant and others drove him off and took possession. Sustaining judgment for the plaintiff in his action of trespass and case, the court said: "In this case, the plaintiff first found the bee tree; he thus acquired all the rights that appertain to the person who first discovered the home of the bees, whatever those rights may be. He proceeded to take possession of the tree, for the purpose of removing the honey, and when the defendants interfered

with him, he was in the act of cutting the tree; he literally had his hand upon the hive; he was as much in possession as he would have been if he had cut the tree down, and had been in the act of removing the honey from its place of deposit, and the honey as certainly secured; the honey is all that is sought in such cases, and all that is of value, as the bees cannot be secured; the operator would much prefer to have them leave, as they always make a vigorous defense of the homestead, and those who thus rob the bees of their treasure generally have other stings to endure than those of conscience. In this case the defendants not only robbed the bees, the penalty for which they doubtless paid at the time, but they also robbed the plaintiff of his rights. They drove him from the actual possession of the property, and seized and appropriated it to their own use, they having no superior right to the plaintiff, thereby making themselves liable to him for the damage."

Until bees are reduced to possession, reclaimed and hived, the only property in them is *ratione soli*. 2 Bl. Com. 392; Rexroth v. Coon, 15 R. I. 35, 37, 23 Atl. 37, 2 Am. St. Rep. 863.

Owing to the peculiarity of their habits, a peculiar rule of property *ratione soli* applies to bees, whereby the owner of land on which wild bees swarm owns them by reason of his ownership of the land. 2 Blk. Com. 392; State v. Repp, 104 Ia. 305, 73 N. W. 829, 65 Am. St. Rep. 463, 40 L.R.A. 687. In *Idol v. Jones*, 13 N. C. 162, it was said, obiter: "It has been said, that in England, the only ownership of bees is *ratione soli*; and the charter of the forest, which allows every man to be entitled to the honey found within his own woods, sanctions the doctrine that a qualified property may be also had in bees, in consideration of the property of the soil, whereon they are found. (2 Bl. Com. 392.) The same rights of ownership in bees and honey, by reason of the ownership of the soil whereon they are found, are supposed to obtain in this country."

Therefore the finding of bees in a tree standing on another man's land gives the finder no right to the bees, for the property of the landowner *ratione soli*, although qualified and of a precarious nature, cannot be changed or terminated by the act of a mere trespasser. *Merrills v. Goodwin*, 1 Root (Conn.) 209; *State v. Repp*, 104 Ia. 305, 73 N. W. 829, 65 Am. St. Rep. 463, 40 L.R.A. 687; *Rexroth v. Coon*, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863. And see the reported case. In *Rexroth v. Coon*, supra, the following facts appeared: "In May, 1881, the plaintiff placed a small pine box, called a beehive, in the crotch of a tree in the woods on land of Samuel Green,

in the town of Hopkinton. It remained in this position until about the first of September 1883, when the defendant went upon the premises and took and carried away the hive, together with a swarm of bees that was then in it, also the honey and honey-comb, and appropriated the same to his own use. The plaintiff had visited the hive about twice a year while it remained in its position, for the purpose of ascertaining whether any bees were in it or had been. He had found none. The plaintiff never had any express permission or license from the owner of the land to place or keep his hive in said tree. The defendant never had any express permission or license from the owner of the land to come upon it, and take and carry away said property." The plaintiff sued in trover for the conversion of the bees. Holding that the plaintiff had no property in the bees on which to base an action of trover, the court said: "Bees are *ferae naturae*, and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious and of uncertain tenure, cannot be changed or terminated by the act of a mere trespasser. That is to say, the act of reducing a thing *ferae naturae* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created. . . . In the case at bar the plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant, by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was, does not in any way aid the plaintiff in this suit. The fact that A. commits a trespass upon land of B., and carries away some of his personal property, would hardly be considered a cause of action in favor of C." In *State v. Repp*, 104 Ia. 305, 73 N. W. 829, 65 Am. St. Rep. 463, 40 L.R.A. 687, the following facts were stated by the court: "In July, 1895, Stevens found a bee tree on the land of Cody, and, without the latter's permission, chopped it down, and put the bees in a gum obtained from Mosely. These were left near the fallen tree, on Cody's land. The gum was cut from a tree on defendant's land, without his knowledge or consent; and finding it, with the bees, where left by Stevens, he [the defendant] removed them, at dusk of day, to the orchard of his mother, and inclosed them in a telescope gum, about thirty-three inches square, nailed to that procured from Mosely. This

was unknown to the mother, whose residence was about one mile from the bee tree, while that of the defendant was three miles further away. It does not appear that the defendant knew who hived the bees, or that Stevens was aware that Mosely was not owner of the gum. When Stevens discovered the bees, after several days' search, the defendant refused to do more than return them, and after some parley this prosecution was begun." Holding that Stevens acquired no property in the bees by hiving them, as a trespasser, on the land of Cody, the court said: "Title to a thing *ferae naturae* cannot be created by the act of one who at the moment is a trespasser, and Stevens obtained no interest in the bees by the mere wrongful transfer from the tree to the gum. He neither owned the land on which he left them, nor the gum in which they were hived. Having neither title nor possession, he had no interest therein."

Similarly a landowner is the owner *ratione soli* of honey made by bees in a tree on his land, and no property therein may be claimed by another by reason of seeing the bees hive in the tree or finding the honey. *Fisher v. Steward, Smith* (N. H.) 60, wherein it was said: "The doctrine contended for by plaintiffs is injurious to the rights of property. Till the bees occupied the tree in question it is not pretended that plaintiffs had any right in it. What gave them a right? Having seen a swarm of bees, in which they had no property, occupying it? This circumstance, whether the effect of accident, or the result of labor and skill, cannot lessen the rights of the owner of the soil. Will it be pretended that plaintiffs thereby acquired a right to the tree? If they acquired a title to the honey, they must necessarily have a right to take it away, to cut down the tree, to pass over the defendant's land for the purpose, etc. Admitting that plaintiffs could acquire property in a swarm of bees, or in the honey, by finding, in some cases, they could not do so in the present case, because such right or property interferes with the rights and property clearly vested in defendant; it is inconsistent with it; it lessens its value at least. It is much more consonant to our ideas of property to say, that the bees and honey in the defendant's trees belong to him in the same manner and for the same reason as all mines and minerals belong to the owner of the soil."

But the rule that a landowner owns *ratione soli* bees which swarm on his land applies fully only to wild, unreclaimed bees, and when reclaimed bees fly from the hive of their owner and swarm on the land of another, the landowner does not acquire property in them, and their former owner does not lose his property in them, if he is able to pursue them, keep them in sight, and identify them,

Goff v. Kilts, 15 Wend. (N. Y.) 550, wherein the court said: "It is said the owner of the soil is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game (game laws out of the question), belong to the owner or occupant of the forest, *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws . . . but if animals *ferae naturae* that have been reclaimed and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded and reconciled as far as is consistent with a reasonable protection of each." And see the reported case.

Although bees are *ferae naturae* and the property in reclaimed bees is qualified, subject to be divested by their escaping and reverting to a wild state, a diversity is to be seen in the law of bees from the general rule as to the escape of animals *ferae naturae*, in that, when a reclaimed swarm of bees escapes from the hive of its owner, his qualified ownership of the bees continues so long as he can pursue them and keep them in sight, or so long as he can distinguish and identify them, even though he may not be able to assert his ownership and recover possession of the bees without being guilty of trespass. 2 Blk. Com. 392; *Merrills v. Goodwin*, 1 Root (Conn.) 209; *Goff v. Kilts*, 15 Wend. (N. Y.) 550. And see the reported case. In *Goff v. Kilts*, supra, Kilts sued Goff in trespass for taking and destroying a swarm of bees and the honey made by them. It appeared that the swarm left Kilt's hive, flew off and went into a tree on the lands of the Lenox Iron Co.; that Kilts pursued them, kept them in sight, and marked the tree; and that two months afterwards the tree was found and cut down, the bees were killed, and the honey was taken by Goff. Holding that Kilts had not lost his property in the bees, the court said: "The question here is not between the owner of the soil upon which the tree stood that included the swarm, and the owner of the bees; as to him,

the owner of the bees would not be able to regain his property, or the fruits of it without being guilty of trespass. But it by no means follows, from this predicament, that the right of the enjoyment of the property is lost; that the bees therefore become again *ferae naturae*, and belong to the first occupant. If a domestic or tame animal of one person should stray to the inclosure of another, the owner could not follow and retake it, without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves, and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like remedy existed in case of an invasion of it. It cannot, I think be doubted, that if the property in the swarm continues while within sight of the owner—in other words, while he can distinguish and identify it in the air—that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant."

The Roman law was to the same effect as the rule just stated. 2 Justinian's Inst. lib. 2, s. 14, cited in 2 Kent Com. 350. But it has been held in a Scotch case that reclaimed bees, escaping from the land of their owner, remain the property only so long as he is pursuing them where he has a right to go, and that, if they come on another's land, that person may prevent pursuit on his land and becomes the owner of the bees if he hives them. Harris v. Elder, 57 J. P. (Eng.) 553, cited in Ingham on Animals, p. 20.

Bees are the subject of bargain and sale, and an action will lie for the recovery of the purchase price of bees sold. Simpson v. Parks, 23 Ont. W. Rep. 837, wherein the plaintiff recovered in an action for the balance of the purchase price of 54 hives or skeps of bees, but, aside from the mere allowing of the recovery, the court gave no peculiar consideration to the law of bees.

Bees as Subject of Larceny.

When in the wild state, unreclaimed, and not reduced to property, bees are not the subject of larceny. Cock v. Weatherby, 5 Smedes & M. (Miss.) 333, wherein it was held that proof of a charge of stealing a bee tree would not support an action of slander, for larceny could not be committed of wild, unreclaimed bees such as would be imported by the word bee tree. The court said: "The

term bee tree relates to the wild, and not to the reclaimed, insect—the insect *ferae naturae*, and not yet reduced to property, and the term tree is applicable to standing timber only—'*arbor dum crescit, lignum dum crescere nescit.*' Neither of these articles are subjects of larceny." In Idol v. Jones, 13 N. C. 162, it was also held that an action of slander could not be predicated on a charge that the plaintiff had stolen a bee tree, although the court in that case treated the charge as being a charge of stealing a tree rather than bees.

Although *ferae naturae*, bees in the possession of any person are the subject of larceny. 2 East P. C. 16, § 41; Tibbs v. Smith, 2 Ld. Raym. (Eng.) 33; State v. Murphy, 8 Blackf. (Ind.) 498; Harvey v. Com. 23 Grat. (Va.) 941. See also Hannam v. Mockett, 2 B. & C. 934, 944, 9 E. C. L. 280, 107 Eng. Rep. (Reprint) 629. For, although not fit for food themselves, their honey is, and for that reason they are deemed to be within the common-law rule that animals *ferae naturae*, when reclaimed or confined, are the subject of larceny if fit for food. Harvey v. Com. 23 Grat. (Va.) 941.

In Tibbs v. Smith, 2 Ld. Raym. 33, 83 Eng. Rep. (Reprint) 18, it was held that the words "thou hast stolen our bees . . . and thou art a thief" were actionable because the charge of thievery imparted that the bees were such as would be the subject of larceny, although without the addition "thou are a thief" they would not be actionable because simply a charge of having stolen bees would not impart that the bees were of a kind whereof larceny might be committed.

Beehives and honey, the property of a person, are the subject of larceny. Harvey v. Com. 23 Grat. (Va.) 941.

But confining wild bees in a *skep* in the top of a tree in which they have swarmed is not such a reduction of them to possession as to make them the subject of larceny. Wallis v. Mease, 3 Bin. (Pa.) 546, which was an action of slander for calling the plaintiff "a damned thief," in which the defendant sought to justify by proving that the plaintiff had been connected with the taking of a swarm of bees which the defendant had confined in a tree top. The court, holding the justification not to be good, because the taking of such bees would not constitute larceny, said per Tilghman, C. J.: "The taking of wild bees has been considered by the people of the country as a species of hunting. Bees are of a wild nature; and without deciding what the law might be, if they were removed from the tree, and secured in a hive, I am of opinion that, while they remain in the tree, they are not the subject of a felony. This wild nature remains unchanged, nor are they completely, and for any valuable purpose, reduced to possession." And further holding that by the

common law the taking of honey *animo furandi* from a tree on the land of another would not constitute larceny, the court, per Brackenridge, J., made the following statement as to the larceny of bees and honey: "The question then will be, whether the taking honey from a tree on the land of another, with an intention of concealment, will amount to a felony. This must depend on the honey being the property of the owner of the land. If the bees are his property, the honey is; for it is the manufacture of his hive. It is the production of what may be called his flock. But this requires proof in the first instance, that the bees are his property. The treeing on his land may form some presumption of it; but this is not sufficient in a criminal case, when it is notorious in natural history, that there are wild bees, or bees *ferae naturae* as in the learned phrase. Bees not reclaimed from their wild nature and domesticated, are not the subject of property, any more than wild fowl or wild beasts. It cannot necessarily be inferred therefore, that the honey made in a tree on another's land, is made by the bees of the owner of the land. But it may be made out of the vesture of his land, and therefore his property. 'The bee sits on the bloom extracting liquid sweet;' and if the flowers are his, the honey is his property. For though it is changed by constipation, 'purissima mella stipant,' yet it is but the liquid condensed or thickened by working into honey; and the taking away butter is not the less a theft, because the taker had churned it from the milk of another. Here, however, a difficulty occurs; it may not have been the herbage of the owner of this land, from whence the liquid was extracted that was made into honey. Bees do not confine themselves to the fruits or flowers growing near, but move to a distance: 'Floriferis ut apes in saltibus omnia libant.' It cannot therefore be made out to a certainty that the honey has been made out of the grass or vegetables of the owner of the land on which the tree is. This may seem an investigation to a minuteness partaking of the ridiculous. But it has not seemed to me possible to treat it otherwise. For though in tenui labor, yet the subtilty becomes necessary in order to discriminate. I have no idea that the understanding of the country could make it more or less a felony to take honey from the alveare, or to use the Anglo Saxon word, the skep of a bee tree on another man's land; yet it does not follow, that it cannot be considered but a felony; and this I take it is the objection to the charge of the judge, that it did not depend upon the understanding of the country whether it was felony or otherwise, but upon the common law, by which it did not necessarily follow that it was felony."

In an indictment for the larceny of bees the words "one swarm of bees of the value of five dollars, of the personal goods of Moses S. Chapman and James Chapman, then and there being found in the possession of the said Moses S. Chapman and James Chapman" had been held to constitute a sufficient allegation of possession to show that the bees were the subject of larceny. *State v. Murphy*, 8 Blackf. (Ind.) 498.

Injuries by Bees.

It is a general rule that no recovery may be had against the owner of bees for injuries inflicted by them except on grounds of negligence, since he does not keep them at his peril. *Petey Mfg. Co. v. Dryden*, 5 Pcn. (Del.) 166, 62 Atl. 1056; *Parsons v. Manser*, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L.R.A. 132. In *Petey Mfg. Co. v. Dryden*, supra, it was held that, in an action to recover damages for the loss of two mules, alleged to have died as the result of bites and stings inflicted by the defendant's bees, since recovery must be predicated on the owner's negligence, case and not trespass was the appropriate remedy. In *Parsons v. Manser*, supra, it was held that since bees are more like domesticated animals than wild animals the rule of absolute liability for injuries by wild animals ought not to be extended to them. The court said: "They [bees] are very useful, the aviary [apiary] often furnishing a livelihood, and generally proving a source of profit; and the books seem to look with more favor upon the keeping of animals useful to man than those which are worthless save as curiosities. For this reason the rule of absolute liability for the consequences of injuries received from wild beasts kept in confinement, declared in the earlier decisions, even if regarded as sound, ought not to be extended to creatures so nearly domesticated. . . . Bees, while generally classed as *ferae naturae* are so useful and common as to be all but domesticated. Keepers of the aviary [apiary] have carefully studied their habits and instincts, and control them almost as certainly as domestic animals. Serious injuries from them are very rare, and, unless some want of care in their management is shown, the owner ought not to be held responsible for damages occasioned by them." In *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630, it was said: "It is insisted by the plaintiff that while the proprietor of animals of a tame or domestic nature *domitae naturae*, is liable for injuries done by them (aside from trespasses upon the soil), only after notice of some vicious habit or propensity of such animal; that one who keeps animals *ferae naturae* is responsible at all events for any injuries they may do, and that as bees belong to the

latter class it follows of course that the defendant is liable. In order to determine this question, upon which no direct or controlling authority exists, that I have been able to find, it becomes necessary to look into the principles upon which one who owns or keeps animals is held liable for their vicious acts. It will be found, on examination of the authorities upon the subject, that this classification of animals by the common law into animals *ferae naturae* and *domitae naturae* has reference mainly if not exclusively, to the rights of property which may be acquired in them; those of the latter class being the subjects of absolute and permanent ownership, while in regard to the former only a qualified property can exist, and the distinction is based upon the extent to which they can be domesticated or brought under the control and dominion of man, and not at all upon the ferocity of their disposition, or their proneness to mischief. For instance, the dog, some species of which are extremely savage and ferocious, is uniformly classed among animals *domitae naturae*, while the hare, the rabbit and the dove are termed *ferae naturae*, although comparatively harmless. It would not be rational to suppose that a classification adopted with exclusive reference to one quality of animals, could be safely used to define and regulate responsibilities growing out of other and different qualities; nor would it accord with that just analysis and logical accuracy which distinguish the common law, that it should be resorted to for that purpose. And although some dicta may be found in the books which might seem to countenance the idea, the decided cases do not lead to any such conclusion. . . . Having shown then, as I think, clearly, that the liability does not depend upon the classification of the animal doing the injury, but upon its propensity to do mischief, it remains to be considered whether bees are animals of so ferocious a disposition, that every one who keeps them, under any circumstances, does so at his peril. If it is necessary for the plaintiff to aver and prove the mischievous nature of the animal, nothing of the kind was done in this case; but if courts are to take judicial notice of the nature of things so familiar to man as bees, which I suppose they would be justified in doing, then I would observe that however it may have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow. Its habits and its instincts have been studied, and through the knowledge thus acquired it can be controlled and managed with nearly as much certainty as any of the domestic animals; and although it may be proper still to class it among those *ferae naturae*, it must nevertheless be regarded as coming very near the dividing line, and in regard to its propensity

to mischief, I apprehend that such a thing as a serious injury to persons or property from its attacks is very rare, not occurring in a ratio more frequent certainly than injuries arising from the kick of a horse, or the bite of a dog."

In the foregoing case, *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630, it was further held not to be negligence to keep bees in a yard adjoining a public highway where they had been kept for eight or nine years without causing damage, and that one so keeping them was not liable for injuries inflicted by them on horses passing on the highway. The court said: "The question is still left whether the keeping of these bees so near the highway subjects the defendant to a responsibility which would not otherwise rest upon him. I consider this question as substantially disposed of by the evidence in the case. It appears that bees had been kept in the same situation for some eight or nine years, and no proof was offered of the slightest injury ever having been done by them. On the contrary, some of the witnesses testify that they had lived in the neighborhood and had been in the habit of passing and repassing frequently, with teams and otherwise, without ever having been molested. This rebuts the idea of any notice to the defendant, either from the nature of bees or otherwise, that it would be dangerous to keep them in that situation; and of course, upon the principles already settled, he could not be held liable."

But the owner of bees is liable for injuries by them which result from his negligence. *O'Gorman v. O'Gorman* [1903] 2 Ir. R. (Eng.) 573; *Parsons v. Manser*, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L.R.A. 132; *Tellier v. Pelland*, 5 Rev. Leg. 61. See also *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630. In *O'Gorman v. O'Gorman*, supra, it was held to be actionable negligence for the defendant to keep bees on his premises in such unreasonable numbers as to prove dangerous to those in the immediate neighborhood, the owner knowing them to be thus dangerous. It appeared that the defendant kept large numbers of beehives close to the boundary fence between his and the plaintiff's yards; that on the occasion in question the defendant smoked his bees out to obtain their honey; that the bees, irritated by the smoke, swarmed on the plaintiff and his horse in a nearby field; and that the horse, stung by the bees, dragged the plaintiff and threw him violently against a wall, causing him severe injuries. On these facts a verdict of £200 against the defendant was sustained. In *Parsons v. Manser*, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L.R.A. 132, the plaintiff sued to recover damages for the stinging to death of his horses by the defendant's bees, the facts of the stinging being stated by the court as follows:

"The plaintiff is a peddler of medicines. As such he called at the house of a defendant to sell goods on the 7th day of July, 1900. He had hitched his team to a post a little west of the gate leading to the house, in the highway south of it, and about five feet from the fence. There were two bee gums about twenty-five feet north of the post in defendant's yard, and three more ten or twelve feet farther on. Trees stood close together west and north of this yard, and shrubbery and bushes to the east. The only unobstructed passage was to the south and southeast. Shortly after entering the house, he heard a crash, and upon running out found that the horses had pushed through or over the fence, and their heads were within a few feet of the hives. The hind wheels of the wagon were still on the fence, and one horse was lying down. Bees covered them. He immediately unhooked the traces, while defendant's daughter cut the lines, but both were soon compelled to flee for their own safety. Two gums were afterwards overturned by the horses. She went after help, while he did what he could by throwing water on the horses and trying to remove them." Holding that the jury properly found negligence from the foregoing facts, the court said: "The defendant naturally expected people to visit his home, and that teams would in all probability be hitched to the post. It was put there and maintained for that purpose, and this in itself was an assurance that it was a safe place to leave horses. But that was the course the bees were likely to fly in going to and from their hives, and there was evidence to the effect that they were prone to attack horses when perspiring, if near them. Moreover, the defendant was advised of this, as his daughter had cautioned a music teacher in his presence of the danger from them in tying her horse to this very post but a few days before. In this respect the case differs from *Earl v. Van Alstine*, supra, where the bees had been in the same place eight years without knowledge of their molesting anyone. Because of their situation and the notice of their inclination to interfere with horses when hitched where plaintiff left his team, the question of defendant's negligence was for the jury, as was also that of contributory negligence."

It has however been held in a Canadian case that the keeping on one's premises of such an unreasonably large number of bees as constituted an unusual danger to neighboring property owners, made the person keeping them liable for injuries inflicted by them entirely aside from any question of his negligence in allowing them to escape. In other words, it was held that such a large number of bees was kept at one's peril. *Lucas v. Pettit*, 12 Ont. L. Rep. 448, wherein the following facts appeared: "The defendant was

the owner of 160 or 170 hives of bees, which he placed in a small yard situate within about 20 feet of the highway running east and west. At the southerly end of this yard was a small building with a frontage of about 24 feet on the highway, and being about 18 feet in depth and 17 feet in height. From north to south, the yard occupied by the hives was about 124 feet in length. Immediately opposite this yard on the south side of the road was the plaintiff's property, consisting of a field of about 8 acres, which was in oats, and beyond it another field in buckwheat. The highway is about 56 feet in width. On the 10th August, 1905, the plaintiff proceeded to the oat field with a pair of horses and a binder for the purpose of cutting the oats, when the horses were attacked by a large number of bees. The horses ran away from the plaintiff, dragging the binder with them to the south end of the field, and there stopped at the fence. The plaintiff followed them and endeavored to unhitch and take them away, but was unable to make them move. He himself was being similarly attacked, and made his escape by immersing himself in a neighboring pool of water and covering the exposed portions of his body with mud. One of the horses died almost at once in the field from the effect of the stings, and the other succumbed within two or three days. The plaintiff himself suffered severely, and was under medical treatment." Holding that the defendant was liable, the court said: "It was estimated that the strength of a hive was between 15,000 and 50,000 bees, and the plaintiff speaks of them as attacking the horses and himself in clouds. He estimated that there were more than four bushels of bees on the horses and in the air. This, of course, is a mere estimate, but it is clear that the number of the defendant's bees was very great. For the defense it was contended that the defendant was guilty of negligence, and that there was no evidence that the bees were of a vicious nature, and that the defendant was not aware of any viciousness or propensity on the part of the bees to attack mankind or animals. The doctrine of scienter or 'notice of mischievous propensities' of the bees has, I think, no application to this case, nor could the absence of negligence, in the sense pressed upon us, relieve the defendant of liability. . . . The right of a person to enjoy and deal with his own property as he chooses is controlled by his duty to so use it as not to affect injuriously the rights of others, and in this case it is a pure question of fact whether the defendant collected on his land such an unreasonably large number of bees or placed them in such position thereon as to interfere with the reasonable enjoyment of the plaintiff's land. I think the reasonable deduction from the answer of the jury to

question 5 is that the bees, because of their numbers and position on the defendant's land, were dangerous to the plaintiff, and also that the defendant had reason so to believe. In my view it is immaterial whether or not the defendant, under these circumstances, regarded the bees as dangerous. If he was making an unreasonable use of his premises, and injury resulted therefrom to the plaintiff, he is liable. It was the defendant's right to have on his premises a reasonable number of bees, or bees so placed as not to unfairly interfere with the rights of his neighbor, but if the number was unreasonable, or if they were so placed as to interfere with his neighbor in the fair enjoyment of his rights, then what would otherwise have been lawful, becomes an unlawful act. In this case the jury found as a matter of fact that the bees, because of their number and situation, were dangerous to the plaintiff. The defendant was acting unlawfully, and he is liable for the injury flowing directly from such unlawful act."

Keeping Bees as Nuisance.

The keeping of bees in such a manner as seriously to interfere with the rights of neighbors in the use of their property may constitute a nuisance to remedy which injunction will lie. *Olmstead v. Rich*, 53 Hun 638 mem. 3 Silv. Sup. 447, 6 N. Y. S. 826, 25 N. Y. St. Rep. 271. In that case it appeared that the defendant kept about 90 swarms of bees on a lot within 60 feet of the plaintiff's premises and about 50 swarms on another lot within 100 feet; that during the spring and summer months these bees were a great annoyance to the plaintiff, stinging him, his guests, and servants, and soiling articles of clothing exposed on the premises, etc. The appellate court, affirming the action of the lower court in granting an injunction against the defendant, said: "Upon the merits the main questions are whether the verdict of the jury that the bees as then kept were a nuisance is sustainable, and whether the injunction was proper. Assuming the first question is reviewable here, about which there may be some doubt, . . . it was peculiarly a matter for the jury. The evidence was somewhat conflicting, and diverse inferences were sought to be drawn. The matter upon either side was fully presented. The identity of the bees was a matter for the jury. The issue was not as to the motives of defendants, . . . nor whether they had knowledge of any vicious propensities of the bees; but whether, under the conditions of things as then and before existing, there was a nuisance. No fault is found with the law applicable to such cases as charged by the court. We find no good reason for disturbing the verdict on the facts. Was it a proper case for an injunction? An

injunction does not necessarily follow, but there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction. . . . No case is cited exactly like the present. A large quantity of bees were kept upon a small village lot next to plaintiff's lot and dwelling. At certain seasons the plaintiff in the use of his lot and dwelling was, according to the evidence on the part of the plaintiff, very seriously discommoded, and the comfortable enjoyment of the property greatly impaired. It was apparently a case calling for some permanent relief, and very different from the cases of trespass cited by defendants. But it is said that the damages of the plaintiff, as indicated by the verdict, are trifling, and that a lawful and useful business is interfered with. The struggle was not over the amount of damages; in fact the jury were told by the court that they would probably be satisfied with rendering a verdict for a very small amount. The real contest was as to whether the condition of things as then existing constituted a nuisance. The jury and the court both so found. Apparently the bees can be removed, without material injury, to a locality where neighbors will not be affected, and the defendant Stephen W. Rich is in fact carrying on a similar business elsewhere upon farms. Having in view the peculiar situation, and the inadequacy of any other remedy, we are inclined to the opinion that an injunction was properly awarded."

A city ordinance undertaking to make it unlawful, and punishable as a nuisance, to own, keep, or raise bees in the city is invalid. *Arkadelphia v. Clark*, 52 Ark. 23, 11 S. W. 957, 20 Am. St. Rep. 154; wherein it was said, per curiam: "Neither the keeping, owning, or raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is, therefore, too broad, and is invalid."

Tithes of Bees.

It was held in England in early times that honey and wax of bees were tithable, i. e., subject to the tithe, or tenth-part, tax. *Barfoot v. Norton*, Cro. Car. 559. But it was also held that tithes in the bees themselves might be discharged in consideration of the fact that the owner of the bees paid tithes in the honey and wax and was put to the expense of hiving

and keeping the bees. Rolle Abr. 651, 15; Anonymous, Cro. Car. 404, 79 Eng. Rep. (Reprint) 951. In the case last cited it was said: "And upon a surmise made that he was sued for tithes of bees, that in consideration he had paid honey and wax, and was at the charge for hives and maintenance of them in winter, he should be discharged of the tithes of the bees themselves.—And upon these surmises a prohibition was granted."

JOHN L. ROPER LUMBER COMPANY

v.

RICHMOND CEDAR WORKS ET AL.

North Carolina Supreme Court—March 3, 1915.

168 N. Car. 344; 84 S. E. 523.

Adverse Possession — Extent — Constructive Possession — Separate Tracts.

Generally, where title is claimed by adverse possession as to two separate pieces of land against the same claimant, an adverse holding of each must be made out by circumstances relating to possession of each respectively, and possession of one will not extend constructively to the other.

[See Ann. Cas. 1915C 148.]

Adverse Nature of Holding — Purchase of Outstanding Title — Effect.

One in possession of land under color of title may purchase an outstanding title without thereby breaking the adverse nature of his holding under the first title, though the period for perfecting title under the first holding has not expired.

[See note at end of this case.]

Same.

Where plaintiff has held adversely for six and one-half years under color of title constituted by a deed from a stranger, he does not abandon or relinquish such holding or the right to complete title thereunder by the purchase of an outstanding interest which was contended to be the interest of a tenant in common of defendants, where there is no intention by plaintiff to abandon the color of title.

[See note at end of this case.]

Appeal from Superior Court, Camden county: WHEDBEE, Judge.

Action by John L. Roper Lumber Company, plaintiff, against Richmond Cedar Works et al., defendants. Judgment for plaintiff. Defendant named appeals. **AFFIRMED.**

[345] Action to recover damages for a trespass on the plaintiff's land, known as the lots numbered 2 and 3 in the New Lebanon Division, which was made in the year 1819. The trespass consisted in cutting roads on the land for the purpose of carting over it, the defendant justifying under a clause contained in the partition decree, reciting that it would be convenient in carting to the Cross Canal for one proprietor to have the free privilege of using the share of other proprietors for that purpose. Plaintiff asked for a restraining order to stop the trespass, which was at first granted, but afterwards vacated, and plaintiff appealed to this Court, when the order was reversed and the injunction directed to be continued to the hearing. 158 N. C. 161. Defendant at first admitted the title of plaintiff to Lots 2 and 3, and set up the right to cross them; afterwards, by amendment, admitted plaintiff's title to Lot No. 2 and formally denied the title to Lot No. 3, and finally, by amendment, denied plaintiff's title to both lots, which defendant alleges was due to the unexpected decision of this Court in *Weston v. John L. Roper Lumber Co.*, involving the title to Lots 1 and 4 in said division, as to the estoppel of a judicial partition between tenants in common. 162 N. C. 165, Ann. Cas. 1915A 931, 77 S. E. 430. The other litigation between them concerned the title to Lot 12 of said division, which was finally decided by this Court in favor of the plaintiff, so that plaintiff has recovered Lots 1 and 4, which bound the land in controversy on the east and west; Lot 12, which bounds it on the north, the Cross Canal being its southern boundary. The jury, in this case, returned the following verdict:

1. Is the plaintiff, John L. Roper Lumber Company, the owner and entitled to the possession of the land described in the complaint, as alleged? Answer: "Yes; the whole thereof."

[346] 2. If so, have defendants entered and trespassed thereon, as alleged? Answer: "Yes."

3. If so, what damage has plaintiff sustained thereby? Answer: "\$75."

The decision of this matter turns chiefly on the plaintiff's adverse possession of Lots 2 and 3. Judgment was entered upon the verdict, and defendant appealed.

Ward & Thompson and *Winston & Biggs* for appellant.

Small, MacLean, Bragaw & Rodman, and *J. Kenyon Wilson* for appellee.

WALKER, J. (after stating the facts).—The defendant contends, as to both tracts, that plaintiff has had no such adverse possession as ripened his title under color, as the two tracts, designated as Lots 2 and 3 in the New Lebanon Division, were held by plaintiff

and claimed by two separate deeds, and were, in fact and in law, to be taken and considered as two separate and distinct tracts of land, which would, therefore, require an adverse possession of each tract during the full period of limitation. It may be admitted, generally, that where the bar of the statute is pleaded, or the benefit thereof is relied on in any way, as to two separate pieces of land against the same claimant, an adverse holding of each must be made out for the requisite time by circumstances relating to the possession of each piece respectively, and mere possession of the one will not be extended so as constructively to include the other. A discussion of the question is not called for, as we are satisfied that there was an actual adverse possession of each tract under color for a sufficient length of time to ripen the title into a perfect one. The defendant's objection was not to the character of the possession, as not being adverse, but to the application of the doctrine of constructive possession to a case where there are two or more separate tracts of land, when it should be restricted to cases where there is only one tract involved. 1 Cyc. 1128. There was no error, therefore, as to Lot No. 2.

The other question presented, as to Lot No. 3, is whether the plaintiff waived or abandoned all right to claim any benefit from its adverse possession of six and a half years under the deed of Harrison E. Weston to it, dated 1 June, 1878, as color of title, by afterwards, 19 December, 1884, taking a deed from H. E. Weston, John R. White, and others. Defendants contend that at the time the last deed was made they were tenants in common with H. E. Weston and the other persons named therein, but it may well be doubted if they have offered evidence sufficient in law to establish the fact under the rule laid down in *Byrd v. Southern Exp. Co.* 139 N. C. 273, 51 S. E. 851, or whether they have connected themselves with the title of Samuel Weston, the first. As tested by the clear weight of authority [347] and the rule of reason, the general doctrine is that a person in adverse possession of land under color may purchase an outstanding title to the same land without thereby preventing his possession from being longer adverse or breaking its continuity; and this is so, although the period fixed by the statute for perfecting his title, under color, had not then expired. The subject is so fully and lucidly treated by Circuit Judge William H. Taft in *Elder v. McClaskey*, 70 Fed. 529, 37 U. S. App. 199, 17 C. C. A. 251, especially at p. 547, that we could not do better than to reproduce what has there been said, and especially as the facts of that case are so clearly analogous to those now under consideration, the outstanding title being that of a tenant in common: "There remains to con-

sider the contention of claimants, sustained by the court below, that, whether the possession of defendants was at any time adverse to the claimants, the disseizin was subsequently purged by recognition and acquiescence of defendants in claimants' title, so that an avowed cotenancy ensued before the statute had run. This contention is chiefly rested on the purchase and acceptance by the defendants of deeds conveying to them outstanding interests of certain of the heirs of the brothers and sisters of William Barr, Sr., whose title was of the same character as that of claimants. It is well settled by binding authority that a vendee is not estopped to deny the title of his vendor. *Robertson v. Pickrell*, 109 U. S. 608, 614, 615, 3 S. Ct. 407 [27 U. S. (L. ed.) 1049]; *Watkins v. Holman*, 16 Pet. 25, 54 [10 U. S. (L. ed.) 873]; *Willison v. Watkins*, 3 Pet. 43 [7 U. S. (L. ed.) 596]; *Blight v. Rochester*, 7 Wheat. 535 [5 U. S. (L. ed.) 516]. And the necessary conclusion from this is drawn, in the last named case, that the person in possession of property under a claim of complete ownership has the right to fortify his title by the purchase of any real or pretended titles, without thereby holding possession in subordination to them. This is further supported by the decisions of many other courts to the same effect. *Warren v. Bowdran*, 156 Mass. 280; *Gardner v. Greene*, 5 R. I. 104; *Chapin v. Hunt*, 40 Mich. 595; *Mather v. Walsh*, 107 Mo. 121, 131; *Giles v. Pratt*, 2 Hill L. (S. C.), 439, 442; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513, 518; *Tobey v. Secor*, 60 Wis. 310, 312. The following are cases where the possessor and defendant purchased outstanding titles of tenants in common with the plaintiffs in ejectment, and yet was held not to have thereby acknowledged the validity of the plaintiff's title. *Fox v. Widgery*, 4 Greenl. (Me.) 214; *Jackson v. Smith*, 13 Johns. (N. Y.) 406, 413; *Northrop v. Wright*, 7 Hill (N. Y.) 477, 489, 496; *Bryan v. Atwater*, 5 Day (Conn.) 181; *Cannon v. Stockmon*, 36 Cal. 539; *Winterburn v. Chambers*, 91 Cal. 183; *Cook v. Clinton*, 64 Mich. 309, 313. And the same rule prevails in Ohio." We need not assent to all that is said in that case as to the relation of vendor and vendee with respect to any estoppel of the latter to deny or dispute the title of the former, and we cite the case only for the purpose of showing that the vendee's adverse [348] possession is not affected by his purchase, and not as binding us to an approval of all the reasons advanced in support of the conclusion, as that is not necessary to a decision of this matter or to the value of the case as an authority.

Mr. Freeman, in his work on Cotenancy and Partition, sec. 106, says: "A person in possession of land may protect himself from

litigation by purchasing any outstanding claim against his property. By so purchasing he does not necessarily admit the superiority of the title bought, nor change his possession, which was before adverse, into a possession subordinate to the newly acquired title. Therefore, one who is in possession of real estate does not become a tenant in common thereof by merely accepting a deed therefor from the owner of an undivided interest therein."

The party who accepts a deed in fee from a grantor having no title or a less estate than he conveys performs no act expressly designed to influence, and which influences, the conduct of the latter to his injury, nor does he make any admission which in good conscience and honest dealing he should be forbidden to gainsay. The grantee is the one exposed to injury, and when necessary for his protection, he may show the truth and dispute the title of his grantor, as a party is only concluded against showing the truth or asserting a legal right when the result would be a wrong, through his means, to some third person. There is no such relation ordinarily existing between the grantee in fee and his grantor as will raise even an implied obligation, on the part of the former, against a denial of the title and estate of the latter. Although a tenant cannot question the right of his landlord, a grantee in fee, as he stands on a different footing in the law, may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession, but the grantee in fee is under no such duty. He does not receive the possession under any contract, express or implied, that he will ever give it up, but takes the land to hold for himself and to dispose of at his pleasure. He owes no faith or allegiance to his grantor, and he does him no wrong when he treats him as an utter stranger to the title; and, finally, it results from these considerations, and perhaps others of equal cogency, that his possession is really adverse to his grantor, as has often been held by the courts. The above principles are supported by the following cases: *Sparrow v. Kingman*, 1 N. Y. 242; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 518. The disseizin, therefore, was not purged by taking the deed, nothing else appearing. A disseizor in possession has an interest in the land which he may transfer with the possession to a third person or which on his [349] death will pass to his heir, and the mere taking of a deed from another, against whom he is holding adversely, does not, of itself, constitute a relinquishment of this right. St.

Paul v. Chicago, etc. R. Co. 45 Minn. 387, 48 N. W. 17.

In *Coakley v. Perry*, 3 Ohio St. 344, one Nathan Perry had purchased the land, received a conveyance, and was in possession. Subsequently he took a deed, with covenant of warranty, from Job Doan, to whom one-fourth interest in a tax title had descended from his father, and with reference to these facts the Court said: "It would be the grossest absurdity to conclude that Nathan Perry, by taking the conveyance from Job Doan, for a trifling consideration, contemplated, instead of continuing seized of the whole premises, as he claimed to have been before, that he became seized of only an undivided part in common with the other heirs of Job Doan's ancestor. It would seem to be just and reasonable that a person in the *bona fide* possession of land under a claim of title should be allowed to buy in any title, real or pretended, with a view to quiet the enjoyment of his possessions, and that the purchase of an adversary title, if it does not strengthen, should certainly not have the effect to impair, the title of the owner. It is not the policy of the law to deter persons from buying their peace and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety." Judge Taft further says in *Elder v. McClaskey*, *supra*, at p. 548: "Whether the acceptance of a deed of an outstanding interest by one in possession shall affect his adverse possession depends on all the circumstances surrounding it. Generally, if his possession began under a claim of title in fee, the purchase of another title is not to be regarded as a change in his attitude. His purchase may strengthen his title, but it is usually not permitted to impair it. Cases may perhaps be conceived where the acceptance of a deed for an interest in property by one in possession would be equivalent to an express avowal of subordination to the title of others in privity with the grantors, but it would be exceptional. The cases relied upon by the court below to establish a different doctrine do not seem to us to do so." He then proceeds to distinguish the cases which it was contended held to the contrary, and demonstrates that they were based upon exceptional circumstances which showed that the grantee in the deed intended to abandon his prior possession and to claim under his newly acquired title, which, of course, would take them out of the rule. It is said in 1 Cyc. p. 1016: "With the exception of at least one decision in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession,

it seems to be very generally conceded that an adverse occupant may purchase an outstanding [350] title without thereby interrupting the continuity of his possession. A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a smaller price than he at great expense and annoyance in litigating it." It may be admitted that, under some special circumstances, the purchase of an outstanding interest will have the effect of divesting the possession of its hostile character, but no such circumstances are to be found in this case. A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. *Cannon v. Stockman*, 36 Cal. 539, 95 Am. Dec. 205. If a party is in possession continuously for seven years, all the time claiming ownership exclusive of any other right, and under color, he is entitled to the benefit of the statute of limitations, no matter how many outstanding adverse claims he may purchase to secure his peace and remove any cloud or suspicion from his title, unless he has in some way estopped or precluded himself from relying on that statute, and the question for the jury to determine on such claim is, whether upon all the evidence he appears to have been continuously in possession during the time prescribed, claiming title adversely and exclusive of any other right. *Cannon v. Stockmon*, supra. This is not the case of a grantee of one tenant in common who is in possession under a deed for the whole and not for the particular tenant's interest, which requires a holding for twenty years to bar the cotenant, the making of the deed and the possession by the grantee claiming thereunder not being sufficient, under our ruling, to constitute such a disseizin of the cotenant as to bar his right if the possession is continued for seven years. *Page v. Branch*, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691; *Roscoe v. John L. Roper Lumber Co.* 124 N. C. 42, 32 S. E. 389; *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621; *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104; *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E.

870, 115 Am. St. Rep. 682, 10 L.R.A. (N.S.) 185. And these cases show, as also does *Caldwell v. Neely*, 81 N. C. 114, that twenty years of possession is essential to bar cotenants, and the fact of holding and claiming under a deed for the whole from one of them will make no difference. *Boggan v. Somers*, 152 N. C. 390, 67 S. E. 965. And the same doctrine was stated very recently in a case between the same parties as those arrayed against each other in this record (*John L. Roper Lumber Co. v. Richmond Cedar Works*, 165 N. C. 83, 80 S. E. 982), where we said: "We are [351] aware that this Court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby. *Cloud v. Webb*, 14 N. C. 317; *Hicks v. Bullock*, 96 N. C. 164; *Breden v. McLaurin*, 98 N. C. 307; *Bullin v. Hancock*, 138 N. C. 198, and *Dobbins v. Dobbins*, 141 N. C. 210, where the other cases are collected. We are not inadvertent to the fact that this State stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc. 1078, and notes); but it has too long been the settled doctrine of this Court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise, we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the Court." Judge Gaston said, in *Cloud v. Webb*, 15 N. C. 290, 25 Am. Dec. 711 (second appeal): "A sole possession by the bargainee of a part under a deed in severalty for that part might and probably would amount to a demonstration plain that such possession was a several holding under that deed, was tantamount to an ouster of that part, and therefore adverse to Mrs. Cloud's claim of a right to the possession thereof." It will be seen by these references within what narrow limits the doctrine as to the effect of a possession held under the deed of one of the cotenants is confined, and as to whether such a deed, followed by possession taken by the grantee, will constitute a disseizin of the other tenants. But here the plaintiff held under a deed made by a stran-

ger, and adversely to all others, for six and one-half years, and we find no evidence that he intended to relinquish the advantage he had gained by such holding and substitute for it a one-half undivided interest in the land of doubtful validity, but the contrary appears to have been the motive and purpose, as the subsequent purchase was clearly intended merely to clear up the title, or to get rid of adverse claims to it, however unfounded they may have been, so that it would be exempt from future attack. It was not supposed by any of the parties to the transaction that plaintiff was buying an interest in common with defendants, but all the circumstances tend to show that it continued to rely upon the adverse possession to ripen its title under the color. The case is, therefore, not like that of [352] one when an outsider receives a deed from one of the tenants for the entire and undivided estate in the land held in common, and has no other source of title. Plaintiff holds the deed of a stranger to a several interest, and not one held in common, and has the right to perfect his title under it, although he may have purchased another claim and taken a conveyance from those asserting it, to safeguard the title, which was maturing by his continued possession under color.

The prayers of the defendants required the court to instruct the jury, as matter of law, that the taking of the second deed prevented plaintiff from claiming any benefit by its adverse possession under the Harrison E. Weston deed of 1878, and there was no error in refusing them. The court properly left the question of adverse possession to the jury, with appropriate instructions. The reference to plaintiff's possession in 1871 and 1872 was harmless, being merely the statement of a contention. The court immediately afterwards correctly instructed the jury as to adverse possession under color, and the jury could not have been misled. The issues were sufficient to prevent all controverted matters and were properly submitted by the court, instead of those tendered by the defendant. *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887, 63 L.R.A. 963; *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Zollicoffer v. Zollicoffer*, 133 N. C. 326, 84 S. E. 349. The other exceptions are without any merit.

After a careful review of the record and a studious consideration of the arguments of counsel, we have not been able to find any error committed by the court at the trial.

No error.

NOTE.

Where a person is in adverse possession of land under color of title, it is held in the

reported case that he does not affect the adverse character of his possession by purchasing an outstanding claim of title to the same land. This question is thoroughly discussed in the note to *Ripley v. Miller*, Ann. Cas. 1912C 952.

THE BRAND.

THE E. STARR JONES.

United States Circuit Court of Appeals, Third Circuit—June 28, 1915.

224 Fed. 391.

Collision — Sailing Vessel in Fault — Side Lights in Improper Position.

A schooner is held to have been solely in fault for a collision with a crossing steamship at night in Delaware bay for carrying her side lights in such position that the one on the side next the steamship was obscured by the sails and could not be seen from the steamship until too late to avoid the collision.

Damages for Collision — Loss of Use of Injured Vessel.

Loss through delay while making repairs is an element of the damages recoverable for collision, and where the injured vessel was under a time charter the rate of charter hire may be accepted as prima facie fixing the measure of damages.

[See note at end of this case.]

Appeal from United States District Court, Eastern District of Pennsylvania: BUFFINGTON, Judge.

Suit in admiralty by Herbert L. Heyliger, master of schooner E. Starr Jones, plaintiff, against steamship Brand, defendant, and cross-suit by Edward Ballestad, master of The Brand, against the schooner. Judgment for cross-libelant. Libelant appeals. The facts are stated in the opinion. **AFFIRMED.**

Howard M. Long for appellant.

Henry R. Edmunds for appellee.

Sitting: McPHERSON and WOOLLEY, Circuit Judges, and THOMSON District Judge.

[392] THOMSON, J.—On October 13, 1912 about 4:30 o'clock a. m. a collision occurred in the Delaware Bay, between the American schooner E. Starr Jones, and the Norwegian steamer Brand, in which both vessels sustained considerable injury. Cross-libels were filed to recover damages, which resulted after trial in a decree sustaining the libel of the

Brand and dismissing that of the E. Starr Jones. After decrees entered, the cases were consolidated and combined into one action for the purpose of appeal.

The E. Starr Jones is a four-masted sailing vessel, 185 feet long and 38 feet beam, and was on a voyage from Philadelphia to Porto Rico with a cargo of coal and carrying a crew of seven men. The Brand is a steamer 280 feet long and 37 feet beam, and bound from Nova Scotia to Chester, Pa., on the Delaware river, with a cargo of plaster. The schooner was under tow by a steam tug until about 3:30 a. m., when the tug was cast loose and the schooner proceeded under her own sails down the bay in a southeasterly course. For a period of about two hours prior to the collision the schooner's sails were being set. The master and some of the witnesses for the schooner say that the sails were all set before the collision, while the mate testifies that they were just finishing that work, pulling the main topsail at the time of the collision. The weather was clear, with wind from the north. There was no mist or haze. The stars were shining, and, although dark, it was a good night for lights to be seen. The approaching vessels were on a wide part of the Delaware Bay. No other vessels were in the immediate vicinity, and each had ample sea room in which to maneuver. It is clear, therefore, that the collision was not the result of inevitable accident, but of fault on the part of one of the vessels.

The learned trial judge exonerated the steamer, holding the schooner to be wholly at fault, and in this conclusion we concur. The finding of the learned judge fixes the cause of the collision to be in so placing the schooner's green light on the starboard side that it was screened or obscured by the sails, and was thus not visible from the approaching steamer. This finding seems to be in harmony with the facts as shown by the testimony. While the law does not regulate just where the side lights on a sailing vessel shall be placed, it does require that the starboard light shall be so located as to show from a point straight ahead to two points abaft the beam on the starboard side, and the port light shall show a similar arc of the circle on the port side. The testimony indicates with considerable certainty that the schooner's side lights were placed in the fore-rigging high above the deck—some witnesses say 14 feet above the rail, or about 18 feet above the deck and over 4 feet inside the rail. It appears that the forestay-sail boom measured 29 feet forward, while the distance from the center of the mast, where the boom is, was about 13 feet. The course of the schooner being southeast, with the wind from the north or northwest, [393] she would have the wind on her port quarter, her booms and sails would all be well off to the starboard

side, and it is claimed with much force that her green light would thus almost necessarily be obscured. This inference which could fairly be drawn from the location of the light and the position of the sails, due to the course of the vessel and the point of the wind, is borne out by the witnesses on the Brand. Assuming that these witnesses are credible, and were ordinarily careful and efficient seamen, their testimony is very convincing.

About 4:15 a. m. the steamer took on board a licensed pilot, said to be one of the most experienced on the Delaware river and Bay. Her lights were properly set and burning. On the lookout bridge was a competent seaman, while the licensed pilot, the captain, second mate, and helmsman were on the main bridge. She was running north by west at about eight knots per hour. It is not controverted that the lights on the Brand were seen and reported from the schooner. The lookouts on each vessel saw and reported the lights on a tug with barges, which was going up the bay. The officers of the schooner, relying on her lights being seen by the approaching steamer, held to her course until a collision was imminent, when her helmsman, in the exigency of the case, put her wheel hard astarboard, changing her course sharply to port. The lookout on the Brand was on the lookout bridge, which extended from side to side of the steamer. The substance of his testimony is that the first thing he saw of the schooner was her fore and top sails when she was about 150 feet away on the port side; that this was the first knowledge he had of her presence; that he had been looking, but saw no light; that, very soon after he saw her sails, he saw her green light for the first time; that she was then close to them, and that her booms were far on the starboard side. The licensed pilot says, in substance, that the first he knew of the schooner's presence was when he saw her sails about four points on the steamer's port bow; that he could see no lights; that as soon as he saw her sails he ordered the helm of the steamer to be put hard aport, which threw her head to starboard about three points, and that he saw her green light just before the collision; that her sails must have obscured her lights, or he would have seen them.

This testimony is corroborated by the second mate and the master, who were on the upper bridge with the pilot. The second mate, a seaman of 20 years' experience, was on watch at the time of the collision. He says the first he saw of the schooner was her sails when she was about 25 or 30 fathoms away; that he looked for lights, but could see none; that right after he saw her sails he made out her green light, and that it must have been obscured by her sails. The master says he first saw the schooner's sails 30 or 35 fathoms

away on the steamer's port bow; that he then looked for lights, but could not see any; that as soon as they saw the sails the pilot gave orders to hard aport the helm of the steamer, and that he then went and helped the man at the wheel; that just before the collision he saw for the first time the schooner's green light, and expresses the opinion that the only way he could have missed seeing her lights was by their being obscured by the schooner's sails.

[394] We have, then, three concurring facts, or groups of facts, which sustain the conclusion of the learned trial judge as to the cause of the collision: First, the reasonable probability of the light being screened from its location in the rigging and the position of the boom and sails, due to the course of the vessel and the direction of the wind; second, the fact that competent officers, whose position on the steamer and the conditions of navigation surrounding their vessel required the exercise of special care and vigilance, saw the sails of the near approaching schooner, but at that time saw no lights upon it; third, the fact that very shortly thereafter the green light appeared, and was seen by all of them, in connection with the admitted fact that about that time the schooner's head was swung to port, which would naturally bring her green light into range.

We therefore concur in the findings of the learned trial judge that the schooner was solely at fault, and that the cause of the collision was the screening of her light by the sails, so that it was not visible to the lookout on the Brand until too late to avoid the collision. The evidence also supports the learned judge's view that neither vessel was at fault in the steps which they severally took to avoid a collision when the same became imminent. Viewed with deliberation after the accident, the course adopted might not be approved as the best; but in emergencies men must act quickly, and the law looks with much leniency on an error of judgment committed in an honest attempt to avoid a threatened danger.

A number of assignments allege error in awarding to the steamer Brand the sum of \$1,212.39 as damages for detention of the vessel during 9 days and 16 hours while undergoing repairs. It is entirely clear that one of the elements of damage to which the appellee was entitled was the loss of the use of the vessel while being repaired, whatever that loss might be. It is said in *The Potomac*, 105 U. S. 630, 26 U. S. (L. ed.) 1194:

"The rules of law governing this question are well settled, and the only difficulty is in applying them to the peculiar facts of the case. In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for

the loss of her use while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned, if not disabled, is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it. In no event can more than the net profits be recovered by way of damages."

What was the loss of the use of the vessel? The vessel at the time of the collision was under charter to the Keystone Plaster Company. The charter hire for 9 days and 16 hours, under the monthly rate stipulated in the charter, was \$1,212.39, which amount the charterers deducted in the settlement with the owners. No other evidence was offered by either side on the question of damages. Conceding that, when there is a market price for the use of the vessel, that price is the test in the first instance of the sum to be recovered, is not the stipulated rate of damage in the vessel's charter at least *prima facie* evidence of the [395] loss occasioned by the detention? It was so held by the Circuit Court in *Orhanovich v. The Steam-Tug America*, 4 Fed. 337. In the case of *The Columbia*, 109 Fed. 661, 48 C. C. A. 596, the court said:

"Taking the facts of this case into consideration, we are of opinion that the evidence as to the provisions of the charter party was competent to be admitted. Conceding that it may not be conclusive in all cases, it nevertheless makes out a *prima facie* case, which, in the absence of any proof to the contrary, justifies the rendition of a decree in accordance therewith. The court did not err in allowing the damages."

In the *Governor Ames*, 187 Fed. 40, 109 C. C. A. 94, the appellate court held that where a vessel was injured in a collision for which the other vessel was in fault, and her detention was not such as to require the discharge of her crew, or prevent her from completing her voyage, the rule is settled that the agreed damage under her charter may properly be accepted as fixing *prima facie* the amount of her damages for the detention. This case quotes approvingly from the opinion of Judge Butler in the case of *The Rebecca v. The America*, 8 W. N. C. (Pa.) 328, 20 Fed. Cas. No. 11,619a, on the question of damages, where that judge said:

"This rule has been pronounced, by those having the largest experience and the highest intelligence on the subject, the safest thing under general circumstances that can be pursued."

Other authorities might be cited to the same effect.

The assignments of error are overruled, and the decree is affirmed.

NOTE.

Right to Recover Damages for Loss of Use of Vessel Resulting from Collision without Total Loss.

Generally, 999.

Effect of Substitution of Another Vessel, 1001

Unnecessary Delay in Making Repairs, 1001.

Computation of Value of Use, 1002.

Generally.

It being a general rule in admiralty that the measure of damages in collision cases is *restitutio in integrum* (The Cayuga, 14 Wall. [U. S.] 270) it follows that in case of a collision not resulting in a total loss the owner of the vessel which is not at fault is entitled to recover as part of his damages for the loss of the use of his vessel during the time reasonably required for the making of repairs made necessary by the collision.

England.—The Black Prince, Lush. 568; The Star of India, 1 P. D. 466, 45 L. J. Adm. 102, 35 L. T. N. S. 407, 25 W. R. 377, 3 Asp. M. C. 261; The Consett, 5 P. D. 229, 5 Asp. M. C. 34; The Astrakhan [1910] P. 172, 79 L. J. P. 78, 102 L. T. N. S. 539, 11 Asp. M. C. 390, 26 Times L. Rep. 329; H. M. S. London [1914] P. 72, 83 L. J. P. 74; 12 Asp. M. C. 405, 109 L. T. N. S. 960, 30 Times L. Rep. 196, See also The City of Buenos Ayres, 25 L. T. N. S. 672; 1 Asp. M. C. 169. Compare The Bodlewell [1907] P. 286, 76 L. J. P. 61, 96 L. T. N. S. 854, 10 Asp. M. C. 479, 23 Times L. Rep. 356.

Canada.—The Nettlesworth, 9 Quebec L. Rep. 359. Compare Charlton v. The Colorado, 3 Can. Exch. 263.

United States.—The Baltic, 10 Ben. 631, 2 Fed. Cas. No. 825; The Narragansett, 1 Blatchf. 211, 17 Fed. Cas. No. 10,017; The Russia, 4 Ben. 572, 21 Fed. Cas. No. 12,169; The Santee, 6 Blatchf. 1, 21 Fed. Cas. No. 12,329; Swift v. Brownell, Holmes 467, 23 Fed. Cas. No. 13,695; The Fannie Tuthill, 17 Fed. 87; Wells v. Armstrong, 29 Fed. 216; The Bergen, 128 Fed. 920, 63 C. C. A. 646; The Cumberland, 135 Fed. 234. See also The Sitka, 156 Fed. 427. Compare La Champagne, 53 Fed. 398; The Saginaw, 95 Fed. 703; Fisk v. City of New York, 119 Fed. 256; The Loch Trool, 150 Fed. 429; The North Star, 151 Fed. 168, 80 C. C. A. 536.

Ohio.—H. M. Loud, etc. Lumber Co. v. Peter, 11 Ohio Cir. Dec. 155, 20 Ohio Cir. Ct. 73.

And see the cases cited throughout this note.

Thus in the case of The Narragansett, 1 Blatchf. 211, 17 Fed. Cas. No. 10,017, the court said: "The item for the loss of the services of the vessel while undergoing neces-

sary repairs seems to be a proper allowance, according to the maritime law, which is less stringent in this respect than the common law." And in Swift v. Brownell, Holmes 467, 23 Fed. Cas. No. 13,695, it was said: "In the estimate of damage to the Helen Mar by the collision, the commissioner allowed demurrage on the Helen Mar while under repair at San Francisco. The rule allowing demurrage, under such circumstances, is too well settled to be questioned." So in the case of The Baltic, 10 Ben. 631, 2 Fed. Cas. No. 825, it appeared that the bark Plutaroh was injured in a collision with the steamer Baltic. A libel was instituted against the steamer to recover demurrage for the loss of use, and expenses incident to her detention pending the completion of repairs, which under an agreement were made by the owners of the steamer. The court saying that the burden was on the owners to prove that the repair of the bark was the extent of their liability under the agreement, held that the libellant was entitled to a decree for sixteen days' demurrage and costs, with a reference to compute the amount, unless it was agreed on. Likewise in The Santee, 6 Blatchf. 1, 21 Fed. Cas. No. 12,329, it was held that damages could be recovered by an owner for the use of his vessel while repairs were made although the repairs made the vessel worth more than she was before the collision. See to the same effect H. H. Loud, etc. Lumber Co. v. Peter, 11 Ohio Cir. Dec. 155, 20 Ohio Cir. Ct. 73. In the case of The Astrakhan [1910] P. (Eng.) 172, 79 L. J. P. 78, 102 L. T. N. S. 539, 11 Asp. M. C. 390, 26 Times L. Rep. 329, it appeared that a Danish warship was injured in a collision through the fault of a British steamship. The court allowing damages for the loss of the use of the warship reviewed the facts as follows. "It is said that she would, in any event, have been laid up; but the unforeseen might have happened, and I think in this class of case you should look to see what is the potential use which the Danish government had for this vessel. Their potential use was to have her under their control to use if they wanted her; they might have wanted her for royal purposes, to conduct Royalty about from some place to another, or to receive Royalty, or for fighting purposes, or for any unforeseen purpose which you may imagine. The government were not able to make use of her, if these things happened."

On the other hand in the case of La Champagne, 53 Fed. 398, it was held that if the owners of a vessel injured in a collision elect to have her sold in her damaged condition, they cannot recover damages in the nature of demurrage. And in the case of The Boldlewell [1907] P. (Eng.) 286, 76 L. J. P. 61, 96 L. T. N. S. 854, 10 Asp. M. C. 479, 23 Times L.

Rep. 356, the court said that where there was no loss from a deprivation of the use of a vessel as the result of a collision there could be no recovery from the owner of the ship at fault. See to the same effect *Charlton v. The Colorado*, 3 Can. Exch. 63. So in the case of *The Saginaw*, 95 Fed. 703, it was held that the owners of a vessel were not entitled to demurrage where they suffered no loss from time taken in repairing the vessel. The court said: "The practice in this district has been not to admit claims for the vessel's time while making repairs, if it occasioned no loss of her regular trips, or other expense. In the present case, as the proofs show that there was no actual loss by detention, except the sum of \$209.29, that amount may be substituted in place of the demurrage allowed in the report." Likewise in the case of *The Loch Trool*, 150 Fed. 429, it appeared that after a collision in the month of March the *Drumcraig* was laid up unrepaiied. She was chartered on August 3, 1904, for a voyage from San Francisco to Australia, and the contract for repairing her was not let until October 17, 1904. The vessel was detained for 24 days while those repairs were being made. There was also evidence tending to show that at the time of the collision two other vessels engaged in the same trade as that of the *Drumcraig*, under the same management and in seaworthy condition, were lying in Oakland creek, and there remained unchartered—one until August 10, 1904, and the other until August 24, 1904. At the time of the collision the *Drumcraig* had just completed a voyage between San Francisco and Sydney, via Puget Sound, and return, and there was evidence tending to show that the net profits of such a voyage, at the rates of freight which then prevailed would have been about \$8,000, and that such voyage could have been performed in eight months. There was also some slight evidence to the effect that the same rates of freight continued for about two months after the collision. But no witness testified directly that the *Drumcraig* could have received a charter at such rates at any time after the collision and prior to August 3, 1904, or that there was any demand for vessels of her class in that trade or any other. The court upheld the commissioner in his rejection of the libellant's claim for loss of use of the vessel. In the case of *The North Sea*, 151 Fed. 168, 80 C. C. A. 536, it was held that demurrage could not be recovered for the loss of a vessel damaged in a collision where it appeared that the vessel was one of a fleet employed on the Great Lakes and belonging to the libellant, and cargoes for the other vessels had been refused at such time owing to the lateness of the season.

In the case of *The Transit*, 4 Ben. 138, 24 Fed. Cas. No. 14,138, it was held that the

damages allowed a pilot boat must be for the detention of the vessel alone; that the allowance could include only the value of the use of the pilot boat as a vessel. The court said: "The \$60 allowed would seem, on the evidence, not to have included anything for the worth of the time of the pilots during the determination of the vessel, though it is impossible to tell, from the report, what it includes, as the report simply calls it 'demurrage.' It ought to include only the value of the use of the boat as a vessel—what, without pilots, or crew, or stores being furnished with her, she could have been chartered for to others, to use as a pilot boat. On the evidence and the report, I do not think the \$60 a day is too much. . . . The question is, what their pilot boat was worth, for her time. In the absence of a market for the chartering of pilot boats, the only other resort proper to be had, is to the judgment of persons acquainted with the piloting business, as to the value of the time of the vessel based upon the employment she was in, its character and constancy, and its then recent results in the way of earnings." See to the same effect *The Emilie*, 4 Ben. 235, 8 Fed. Cas. No. 4,451. And in the case of *The Stromless*, 1 Lowell 163, 23 Fed. Cas. No. 13,540, the court said: "The rule is to give demurrage if the vessel has lost employment; and it seems a fair matter of inference that a coasting vessel of this character would obtain freights during the busy season of the year. We have no fixed measure of so much a ton for each day's delay, and I must rely on the evidence in every case, which in this points to forty dollars a day for this schooner." In the case of *The Rhode Island*, Abb. Adm. 100, 6 N. Y. Leg. Obs. 103, 20 Fed. Cas. No. 11,740a, the court holding that the owner of a vessel injured as the result of a collision could recover damages for the loss of the use of the vessel while detained for repairs stated the rule as to the measure of damages as follows: "As it is fitting in admiralty courts that some rule of general application should be observed in awarding discretionary damages, I am induced to think, in the absence of direct evidence of loss, that the value of the vessel should be regarded, and that a reasonable percentage upon that value may be properly taken as a fair measure of loss. The maintenance and wages of the crew being provided for, and no wear or tear that is appreciable being shown, it seems to me that the positive damage sustained by the party consists in being kept out of the use of his capital, the value of the vessel, during her repairs; and a proper percentage on that capital would afford an admissible mode of compensation. In this case I adopt six per cent., the usual rate of interest awarded by this court, and the legal rate in Connecticut,

where the vessel is owned, as a reasonable allowance in that respect." And in the case of *The Mary Steele*, 2 Lowell, 370, 16 Fed. Cas. No. 9,226, it was held that a fishing boat losing a trip as the result of injury to a seine caused by a collision could recover the probable profits of the trip. In a review of the facts the court said: "It is proved that the *Hattie N. Reed* was a market boat, accustomed to make trips which averaged about a week in length, bringing to Boston fresh fish for immediate sale, netting from \$700 to \$1,000 for a trip. She was fitted with ice and various other appliances, and, among others, with this seine, and with hooks and lines. At this time the fish would not bite freely, and must be caught in the net, or not at all. Without the seine the trip was certain to fail, and when it was damaged, the master thought best to carry it to Boston to be repaired. There was some conflict in the evidence as to whether the seine could have been mended at Boothbay. Upon the whole evidence, I think the preponderance is that the work could not be done there to any better advantage, in point of time, than at Boston. Under these circumstances, is the *Mary Steele* bound to pay for a broken voyage, or only for the immediate injury to the seine? It seems a hardship that a damage of \$45 to a net should involve some hundreds of dollars by way of loss of the use of the net. Supposing a boat had been stove, would that carry like consequences, on the ground that the seine could not be set without a boat? And suppose a thole-pin in the boat were broken, is the voyage to be paid for? The answer is, that the injury or destruction of any thing which cannot be replaced, and which entails the loss of the voyage, however insignificant the thing itself may be, will often carry with it damages for the loss which is its necessary consequence. A comparatively small injury might sometimes oblige a considerable deviation and delay, such, for example, as the loss of all the nautical instruments. The damages would not be the mere value of these instruments on shore, if the consequence is a further loss occasioned by the necessity of supplying them."

Effect of Substitution of Another Vessel.

The fact that the owner of the injured vessel substitutes another vessel belonging to him in the service in which the injured vessel was engaged while the latter is being repaired does not affect the right to recover damages for the loss of the use of the injured vessel. *The steamship Mediana* [1900] A. C. (Eng.) 113, 9 Asp. M. C. 41, 69 L. J. P. 35, 82 L. T. N. S. 95, 48 W. R. 398; *The Steamboat Cayuga*, 2 Ben. 125, 5 Fed. Cas. No. 2,535, 7 Blatchf. 385, 5 Fed. Cas. No. 2,537, 14 Wall.

270, 20 U. S. (L. ed.) 828; *The Favorita*, 18 Wall. 598, 21 U. S. (L. ed.) 856, *affirming* 8 Blatchf. 539, 8 Fed. Cas. No. 4,695; *The Emma Kate Ross*, 50 Fed. 845, 3 U. S. App. 171, 2 C. C. A. 55, *modifying* 46 Fed. 872; *Coffin v. The Osceola*, 34 Fed. 921; *New Haven Steam-Boat Co. v. New York*, 36 Fed. 716; *The State of California*, 54 Fed. 404, 4 C. C. A. 393, 7 U. S. App. 652; *The Providence*, 98 Fed. 133, 38 C. C. A. 670. *Compare* *The City of Peking*, 15 App. Cas. (Eng.) 438, 59 L. J. P. C. 88, 63 L. T. N. S. 722, 39 W. R. 177, 6 Asp. M. C. 572. *Compare* *The Wm. M. Hoag*, 101 Fed. 846. Thus in the case of *The Favorita*, supra, the court said that a ferry company could recover demurrage for the loss of the use of a boat during repairs after a collision although the ferry company had suffered nothing by such loss of use as her place had been supplied by a spare boat kept for emergencies which would otherwise have been idle. And in the case of *The State of California*, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393, the court said: "The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner from lack of enterprise of inability failed to have an available substitute for use in such an emergency." But in the case of *The Wm. M. Hoag*, 101 Fed. 846, it was held that damages could not be recovered for loss of use where a vessel was being repaired at her dock when injured and another vessel of the owners had taken her place. The court reviewed the facts as follows: "The damages claimed by the *Lurline* amount to \$1,058.78. This includes \$325 demurrage. But demurrage cannot be allowed. The steamer *Undine* had taken the place of the *Lurline* upon the latter's route prior to the accident, and while the *Lurline* was undergoing repairs. The only effect of the accident, so far as the question of demurrage is concerned, was to continue the *Undine* where she was until the repairs upon the *Lurline* were completed; it being the intention, upon the return of the *Lurline* to her route, to place the *Undine* upon the dock for repairs. So that there was no interruption of the business of the Vancouver Transportation Company, and no appreciable loss from this cause, so far as appears."

Unnecessary Delay in Making Repairs.

The owner of a vessel damaged in a collision can recover compensation for her loss of use for such a period of time only as is necessary to complete the repairs and not for an unnecessary or unusual delay. *The Sunny-side*, 1 Brown Adm. 415, 23 Fed. Cas. No. 13,

621; *The Thomas Kiley*, 3 Ben. 228, 23 Fed. Cas. No. 13,924; *The Joseph Nixon v. The Steam-Tug George Lysle*, 2 Fed. 259; *The Fannie Tuthill*, 17 Fed. 87; *The Mina A. Read*, 30 Fed. 287; *The John H. May*, 53 Fed. 604; *The Sovereign of the Seas*, 139 Fed. 812; *Brady v. The New Philadelphia*, 19 How. Pr. (N. Y.) 315, 3 Fed. Cas. No. 1,797. Compare *H. M. S. London* [1914] P. (Eng.) 72, 83 L. J. P. 74, 12 Asp. M. Cas. 405, 109 L. T. N. S. 960, 30 Times L. Rep. 196. Thus in *Brady v. The New Philadelphia*, supra, it was held that a deduction should be made from the award for fifteen days after the injured barge had been raised during which the owner had notice of the fact and did not begin the work of discharging her cargo preparatory to repairs. So in the case of *The Thomas Kiley*, 3 Ben. 228, 23 Fed. Cas. No. 13,924, the court said: "As to the question of demurrage, I am of the opinion that the libelants are not entitled to recover demurrage for the period of detention caused by the fact that the boat was frozen in at Elizabethport, where she went to repair. The collision occurred in the port of New York, where as the evidence shows the repairs could have been effected promptly, and without any risk of freezing up. It is not shown that the repairs could have been done more cheaply at Elizabethport than in New York, nor does it appear that that was the home port of the vessel, nor is any reason whatever suggested by the evidence for taking the boat to Elizabethport. The taking of the boat, without any sufficient reason, to a port where she was in danger of being frozen up, and where she was, in fact, frozen up immediately upon her arrival, was an error on the part of the master of the canal boat, for the consequences of which he alone is responsible. He cannot charge the respondents with a loss which the exercise of ordinary prudence on his part would have avoided."

But in the case of *The H. M. S. London* [1914] P. (Eng.) 72, 83 L. J. P. 74, 12 Asp. M. Cas. 405, 109 L. T. N. S. 960, 30 Times L. Rep. 196, the question was whether the plaintiffs were entitled, as part of their damages resulting from a collision at sea, to a sum for the detention or loss of the use of their vessel during the portion of the time she was in a dry dock undergoing repairs, when the actual work of repair was suspended by reason of a strike. Holding that damages for loss of the use of the vessel during the period of the strike were properly allowed the court said: "It seems clear that the negligent act of the defendants, which brought about the collision and damaged the plaintiffs' vessel, necessitating her being taken to dry dock to be repaired, was the primary and substantial cause of the damage sustained by the plaintiffs through the loss of her use during the whole time she lay there, un-

available as a trading vessel. Many illustrations occur to the mind of things which might happen to prolong the period of repair, and of consequent nonuse of an innocent vessel damaged in a collision at sea, where it would appear to be quite wrong to exonerate the wrongdoer and impose a pecuniary loss upon the owner of the innocent ship. Suppose, for example, that a great liner were injured in a collision in the Atlantic Ocean, and that no dock was available for her repair before she reached Southampton. She properly, and reasonably, and perhaps inevitably, makes for Southampton. Before she arrives there a strike takes place, and it is impossible for her to be docked; and there is no reasonable probability of the strike coming to an early end. There might be no other dock in this country to accommodate her. She then proceeds, say, to Hamburg, properly and reasonably in the circumstances, in order to be dry-docked there. Before she arrives, difficulties occur there, either through strikes or other causes, which render it impossible for her to enter a dry dock large enough to receive her. She then, properly and reasonably in the circumstances, returns towards Southampton in the expectation of the strike terminating at an early date, and, after, say, some days' delay, is able to enter a dry dock and to be put in train to be repaired. Could it be said that the loss of the use of the vessel in the interval by reason of the stated difficulties should fall upon the innocent owner, and that the wrongdoer responsible for the collision should escape free from all liability for such loss? . . . In my judgment it would be just upon general principles, and also in accordance with the true principle deducible from the authorities, to hold, in cases where a vessel is injured in a collision at sea by the negligence of another vessel, that where it is reasonable to take the damaged vessel to a dock to be repaired, and where the owner of the innocent vessel acts in a reasonable and business-like way in all matters connected with the docking and repairing of the vessel up to the time of the vessel being delivered to him in a state of repair, the owner of the vessel at fault—i. e., the wrongdoer who commits the tort—is liable at law to make good any loss which the owner of the injured ship can show he suffered by being deprived of the use of his ship during the whole period when she was unavailable for use through being under repair."

Computation of Value of Use.

Where a vessel which is injured in a collision is at the time thereof under charter the terms of the charter are usually taken as fixing the value of her use during the time when she is detained by the necessity for re-

pairs. *The Morning Star*, 4 Biss. 62, 17 Fed. Cas. No. 9,817; *The Potomac*, 105 U. S. 630, 26 U. S. (L. ed.) 1194; *Orhanovich v. The Steam-Tug America*, 4 Fed. 337, affirming 8 W. N. C. (Pa.) 328, 20 Fed. Cas. No. 11,619a; *The Silicia v. The Lord Warden*, 30 Fed. 845; *The Armonia*, 81 Fed. 227, 26 C. C. A. 338; *The Columbia*, 109 Fed. 661, 48 C. C. A. 506; *The Glenogle*, 122 Fed. 503; *Christie v. Fane Steamship Co.*, 159 Fed. 648, 86 C. C. A. 516; *The Governor Ames*, 187 Fed. 40, 109 C. C. A. 94. And see the reported case. See also *The Isaac Newton*, 4 Blatchf. 21, 14 Fed. Cas. No. 7,091; *Larrabee v. The Piedmont*, 14 Fed. Cas. No. 8,095; *The Bulgaria*, 83 Fed. 312; *The Providence*, 98 Fed. 133, 38 C. C. A. 670; *Société Des Voiliers Francais v. Oregon R. etc. Co.* 178 Fed. 324. Compare *The Jas. A. Dumont*, 34 Fed. 428; *The Margaret J. Sanford*, 37 Fed. 148; *The Emma Kate Ross*, 50 Fed. 845, 3 U. S. App. 171, 2 C. C. A. 55, modifying 46 Fed. 872.

Where the owner of a vessel damaged in a collision hires another vessel to take her place during the period of detention for repairs he may recover as compensation for the loss of her use the amount expended in hiring a substitute. *The St. John*, 7 Blatchf. 220, 21 Fed. Cas. No. 12,224; *The Emma Kate Ross*, 50 Fed. 845, 2 C. C. A. 55, 3 U. S. App. 171, modifying 46 Fed. 872. See also *The Yorkshireman*, 2 Hag. Adm. (Eng.) 30 note. Compare *The Clarence*, 3 W. Rob. (Eng.) 283; *Brown v. Beatty*, 35 U. C. Q. B. 328.

Where no more direct method of ascertaining the value of the use of a vessel is available the amount of damages recoverable by the owner for the loss of her use is often based on her average or probable net earnings for the period of her detention.

England.—*The Gazelle*, 2 W. Rob. 279; *H. M. S. Inflexible*, *Swabey* 200; *The Steamship Gracie v. The Steamship Argentino*, 14 App. Cas. 519; *The Risoluto*, 8 P. D. 109, 5 Asp. M. C. 93, 52 L. J. Adm. 46, 48 L. T. N. S. 909, 31 W. R. 657.

Canada.—*The Normanton*, 3 Quebec L. Rep. 303.

United States.—*The Cayuga*, 14 Wall. 270, 20 U. S. (L. ed.) 828, affirming 7 Blatchf. 385, 5 Fed. Cas. No. 2,537; *The Potomac*, 630, 26 U. S. (L. ed.) 1194; *The May Flower*, 1 Brown Adm. 376, 16 Fed. Cas. No. 9,345; *The Excelsior*, 17 Fed. 924; *The Belgenland*, 36 Fed. 504; *The State of California*, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393; *The Cayuga*, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188; *The Bulgaria*, 83 Fed. 312; *The Providence*, 98 Fed. 133, 38 C. C. A. 670; *The Itasca*, 117 Fed. 885; *Winslow v. Thompson*, 130 Fed. 1001, affirmed 134 Fed. 546, 67 C. C. A. 470; *U. S. Shipping Co. v. U. S.* 146 Fed. 914; *The Tremont*, 161 Fed. 1, 88 C. C. A. 304; *The Marie Palmer*, 173 Fed. 569;

Société des Voiliers Francais v. Oregon R. etc. Co. 178 Fed. 324; *The Europe*, 190 Fed. 475, 111 C. C. A. 307. Compare *the Sequoia*, 132 Fed. 625.

Illinois.—*Chicago v. Hawgood, etc. Transit Co.* 110 Ill. App. 34.

In the case of *The Cayuga*, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188, the court said: "The actual loss of the use of the barge to the owners was the value to them of the gross earnings she would have made from her voyage if it had not been interrupted, less the expense which they would have incurred in the accomplishment of it; and, as the means existed for a definite estimate, we think there was no error in not resorting to a mere arbitrary standard, and the assignment of error thereon is not sustained." So in the case of *H. M. S. Inflexible*, *Swabey* (Eng.) 200, it was said: "The last head is indemnity for the loss of time during the detention, and this must be estimated upon the principle, as near as may be, of what would certainly or most probably have been obtained if there had been no collision; and as to the time for which such compensation must be made, it ought to be reckoned from the period when the vessel, in the ordinary course, would have been ready for sea if there had been no collision, up to the period when with due diligence the repairs ought to have been completed." In *The State of California* 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393, the court said that the average daily earnings of the vessel for a period extending from six months prior to the end of six months subsequent to the date of the collision, from which the court could as well determine the capacity of the ship and the condition of the trade in which she was then engaged, and make a fair estimate of the value of her use during the time of her detention, as from expert evidence, was a proper basis for computing damages to the vessel for her detention for repairs. See to the same effect *The Bulgaria*, 83 Fed. 312. And in the case of *The Potomac*, 105 U. S. 630, 26 U. S. (L. ed.) 1194, the court said: "In order to make full compensation and indemnity for what has been lost by the collision, restitutio in integrum, the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages and the burden is upon the libellant to prove the extent of the damages actually sus-

tained by him." So in the case of *The Europe*, 190 Fed. 475, 111 C. C. A. 307, it was said: "There was no better method of estimating the loss to her owner by detention for the particular days during which the damages caused by the collision were being repaired than the calculation which the court made, based on proof of daily expenses and estimated average daily earnings for the preceding five years."

In other cases wherein the value of the use of the particular vessel was not fixed definitely by a charter or by the hiring of a substitute vessel, the value of the use has been arrived at by taking evidence of the market value of the use of such a vessel at the time and place in question.

England.—*Mersey Docks, etc. Board v. The Steamship Marpessa* [1907] A. C. 241, 76 L. J. P. 128, 97 L. T. N. S. 1; 10 Asp. M. C. 404, 51 Sol. J. 530, 23 Times L. Rep. 572, *affirming* *The Marpessa* [1906] P. 95, 75 L. J. P. 18, 94 L. T. N. S. 428, 54 W. R. 339, 10 Asp. M. C. 232; *No. 7 Steam Sand Pump Dredger v. The Steamship Greta Holme* [1897] A. C. 596.

Canada.—*Rex v. Keeping* [1874-1884] Newfoundland L. Rep. 516.

United States.—*Williamson v. Barrett*, 13 How. 101, 14 U. S. (L. ed.) 68; *The R. L. Maybey*, 4 Blatchf. 439, 20 Fed. Cas. No. 11, 871; *The Walter W. Pharo*, 1 Lowell 437, 29 Fed. Cas. No. 17,124; *Harris v. The Prometheus*, 11 Fed. Cas. No. 6,127; *Larrabee v. The Piedmont*, 14 Fed. Cas. No. 8,095; *North Shore Staten Island Ferry Co. v. The Hugenots*, 18 Fed. Cas. No. 10,330; *The South America v. Warran*, 22 Fed. Cas. No. 13,180a; *Warner v. The South America*, 29 Fed. Cas. No. 17,190; *The Excelsior*, 17 Fed. 924; *The Jas. A. Dumont*, 30 Fed. 428; *The Margaret J. Sanford*, 37 Fed. 148; *The Lagonda*, 44 Fed. 367; *Brady v. The New Philadelphia*, 19 How. Pr. (N. Y.) 315, 3 Fed. Cas. No. 1,797. See also *The Cambridge*, 2 Lowell 21, 4 Fed. Cas. No. 2,334; *The Hermann*, 4 Blatchf. 441, 12 Fed. Cas. No. 6,408; *The Mayflower*, 1 Brown Adm. 376, 16 Fed. Cas. No. 9,345; *The Transit*, 4 Ben. 138, 24 Fed. Cas. No. 14,138; *The Venus*, 17 Fed. 925. *Compare* *The W. H. Clark*, 5 Biss. 295, 29 Fed. Cas. No. 17,482; *Fisk v. City of New York*, 119 Fed. 256; *The Sequoia*, 132 Fed. 625.

Illinois.—*Chicago v. Hawgood, etc. Transit Co.* 110 Ill. App. 34.

In *Williamson v. Barrett*, 13 How. 101, 14 U. S. (L. ed.) 68, the court said: "The market price, . . . of the hire of the vessel applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made. It can be

ascertained as readily, and with as much precision, as the price of any given commodity in the market; and affords as clear a rule for estimating the damage sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived." See to the same effect *The Hermann*, 4 Blatchf. 441, 12 Fed. Cas. No. 6,408. So in *The Marpessa* [1907] A. C. 241, 76 L. J. P. 128, 97 L. T. N. S. 1, 10 Asp. M. C. 404, 51 Sol. J. 530, 23 Times L. Rep. 572, *affirming* 75 L. J. P. 18 [1906] P. 95, 94 L. T. N. S. 428, 54 W. R. 339, 10 Asp. M. C. 232, wherein it appeared that a sand pump dredger had been run down and disabled for nine days, the court said: "It seems to me that the loss sustained in the present case under the claim of demurrage is the value of the work which would have been done by the dredger during those days had she not been disabled. So many tons of sand would have been removed, which it is the duty and the interest of the plaintiffs to remove, and which by reason of the defendant's negligence were not removed. If the plaintiffs had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and perhaps, not being available at all; for the construction is peculiar. Failing that evidence, the plaintiffs were entitled to put their case in another way. They might say: The cost to us of maintaining and working this dredger, while it is working, amounts to so much more per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation." See to the same effect *No. 7 Steam Sand Pump Dredger v. The Steamship Greta Holme* [1897] A. C. (Eng.) 696. And in *Harris v. The Prometheus*, 11 Fed. Cas. No. 6,127, the court said that the rule in such cases was that the libellant could recover for the use of his vessel during the time necessary to make the repairs; and by the use of the vessel was meant what she would produce for chartering in the business in which she had been usually employed. But in the case of *The W. H. Clark*, 5 Biss. 295, 29 Fed. Cas. No. 17,482, the court said: "The libellant claimed a per diem allowance for the time the boat was undergoing repairs. That seems to have been settled in *Williamson v. Barrett*, 13 How. 101 [14 U. S. (L. ed.) 68], as a proper item of damages in case of collision. But I hardly think it proper to allow the same compensation as when in use, as the wear and tear

when used is something, as well as the ordinary risk of navigation."

In the case of *The Walter W. Pharo*, 1 Lowell 437, 29 Fed. Cas. No. 17,124, it was held that the owner of a yacht could recover damages for loss of use while undergoing repairs at the rate at which he could have hired her out to pleasure parties. The court said: "Here the yacht was not kept for profit and was never let to hire. Still I am of opinion with the libellant that he may have compensation for the loss of her use at the market rate of such craft, because it is no concern of the respondents what use the libellant chooses to put his vessel to. He had a right to change his mind at any moment. It is different from the case of a vessel kept for hire whom no one wishes to hire. Damages must be assessed by market value when that is possible. The evidence tends to show that such boats would let for about eight dollars a day, and I suppose I may assume that this would be only on week days and when the weather is good. How many such days there were during the twenty days of the repairs I cannot tell. I allow eighty dollars for this damage." See to the same effect the *Lagonda*, 44 Fed. 367. *Compare Fisk v. City of New York*, 119 Fed. 256.

MOORE

v.

**AETNA LIFE INSURANCE
COMPANY.**

Oregon Supreme Court—February 16, 1915.

75 Oregon 47; 146 Pac. 151.

**Accident Insurance — "Loss" of Hand
— What Constitutes.**

An accident policy, which binds insurer to pay a specified sum on insured suffering accidental injuries resulting in the "loss of a hand" by removal at or above the wrist, makes insurer liable where insured was accidentally shot in the hand, necessitating amputation of the hand, except a part apparently worthless; the amputation beginning at the wrist.

[See note at end of this case.]

Construction of Policy — Interpretation Favoring Insured.

A policy reasonably susceptible of two interpretations will be construed most favorably for insured.

Appeal from Circuit Court, Multnomah county: CLEETON, Judge.

Action by George C. Moore, plaintiff, against Aetna Life Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Snow & McCamant and *MacCormac Snow* for appellant.

Charles A. Hart and *C. E. McCulloch* for respondent.

[48] **MOBRIDE, J.**—This is an action to recover upon an accident insurance policy. That portion thereof which is material to this case stipulates that the plaintiff shall be entitled to recover \$1,000 if he should suffer accidental injuries resulting in the "loss of a hand by removal at or above the wrist." The plaintiff was accidentally shot in the hand, necessitating the removal of all the bones of the hand at the wrist except the metacarpal bone of the thumb. From the medical testimony, which is meager, and photographs taken about the time of the trial, it appears that the amputation began at the inner side of the left wrist, removing probably a small portion of the ulnar bone, and including in the operation all the metacarpal bones of the four fingers at their articulation with the ulnar, os magnum, [49] and trapezoid, respectively. The os magnum trapezoid and trapezium are clearly left intact, and the bones of the thumb, while possibly injured by the shot, retain their continuity. The thumb itself was not removed, although the ball of that member was partially destroyed and the ligaments so injured that it is stiff and entirely useless. The medical witness stated that in his opinion it would have been better to have removed what remained of the thumb, so that plaintiff could have had an artificial hand. There was enough of the flesh on the hand to cover the bones of the wrist forming what the medical witness termed "a bunch of hardened callous" at the end of the wrist, probably no more than good surgery would require for the protection of the bones of the wrist. The cause was tried without the intervention of a jury, and the court found that the plaintiff had suffered the loss of his hand at the wrist, and rendered judgment in his favor, from which defendant appeals.

1. Defendant's contention is that the loss of a hand by removal at or above the wrist means that the entire hand must be physically separated from the body at or above the wrist; and the logical sequence of this argument is that if any fragment useful or useless is not so removed, the plaintiff has not brought himself within the terms of his policy and cannot recover. The question is one of extreme nicety, and there is a dearth of decisions covering the exact point here involved;

there being no case cited by counsel or discovered by us involving the construction of a policy exactly identical in its terms with the one upon which this action is predicated. Thus in *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 46 N. W. 799, 20 Am. St. Rep. 151, 9 L.R.A. 685, where a policy was issued against [50] the loss of a hand or foot, it was held that the insured, who was shot in the back, the injury completely paralyzing the lower limbs so that both his feet were rendered useless, could recover although there was no physical severance of either foot; the court holding that the phrases covering the loss of a foot should be construed to include the loss of the use of it. There are a number of decisions to the same effect, but in none of these do the words "by removal," which are used in the policy here considered, appear.

We will now consider the cases cited by counsel for defendant where the words "by removal," or their equivalent "by severance," are contained in the policy. The first of these is *Fuller v. Locomotive Engineers' Mut. L. etc. Assoc.* 122 Mich. 548, 81 N. W. 326, 80 Am. St. Rep. 598, 48 L.R.A. 86, where the policy was issued against "injuries which alone shall cause the amputation of a limb (whole hand or foot)." The plaintiff in that case suffered an injury which resulted in an amputation of about one third of the foot, leaving all of the heel, substantially all of the hollow of the foot, and possibly part of the ball of the foot; the policy having been conditioned upon the amputation of "the whole of the foot." The court held that he could not recover even though he claimed in his testimony that the remaining portion of the foot was useless. The opinion contains an interesting *résumé* of the cases bearing upon this subject, and distinguishes between the case then in hand and *Sneck v. Travelers' Ins. Co.* 88 Hun 94, 34 N. Y. S. 545, hereafter to be noticed. Another of the cases is *Chevaliers v. Shearer*, 27 Ohio Cir. Ct. Rep. 509, in which the plaintiff was insured against loss of the hand by amputation. He received an injury whereby he lost the complete use of his hand; but no part of it was amputated, and it was [51] held that the injury was not within the terms of the policy. In *Mady v. Switchmen's Union of North America*, 116 Minn. 147, 133 N. W. 472, the plaintiff was insured against injury occasioned by physical separation of four fingers at or above the third joint. The proof showed that he had lost three fingers by amputation at the third joint, and that the fourth finger was injured so as to impair its usefulness 50 per cent. It was held that this injury was not within the terms of the policy. In *Stoner v. Yeomen of America*, 160 Ill. App. 432, plaintiff was insured against injury by loss of a hand at or above the

wrist. The evidence showed that he had at least half of the hand left. The court held he could not recover, saying:

"He [plaintiff] testified he could use the hand to drive nails, but that he did not have much strength in it; that he had worked at the carpenter's trade earning \$2 a day since the injury. It is clear that plaintiff's hand was badly injured, but he has the use of more than half the hand, so that he has not lost a hand at or above the wrist."

How different from the case at bar, where substantially nothing remains of plaintiff's hand but a worse than useless fragment!

Another case is *Brotherhood of Railroad Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759, where plaintiff in the court below was insured against suffering the "amputation of the entire hand at or above the wrist." One finger was amputated, leaving the rest of the hand, as he claimed, useless. It was held that he could not recover. In this case, like the case of *Fuller v. Locomotive Engineers' Mut. L. etc. Assoc.* 122 Mich. 548, 81 N. W. 326, 80 Am. St. Rep. 598, 48 L.R.A. 86, the court distinguishes the case in hand from *Sneck v. Travelers' [52] Ins. Co.* 88 Hun 94, 34 N. Y. S. 545, much relied on by respondent here, saying:

"The Circuit Court, in its opinion, refers to the case of *Sneck v. Travelers' Ins. Co.* 88 Hun 94, 34 N. Y. S. 545, and holds that the law announced there is applicable. In that case, the policy of insurance provided against loss, by severance, of one entire hand. The insured lost only a portion of his hand; but it appeared that the part remaining was useless, and it was held that plaintiff had lost his 'entire hand,' within the meaning of the policy providing for such loss. In the regulation under consideration here, the word 'loss' is eliminated, and the association limited its liability to cases where an entire hand is actually amputated or severed. If, under the regulation in question, defendant in error is entitled to recover for the loss of the use of his entire hand, which has been severed in part only, then the words 'at or above the wrist joint' would serve no purpose."

The foregoing are the leading cases cited to support defendant's contention. They may be divided into three classes: (a) Where no part of the hand or foot has been severed, but where it has become useless by reason of an injury to some other part of the body, as in the case of the man who was paralyzed by being shot in the back; (b) where some portion of the injured member has been severed, but some useful portion still remains, as in the case of *Mady v. Switchmen's Union of North America*, 116 Minn. 147, 133 N. W. 472, or the case of *Stoner v. Yeomen of America*, 160 Ill. App. 432, where there was a

partial amputation, but enough of the injured member left to enable the injured person to use it imperfectly in his ordinary business; or (c) where there was an injury requiring the amputation of a comparatively small part of the injured member, the larger portion remaining but practically useless. In our opinion the case at bar does not come within any [53] of these classifications, either in letter or spirit, and the plaintiff must be held to be within the true meaning and spirit of the policy.

2. It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured: *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 413, 88 Am. Dec. 337; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L.R.A. 495; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 U. S. (L. ed.) 977, 18 S. Ct. 552; *Sneck v. Travelers' Ins. Co.* 88 Hun 94, 34 N. Y. S. 545. This is but giving effect to the maxim of Lord Bacon quoted in the case of *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 413, 88 Am. Dec. 337, namely:

"All words, . . . whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person."

And it is also observed in the same opinion:

"It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee . . . It is also a familiar rule of law that, if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether the given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

Now, in view of these salutary maxims of the jurists, let us consider the relations of the parties and the object which plaintiff had in view when he took out this policy. He had a good hand against losing the [54] use of which he desired to insure. If he had been told the intent and meaning of the policy was such that if in case of a necessary amputation the surgeon should leave some useless shred of his hand to be a source of annoyance and inconvenience, and thereby his policy would be practically worthless, does any sane person believe for a moment he would have taken out the policy? The substance of what he sought was insurance against the possible loss of his hand as a

useful member of his body. Substantially he has lost his hand by removal at the wrist. In view of all the decisions, it is apparent that the words "by removal at or above the wrist" were introduced as a safeguard against possible fraud and to prevent a recovery in cases where there had been no substantial removal of the injured member; but here the hand, as a hand, is gone. Practically the plaintiff has no hand. What occasioned this practical loss of his hand? The answer must be the gunshot wound, and the consequent removal at the wrist of all that made the member useful. An insurer should not be allowed by the use of obscure phrases and exceptions to defeat the very purpose for which the policy was procured. This rule finds support in *Sneck v. Travelers' Ins. Co.* 88 Hun 94, 34 N. Y. S. 545, which is in many respects similar to the case at bar. The plaintiff was insured against "loss by severance of one entire hand." It appeared from the testimony that 13 of the 27 bones of the hand were gone; that nearly one half of the hand, anatomically speaking, remained, but was useless. The court held that he was entitled to recover, and used this language:

"To require the insured to submit to a strictly literal interpretation of the contract prepared for him by the insurer, without regard to the purpose of the [55] contract or the understanding thereof by the parties, would be to hold that only in case of the severance of the entire hand in a most accurately anatomical or technical sense could the insured recover under this clause of the policy. We do not believe that such a conclusion is required in the present case. The term 'entire hand' is to be taken in its general acceptance and ordinary meaning. In construing this contract the law does not require an injury which comes within a strictly accurate and technical definition of the words employed, but one which reasonably, fairly and practically comes within the meaning of the terms employed in their general and usual meaning and acceptance. In a contract of insurance providing for indemnity for the loss of a limb, the compensation to be paid is not merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that, in the use of the language above referred to, the 'entire hand' as a part of the human structure is considered in connection with the use to which it is adapted, and the injury which the loss of

such use would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations, which influenced the insured to enter into the contract."

This case was afterward affirmed by the court of appeals in a memorandum opinion which does not further discuss the legal points involved. A further case having some features in common with the case at bar is *Garcelon v. Commercial Travelers' Eastern Acc. Assoc.* 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540. Plaintiff was insured against the loss of an arm and suffered [56] an accident necessitating the amputation of his arm below the elbow. There, as here, the defendant contended that the loss of a portion of an arm was not the "loss of an arm" within the meaning of the policy; but the court overruled its contention. In *Fuller v. Locomotive Engineers' Mut. L. etc. Assoc.* 122 Mich. 548, 81 N. W. 326, 48 L.R.A. 86, 80 Am. St. Rep. 598, the court, after citing authorities, remarks:

"The cases establish the proposition that where an insurance policy insures against the loss of a member, or a loss of an entire member, the word 'loss' should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word 'loss' is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, 'loss by severance of feet or hand,' has failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract."

1 Am. & Eng. Enc. of Law (2 ed.) page 301, sums up the authorities as follows:

"It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of these members from the body. But this view has not met with favor from the courts; it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of his feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost [57] as much as though actually severed from the body. Many of the companies have altered their policies so as to read, 'the loss

of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner rather than to the exact physical extent of the injury."

We do not cite these excerpts as being precisely in point in the present case, but rather to indicate the tendency of the courts to adhere to the spirit rather than the strict letter of these contracts; and, construing this policy in accordance with its spirit and substance, we hold that the plaintiff has suffered the loss of his hand by removal at the wrist, and therefore affirm the judgment.

Affirmed.

Moore, C. J., and Benson and Burnett, JJ., concur.

NOTE.

What Constitutes Loss or Severance of Limb or Member within Meaning of Accident Insurance Policy.

Introductory, 1008.

"Loss" of Limb or Member, 1008.

"Severance" of Limb or Member, 1011.

Introductory.

Provision is usually made in an accident insurance policy for the payment of certain specified amounts to the insured for the "loss" of an arm, leg, hand, or other member of the body, as the result of accident. Under such a provision the question naturally arises whether a complete dismemberment is required to authorize a recovery of the prescribed indemnity or whether an injury rendering the member wholly useless is within the terms of the policy. Probably because of the decisions taking the latter view, many more recent policies have substituted for "loss" the term "severance," or "loss by severance," or a similar expression. The present discussion is addressed to the question what injuries to a limb or member fall within any one of these phrases.

"Loss" of Limb or Member.

The "loss" of a limb or member within the meaning of an accident insurance policy may consist in an inability of the injured part to perform its functions as a result of injury, though there is no physical severance. *Supreme Ct. of Honor v. Turner*, 99 Ill. App. 310; *Theorell v. Supreme Ct. of Honor*, 115 Ill. App. 313; *Sisson v. Supreme Ct. of Honor*, 104 Mo. App. 54, 78 S. W. 297; *Gahagan v. Morrissey*, 6 Pa. Dist. 135, 19 Pa. Co. Ct. 238; *Modern Order of Praetorians v. Taylor*, 60 Tex. Civ. App. 217, 127 S. W. 260; *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 46 N. W. 799, 20 Am.

St. Rep. 151, 9 L.R.A. 685; *Lord v. American Mut. Acc. Assoc.* 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L.R.A. 741. And see the reported case. See also *Wiest v. U. S. Health, etc. Co.* 186 Mo. App. 22, 171 S. W. 570; *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, 106 N. W. 168, 121 Am. St. Rep. 782. Compare *Stevens v. People's Mut. Acc. Ins. Assoc.* 150 Pa. St. 132, 24 Atl. 662, 16 L.R.A. 446. Thus in *Gahagan v. Morrisey*, supra, it appeared that an injury had deprived the plaintiff of the use of his left arm. In his contract of insurance was contained the following provision: "Any member in good standing suffering the loss of a hand at or above the wrist joint, or the loss of a foot at or above the ankle joint, or the loss of the sight of both eyes, shall be considered totally disabled, and shall receive the full amount of his benefit policy." His arm was totally disabled beyond all question but nevertheless he was employed in yard service. The court held that the loss of the use of the hand was covered by the policy and allowed a recovery. In *Supreme Ct. of Honor v. Turner*, 99 Ill. App. 310, it appeared that the appellee, accidentally shot himself through the palm of his left hand most seriously crippling it. The section of the by-law of the insurer applicable to the case read as follows: "If a member loses a hand or foot by accident, he shall receive one-fourth of the amount of his certificate of membership in cash and the other three-fourths at his death." He brought suit and recovered judgment for \$500 by virtue of such section. The appellant contended that the judgment should be reversed because the evidence did not show a total and complete loss of the hand and it was insisted that to entitle a member to recover, the loss of use of the hand must be as complete as it would be if the hand had been amputated. Holding that within the meaning of the policy the hand was lost the court said: "We cannot adopt a construction so narrow. To constitute the loss of a hand within the meaning of the certificate of insurance, it is not necessary that the hand be severed from the arm. It is lost if it be so badly injured that it cannot perform the functions intended for it. The testimony shows that a gun load of shot passed through the palm of appellee's hand, coming out at the back of the hand; that the muscles of the thumb were torn away; that the abductor muscles were injured; that the nerves were badly torn; that three fingers were paralyzed and the appellee has no practical use of the hand for laboring purposes." So in *Sisson v. Supreme Ct. of Honor*, 104 Mo. App. 54, 78 S. W. 297, wherein it appeared that under a policy providing for indemnity in case of the loss of hands or feet it was held that where evidence was produced that a hand was so crushed as to

be practically useless although the whole hand was not amputated the question whether a recovery could be had under the policy for the loss of the hand was for the jury. The court said: "We are of the opinion that the phrase, 'should lose a hand,' used in section 1, article 12, of the constitution of the defendant association, in force when plaintiff received his certificate of insurance, was used in its ordinary and popular sense and does not mean that there should be a total destruction of the hand, anatomically speaking, but that the loss of the use of it for the purposes to which a hand is adapted would be a loss of it, within the meaning of section 1, supra, of the laws of the society. The physician who operated on his hand and treated it afterwards testified that it was lost in the sense that it was of no practical use. The evidence of the plaintiff is such as to show that the hand is more a source of inconvenience and annoyance than of utility, and that for the purposes to which a hand is adapted it is practically useless. In the light of this character of evidence, we think the question of whether or not there was a loss of the hand was properly submitted to the jury." In *Lord v. American Mut. Acc. Assoc.* 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L.R.A. 741, the question was whether the tearing off of three fingers and a part of the fourth, cutting the hand, and destroying the joint of the thumb, was the loss of one hand, "causing immediate, continuous, and total disability" of the same, within the meaning of a contract of insurance. The court said: "After careful consideration we are constrained to hold that it was a question of fact for the jury; and the jury have found that such loss of the hand was entire. On the part of the defendant it is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured so as to become useless as a hand, then the defendant became liable for its loss under the contract." In *Theorell v. Supreme Ct. of Honor*, 115 Ill. App. 313, it appeared that the insured fell and injured himself in such a way that his lower limbs were paralyzed. He brought suit claiming the right to recover \$1,000 under a provision of a benefit certificate issued to him by the defendant which provided for indemnity in case of the loss of hands or feet. Reversing an order directing a verdict for the defendant, the court said that while it did not express any opinion as to whether the evidence was sufficient to sustain a verdict, still, in view of the testimony in the case and the interpretation put on the defendant's by-law previously

(Supreme Ct. of Honor v. Turner, 99 Ill. App. 310), that to constitute the loss of a limb it was not necessary that it be severed, the question was for the jury. In Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 46 N. W. 799, 20 Am. St. Rep. 151, 9 L.R.A. 685, it appeared that the plaintiff was shot in the back, and the ball penetrated his spine, producing an immediate and total paralysis of the lower part of his body and entirely destroying the use of both feet. It was held that the company was liable under a policy in which was a provision insuring the plaintiff against the loss of two entire feet. The court said: "To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body." So in *Modern Order of Praetorians v. Taylor*, 60 Tex. Civ. App. 217, 127 S. W. 260, wherein a judgment for the plaintiff was reversed for the reason that the evidence tended to show that the plaintiff might recover, at least in part, the use of his foot, the court said: "What is the meaning of the language of the constitution of the order 'that, if a member should lose a foot or hand by accident while said certificate is in force, he should receive one-fourth of the amount of his benefit in cash?' Does this language mean that a recovery can be had for a temporary loss of a hand or foot, or must loss of the member be permanent? We do not think that this language means that there must be a severance of the foot or hand from the body to entitle one to recover. The language 'loss of a foot' in common parlance means the loss of the use of that member. It does not mean a temporary loss, but a permanent

loss. In our opinion this language of the constitution means a permanent loss of a foot."

But in *Stevens v. People's Mut. Acc. Ins. Assoc.* 150 Pa. St. 132, 24 Atl. 662, 16 L.R.A. 446, it appeared that the insured while driving rapidly over a rough place in a public road, received a wrench or concussion of the spine, which resulted in a few days in the loss of the use of his left leg. This condition continued until he was encased in a plaster jacket which was applied around his body in such a manner as to cause the weight of the body to rest on the hips and thereby relieve the affected parts, the pressure on the spinal column, and consequent soreness and pain. Soon after commencing the use of this contrivance the condition of the plaintiff improved so that he was finally enabled to resume the practice of his profession and to go about visiting his patients riding in his wagon, or on the cars, or walking to some extent. It was held that the defendant company was not liable inasmuch as the insured had the use of his foot by means of the plaster jacket. The court said: "It is only when he removes the mechanical appliance called a plaster jacket that he becomes disabled. In such circumstances we do not see how he can be considered to have suffered the loss of a foot. He has neither lost a foot nor the use of it. He has it and he constantly uses it, and therefore it cannot be said that, because he is deprived of its use, he is entitled to be considered as having lost the foot itself."

In *Stoner v. Yeomen of America*, 160 Ill. App. 432, it appeared that the plaintiff, who was insured in the defendant benefit society, sustained an injury consisting in the loss of the third and little fingers and the forcing into the palm of the hand of the knuckle joint of the middle finger, leaving the thumb uninjured and the first finger stiffened slightly so that it would close only about two-thirds. Reversing a judgment for the plaintiff it was held that the injury was not the loss of a hand at or about the wrist within the provisions of the policy. The court said: "Appellee by his own showing has at least half the hand left. He was asked by his counsel whether or not he could perform the work necessary in his vocation, and his answer was, 'Well, it interferes with anything I want to do.' He testified he could use the hand to drive nails but that he did not have much strength in it; that he had worked at the carpenter's trade earning two dollars a day since the injury. It is clear that plaintiff's hand was badly injured, but he has the use of more than half the hand, so that he has not lost a hand at or above the wrist." Compare *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, 106 N. W. 168, 121 Am. St. Rep. 782.

In *Gentry v. Standard L. etc. Ins. Co.* 6 Ohio Dec. 114, the policy under consideration provided that there must be a loss of "one entire hand and one entire foot, or two entire hands or two entire feet." It was held that, the defendant not being liable unless the insured lost two entire limbs, the plaintiff could not recover for the loss of one hand. The court said: "It may not be morally creditable to so write the policy without a corresponding fixed total loss for a single hand or foot, or eye, but the legal right exists to this contract; and such I find was the contract, and that therefore by the exhibit the plaintiff cannot recover \$3,000 for one hand."

"Severance" of Limb or Member.

There can be no recovery for the severance of a part of the limb or member, or for the complete loss of its use as the result of injury, under an accident insurance policy providing for indemnity only in case of actual "severance." *Fuller v. Locomotive Engineers' Mut. L. etc. Assoc.* 122 Mich. 548, 81 N. W. 326, 80 Am. St. Rep. 598, 48 L.R.A. 86; *Mady v. Switchmen's Union of North America*, 116 Minn. 147, 133 N. W. 472; *Wiest v. U. S. Health, etc. Co.* 186 Mo. App. 22, 171 S. W. 570; *Newman v. Standard Acc. Ins. Co.* 192 Mo. App. 159, 177 S. W. 803; *Brotherhood of Railroad Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759; *Chevaliers v. Shearer*, 27 Ohio Cir. Ct. Rep. 509. Compare *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, 106 N. W. 168, 121 Am. St. Rep. 782. Thus in *Fuller v. Locomotive Engineers' Mut. L. etc. Assoc.* supra, the policy in question provided that an accidental injury must "cause amputation of a limb (whole hand or foot)." The insured lost about one-third of the foot from the toe. The heel, substantially all of the hollow, and part of the ball of the foot, was left. It was held that the company was not liable. The court said: "In the present case the word 'loss' is eliminated, and the insurance is against 'an injury that shall cause the amputation of a limb (whole hand or foot)', or total and permanent loss of eyesight." This language is not ambiguous, and, if the insurance company intended to limit its liability to cases where the entire member was actually amputated, it could not well have chosen more apt and certain language to indicate it, without supplementing it with a negative statement that should exclude recovery for the amputation of less than the entire foot or hand; and it is doubtful if that would not be open to the same construction as the language actually used." In *Brotherhood of Railroad Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759, it appeared that the insured had his entire hand so crushed that it became useless, but only the thumb was amputated.

The policy provided that the insurance would become effective when the insured should "suffer the amputation or severance of an entire hand at or above the wrist joint." It was held that there was no cause of action under the provision. The court said: "According to the averments of the amended petition, defendant in error had his right hand caught between the bumpers of the cars, and it was thereby so crushed, mangled and broken that it became necessary to amputate the thumb thereof, and the hand from above the wrist joint was then so crushed, mangled, broken and severed that during the rest of his life he is permanently disabled from using the hand to perform any manual service whatever. The word 'severed' is used, but it is wholly inconsistent with what follows, for it is stated that during the rest of his life he is permanently disabled from using the hand—the only inference being that the hand is still there, but useless. The association did not insure him against the injury which is described in the amended petition. There is no authority on the part of the court to make a new contract for the parties. It must deal with the contract as it finds it." So in *Wiest v. U. S. Health, etc. Co.* 186 Mo. App. 22, 171 S. W. 570, the policy in question provided that the loss of a hand should mean loss by severance at or above the wrist joint. The insured as a result of an amputation necessitated by an injury lost the thumb and first three fingers of his left hand, together with a large portion of the palm, leaving only the little finger and a part of the palm supporting it, which however were found to be paralyzed permanently and of no use or service to the insured. The court, affirming a nonsuit, held that the defendant had chosen apt language to indicate that it did not agree to indemnify the assured for the loss of a hand, unless that loss should consist in the actual physical severance of the hand at or above the wrist joint. Likewise in *Chevaliers v. Shearer*, 27 Ohio Cir. Ct. Rep. 509, it appeared that the policy in suit provided indemnity in case the insured should "by accident lose one hand by amputation at or above the wrist." As a result of injuries the right arm of the insured was permanently disabled, the full use and service thereof being destroyed, but neither the arm nor the hand was amputated. It was held that the plaintiff was not entitled to a recovery. In *Newman v. Standard Acc. Ins. Co.* 192 Mo. App. 159, 177 S. W. 803, it appeared that the plaintiff was accidentally shot in his left hand, so that it became necessary to amputate the thumb and the next, or index, finger. The policy contained the following provision: "For the loss of thumb and index finger of either hand by severance at or above metacarpophalangeal joints, one-third of the principal sum." Whether the severance, or amputation, by the

surgeon was at the joints named, or below them, was the question in dispute. The facts as to the amputation were stated as follows: "The actual cutting, or severance, was through the bone of the thumb and finger two-eighths and three-eighths of an inch, respectively, below the articulation, or in other words below the point where the ends of the bones in the body of the hand and in the thumb and finger come together. It was far enough below to leave two stubs of the thumb and finger bones plainly to be seen in the X-ray picture taken of his hand, and plainly showing two ends or heads of the bones jointed together, the articulation not disturbed in either the thumb or finger. The evidence also showed that plaintiff could move, or work, these joints. But it was shown by plaintiff that there are structures which enter into the formation of a joint; these being bone, cartilage, ligament, fibro cartilage, and synovial membrane. Some of these extend considerably above and below the point of articulation or contact of the ends of the two thumb bones and the two finger bones; and some of these are at the ends and some compose the covering of these ends of the bones." Reversing a judgment for the plaintiff the court said: "It seems to us that plaintiff confounds the 'structures' below the point of articulation which are necessary to sustain a joint, with the joint itself. This is shown by the first expert witness in his behalf, who stated that: 'A joint consists of the head of the bones entering into that joint, its cartilage, its ligaments, and its synovial membrane.' If the ends of two boards are joined, there is a joint. The boards may be held in place, that is, the joint may be sustained by nailing a board on either side, extending each side of the point of junction, say, for three feet. These side pieces hold the boards together and thereby sustain the joint, but no one would think of calling them the joint itself; and, if a carpenter was ordered to take his knife or saw and sever the boards at the joint, it would not occur to him that he was complying with the order by cutting through the board at a point away from the junction and leaving the end of each board undisturbed. In severing the side boards (and one of the main boards), he would be severing the structure which held the ends of the two main boards in apposition, but he would not disturb the joint. The contract, in using the word 'joint,' fixed a place, a point, of severance; it had no reference to the structures which must exist in order that a joint may be made. We do not mean to hold that for the severance to be 'at the joint,' within the meaning of the policy, it must follow and coincide with the line of articulation, but only that it must be such as destroys the joint as a joint; that is, as an anatomical mechanism. That is to say, the joint must be dis-

membered." So in *Mady v. Switchmen's Union of North America*, 116 Minn. 147, 133 N. W. 472, it appeared that the policy of the defendant company contracted to insure the plaintiff against total disability, which was defined as "suffering by means of a physical separation of the loss of four fingers of one hand at or above the third joint, . . . provided the above amputations occur." The plaintiff lost three fingers by amputation, and the fourth finger, though not amputated, was so badly injured that the loss of its usefulness approximated fifty per cent. Affirming a verdict for the defendant the court said that as the fourth finger was not physically separated, remaining intact as part of the hand, the injury did not come within the language of the provision.

On the other hand in *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, 106 N. W. 168, 121 Am. St. Rep. 782, it appeared that the pertinent provision of the constitution of the insurer was as follows: "Any member in good standing, suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or suffering the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled and shall receive the full amount of his beneficiary certificate, but not otherwise." The plaintiff received a personal injury by cutting his left hand, and as a result of this injury lost his second, third and fourth fingers and about half of the second, third and fourth metacarpal bones, which removed nearly half of the palm of his hand, damaged the first and second joints of the index finger, and caused a running sore on the thumb between the second and third joints, which stiffened and impaired the motion of the thumb and practically destroyed its usefulness. The plaintiff's testimony tended to show that this injury had totally destroyed the usefulness of the hand, as such, while the evidence offered by the defendant tended to show that the remaining thumb and finger on the hand and the partially stiffened wrist joint were of some utility to the plaintiff. The trial court, being of the opinion that, under the quoted provision of the defendant's constitution, the plaintiff was entitled to recover only on proving that the entire hand was severed at or above the wrist joint, directed a verdict for the defendant. The appellate court reversed that judgment and held that the question whether there was a total loss of the use of the plaintiff's hand, at or above the wrist joint, under the evidence contained in the bill of exceptions, was one of fact for the jury. Compare *Stoner v. Yeomen of America*, 160 Ill. App. 432.

In *Sneck v. Travelers' Ins. Co.* 88 Hun 94, 34 N. Y. S. 545, affirmed 156 N. Y. 669, 50 N. E. 1122, reversing 81 Hun 331, 30 N. Y.

S. 881, it appeared that the policy in suit provided indemnity for injuries in case of "loss by severance of one entire hand." About one-half of the hand of the insured was cut off by a planer and testimony was offered to show that the rest of the hand was useless. The court said: "In a contract of insurance providing for indemnity for the loss of a limb, the compensation to be paid is not merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that in the use of the language above referred to the 'entire hand,' as a part of the human structure, is considered in connection with the use to which it is adapted and the injury which the loss of such use would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations which influenced the insured to enter into the contract?"

In *Garcelon v. Commercial Travelers' Eastern Acc. Assoc.* 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540, it appeared that the plaintiff, the holder of a benefit certificate issued by the defendant association entitling him to indemnity, instituted an action to recover for the loss of an arm by amputation four inches below the elbow, as the result of an injury, the word "loss" having been agreed to mean actual amputation. The court said: "We consider the amputation of an arm a little below the elbow to be the loss of an arm in the common acceptance of those words and within their meaning as used in the policy, which specifies merely the 'loss of an arm' without mentioning whether the loss is by amputation below or above the elbow joint."

STATE

v.

CRAFT ET AL.

North Carolina Supreme Court—December 16, 1914.

168 N. Car. 208; 83 S. E. 772.

Monopolies — Combination to Raise Prices — Criminality.

A combination by dealers in a necessary of life to raise, by agreement, the price thereof is indictable at common law.

[See note at end of this case.]

Same.

Where a conspiracy to raise the prices of necessities of life is shown, it is no defense that a person, not one of the conspirators, sold the same commodity at as high a price as the conspirators had agreed on, or that one might think that the price agreed on was reasonable, or that the commodity could not be produced profitably at less than the price agreed on, in view of the conditions under which the conspirators carried on the business. [See note at end of this case.]

Conspiracy — Evidence — Declaration of Cocomspirator.

On a trial for a conspiracy by milk dealers to raise the price, the testimony of a witness that he had heard defendants say, after the agreement to raise the price was signed, that they sold milk thereafter at the higher price agreed on is admissible.

Indictment — Variance Immaterial.

The variance between an indictment alleging that defendants wrongfully agreed to raise the price of milk to 13 cents and the proof that after the agreement they sold milk at 12½ cents is immaterial, for the gist of the offense was the unlawful combination to raise the price, sustained by proof of agreement so to do, and that in consequence thereof defendants did raise the price.

Conclusion of Indictment — Indictment at Common Law Concluding against Statute.

Under Revisal 1905, § 3254, making an indictment sufficient in form where it expresses the charge against defendant in a plain, intelligent, and explicit manner, an indictment otherwise sufficiently good as charging a common-law offense is not invalid because it concludes "against the form of the statute."

Criminal Law — Intent — When Essential.

Under the rule that, when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which makes the offense, the intent of milk dealers entering into an unlawful combination to raise the price is immaterial in determining their guilt of a common-law conspiracy to raise the price.

Trial — Instruction — Directing Conviction — What Constitutes.

Where the undisputed evidence showed that defendants signed an agreement to raise the price of milk, that they controlled 60 per cent of the output necessary in a city, and it was admitted by defendants that, in consequence of the agreement, they raised the price, a charge that on the agreement and the evidence defendants were guilty, and directing the jury to take the case and return a verdict, is not objectionable as directing a verdict, but merely informs the jury that the agreement and the admission made defendants guilty. [See Ann. Cas. 1916A 1252.]

Harmless Error — Statutory Offense Tried as Common-law Crime.

That the trial judge and solicitor considered that an indictment charged a common-law conspiracy is not prejudicial to defendants merely because of the failure of the judge and

solicitor to consider Laws 1913, c. 41, punishing combinations in restraint of trade.

Appeal from Superior Court, New Hanover county: ALLEN, Judge.

Criminal action. Ed. C. Craft et al., convicted of conspiracy and appeal. The facts are stated in the opinion. **AFFIRMED.**

Woodus Kellum and Herbert McClammy for appellants.

Attorney-General Bickett and Assistant Attorney-General Calvert for appellee.

[209] CLARK, C. J.—The indictment charges that Ed. C. Craft and others (naming them), "being dealers and distributors of milk and carrying on and conducting such business severally and independently each from the other, but controlling and handling in the aggregate a large supply of the fresh milk sold for human consumption and used within the city of Wilmington and county of New Hanover, did, on or about 20 October, 1913, within the State and county aforesaid, knowingly, wickedly, and unlawfully conspire, contract, and agree among themselves, and with each other, not to sell fresh milk to consumers at retail for less than a certain price, to wit, the sum of 13 cents per quart, with a view to raise the price of such article of necessity, and by such conspiracy and agreement to unfairly stimulate the market price of such article in which they were dealing, and with a view to lessen and destroy full and free competition in the sale thereof, . . . and in pursuance of the aforesaid conspiracy, understanding, and agreement, did subsequently, to wit, on [210] or about 1 November, 1913 severally increase the price of their milk sold at retail to consumers within the city and county aforesaid from 10 cents per quart to 13 cents per quart."

A verdict of not guilty was entered against one of the defendants, George W. Branch, who then testified for the State that he and the other defendants signed the following paper, which afterwards appeared in the *Morning Star*. The paper which was put in evidence is as follows:

"To the Public: We, the undersigned dairymen of New Hanover County, desire to notify our customers and patrons and the public generally that on and after 1 November, 1913, it will be impossible to furnish milk to our customers for less than 12½ cents per quart for bottle milk at retail, and milk in cans at 40 cents a gallon. We deplore the issuance of this notice more than our customers do to receive it, but on account of the high cost of labor and of the enormous prices of hay and grain making it impossible to sell milk at the present price. We de-

plore the fact that conditions compel us to pursue this course, but we are compelled to issue this notice or get out of business, as we are losing money each day we continue in the same. We desire, however, to state that as soon as labor becomes cheaper and the price of grain and hay is decreased, we will lower the price of milk in proportion. Thanking our customers for past favors and assuring them of our high appreciation of the same, wishing to continue to serve them in the future, we beg to remain, Respectfully."

(Here follow the signatures of Edward C. Craft and the other defendants.)

Branch further testified that prior to that time he had charged 10 cents per quart for milk and afterwards he charged 12½ cents, and that he heard the other defendants say after the paper was signed that they sold milk at 12½ cents.

The defendants are not indicted for raising the price of milk, which each of them had the right to do, if done without agreement and combination with others; nor are they indicted for agreeing to create a monopoly and crush competitors; but they are charged with conspiring and agreeing to raise the price of milk.

Such a combination was indictable at common law. The subject is one of vital interest at the present time, and has thus been discussed by Chief Justice White in *Standard Oil Co. v. U. S.* 221 U. S. 58, Ann. Cas. 1912D 734, 31 S. Ct. 502, 34 L.R.A.(N.S.) 834, where he says for the Court: "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts, or other acts of individuals or corporations, led as [211] a matter of public policy to the prohibition, or treating as illegal, all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." To the same effect is the opinion in *U. S. v. American Tobacco Co.* 221 U. S. 179, 31 S. Ct. 632, 55 U. S. (L. ed.) 691.

The authorities are thus summed up, 27 Cyc. 891: "From the earliest times it was considered a serious matter if several combined to control trade or enhance prices." It is also said, 8 Cyc. 634, citing authorities: "It is an indictable conspiracy at common law for persons dealing in a commodity which is one of the necessities of life to bind themselves under a penalty not to sell such commodity at less than a designated price." To same purport, *Spelling on Trusts*, sec. 52.

Exception 2 was to the exclusion of the question whether a milk dealer, McEachern, not one of the defendants, sold his milk from 12 cents to 15 cents. Exception 3 was to the exclusion of the question how many milk dealers the witness knew in New Hanover County. Exception 4 was to the exclusion of the question whether the witness was capable of forming an opinion satisfactory to himself whether 12½ cents was a reasonable price. Exceptions 5 and 6 are to the exclusion of the inquiry whether there was a dairyman engaged in the business in that county who had land sufficient to make enough food for his cattle to eat.

A conspiracy to raise the prices of the necessities of life being a crime at common law, it could be no defense to show that another person than one of the conspirators sold the same commodity at as high a price as these defendants had agreed upon, or that the witness might think the price agreed on a reasonable one, or that the article could not be produced profitably at less than the price agreed on, in view of the conditions under which the defendants were carrying on their business. The indictment is not for raising the price, but for the combination and agreement to do so.

Exceptions 7 and 8 are to permitting the witness to say that he had heard the defendants say after the agreement was signed that they sold milk thereafter at 12½ cents. This was competent. Besides, the judge [212] states in the case on appeal: "The defendants admitted that in consequence of the said agreement, they raised the price of milk from 10 cents to 12½ cents a quart."

The exception for an alleged variance between the indictment and proof, in that the allegation was that the defendants agreed to raise the price of milk to 13 cents and that the proof showed that they sold at 12½ cents, cannot be sustained. The gist of the charge is the unlawful agreement and combination to raise the price, and the proof is that the defendants did so agree, and in consequence of such agreement did raise the price. Whether the agreement and raise was to 13 cents or to 12½ cents is immaterial. "A variance will not result where the allegations and proof, although variant, are of the same legal

signification." 22 Cyc. 456, citing among others *State v. Brown*, 82 N. C. 585. An immaterial variance in an indictment is not fatal. *State v. Seaboard Air Line R. Co.* 149 N. C. 508, 62 S. E. 1088; *State v. Ridge*, 125 N. C. 655, 34 S. E. 439.

The exception to the conclusion of the indictment, "against the form of the statute," cannot be sustained. In fact, the indictment concludes both "against the form of the statute and also against the peace and dignity of the State." But we have long outgrown such matters as that, and it is held that the conclusion is a mere matter of form and surplusage. *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312. Especially is this so (as is said in *State v. Kirkman*, supra) since the statute, now Revisal, 3254, which makes the bill "sufficient in form, for all intents and purposes, if it expresses the charge against the defendant in a plain, intelligible, and explicit manner," and, if that is done, forbids that the bill should either be "quashed or judgment arrested by reason of any informality or refinement." *State v. Kirkman* has been repeatedly cited since with approval, *State v. Harris*, 106 N. C. 688, 11 S. E. 377; *State v. Arnold*, 107 N. C. 863, 11 S. E. 990; *State v. Peters*, 107 N. C. 882, 12 S. E. 74; *State v. Peeples*, 108 N. C. 768, 13 S. E. 8; *State v. Call*, 121 N. C. 649, 28 S. E. 517; *State v. Hester*, 122 N. C. 1052, 29 S. E. 380.

The evidence was that about 60 per cent of the output of milk for retailing in Wilmington was controlled by the defendants. The court properly refused the motion to nonsuit. The defendants also asked the court to hold that the jury could not convict unless they were satisfied that it was the intention of the defendant to violate the law; but the court held that it was not a question of intent, and that it was not for the jury to consider the question of intent; that the only question to be considered was whether or not the defendants signed the agreement and in consequence of the agreement raised the price of milk. In this there was no error. It has been repeatedly held that when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which makes the offense. *State v. McLean*, 121 N. C. 589, 28 S. E. 140; *State v. Smith*, 93 N. C. 516; *State v. Heaton*, 77 N. C. 505; *State v. Presnell*, 34 N. C. 103.

[213] The court charged the jury: "I have not the making of the law. I can only enforce it. My interpretation of the law is this: The defendants are indicted under the common law—we have no statute that covers it—and at common law a combination of this kind between parties and individuals which has been read to you, and it being admitted in consequence of that agreement the price of

milk was advanced from 10 cents to 12½ cents, I tell you upon the agreement and the admission that the defendants are guilty. You can take the case and return your verdict." The jury retired and afterwards returned a verdict of guilty against each of the defendants. The court imposed a fine of \$10 on each.

The evidence was uncontradicted that the defendants signed the agreement to raise the price of milk; that together they controlled 60 per cent of the output of that necessary article in Wilmington, and it was admitted by them that in consequence of the said agreement they raised the price of milk from 10 cents to 12½ cents per quart. The court did not "direct a verdict" to be entered, but told the jury that such agreement and admission of the defendants would make the defendants guilty. The jury took the case and later returned their verdict in accordance with the opinion of the court upon these facts, which were not controverted. This the court could do (*State v. Riley*, 113 N. C. 648, 18 S. E. 168, where the distinction is pointed out).

In *Swift v. U. S.* 196 U. S. 375, 25 S. Ct. 276, 49 U. S. (L. ed.) 518, which was an action to enjoin violations of the Federal antitrust act with respect to sales of fresh meat, the Court said: "The defendants cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete."

"A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity is in the contemplation of law an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices, whereby it appears that the parties acted under such agreement, an indictment for conspiracy is sustainable." *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 36 Am. St. Rep. 690, 23 L.R.A. 221. That was an indictment against retail coal dealers for entering into an agreement to organize a coal exchange and fix prices, below which no member was permitted to sell.

In *Chicago, etc. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770, it was held: "A combination between independent producers of coal to prevent competition in its sale and to regulate and fix the price at which coal should be sold in the State of Illinois is inimical to trade and commerce, detrimental to the public, and unlawful, and amounts to a common-law conspiracy, regardless of what may be done in furtherance of the conspiracy."

[214] In *Harris v. Com.* 113 Va. 746; Ann. Cas. 1913E 597, 73 S. E. 561, 38 L.R.A.

(N.S.) 458, the Court held the same principle as above, but ruled that insurance not being an article of merchandise, or manufacture, nor one of the necessities of life, nor of prime necessity within the letter or spirit of the law against engrossing, an indictment for a conspiracy to raise insurance rates could not be maintained in the absence of a statute making it a criminal offense. The decision, however, fully recognizes the rule that a combination in restraint of trade in the necessities of life is a conspiracy for an unlawful purpose at common law and punishable as such.

In *Sanford v. People*, 121 Ill. App. 619, it was held that a combination to enable members thereof to dictate prices in a necessary article (in that case the sale of coal to consumers) was in violation of the common law and of the State statute against trusts.

In *State v. Dreany*, 65 Kan. 292, 69 Pac. 182, though the indictment was dismissed on the ground that there was no evidence to show that the defendants had entered into an unlawful agreement to fix prices to be paid for grain in a certain town, it was recognized that this was an offense at common law.

This whole subject has been so fully discussed in the *Standard Oil* and *American Tobacco Company* cases, both in 221 U. S. and above cited, and in other cases before the United States Supreme Court, that it would be useless repetition to go further.

The solicitor stated that he was proceeding at common law, and the judge also told the jury that this was an offense only at common law, and that we have no statute on the subject. Their attention probably was not called to chapter 41, Laws 1913. Section 1 of that chapter provides: "Every contract, combination in the form of trusts or otherwise, or conspiracy in the restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal." This section further makes it indictable. Section 2 provides: "Any act, contract, combination in the form of trusts, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of section 1 of this act." Section 3 makes all such contracts, combinations, and conspiracies unreasonable and illegal.

The defendants, however, cannot take advantage of the fact that the judge and solicitor considered the action of the defendants illegal only from the standpoint of the common law.

Upon consideration of the whole case we find

No error.

NOTE.

The reported case applies the common-law rule whereby a combination in restraint of trade in the necessities of life is an indictable offense. In case of an agreement to raise the price of an article, the fact that the article could not be profitably produced at less than the price agreed on is held to be no defense, inasmuch as the indictment is not for raising the price, but for the combination so to do. And it is pointed out that an intention to violate the law is not essential to the offense, for when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which makes the offense. Further, the court in the reported case calls attention to the North Carolina statute making conspiracies in restraint of trade illegal but holds that the defendant cannot take advantage of the fact that he was tried only under the common law.

Unlawful combinations in restraint of trade are considered from the viewpoint of the common law in the note to *Atty-Gen. v. Adelaide Steamship Co.* Ann. Cas. 1914A 417. The question of a combination in restraint of trade as a criminal conspiracy is discussed in the note to *Harris v. Com.* Ann. Cas. 1913E 597. And the question of the survival of a right of action for a conspiracy to restrain trade is treated in the note to *Frohlich v. Deacon*, Ann. Cas. 1916C 722.

**IN RE BOWMAN.
SECULAR SOCIETY, LIMITED**

v.

BOWMAN.

England—Court of Appeal—July 30, 1915.

[1915] 2 Ch. 447.

Wills — Validity — Gift Subversive of Religion.

A testamentary gift to an incorporated society whose purposes are to promote the principle that human conduct should be guided by natural rather than revealed religion and to secure the elimination of sectarian and ecclesiastical influences in the law is valid.

[See note at end of this case.]

[447] ADJOURNED SUMMONS.

Charles Bowman by his will, dated September 14, 1905, after appointing his widow and George Warren to be executors and trustees thereof, devised and bequeathed all his

real and [448] personal estate not therein otherwise disposed of to his trustees upon trust after the death of his wife for sale and conversion and then subject to the payment of certain legacies to his grandchildren and the provision for certain annuities out of the proceeds of such sale and conversion "upon trust for the Secular Society, Limited, of 2, Newcastle Street, Farringdon Street, London;" and he directed that the receipt of two of the directors of the said society countersigned by the secretary for the time being should be a sufficient discharge to his trustees. By a codicil dated February 28, 1908, he revoked the appointment of George Warren as executor and trustee and appointed C. J. Bowman and A. G. Stanzick to be executors and trustees of his will in the place of the said Warren.

The testator died on April 21, 1908, and his will and codicil were proved on May 19, 1908.

The testator's widow died on October 18, 1914.

The testator's grandchildren having given notice that they intended to dispute the validity of the gift to the Secular Society, Limited, the plaintiff took out an originating summons for the determination of the question whether the said gift was good and valid or not.

The Secular Society, Limited, was a company registered under the Companies Acts, limited by guarantee. Its objects as stated in the memorandum of association were as follows:

"(a) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action. (b) To promote the utmost freedom of inquiry and the publication of its discoveries. (c) To promote the secularisation of the State so that religious tests and observances may be banished from the Legislature, the Executive and the Judiciary. (d) To promote the abolition of all support, patronage or favour by the State of any particular form or forms of religion. (e) To promote universal secular education without any religious teaching in public schools maintained in any way by municipal rates or imperial taxation. (f) To promote an alteration in this laws concerning religion so that all forms of opinion may have the [449] same legal right of propaganda and endowment. (g) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens. (h) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people and the repeal of all Sabbatarian laws de-

vised and operating in the interest of religious sects, religious observances or religious ideas. (j) To employ lecturers, writers, organisers or other servants for the same end. (k) To publish books, pamphlets or periodicals. (l) To assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting any of the above objects. (m) To have, hold, receive and retain any sums of money paid, given, devised or bequeathed by any person and to employ the same for any of the purposes of the society. (n) To co-operate or communicate with any kindred society in any part of the world. (o) To do all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects."

The articles of association provided (inter alia) as follows:—

"Article 54. All monies received on account of entrance fees, subscriptions, donations, bequests, or otherwise shall be applied solely in carrying out the objects of the society, and in payment of just debts and expenses of management.

"55. No portion of the income of the society, from whatever source derived, shall be paid, or transferred directly or indirectly by way of dividend or bonus or otherwise howsoever by way of profit, to the persons who at any time are, or have been, members of the society, or to any of them, provided that nothing herein contained shall prevent the payment of remuneration to any officers or servants of the society, or other person in return for any services actually rendered to the society.

"56. The society shall not be wound up or dissolved except with the consent of at least nine tenths of its members, to be expressed by a resolution at a general meeting specially called for that purpose.

"57. If upon the winding up or dissolution of the society there remains, after the satisfaction of all its debts and liabilities, any property, the same shall not be paid to or distributed amongst [450] the members, but shall be given or transferred to or between such other kindred society or societies, or to or between such other non-sectarian charity as may be designated by the resolution for winding up, or, in the absence of such designation, as the liquidators may select."

Certain documents issued by the officers of the society were tendered in evidence on behalf of the defendants to show that the limited company was a mere screen for the National Secular Society, against the leaders of which numerous prosecutions for blasphemy had in the past been undertaken by the Government of the day. A book issued by the society in which the Bible was held up to ridicule was also tendered. This evidence was, however, rejected by the learned judge.

The adjourned summons was heard by Joyce J. on April 15, 1915.

JOYCE, J.—It will hardly be necessary to say so, but personally I have not the smallest sympathy with the objects of the society which Mr. Tomlin represents on this occasion, still less with the manner in which they have proceeded; but still, this is a case to be decided according to law and according to law only. The testator has given a legacy to a company which is governed by a memorandum and articles of association. In the memorandum and articles it is in effect prescribed how the moneys given to the company are to be expended, and they can be expended for nothing else. It practically comes to this; it is a legacy to the society to be expended upon trust in carrying out the objects if the society according to its prescribed rules. Notwithstanding the argument addressed to me by Mr. Cave, I do not find in this memorandum or in the articles anything subversive of morality or contrary to law or contravening the provisions of any statute. I may be wrong, but that is my opinion.

If that be so, then this legacy is a perfectly good legacy unless [451] it can be made out that having regard to the constitution of this society the rule against perpetuities is infringed by the bequest of this legacy. If the memorandum or articles had prescribed that money received in this way should be invested and kept as capital and only the income applied to the purposes of this society, then one would have been compelled, I think, to have considered the question whether the objects were charitable, because if they were not charitable then a perpetuity would be created by the trust, and that trust would have been bad unless charitable; but I do not find in these articles anything creating a perpetuity with regard to the money coming to the society by legacies or gifts or anything of the kind. The mere fact that on a winding-up the money is not to be divided among the members, if that article be valid, does not create a perpetuity. If it did I am not sure that that article would not have been void, but I do not think it does.

It appears to me that there is nothing to invalidate or take away or destroy the validity of this gift to the society, and I think the gift is good.

From this decision the next of kin and heir-at-law of the testator appealed. The appeal came on for hearing on July 13 1915.

Cave, K. C. and *J. Arthur Price* for appellants.

Tomlin, K. C. and *Hon. M. M. Macnaghten* for respondents.

Solicitors: *Calder Woods & Pettrick; Harper, Battcock & Goode.*

[451] LORD COZENS-HARDY, M.R.—Mr. Charles Bowman by his will left his residuary estate upon trust for the Secular Society,

Limited. Joyce J. has declared that this gift of the residuary estate is valid. From this decision the heir-at-law and next of kin appeal.

These are two points which may at once be got rid of. This is not claimed to be a charity. The plaintiffs assert their right to the residuary estate as their own property. In the next place no question of perpetuity arises, because the plaintiff is a limited company, and, in the view of the law, a person competent to dispose of what is given. But it is argued on behalf of the appellants that the plaintiffs' society is illegal inasmuch as its objects are antagonistic to all religion, and therefore no Court ought to aid it in recovering the legacy. A limited company is bound by its memorandum of association. It cannot go outside its limits. I decline to look at anything but the memorandum, and in particular I have no right to consider whether the chairman or any of the directors of the company may have been guilty of what the law would undoubtedly regard as the publication of blasphemous libels. When I turn to the memorandum I see that it is one of those companies permitted by law, the objects of which are not pecuniary gain. No dividend or income can be received by any member of the company. It is a company limited by guarantee. When I look at the objects for which the company is formed I find that the principle object is: "(a) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief and that human welfare in this world is the proper end of all thought and action." [The Master of the Rolls then referred to the other objects stated in the company's memorandum of association, and continued:] I am not satisfied that any one of these objects is unlawful. Many of these objects are supported by a large section of the [462] community, and I think it would be a retrograde step if we were to hold that there is necessarily any illegality in the company. I say "necessarily" because in my view it is not sufficient to say that the society acting by its directors may use the funds which they receive under this will for a blasphemous purpose, in which case the parties concerned may justly be exposed to an indictment. It is sufficient that they can so apply the money as to be free from any taint of illegality. If, however, any one of the objects in the memorandum were necessarily unlawful, for example for an immoral purpose, I do not think that the addition of other innocent objects would entitle the company to obtain the money, but in my view the facts do not bring the case within that principle. It has, however, been strenuously argued that blasphemy at common law is unlawful, even though it may not be a criminal offense, and there is no doubt a

large body of ancient authority, and some modern authority, in support of this view. In my opinion the better view, and the one which ought to be followed, is that which was expressed by Lord Coleridge in *Reg. v. Ramsay*, 15 Cox C. C. 231, and not that which was expressed by Stephen, J. In substance the view of Lord Coleridge was that publications intended in good faith to propagate opinions on religious subjects which the persons who publish them regard as true are not blasphemy if it is done in a decent way and with regard to the feelings of others. Phillimore J. in a subsequent case has distinctly adopted this view, and I think it ought to be adopted in this Court. This is one of those subjects in which there have undoubtedly been great changes of opinion within the last 100 years, and I think within the last half-century. It is really a question of public policy, which varies from time to time. It is to my mind almost shocking to hold in the twentieth century that the publications of Positivists, and other schools of philosophers, who do not admit, and probably even deny, the existence of a God, are necessarily blasphemous. I think the older view must now be regarded as obsolete, and any decision to that effect ought no longer to be followed. I do not propose to go through the later authorities, which are numerous. I think the law is accurately [463] stated by Erskine J. in advising the House of Lords in *Shore v. Wilson*, 9 Cl. & F. 524, 525, where he says, after referring to various Toleration Acts, "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries." I think it is impossible to contend that the main object of the plaintiffs' society, as described in clause (a), cannot be given effect to without incurring liability to indictment for blasphemy at common law. It is, however, contended that this relaxation of old principles is limited to criminal blasphemy, and that it is sufficient for the present appellants to say that the object, though not illegal, either by statute or common law, is yet unlawful in the sense that the Court will not aid the plaintiffs to get the legacy. It seems to me that the undoubted relaxation of the views as to common-law blasphemy must extend to matters outside the criminal law.

Thus far I have dealt with the case without referring to some comparatively modern authorities which undoubtedly present diffi-

culties. *Briggs v. Hartley*, 14 Jur. 683, 19 L. J. Ch. 416, decided by Shadwell V.-C. in 1850, was simply this: A legacy for the best essay on Natural Theology treated as a science and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion; the Vice-Chancellor said: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and, therefore, it must fail." In my view that is a decision which ought not to be followed.

Cowan v. Milbourn, L. R. 2 Ex ch. 230, is a case which I feel great difficulty in following. The defendant had agreed to let rooms to the plaintiff, who was secretary to the Liverpool Secular Society. The defendant discovered that the rooms were to be used for the [464] purpose of having lectures delivered there in advance of the views of the society. The titles of the proposed lectures were published. The most material ones were: "The Character and Teachings of Christ: the former defective, the latter misleading." "The Bible shown to be no more inspired than any other book." "Catholicism, Protestantism and Secularism: which contains more truth and which is best calculated to benefit humanity." The defendants refused to carry out their contract, and it was held that the plaintiff could not recover on the ground that the lectures announced were blasphemous and illegal. Kelly C. B. based his judgment on the ground that Christianity is part and parcel of the common law of the land, and that therefore to support and maintain propositions indicated in the titles of the proposed lectures was a violation of the first principles of law and could not be done without blasphemy. Bramwell B. said that an act may be illegal in the sense that the law will not aid it, and yet that the law will not immediately punish it. It will be observed that there was nothing to indicate that the proposed lectures would not be delivered in decent and inoffensive language. So far as I am aware this case, which was decided in 1867, has never been followed, and, notwithstanding my profound respect for the learned judges who decided it, I am bound to say that I think it ought not to be followed. If *Cowan v. Milbourn*, L. R. 2 Ex ch. 230, is still good law, the plaintiffs cannot claim the legacy, but as I do not consider it is good law, I think Joyce J. was right in the view which he took and that the appeal must be dismissed.

PICKFORD, L.J.—The testator in this case left his estate, after providing for certain annuities and legacies, in trust for the Secular Society, Limited, and the question is whether that bequest is valid. Two objections were taken to its validity: (1.) that it is a bequest for purposes which are illegal,

or if not illegal in the sense that they are criminal, at any rate contrary to public policy; and (2.) that it tends to a perpetuity.

The Secular Society, Limited, is a company registered under the Companies Acts, limited by guarantee. Its objects are stated in the memorandum of association. That memorandum has [465] already been read, and I do not think it necessary to read it again. The articles contain the following provisions as to application of funds, and dissolution or winding up, in articles 54 to 57. [The Lord Justice read them and continued:] The first question whether this is a bequest for purposes illegal or contrary to public policy depends, in my opinion, upon the question whether the objects of the society as expressed in the memorandum are illegal or contrary to public policy. It was contended on behalf of the heir-at-law and next of kin that the Court ought to look behind the purposes stated in the memorandum, and that in that case it would be found that the society was formed for the purpose of enabling an unregistered body called the Secular Society and its members to hold money bequeathed for their purposes, which it would be difficult for them to hold if bequeathed directly to them. It was also contended that if the actions and the writings of the members of that society were examined it would be found that their purposes included that of subverting the Christian religion, and of doing so by means which are illegal within any interpretation that has been put upon the law of blasphemy. I do not think we are at liberty to go behind the purposes stated in the memorandum. This is a bequest to the limited company and not to its members, and if the objects of the company are legal I do not think a bequest to it is invalid because its members apply the money to an illegal purpose, though they may by doing so subject themselves to punishments. It is therefore necessary only to consider the objects of the company and in substance only (a). I do not see anything illegal or contrary to public policy in the other objects, except so far as some of them may be ancillary to (a). If (a) be not illegal or contrary to public policy, then there is no legal objection to any of the objects. It is contended that a part of the object (a) is the denial and subversion of the Christian religion, and that to pursue that object is illegal in the strict sense of being a punishable offense. I do not think the pursuit of that object by a limited company is within the words of the statute 9 Will. 3, c. 35, which applies only to a certain class of persons, and therefore, if illegal, it must be so at common law.

[466] The law as to blasphemy has changed very much in the course of time, and much religious controversy is now considered per-

fectly unobjectionable which would have been punishable by the law in former years. I adopt the law as laid down by Lord Coleridge, C.J. in *Reg. v. Bradlaugh*, 15 Cox C. C. 217, and *Reg. v. Ramsey*, 15 Cox C.C. 231, and followed by Phillimore J. in *Rex v. Boulter*, 72 J. P. 188; and adopting that interpretation of the law, I consider there is nothing in the objects stated in (a) that is punishable by the law.

A much more difficult question is whether this object, though not illegal in the sense of being punishable, is illegal in the sense that the law will not recognize it as being the foundation of legal right and will do nothing to aid it. The denial of religion is nothing in terms the object of the company as set out in (a), but I think that it is involved in it, and that it is not possible to promote the principle that human conduct should be based upon natural knowledge and that human welfare is the proper end of all thought and action without at any rate inferentially denying the Divine government of the world and the principles of religion. I think there is no doubt that in former times such an object would have been held to be contrary to public policy, but the question is whether it is right to hold so now. I think that the doctrine of public policy cannot be considered as being always the same and that many things would be, and have been, held contrary to public policy which are not so held now. I agree with what was said by Lord Coleridge in *Reg. v. Ramsay*, 15 Cox C. C. 235. It is true that he was speaking only of criminal law in that passage, but I think his words are equally applicable to civil rights. It must not be assumed that the objects of the company will be promoted by what has been called licentious and contumelious abuse applied to sacred things; they may be promoted by discussion of a perfectly orderly and decent character, and that being so, the object does not necessarily involve anything more than such discussion. I think that at the present day such discussion, though it does involve a denial of religion, ought not to be held contrary to public policy, and [467] that the doctrine should be confined to denials of religion of the nature described by Lord Coleridge.

I do not propose to discuss the authorities cited to us at any length, as they are fully dealt with by the other members of the Court, but it is perhaps necessary to mention two of them, i.e., *Briggs v. Hartley*, 14 Jur. 683, 19 L. J. Ch. 416, and *Cowan v. Milbourn*, L. R. 2 Exch. 230. In the former *Shadwell V.-C.* held a bequest for the best essay on Natural Theology treated as a science and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion invalid because inconsistent

with Christianity; and in the latter the Court of Exchequer, Kelly, C. B., Martin, B., and Brawwell, B., held a contract for the letting of rooms for lectures contrary to the Christian religion not binding. The nature of the lectures is only to be gathered from the titles, and the title most referred to is: "The Character and Teachings of Christ: the former defective, the latter misleading." Whatever may have been the doctrine as to public policy prevailing in 1850, when the former case was decided, I do not think that it ought now to be followed. If the latter decision means that no consideration will support a contract which involves any questioning of the truth of religion, I also think that should not be followed, but the Court may have inferred from the title to which I referred that the lectures attacked religion in a reviling and contumelious manner, and if that were the case, the decision was, I think, right.

For these reasons I do not think that the objects of the company were illegal in either of the senses in which that word was used.

On the question of perpetuities I do not think it necessary to add anything to what has been said by the Master of the Rolls.

WARRINGTON, L. J.—Charles Bowman, the testator, by his will, directed that after the death of his wife his trustees should convert into money the whole of his estate, and, after making certain payments out of the proceeds, should stand possessed of the ultimate residue thereof in trust for the Secular Society, [468] Limited. The testator died in 1908 and his wife in 1914. The question was then raised whether or no the gift of the residue was in law capable of taking effect. An originating summons was issued for the purpose of determining this question. Joyce J. has decided in favour of the gift. The heir-at-law and the next of kin of the testator appeal, contending that the gift of the ultimate residue is for an unlawful purpose and therefore void, and that there is consequently an intestacy.

The Secular Society is a company incorporated under the Companies Acts. The memorandum of association states that the objects for which the company is formed are "(a) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action;" and to promote a number of other ends, political and otherwise, and to do a number of other things, which it is unnecessary to specify. The appellants contend that the principle above set forth involves the rejection of all religious sanctions for human conduct and of all religious belief and that to promote such

a principle is to promote atheism and irreligion and is unlawful. They contend further that a gift to or a trust for a company incorporated with such an unlawful object, whether that object be merely one of many or, as they say it is in this case, the main and governing object of the company, the others being merely ancillary thereto, is a gift or a trust for an unlawful purpose and is therefore void. On the construction of this memorandum I think the "objects clause" divides itself into two parts, one being clauses (a) to (h) inclusive, the other being contained in clauses (i) to (o). The real and substantial objects with which the company is incorporated are those expressed in the first part, the matters mentioned in the second part are incidental or ancillary only. The object expressed in clause (a) is one at all events of the real and substantial objects with which the company is formed, and I think we are driven to conclude that money given to the company is given to be used in furtherance of that object which thus becomes the purpose of the gift. So far I agree with the appellants that if the promotion of the [469] principles described in clause (a) is illegal the gift in question is given for an illegal purpose. Further, I think the principle as described in the memorandum does involve the negation of any religious sanction for human action and to this extent may be said to tend to the subversion of a religion as an active force in human life. It is moreover impossible to reconcile such a principle with a belief in the Divine government of the world or in revelation, and it must therefore be taken to involve a denial of the truth of such a belief, and to promote it would be to promote atheism. The question, therefore, comes to this: Is the mere promotion of a principle involving the characteristics above mentioned an illegal act? It would, of course, be illegal if it amounted to an offence of blasphemy at common law. In Halsbury's Laws of England, vol. ix. p. 531, this offence is said to consist in (1.) scoffingly or irreverently ridiculing or impugning the doctrines of the Christian faith, or (2.) uttering or publishing contumelious reproaches of Jesus Christ, or (3.) profane scoffing at the Holy Scriptures or exposing any part thereof to contempt or ridicule; but it is not blasphemy with due gravity and propriety to contend that the Christian religion or any part of its doctrine or the whole or any part of the Holy Scriptures is untrue. The accuracy of this definition has been disputed, and it has been said that any denial of the truth of Christianity in general or of the existence of God, however decent may be the terms of such denial, is by the common law punishable as blasphemy (see Stephen's Digest of Criminal Law, 5th ed. p. 125, and Kelly, C.B. in

Cowan v. Milbourn, L. R. 2 Exch. 230, as to which case I have something to say presently on another point). But in my opinion the weight of authority is strongly in favour of the accuracy of the definition (see per Lord Coleridge in Reg. v. Ramsay, 15 Cox C. C. 231, and per Phillimore J. in Rex v. Boulter, 72 J. P. 188). On this point I desire particularly to refer to the opinion of Erskine, J., advising the House of Lords, in Shore v. Wilson, 9 Cl. & F. 355, 524. He says this: "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would [470] be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it." In my opinion, therefore, the promotion of the principle in question, provided it be done with due gravity and propriety, would not be illegal in the sense of being an offence at common law.

The next question is whether it is made illegal by the statute of 9 Will. 3, c. 35. Under the terms of that statute any person having been educated in or at any time made profession of the Christian religion who by writing, printing, teaching, or advised speaking asserts or maintains that there are more Gods than one, or denies the Christian religion to be true or the Holy Scriptures to be of Divine authority, is guilty of an offence under the Act. That is to say, this statute renders the conduct described an offence only in the case of persons answering a particular description. In my opinion it would not be right to assume that the agents of the company who carry out its objects will be persons answering that description. Unless that assumption is made the object we are considering is not rendered illegal by the statute. I am aware that wherever this statute has been referred to the words limiting its application to a particular class have been ignored, but on the other hand the words are there, and when the statute is relied upon as creating an offence they cannot, in my opinion, be left out. So far as can be now ascertained there has never been a prosecution under it, and its effect has therefore not been directly tested. I think I may safely say that nowadays it would be strictly construed. Next the purpose of the gift is said to be illegal because by the express terms of the statute 29 Car. 2, c. 9, by which the writ de haeretico comburendo was abolished, the jurisdiction of the Ecclesiastical Courts in cases of atheism, blasphemy, heresy or schism, and other damnable doctrines and opinions is preserved, and those Courts may punish the

same by ecclesiastical punishment and censure. In my opinion a gift cannot properly be held invalid on the ground that it is given for a purpose which may be contrary to ecclesiastical law but is not otherwise illegal. Lastly it [471] is said that the purpose of the gift is against public policy and therefore illegal. The doctrine that contracts ought not to be enforced or legal sanction ought not to be given to legacies or trusts otherwise valid and effectual on the ground of public policy ought to be applied with the utmost caution. As to this Lord Bramwell made some pertinent remarks in the case of *Mogul Steamship Co. v. McGregor* [1892] A. C. 25, 45, he says: "Public policy," said Mr. Justice Burrough (I believe quoting Chief Justice Hobart), "is an unruly horse, and dangerous to ride." I quote also another distinguished judge, more modern, Mr. Justice Cave: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences?" In respect of such a matter as the discussion of questions affecting religion the views of men as to what is or is not contrary to public policy vary with the times. It is not so very long ago that the promulgation of the views of Charles Darwin on the "Origin of Species" or those of Robertson Smith on the incorrectness of the attribution of certain books of Scripture to the traditional authors was regarded by many as tending to subvert the foundations of revealed religion, but at the present time most people of education, at all events judging from the experience of the past, would regard temperate and instructed discussion of such subjects as tending rather to strengthen than to weaken the real foundations and at all events would not for a moment think that to allow such discussion is against the public interest. In my opinion, therefore, we ought not to hold the gift in the present case to be invalid on the ground now under consideration, unless we are bound so to do by authority of such a kind that to refuse to follow it would be to alter the law.

[472] The cases as to charities do not seem to me to be in point. It may well be that a trust which could not be supported as a charity because it could not be brought within the spirit and intentment of the Statute of Elizabeth might yet be not illegal if

expressed in such a way as not to infringe the rule against perpetuities. In *De Costa v. De Paz*, 2 Swanst. 487, note, a gift for encouraging the preaching of the Jewish religion was held to be bad, the reason given being that to preach a religion contrary to the Christian religion could not be a good charity. On the other hand, where a gift was capable of being supported as one for the relief of the poor it was held good, though the form of relief given was the supply of the materials necessary for the due performance of the Jewish rites (see *Straus v. Goldsmid*, 8 Sim. 614).

As to the suggested non-existence of copyright in books impugning the veracity of the Scriptures there seems to be no actual decision. In some cases injunctions protecting the copyright have been refused on the ground that until the plaintiff had brought an action and established his copyright the Court of Chancery would not interfere, but in none has there been any detailed examination of the impugned book or any consideration of the mode in which the author's views are presented. It is true that in *Lawrence v. Smith*, Jac. 471, 474, Lord Eldon said that the law does not give protection to those who contradict the Scriptures, but this was a mere dictum, the learned Lord Chancellor refusing the injunction on the ground mentioned above. The appellants in this part of their case relied chiefly on *Cowan v. Milbourn*, L. R. 2 Exch. 230. The question there was whether a man who had let certain rooms for the purpose of lectures and afterwards discovered that the lectures to be delivered were of a blasphemous nature was bound by his contract. The subject of the proposed lectures could only be guessed by their titles. One of them was: "The Character and Teachings of Christ: the former defective, the latter misleading." The Court there held that the proposed lectures, judging from their titles, were blasphemous and the purpose of the letting was unlawful and the contract could not be enforced. I think Kelly, C.B., thought that the [473] delivery of the lectures would amount to the common law offence of blasphemy. He mentions in particular the lecture the title of which is set out above, and he may well have thought that to impugn the character of Christ must necessarily involve that offence even according to the narrow definition: I infer, however, from the words he has used, that he would have hardly accepted that as correct. Bramwell B. founds his statement that the purpose was unlawful on the Act of William III., and also refers particularly to the same lecture. Neither of the judges really dealt with the question whether the lectures, if not infringing a positive ordinance of law, would have rendered the contract incapable of being enforced. It is quite

true that Bramwell B. laid it down that a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it, but accepting this as correct, as I think it clearly is, it still remains to consider whether the particular thing in question is unlawful in the wider sense or not.

In my opinion there is no authority binding us to hold that the promotion in a proper manner of the objects of the company is contrary to public policy, and we ought not to hold it to be so.

I have already said that it is, in my opinion, not unlawful on the other grounds suggested, and the appeal therefore fails.

NOTE.

Validity of Testamentary Disposition Subversive of Religion.

In discussing the validity of a testamentary disposition for a purpose which is deemed to be subversive of religion, this note does not touch on the validity of such a testamentary gift as being to a charitable use. To constitute such a use the gift must fall affirmatively within one of the classes originating in the enumeration in the statute of Elizabeth, and the decision that a gift cannot be so classified in no manner involves the validity of a gift not requiring the aid of the doctrine of charitable uses. See generally 5 R. C. L. tit. *Charities*, p. 322, et seq. See also the notes to the following cases: *Biscoe v. Thweatt*, 4 Ann. Cas. 1136; *Sears v. Atty.-Gen.* 9 Ann. Cas. 1200; *In re Douglass*, Ann. Cas. 1914D 447. In the foregoing notes, in the course of a discussion of the question whether a gift to a church is a valid charity, cases passing on gifts in support of Christian Science, Swedenborgianism and the like are reviewed.

According to the early English cases, any attempt to bring into controversy the truth of any of the doctrines of Christianity constituted the crime of blasphemy. See the note to *Morrison v. State*, Ann. Cas. 1914A 811. As an inevitable result of that holding, any testamentary disposition of property designed to promote a discussion of the truth of those doctrines was in furtherance of a crime, and was void. *Briggs v. Hartley*, 14 Jur. (Eng.) 683, 19 L. J. Ch. 416; *Thornton v. Howe*, 31 Beav. (Eng.) 14. So in *De Costa v. De Paz*, 2 Swanst. (Eng.) 487 note, Amb. 228, a case decided before the disabilities of the Jews were removed by Act of Parliament, it appeared that a Jew by his will ordered that a certain amount of his estate should be appropriated to the establishment of a *Jesiba*, or assembly, for the daily reading of the Jewish holy law. The court held that the bequest was not good in law as it would promote a re-

ligion contrary to the established one. In *Shore v. Wilson*, 9 Cl. & F. (Eng.) 355, a bequest for promoting Unitarianism was held to be void.

But by the modern doctrine both in England and in the United States a mere denial of the truth of Christianity does not constitute an offense. If the decencies of controversy are observed, even the fundamentals of that religion may be attacked without incurring the penalties of blasphemy. See the note to *Morrison v. State*, Ann. Cas. 1914A 811. The modern doctrine is that Christianity is a part of the common law only in the qualified sense that it cannot be openly and maliciously reviled and blasphemed against. See the note to *Clement v. Graham*, Ann. Cas. 1913E 1208, at page 1228. The constitutional provisions securing liberty of conscience and freedom of religious worship were "intended to extend equally to all sects whether they believed in Christianity or not, and whether they were Jews or infidels." *Vidal v. Philadelphia*, 2 How. 127, 11 U. S. (L. ed.) 205.

Basing its decision principally on the changes heretofore discussed in the law of blasphemy the reported case which overrules several earlier cases (some of which are cited *supra*), upholds the validity of a testamentary gift to a society whose object is to "promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief and that human welfare in this world is the proper end of all thought and action."

In the United States the precise question under discussion does not seem to have been passed on. A somewhat analogous question was considered in the case of *In re Bissell*, 63 Neb. 585, 88 N. W. 683, wherein the court sustained a bequest to a "National Christian Association" whose principal activity consisted in opposition to the order of Freemasons. The case is illustrative of the modern policy of permitting free discussion of all sides of questions of a religious or semi-religious nature, since the order which the testator's gift was designed to oppose is not only sanctioned by law but has repeatedly been held to be a charity. See the note to *Morrow v. Smith*, Ann. Cas. 1912A 1183. In the case of *In re Bissell*, *supra*, the court said: "This is a country of free speech and free opinions. One who does not believe in secret societies, who thinks that their tendency is bad, has a right in every legitimate way to oppose their growth, and to seek by all legal means to cause their members to withdraw their membership. He may go out upon the street and preach against their existence, and he may hire others to do the same. No lawyer of standing would, we think, risk his

reputation by urging that Mr. Bissell could avoid payment of any sum he might agree to pay Mr. Phillips, or any other speaker, for delivering a lecture in opposition to secret societies. He would not urge to the court that Mr. Bissell would not be liable for the rent of a hall engaged by him for such a purpose. He would not urge that Mr. Bissell might escape payment of his subscription to the Cynosure upon the ground that it was advocating illegal principles; and, if not, why might not he devote his property at his death for the employment of men to advocate the same principles for which he would be legally liable, had he contracted with them to advocate during his lifetime. Why may he not bequeath his property to the use of any purpose for which he could legally pledge it in his lifetime? Many churches oppose secret societies. Their ministers preach their opposition from the pulpit, and yet no one has advocated that they be suppressed for denouncing legal and legitimate organizations, and no one has yet sought to avoid a subscription to a church upon the ground that it is advocating principles at war with the legally established institutions of the state."

ducing gas company, under which the latter was to furnish gas to the former upon the basis of a percentage of meter readings, which had two or three years to run when the suit was commenced, remained in force, and no evidence was offered to show the rate paid by the distributing to the producing company after the expiration of such contract.

[See note at end of this case.]

Error to Ohio Supreme Court.

Action by City of Newark, plaintiff, against Newark Natural Gas and Fuel Company, defendant. Judgment for plaintiff in Court of Common Pleas, Licking county. Judgment affirmed by Court of Appeals and by Supreme Court of Ohio. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

James R. Fitzgibbon, Eugene Mackey, S. M. Douglass and Charles Montgomery for plaintiff in error.

Frank A. Bolton, Ralph Norpell and Edward Kibler for defendant in error.

[406] PITNEY, J.—The question upon which our jurisdiction is here invoked is whether an ordinance of the City of Newark, Ohio, passed March 6, 1911, fixing the maximum price that plaintiff in error might charge to consumers of natural gas in that city for a period of five years at 20 cents per thousand cubic feet, with 10% discount for prompt payment, a rate described as "18 cents net," is confiscatory, and therefore in violation of the "due process" clause of the Fourteenth Amendment (9 Fed. St. Ann. 416). Plaintiff in error operates under a franchise granted by a city ordinance passed February 21, 1898, for a term of twenty-five years, which permitted a rate of 25 cents per thousand for a period of ten years from its passage, but within that period the company voluntarily introduced a net rate of 18 cents and maintained it for some years prior to the adoption of the ordinance of 1911. The company refused to accept the provisions of the latter ordinance and notified its customers that it would discontinue service unless the rate of 25 cents was paid. Thereupon the city filed a petition in the Court of Common Pleas of Licking County praying a mandatory injunction. The company answered that the ordinance provided no just compensation for the use of its property and therefore deprived it of its constitutional rights. Voluminous evidence was taken upon [407] this issue, and the court found the defense to be unfounded in fact, and made a decree in favor of the city, but without prejudice to the right of the company to apply for a modification "if at any time it should appear that said rate of 18c net does not render an adequate return to said defendant Company." An appeal was

NEWARK NATURAL GAS AND FUEL COMPANY

v.

CITY OF NEWARK.

United States Supreme Court—January 8, 1917.

242 U. S. 405; 37 S. Ct. 156.

Constitutional Law — Who May Assert Invalidity.

A gas-distributing company cannot assert that constitutional rights of a gas-producing and transporting company furnishing gas to the former company upon the basis of a percentage of meter readings will be infringed by a municipal ordinance fixing the gas rates which the distributing company may charge.

[See 19 Ann. Cas. 175; Ann. Cas. 1915C 57.]

Gas — Rate Regulation — Validity.

The property of a gas-distributing company cannot be said to have been taken without due process of law, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 416), by a decree which enforced, without prejudice to the right to apply thereafter for a modification, a municipal ordinance fixing gas rates for five years, where there was no claim that the company could not operate profitably under such ordinance so long as its contract with a pro-

Ann. Cas. 1917B.—65.

taken to the Court of Appeals and there heard upon the evidence taken in the Court of Common Pleas and additional evidence, and the same decree was entered as in the Court of Common Pleas. The Supreme Court of Ohio affirmed the decree. 92 Ohio St. 393, 111 N. E. 150.

The opinions of the state courts show that they gave careful consideration to the questions of the value of the property of plaintiff in error at the time of the inquiry, the total amount of net profits that could be earned under the rate fixed, and whether this would be sufficient to provide a fair return on the value of the property. The concurring judgments were based upon principles thoroughly established by repeated decisions of this court, *Covington, etc. Turnpike Co. v. Sandford*, 164 U. S. 578, 597, 598, 17 S. Ct. 198, 41 U. S. (L. ed.) 560; *San Diego Land, etc. Co. v. National City*, 174 U. S. 739, 754, 19 S. Ct. 804, 43 U. S. (L. ed.) 1154; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 29 S. Ct. 148, 53 U. S. (L. ed.) 371; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 48, 29 S. Ct. 192, 15 Ann. Cas. 1034, 53 U. S. (L. ed.) 382, 48 L.R.A.(N.S.) 1134; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 163, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244; and the finding that there was no confiscation is amply supported by the evidence. The reservation of the right to apply thereafter for a modification was in accord with the action of this court in the *Knoxville* and *Willcox* Cases, 212 U. S. p. 19, 29 S. Ct. 148, 53 U. S. (L. ed.) 382, p. 55, 29 S. Ct. 192, 15 Ann. Cas. 1034, 53 U. S. (L. ed.) 400, 48 L.R.A.(N.S.) 1134.

A distinction is sought to be based upon the fact that two companies are necessarily affected by the rate, a producing and a distributing company; it being contended that the state courts have ignored the cost of production. It appears that after the granting of the franchise of 1898 plaintiff in error, which theretofore had been both a producer and a distributor of gas, sold all of its property to [408] the stockholders of the Logan Natural Gas & Fuel Company, and thereafter confined its activities to distribution, the Logan Company being in control of production and transportation; and that in 1904 the Logan Company entered into a contract with plaintiff in error to furnish the gas needed to supply the city for a term of years, on the basis of a percentage of the aggregate readings of the consumer's meters, in the proportion of 70% of the gross receipts for the Logan Company and 30% for plaintiff in error. At the time the suit was commenced the contract had two or three years to run, while the limiting ordinance was to continue for five years. There is no contention that plaintiff in error could not operate profitably under the ordinance of 1911 so

long as the contract remained in force; but it is said that because of changed conditions including the partial exhaustion of the gas producing field the contract was no longer profitable to the Logan Company under the rate permitted by the ordinance of 1911, the cost of production and transportation of natural gas alone being at that time, as is asserted, as much as the entire amount of the net rate of 18 cents allowed by the ordinance. But plaintiff in error cannot be heard here to assert the constitutional rights of the Logan Company (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 S. Ct. 359, 58 U. S. (L. ed.) 713), and the pertinent question is what plaintiff in error would probably have to pay for gas during the life of the ordinance. The contract measured this so long as it continued in effect. And, although it expired some time before the closing of the evidence in the Court of Appeals, as the Supreme Court pointed out, no evidence was offered to show the rate paid by the Newark Company to the Logan Company after its expiration. The ordinance specified a period of five years, but by the decree this was made subject to the provision giving a right to plaintiff in error to apply for relief if it should appear that the 18 cent rate did not render an adequate return.

[409] Plaintiff in error has failed to show that the ordinance has the effect of depriving it of property without due process of law within the meaning of the Fourteenth Amendment, and the judgment under review is

Affirmed.

NOTE.

State or Municipal Regulation of Gas Rates.

Scope of Note, 1026.

In General, 1027.

Reasonableness of Rate:

In General, 1030.

Computation of Value of Plant:

In General, 1033.

Value of Good Will, 1034.

Going Concern Value, 1034.

Valuation of Working Capital, 1036.

Valuation of Overhead Charges, 1037.

Valuation of Special Franchises, 1037.

Valuation of Depreciation, 1038.

Adequacy of Return on Value of Plant, 1040.

Scope of Note.

The earlier cases passing on the question of state or municipal regulation of gas rates are reviewed in the notes to *Richmond v. Richmond Natural Gas Co.* 11 Ann. Cas. 746;

Willcox v. Consolidated Gas Co. 15 Ann. Cas. 1034; and Cedar Rapids Gas Light Co. v. Cedar Rapids, 138 Am. St. Rep. 299. This note presents the recent cases on the subject.

The validity of an ordinance forbidding a reduction in the rates of a gas company is discussed in the note to Economic Gas Co. v. Los Angeles, Ann. Cas. 1916A 931. The right of a gas company to make a minimum charge per month for service is treated in the note to State v. Water, etc. Co. Ann. Cas. 1914D 452; and the right of a gas company to require the payment of charges in advance, or a deposit as a condition of furnishing service, is discussed in the note to Woodley v. Carolina Telephone, etc. Co. Ann. Cas. 1914D 116.

In General.

The power of a state, acting directly or through a commission to which it has delegated the authority, or of a municipality, in the exercise of the authority given it by the legislature, to regulate reasonably the rates to be charged for gas, has not been questioned in the majority of the recent cases dealing with the state or municipal regulation of gas rates. Lincoln Gas, etc. Co. v. Lincoln, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, *reversing* 182 Fed. 926; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 32 S. Ct. 389, 56 U. S. (L. ed.) 594, *affirming* decree 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299, 48 L.R.A.(N.S.) 1025; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, *modifying* decree 199 Fed. 204; Ft. Smith Light, etc. Co. v. Ft. Smith, 202 Fed. 581; Bonbright v. Geary, 210 Fed. 44; Manufacturers' Light, etc. Co. v. Ott, 215 Fed. 940; Landon v. Public Utilities Commission, 234 Fed. 152; Public Service Gas Co. v. Board of Public Utility Com'rs, 84 N. J. L. 463, 87 Atl. 651, judgment *affirmed* 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which *overruled* on rehearing 87 N. J. L. 581, 92 Atl. 606; Saratoga Springs v. Saratoga Gas, etc. Co. 191 N. Y. 123, 14 Ann. Cas. 606, 83 N. E. 693, 18 L.R.A.(N.S.) 713, *reversing* 122 App. Div. 203, 107 N. Y. S. 341; People v. Willcox, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A.(N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677. And see the reported case, *affirming* 92 Ohio St. 393, 111 N. E. 150. See also Gainesville Gas, etc. Co. v. Gainesville First Nat. Bank, 63 Fla. 425, 58 So. 785; State v. Public Service Commission, 76 Wash. 492, 136 Pac. 850.

In the few cases wherein the power of a state or municipality to regulate the rates to be charged for gas by a gas company has been questioned, it has generally been upheld. Moline v. Moline Drilling, etc. Co. 89 Kan. 670, 131 Pac. 1189; State v. Flannelly, 96

Kan. 372, 152 Pac. 22; State v. Litchfield, 97 Kan. 592, 155 Pac. 814. See also State v. Redding, 84 Kan. 654, 114 Pac. 1094. *Compare* Shawnee Gas, etc. Co. v. Corporation Commission, 35 Okla. 454, 130 Pac. 127; Tacoma Gas, etc. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655. Under the Kansas statute (Laws 1897, c. 82) a city of the third class has authority to pass an ordinance granting to a gas-distributing company the right to furnish gas to the city and its inhabitants, and for that purpose to lay its pipes through the streets and alleys, and also by the same ordinance to fix the maximum rates for the proposed service. Moline v. Moline Drilling, etc. Co. 89 Kan. 670, 131 Pac. 1189. However, the price at which gas shall be furnished cannot be regulated by ordinance under a general power to a municipality to provide reasonable regulations for the supply, distribution, and consumption of gas or light. Tacoma Gas, etc. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655. In Shawnee Gas, etc. Co. v. Corporation Commission, 35 Okla. 454, 130 Pac. 127, it was held that the proviso to section 18 of article 9 of the constitution protecting from impairment municipal powers of regulation inhibited a construction of the section that would confer on the corporation commission authority to fix the rates for a gas company furnishing gas within the limits of a city under franchise from the city without regard to whether the city had authority conferred on it by the statute (Comp. Laws 1909, § 693) to regulate rates and charges therefor.

Under the West Virginia statute (Act Feb. 22, 1913, Laws 1913, c. 9) creating the Public Service Commission and prescribing its powers and duties, it has been held that the commission had authority under the statute to institute of its own motion an investigation into the reasonableness of rates, to find them unreasonable, and to direct a change to rates which it concluded from the investigation to be reasonable. And it was held that the rates for supplying natural gas fixed by the commission for supplying gas to the citizens of West Virginia by a West Virginia corporation were not confiscatory, merely because at the same rates the business of supplying natural gas to customers in other states by the same corporation did not allow a reasonable profit. Manufacturers' Light, etc. Co. v. Ott, 215 Fed. 940.

Under a New York statute (Transportation Corporations Law, Laws 1890, p. 1149, c. 566, § 70) providing that the maximum rate to be charged for gas in cities having a population of eight hundred thousand or over should be \$1.25 per thousand cubic feet, it has been held that whatever price the legislature permitted a gas company to charge must be deemed reasonable, and hence that a charge

of any sum less than the maximum rate must be held to be a reasonable charge. The court also held that when the price of gas was established by law, it was not competent for the person purchasing it to resist payment on the ground that the law permitted the seller to make an unreasonable charge, and hence where the plaintiff gas company furnished and the defendant city received and used the gas at the rate of ninety cents per thousand cubic feet, the latter was prohibited by statute from raising any controversy with respect to the reasonableness of the charge. *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, 117 Am. St. Rep. 868, 15 L.R.A. (N.S.) 763.

The distributing companies of a natural gas company, whose system extends through several states, are to be regarded as the agents of the gas company, and therefore, in the matter of the rates charged for gas, are likewise subject to the control of the state through its public utilities commission. *State v. Flannelly*, 96 Kan. 372, 152 Pac. 22; *State v. Litchfield*, 97 Kan. 592, 155 Pac. 814. In the case last cited the question was whether a gas company, engaged in furnishing natural gas to the inhabitants of a city, obtained partly from its own wells, and partly from another company with which it had entered into a contract for a portion of its supply, and which latter company was engaged in transporting gas through Kansas and into Missouri, was subject to the jurisdiction of the public utilities commission so that the rate to be charged for gas could not be increased without the concurrence and authority of that tribunal. The contention of the Olathe Gas Company was that it had a franchise from the city of Olathe, a city of the second class, which permitted it to charge the thirty-cent rate; that the company was principally engaged in supplying the people of the city of Olathe, since it furnished gas to no one outside of the city except to nineteen farmers residing near its pipe line; and that the public utilities commission had no authority to fix the rate which it should charge. On behalf of the state it was contended that the Olathe Gas Company, under its contract with the Kansas Natural Gas Company in contemplation of which the Olathe franchise was obtained, became the agent of the Kansas Natural Gas Company and was therefore subject to the jurisdiction of the public utilities commission. The court held that the insistence of the Olathe Gas Company that it stood in a different relation because of the peculiar provisions of its contract and under which it sold and distributed more gas than it obtained from the Kansas Natural Gas Company, had no basis, where, in describing the parties to the contract the Kansas Natural Gas Company was designat-

ed as the "gas company" and the Olathe Gas Company as the "agent," and the provisions and recitals of the contract indicated that the relationship, intentionally entered into, was that of principal and agent, and that therefore its rates were subject to the regulation of the public utilities commission.

As the fixing of rates for public service corporations is essentially legislative action, in the absence of a delegation thereof by the legislature, express or necessarily implied, a municipal corporation has no power to regulate or control rates for public service, such as furnishing gas, or the terms and conditions of contracts thereof, otherwise than by contract with the corporation or person rendering such service. So, where a municipality granted by two ordinances franchises to operate plants to furnish natural gas to the town, it was held that a provision in the franchise ordinances fixing the rates to be charged for gas was valid; that they were contracts binding both the town and the grantees, and that, having accepted the grant, the grantees accepted all its terms and could not deny the town's power to fix the rates by contract; also that, in exercising its function under the statute (Code, c. 47) giving a town the power "to erect or authorize or prohibit the erection of gas works," etc., the council might impose conditions and rates in the franchise. *St. Mary's v. Hope Natural Gas Co.* 71 W. Va. 76, 76 S. E. 841, 43 L.R.A. (N.S.) 994.

But a municipality possesses no authority to make a contract limiting its power to fix reasonable rates for gas for the future. *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622, 34 S. Ct. 226, 58 U. S. (L. ed.) 404, *affirming* 88 Kan. 165, 127 Pac. 659; *Ft. Smith Light, etc. Co. v. Ft. Smith*, 202 Fed. 581. Thus, in the case first cited by the statute under consideration (*Laws Kansas 1903*, c. 122, §§ 2, 51, 169, 170) cities of the first class were empowered "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers," to "prescribe and fix maximum rates and charges, and regulate the collection of the same" for gas service, which "rates and charges so prescribed shall at all times be reasonable and just," to "make contracts and grant franchises, etc., concerning heat, light, power," etc., and "at all times during the existence of any such grant, contract or privilege . . . to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat," etc. Under section 170a. the foregoing limitations were made applicable to natural gas. The court said: "Consid-

ering these statutory provisions the court below (88 Kan. 165) decided that they did not authorize the city to divest itself by contract of its duty to see that nothing but reasonable rates were enforced, however much the statute might have as to other subjects conferred upon the city an authority to contract in the complete sense. Looking comprehensively at the provisions in question, in the light of the duty resting on us to which at the outset we referred, not lightly to disregard the construction which the state court of last resort has given to the statutes of the state, we can see no ground for holding that the court erred in its conclusion. Conceding that there are forms of expression used in the statute which taken isolatedly might be considered as having conferred the power to fix a contract rate, such concession is not decisive, since we must consider the statute as a whole. And when we do so, we think, to divorce the expressions referred to from the context would be, not to interpret and apply, but to distort, the statute. Especially is this conclusion necessary when the broad scope of the provisos which we have quoted is taken into view, since they in effect forbid the making of contract rates as to both water and gas by commanding that the governmental power see to it that only reasonable rates are exacted shall be perpetually preserved and exerted. In face of such a plain manifestation of the legislative will, it would be a departure from the obvious intent and purpose of the lawmaker to hold that the statute conferred the power to do that which the text makes it apparent there was a dominant and fixed purpose of the legislature to forbid. This conclusive view also applies to the special provision concerning natural gas. We say this because, as obviously the prior sections of the statute embraced only manufactured gas, the provision as to natural gas was rendered necessary in order to give the same power to deal with that subject as was conferred concerning manufactured gas. In other words, on its face, the purpose of the provision was to bring natural gas within the statute, subject to the regulations and limitations which the statute imposed and it could not therefore have been intended to cause dealings concerning natural gas to be for the purposes of power conferred within the statute and at the same time to exclude the conferred authority from the safeguards and regulations which the statute exacted. The bringing of natural gas within the power therefore caused it to be subject to the limitations which the statute imposed and which as we have seen rendered it impossible to contract away the governmental power to forbid unreasonable and secure reasonable rates."

In *Ft. Smith Light, etc. Co. v. Ft. Smith*, 202 Fed. 581, wherein it appeared that the

plaintiff was selling natural gas under an ordinance providing that the price charged for such gas should not exceed the sum of one dollar per thousand cubic feet, it was contended by the plaintiff that this provision for a maximum rate of one dollar, together with certain other provisions in the ordinance requiring the grantee of the franchise, and his successors, to furnish gas free to certain public buildings, constitute a contract which prevented the city from making a lower maximum than one dollar. However it was held that this contention was not good for three reasons: First, that the city by the ordinance did not undertake to surrender any right or power it had, but on the other hand, the grantee of the franchise in accepting the ordinance undertook to sell natural gas at a price not to exceed one dollar per thousand cubic feet regardless of conditions, that with reference to fixing the price of gas the ordinance was a limitation on the grantee of the franchise, and not upon the city; second, that the law giving municipalities the power to fix rates was in force at the time of the passage of the ordinance; that it therefore became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise; and, third, that the city could not by contract divest itself of the power conferred upon it by the legislature.

In *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 32 S. Ct. 389, 56 U. S. (L. ed.) 594, *affirming* decree 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299, 48 L.R.A. (N. S.) 1025, it appeared that an ordinance under which a gas company was granted a renewal of its franchise provided in part that "in consideration of the privileges herein granted to said company, it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed \$1.80 per thousand feet and 20 cents per thousand cubic feet discount if consumers pay on or before the 10th of each month after consumption," etc. It was admitted that under the laws of Iowa the rate could be changed by the city, but it was argued that the quoted words imported a contract that it should not be changed to such an extent as to make impossible the offer of a discount for prompt payment; that being the cheapest and most efficient way of collecting the price of the gas. The court held that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment, and that the words relied on by the plaintiff expressed its promise in consideration of the privileges granted, not a promise by the city, and that while it was true that the contract was in the form of an ordinance, the ordinance was drawn as a contract to be accepted and it was accepted by the

plaintiff; that it contained reciprocal undertakings, the one in question being that of the plaintiff; and it was subject to the power retained by the city to regulate rates, which power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution or contract. (Code of 1897, § 725, 22 G. A. 1888, c. 16.)

The fact that the rate for gas as fixed by the city conflicts with unexpired contracts between the complaining company and its customers, does not invalidate the ordinance, as a customer cannot take away the power of the city to fix the rates (if it has that power) by making such a contract. *Portland R. etc. Co. v. Portland*, 200 Fed. 890.

The mere fact that gas is being sold in nearby towns in an adjacent state at a less rate does not of itself justify a city council in reducing rates. *Ft. Smith Light, etc. Co. v. Ft. Smith*, 202 Fed. 581.

If, under a statute authorizing the fixing of rates after investigation, the body authorized to act, in fact acts without investigation, its action is void. *Ft. Smith Light, etc. Co. v. Ft. Smith*, 202 Fed. 581, wherein the court said: "The law of this state empowers the city council to make such examination as will be necessary to determine whether or not the prices charged for water, gas, or electricity are reasonable, and, if upon examination the council shall determine that an exorbitant price is being charged, it will be its duty to fix such price to be paid as it may deem to be reasonable. Any person, company, or corporation owning or operating any water, gas, or electric lighting plant in any city or town of the state is required to appear before the city council, or any committee thereof, as often as such city council may deem necessary, and exhibit the books of the water, gas, or electric lighting plant. The law clearly contemplates such an investigation as will enable the council to come to a just conclusion as to a reasonable price to be charged. According to the allegations of the complaint and the evidence, no examination was made of the books of the plaintiff. The value of its plant used in the distribution and sale of gas was not ascertained; the cost of operation was not inquired into; no allowance was made for depreciation. If these allegations are true . . . it was impossible for the council to form a just conclusion as to a reasonable price."

In *Kings County Lighting Co. v. New York*, 162 N. Y. S. 583, it was held that the purpose should not be imputed to the legislature, in passing a statute (Laws 1903, c. 736) fixing seventy-five cents per thousand cubic feet as the price of gas to the city of New York as a consumer, of taking away the plaintiff's right to compensation under a prior contract not yet expired, by which the plaintiff did not

furnish or sell gas, except as incidental to maintaining street lamps with the illumination therefor, when the gas consumed was but one item (and that not a separable one) of the service contracted for; that as the result of an inquiry into the cost of gas production, the legislature had by separate act fixed the price of gas in New York city to the public, with the express proviso that the regulation should not apply to gas furnished or sold to the city of New York (Laws 1906, c. 125), and that the act under construction fixed the price for gas furnished to the city, not in its governmental capacity, but merely as a large consumer, entitled to special terms; in no sense, therefore, was it an exercise of the police power, as it was not for the general public, but for the defendant's relief, standing apart from general local consumers.

In *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 18 Ann. Cas. 332, 90 N. E. 40, 26 L.R.A.(N.S.) 92, it was said obiter that where a gas company and a city had entered into a contract regulating the price of gas for ten years under the statute (Rev. St. 1880, §§ 2478, 2479), the city might regulate the price of gas after the expiration of the ten years term expressed in the contract, if the gas company continued to exercise its franchise in the city, not by virtue of the contract, but by virtue of the statute which empowered the city council to fix the price for a period of ten years. Compare *Granville v. Crawford Natural Gas, etc. Co.* 34 Ohio Cir. Ct. Rep. 256, wherein it was held that a demurrer lay to the petition of a municipality to restrain a gas company, after the expiration of an ordinance fixing the price of gas for ten years, from charging prices in excess of the amounts specified in a new ordinance for the succeeding term of ten years at flat or meter rates, and from refusing to furnish gas other than by meter and at meter rates.

Reasonableness of Rate.

IN GENERAL.

The rule is that the public is entitled to be served with gas at reasonable rates, and that the gas company is entitled to charge a rate sufficiently high to yield it a fair return on its investment on the reasonable value of the property used by it in the public service. *Lincoln Gas, etc. Co. v. Lincoln*, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, reversing 182 Fed. 926; *Bondbright v. Geary*, 210 Fed. 44; *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A.(N.S.) 1, modifying 156 App. Div. 603, 141 N. Y. S. 677; *Newark Natural Gas, etc. Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150, affirmed by the reported case. See also *Portland R. etc. Co. v. Portland*, 200 Fed. 890.

However, in a suit to restrain the enforcement of a city ordinance fixing certain rates to be charged by gas and electric light companies, the court may review the action of the rate-making body only to determine whether, under the rate prescribed and the other rates which the complainant may lawfully charge, it will be unable to realize a fair and just return on the value of its property devoted to the particular public use, and will amount to a taking of its property without just compensation. *Portland R. etc. Co. v. Flannelly*, 200 Fed. 890. See also *State v. Flannelly*, 96 Kan. 372, 152 Pac. 22. But the court has no authority to fix rates, nor should it attempt to assume such a power and set aside rates fixed by a legislative body, because it might, on investigation, come to a different conclusion as to the reasonableness thereof. *Portland R. etc. Co. v. Portland*, 200 Fed. 890; *Pacific Gas, etc. Co. v. San Francisco*, 211 Fed. 202. See also *State v. Flannelly*, 96 Kan. 372, 152 Pac. 22, wherein the court said: "Who has the power to fix the rates at which natural gas shall be sold by the receivers of the Kansas Natural Gas Company, the public utilities commission, or the court appointing the receivers? The legislature has said that the public utilities commission shall fix these rates. The courts have repeatedly declared that the courts cannot fix rates, and that fixing rates is a legislative function. When rates are fixed, the courts can ascertain whether or not they are in violation of law or of some constitutional provision. But courts have not the authority to determine what rates will be reasonable, just, compensatory, or legal, and then put in effect those rates. The commission cannot finally determine what rates will be legal and will not violate constitutional provisions. The commission is the body authorized by law to say in the first instance what rates are legal and will not violate constitutional provisions, but the courts must finally say whether or not the rates fixed are illegal or do violate such provisions. The one function is legislative, while the other is judicial. The commission cannot invade the field occupied by the court; neither can the court invade the field occupied by the commission. The commission must act first, and the courts afterward."

In *Pacific Gas, etc. Co. v. San Francisco*, 211 Fed. 202, an ordinance fixing gas rates for the fiscal year beginning July 1, 1913, was attacked as confiscatory, and a temporary restraining order was granted until the application for an injunction pendente lite could be heard. The defendant subsequently asked that the order should be modified so as to prohibit the complainant, pending the restraint, from collecting rates in excess of those fixed by the board of supervisors for

the previous fiscal year of 1912-1913. The court said: "But obviously the court would not be justified in making such a modification. The ordinance fixing rates for that year has expired by limitation, and those rates, therefore, no longer exist as legal rates. For the court to so modify the order would be tantamount to itself undertaking to fix a rate, a thing which it may not competently do. Moreover, since the rates for that year, or the latter half of it, were substantially the same as the rates fixed by the present ordinance, such a modification would be practically equivalent to determining on this preliminary motion the substantive question involved in the controversy—whether the rates of the present ordinance are such as to furnish adequate compensation for the service. But while the court cannot undertake to do what defendant asks in that regard, it is not without power to protect defendant and its consumers against any effort by complainant to charge a rate palpably and obviously unconscionable, since upon such fact being brought to its attention, it is always within the power of the court to vacate the restraining order and leave the complainant at the mercy of the ordinance sought to be annulled. He who seeks equity must do equity."

Where the rate to be charged for gas is fixed by law, as by statute or by a municipal ordinance, the sufficiency of the price prescribed to produce a fair profit on the value of the property employed in the business is strongly to be presumed. *Lincoln Gas, etc. Co. v. Lincoln*, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, reversing 182 Fed. 926; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, modifying decree 199 Fed. 204; *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, 117 Am. St. Rep. 868, 15 L.R.A. (N.S.) 763. See also *Portland R. etc. Co. v. Portland*, 200 Fed. 890; *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231, 143 N. W. 728. And likewise, where an ordinance, which constitutes a contract between the city and the gas company, authorizes the city council to fix the rates for gas, it will be presumed that the rates so fixed are fair and reasonable until the contrary is shown. *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231, 143 N. W. 728.

The burden of showing that an ordinance fixing the rates to be charged for gas is confiscatory in its character rests, therefore, on the complaining company. *Lincoln Gas, etc. Co. v. Lincoln*, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, reversing 182 Fed. 926; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, modifying decree 199 Fed. 204; *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231, 143 N. W. 728; *Newark Natural Gas, etc. Co.*

v. Newark, 92 Ohio St. 393, 111 N. E. 150, *affirmed* by the reported case. See also Portland R. etc. Co. v. Portland, 200 Fed. 890. In State v. Public Service Commission, 76 Wash. 402, 136 Pac. 850, it was held that, in an inquiry by a public service commission at the instance of a city, as to the reasonableness of a gas company's proposed increase in its minimum monthly charge made to its customers, the burden of proof was not on the company to show the reasonableness of its proposed new rate and that the proposed rate was not so clearly unreasonable and exorbitant that the commission or the courts could judicially know that it was such, nor one which had been established by the commission and which could not, under the statute [Public Service Com. Law, § 84 (Laws 1911, c. 117)] be changed without first obtaining the consent of the commission.

In Public Service Gas Co. v. Board of Public Utility Com'rs, 84 N. J. L. 463, 87 Atl. 651, judgment *affirmed* 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which *overruled* on rehearing 87 N. J. L. 581, 92 Atl. 606, the court said, in holding to be valid an order of the board of public utilities commissioners reducing the rate for gas supplied by a gas plant: "In these cases [when the court is dealing with the validity of the verdict of a jury upon a rule to show cause, or with the determination of commissioners of assessment as to the amount of special benefits, or the determination of the state board of taxation as to the valuation of property] there is a presumption in favor of the action of the inferior tribunal because in each case that tribunal is acting in a judicial capacity and may fairly be supposed to preserve a judicial attitude. The same rule has been sometimes applied in rate cases, but with less reason. The presumption in favor of the acts of a judicial or quasi-judicial tribunal does not apply with the same force to a legislative tribunal, nor to a tribunal which possesses not only to some extent the powers of a court but also to some extent the powers of a public prosecutor. A legislative body prescribing a rule for future conduct is not limited by the same considerations of justice as a tribunal required to do justice in accordance with existing rules; and one in the position of a public prosecutor can hardly be supposed to preserve a judicial frame of mind; he is rather in the position of one who is judge in his own cause. Under the Public Utilities Act, the commissioners are given extensive powers of legislation and are given the power of initiating proceedings themselves. The manner in which these powers shall be exercised involves often a consideration of large questions of public policy or business wisdom. For example, in this very case the commissioners have fixed a rate for the Passaic dis-

trict alone, to the exclusion of all other parts of the state in which the gas company by its charter may operate. Whether it is wise to segregate in this way a thickly settled territory in which gas may be manufactured in large quantity and distributed at comparatively small expense, so as to give the inhabitants of the populous districts the advantage of their density of population, or whether it is wise to determine the rate by a consideration of the facts throughout the territory served as a whole, so that the smaller towns may profit by the economies resulting from business on a large scale, and so that the charge for distribution through miles of pipe where consumers are few may be reduced by entering into an average with the cost of distribution through short lines of pipe where consumers are many, is a question of public or business policy, not a question of law or abstract justice to be tested by fixed rules. In such a case there may perhaps be a fair presumption that the action of the commissioners is dictated by wise policy but hardly that its action is just and reasonable. In addition, disobedience to the order of the commission subjects to a penalty of \$100 per day, and in some cases amounts to a misdemeanor, so that the public service company is entitled to the benefit of the ordinary rules that require penal and criminal statutes to be construed strictly. All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the commissioners, it depends, like the opinion of the court of another state, upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body."

In determining the reasonableness of a rate fixed for gas, as in every other legislative rate case, there are presented three questions of prime importance: First, the present reasonable value of the company's plant engaged in the regulated business; second, what will be the probable effect of the reduced rate on the future net income from the property engaged in serving the public; and third, in ascertaining the probable net income under the reduced rates prescribed, what deduction, if any, should be made from the gross receipts as a fund to preserve the property from future depreciation. Lincoln Gas, etc. Co. v. Lincoln, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, *reversing* 182 Fed. 926.

The inquiry into the reasonableness of a gas rate is also to be aided by another rule, that if the valuation of any one of the necessary elements of the public service plant is fixed by the rate-making authorities at an amount unjustly or unreasonably low in a substantial amount, or if the value of an ele-

ment of substantial value used and useful in maintaining or operating such a plant is entirely omitted by the rate-fixing authority, such unreasonable and unjust valuation or omission of valuation is the taking of private property for a public use without just compensation. *Bonbright v. Geary*, 210 Fed. 44. However, in *Public Service Gas Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 463, 87 Atl. 651, judgment *affirmed* 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which *overruled* on rehearing 87 N. J. L. 581, 92 Atl. 606, the court said: "The commissioners undertook to ascertain the present value of the property. The cities insist that only the cost of reproduction should be allowed. We are met with difficulties and valid objections whether we adopt the standard of actual investment, of cost of reproduction or present value. It would be a waste of time for us to go over this discussion. We think it enough to say that the great weight of authority is in favor of the standard of present value. That standard has the sanction of the United States Supreme Court in cases involving the constitutional rights of the companies and is said by that court to be no longer open to dispute under the Constitution. *San Diego Land, etc. Co. v. Jasper*, 189 U. S. 439, 442, [23 S. Ct. 571, 47 U. S. (L. ed.) 892]. Since all cases of the kind may come before that tribunal for final adjudication, and its decisions upon the constitutional question would be binding upon us, we ought to adopt the same rule. That it is not quite inflexible is shown by what the court has said as to the allowance for the increased value of the land. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 52, 15 Ann. Cas. 1034, 29 S. Ct. 192, 53 U. S. (L. ed.) 382, 48 L.R.A.(N.S.) 1134. No difficulty of that kind is presented in the present case. There is as usual a difference in the valuation of the physical plant by the company and those employed on the part of the commissioners or the cities. The commissioners accepted neither valuation, but adopted a value above the lowest of all and above the assessed valuation, but less than that fixed by the lowest of the company's experts. Their method was not an exact one, but perhaps the result was as good as could be expected from the variance in the testimony. We should have no more confidence in our own result and are not disposed to disturb theirs."

COMPUTATION OF VALUE OF PLANT.

In General.

It has been said that the court, as one means of finding the present value of a gas-making plant, may find the present cost of replacing it, by estimating the cost of repro-

ducing it new and then estimating the depreciation, which should be deducted, and the working capital, which should be added. *Lincoln Gas, etc. Co. v. Lincoln*, 223 U. S. 340, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, *reversing* 182 Fed. 926; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, *modifying* decree 199 Fed. 204; *Bonbright v. Geary*, 210 Fed. 44; *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231, 143 N. W. 728; *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A.(N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677.

The sum that it would cost to take up and replace street pavements which were not laid when the gas mains were put in, should not be considered in ascertaining its present value. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, *modifying* decree 199 Fed. 204; *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A.(N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677. Thus, in the case first cited the court said: "As to the item of \$140,000, which, it is contended, should be added to the valuation, because of the fact that the master valued the property on the basis of the cost of reproduction new, less depreciation, and it would be necessary in such reproduction to take up and replace pavements on streets which were unpaved when the gas mains were laid, in order to replace the mains, we are of opinion that the court below correctly disposed of this question. These pavements were already in place. It may be conceded that they would require removal at the time when it became necessary to reproduce the plant in this respect. The master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements, and that the company had no right of property in the pavements thus dealt with, and that there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because the plant, when put in, would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly theoretical, when no benefit was derived therefrom. We find no error in this disposition of the question."

In *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A.(N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677, the court said: "In determining the cost of reproduction the commission allowed \$12,717 as the cost of restoring the pavement as it existed when the mains and service pipes were laid in the streets. The relator claimed an allowance of at least \$200,000 for the cost of restoring pavements subsequently laid on the theory that that cost would have to be incurred if

the mains were to be laid to-day. But the new pavements in fact added nothing to the property of the relator. Its mains were as servicable and intrinsically as valuable before as after the new pavements were laid. The controlling considerations under the preceding point also determine this. The rights of the public are not to be ignored. The question has a double aspect. What will be fair to the public as well as to the relator? (*Smyth v. Ames* [169 U. S. 466].) Should the public pay more for gas simply because improved pavements have been laid at public expense? It is no answer to say that the new expensive pavements suggest improved conditions which, though adding to the value of the plant, will not, by reason of the greater consumption, add to the expense per thousand feet of the gas consumed. The public are entitled to the benefit of the improved conditions, if thereby the relator is enabled to supply gas at a less rate. The relator is entitled to a fair return on its investment, not on improvements made at public expense. It is said that the mains will have to be relaid. So will the new pavements, and much oftener. Both might possibly be relaid at the same time. The case is not at all parallel to the so-called unearned increment of land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas. The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason. On the one hand it should not be so applied as to deprive the corporation of a fair return at all times on the reasonable, proper and necessary investment made by it to serve the public, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service."

In ascertaining the amount which should constitute a proper return on the value of the property used by a gas company in the public service the commission is not entitled to consider as part of what accrues to the company as gross receipts of its yearly operations the annual appreciation in the value of its land. *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A. (N.S.) 1, *modifying* decree 156 App. Div. 603, 141 N. Y. S. 677.

The reasonable valuation of a contract with the federal government for power received from a plant operated by the reclamation service should be considered, as it is a contract having a substantial value for the company, and its omission in a gas rate-making proceeding is a substantial error. *Bonbright v. Geary*, 210 Fed. 44.

Value of Good Will.

"Good will," in the sense in which that term is generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of the valuation for the purpose of rate-making of public service gas companies. *Des Moines Gas. Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, *modifying* decree 199 Fed. 204.

Going Concern Value.

"Going value," or "going concern value," that is, the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered as a distinct item, to be appraised and included in the base in computing the value of the property on which the owner has a right to make a fair return when it is privately owned, although dedicated to public use. And the rule is that each case must be controlled by its own circumstances. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, *modifying* decree 199 Fed. 204; *Bonbright v. Geary*, 210 Fed. 44; *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A. (N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677. In *Bonbright v. Geary*, *supra*, the court said: "With respect to the item of accrued deficits based upon a reasonable return on the money invested since the organization of the company, estimated by the experts at \$280,000, and for which no allowance was made by the corporation commission, we have not had time to examine the evidence with respect to this item. As has been stated, this is the valuation of a going concern as distinguished from the bare bones of the corporation. The courts recognize a difference between the value of a plant of this character, without customers or business, and a plant that has been fully established and connected up with a municipal lighting system and with the houses, business places, and factories of regular customers. The present corporation was in August of last year a going concern; it was connected up with the municipal lighting system, the houses, business places, factories, and other institutions of a prosperous community, and there was nothing more to do except to deliver the service, for which

the corporation was fully and efficiently equipped. We think this element of valuation should be considered in connection with the other elements of valuation with the view of determining the actual present value of the whole plant."

In *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L.R.A. (N.S.) 1, *modifying* 156 App. Div. 603, 141 N. Y. S. 677, the court said: "The difficulty of determining the 'going value' will not justify the disregarding of it. Rate-making is difficult. But that will not justify confiscation. The difficulty, however, will lessen, as it does in most cases, when we cease to think about the subject vaguely. What then, is 'going value,' and how is it to be appraised? It takes time to put a new enterprise of any magnitude on its feet, after the construction work has been finished. Mistakes of construction have to be corrected. Substitutions have to be made. Economies have to be studied. Experiments have to be made, which sometimes turn out to be useless. An organization has to be perfected. Business has to be solicited and advertised for. In the case of a gas company, gratuitous work has to be done, such as selling appliances at less than a fair profit and demonstrating new devices to induce consumption of gas and to educate the public up to the maximum point of consumption. None of these things is reflected in the value of the physical property, unless, of course, exchange value be taken, which is not admissible in a rate case. The company starts out with the 'bare bones' of the plant, to borrow Mr. Justice Lurton's phrase in the *Omaha v. Omaha Water Co.* [218 U. S. 180, 30 S. Ct. 615, 54 U. S. (L. ed.) 991, 48 L.R.A. (N.S.) 1084]. By the expenditure of time, labor and money, it co-ordinates those bones into an efficient working organism and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property. The investors in a new enterprise have to be satisfied as a rule with meagre or no returns, while the business is being built up. In a business subject only to the natural laws of trade, they expect to make up for the early lean years by large profits later. In a business, classified among public callings, the rate-making power must allow for the losses during the lean years, or their rate will be confiscatory and of course will drive investors from the field. It remains to consider how 'going value' is to be appraised. That presents a question of fact, the determination of which is primarily within the province of the rate-making body. . . . Obviously, the most satisfactory method is to show the actual experience of the company, the original investment, its earnings from the start, the

time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration. The business in this case was twenty years old, the books of the old company were not available, and it is of course problematical whether, if produced, they would have shown the necessary facts. The question, therefore, had to be determined, as all questions of fact have to be, by the best evidence available. Here, I may repeat that mere difficulty in the proof would not justify a confiscatory rate. The value of the physical property was shown by opinion evidence as to the cost of reproduction. The same kind of evidence was given by two witnesses for the relator as to the cost of building up the business to its present state. In the appellants' brief it is said that they were men 'of mature age and much experience.' One witness said that thirty dollars a meter was an arbitrary sum usually adopted by engineers as the cost of building up such a business, and he put the cost in this case at \$600,000. Another witness estimated the 'going value' to be \$781,916. He explained at length how he arrived at that figure. He assumed the existence of two plants, situated exactly alike in the same community and with the same physical property, 1, the actual plant with its established business; 2, a suppositional plant with no business. He then estimated the length of time and expense required by the second plant to develop its business to the stage and revenue of the actual plant. There would appear to be as good ground for admitting the opinion of a qualified expert on such a subject as on the cost to reproduce the physical property. Of course, the commission was not bound by that evidence. It had in addition the experience of the relator and its predecessor as to payment of dividends, the amount of capitalization of both, and the value of the physical property in its present condition determined as above stated. With nothing opposed to those facts and the opinion evidence it was not justified in ignoring the evidence of 'going value' or of merely attaching some inappreciable importance to it."

In *Public Service Gas Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 463, 87 Atl. 651, judgment *affirmed* 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which *overruled* on rehearing 87 N. J. L. 581, 92 Atl. 606, in determining whether a gas rate was a just and reasonable individual rate under the statute

[Public Utilities Act, § 16 (P. L. 1911, p. 377)], the court said: "The controversy turns mainly on the allowance for going value and the refusal to allow anything for the value of the franchise. For going value or cost of developing the business, \$1,025,000 was allowed. The cities claim that no allowance at all should be made and their writ was prosecuted to secure the correction of this alleged error. . . . It is necessary, therefore, to determine first whether any allowance at all for going value is proper. We think both on weight of authority and on reason there should be such an allowance. . . . The cost of a gas plant includes not merely the loss of interest while the plant is in course of construction and is building up a paying business, but even in the case of an old established plant, for the manufacture and distribution of a commodity to the use of which the public has become so accustomed that it seems a necessity, there must be loss while pipe lines are extended to await the coming of consumers as the city extends. There is the cost of securing and retaining customers, of encouraging the greater use of gas for fuel and for light by the introduction of new and approved appliances, the necessary loss attending experiments that promise improvement, the obsolescence of plant apparatus from that ordinary calculable depreciation which may be charged to current expenses instead of being capitalized, the expense that must attend and the additional value that arises from the uniting of separate concerns and the organization of a great industry with a view to economical production, and the cost of procuring capital for the original works or subsequent extensions. What items should be charged to construction; what to business development; how much to current expenses, and how much to permanent investment of capital, are all most important practical business questions. However these questions may be solved, all these expenses must be met. Whether they shall be met at the expense of present consumers by being charged at once to current expenses thus reducing the net return and making necessary a higher rate, or whether they shall be capitalized in whole or in part and constitute a permanent addition to capital, or be capitalized and gradually amortized, are business questions. The legal question is whether these items constitute a going value upon which the company is entitled to a return if the individual rate is to be just and reasonable. To this we answer yes. The argument addressed to us on the other side is that all the so-called going value appears in the valuation of the physical plant at the cost of reproduction; the suggestion is, that unless there was going value, the physical plant would be mere junk, and that the differ-

ence between the valuation of the physical plant at its cost of reproduction and its valuation as junk is the true going value. The argument seems to us specious rather than sound. We think that if by value we mean what the economists call exchange value, then a buyer would undoubtedly give more for a plant already doing a profitable business than for a plant of equal cost, capacity and future possibilities, but without the established business. To a purchaser the assurance of an immediate return is worth paying for, and we see no reason to doubt the correctness of the ruling of the United States Supreme Court in *Omaha v. Omaha Water Co.* [218 U. S. 180, 30 S. Ct. 615, 54 U. S. (L. ed.) 991]. We agree with the view expressed for that court by Mr. Justice Lurton: 'That the difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers.' It is true that that was a condemnation case and not a rate case, and involved therefore a question of exchange value, and not the question of a fair and reasonable valuation as between a public service company and the public. The two bases of valuation may properly be different, since upon a sale or condemnation the probability of an assured income and a continuance of the existing rates enters into and affects the exchange value; while in the case of a valuation for the purpose of fixing a rate, the question is what valuation and rate will tempt the investment of capital, and to what extent existing rates may with justice be lowered. In this view the fallacy of the argument on behalf of the cities is that it requires the investor to suffer all the loss if the enterprise fails and deprives him of the chance of additional gain if the enterprise succeeds; and it fails to allow any recompense for the skill shown in developing and conducting the business, or even for the value of experience, which is proverbially expensive. Even in a business as well established and as necessary as the gas business, there is competition with other methods of obtaining light, heat and power, and there are few of us who have not ourselves had experience of the extension in the use of gas due to the efforts of the company to introduce new appliances. Moreover, we think counsel for the company are right in their contention that the value of an assembled and united plant may be greater than the total value of the separate parts."

Valuation of Working Capital.

In *Bonbright v. Geary*, 210 Fed. 44, in fixing the amount to be allowed for the working capital of a gas plant, the court said: "The experts for the complainant value this item

at \$50,000. The corporation commission valued it at \$23,500. We think the latter sum is too small for the current business of the corporation. The corporation must carry a certain amount of supplies and should pay its bills for repairs and supplies at the end of the week or month as they come due and should not be obliged to await the collection of its revenues from the rates collected by the company from its customers. There is always more or less delay in collecting rates. The company should therefore have constantly on hand what might be termed a revolving fund to pay its own current obligations and keep its credit good and enable it to transact its business promptly and satisfactorily to everybody concerned. We think that a working capital of \$50,000 is a reasonable capital for the corporation in this case and should be allowed as a valuation in its plant."

Valuation of Overhead Charges.

With respect to the valuation of the overhead charges of a gas plant the court in *Bonbright v. Geary*, 210 Fed. 44, said: "This item is not very clearly defined, but appears to include the expenses that would necessarily be incurred in the reproduction of the property. It includes the legal expenses of organization and the expenses for office, engineering, inspection, supervision, and management during the period of construction; it would also include fire and casualty insurance, taxes, and interest during the period, contractors' profits, and other minor expenses of like character. The complainant's experts estimated this valuation at twenty per cent on the physical valuation of the material and cost of construction entering into the plant; the corporation commission has estimated it at twelve per cent of the physical valuation of the materials and cost of construction as they have estimated these elements. Complainant's criticism of this estimate is that it is too low and does not include all the expenses that necessarily enter into the reproduction of such plant. We think this estimate needs further consideration and probable revision in a final valuation of this item."

Valuation of Special Franchises.

In *Public Service Gas Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 463, 87 Atl. 651, judgment affirmed 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which overruled on rehearing 87 N. J. L. 581, 92 Atl. 606, it appeared that in the determination of the question whether the rate for gas fixed by the commissioners was a just and reasonable individual rate under the statute [Public Utilities Act, § 16 (P. L. 1911, p. 377)], the most important controversy in arriving at the present value of the plant in order to

ascertain the reasonableness of the rate therefrom, was with reference to the allowance for the value of the special franchises. The court said: "The question of the propriety of allowing for the value of special franchises is one not yet settled upon authority. That they are property is well settled. . . . Our own taxing laws recognize them as property and tax them accordingly. . . . Such franchises, however, are property of a peculiar kind; the right of property in them is not absolute, but is qualified by the right of the state to fix reasonable rates. . . . Where, . . . the rate is fixed the value of the franchise may be calculated upon the assumption of that rate. But where, as in this case, the rate is not fixed and may be changed, there is no stable basis upon which to calculate the value of the franchise, since that value is dependent upon the rate. The rate must indeed be reasonable, but to assume a value for the franchise in order to determine the reasonableness of the rate is to reason in a circle; the value and the rate are mutually dependent, and one must be fixed independently if it is to form a basis for the calculation of the other. . . . That a special franchise in the absence of an exclusive right is property only in a qualified sense, is the result of the right of the state not only to regulate rates, but also to authorize a municipality to supply itself, and thereby destroy the value of the special franchise. . . . This argument is inapplicable where the public service company has an exclusive right. . . . That is not shown to be the present case. The charter of the Public Service Gas Company (Pamph. L. 1873, p. 1442) does not purport to create an exclusive right. We do not attribute much force to the argument that the special franchises were a gift from the state. Even if that is so as to the franchises under the Oxy-Hydrogen Company charter of 1873, it may not be so as to the special franchises of the constituent companies now merged in the Public Service Gas Company; they seem to have cost something. When it is said that these franchises were a gift, it is probably meant that the public received little or nothing for them except the obligation which the companies assumed—to perform the public duties for which they were chartered. This obligation may or may not have been a fair equivalent. Probably in the early days when the success of the business was doubtful, the bargain was a good one for the public, while in the later days when gas had become a public necessity and the growth of the municipalities to such a point as to make the business a probable success, was assured, the bargain was a good one for the companies. Assuming, however, that the bargain was always a good one for the companies and that the cost

to the companies way always so trifling that the franchises may fairly be regarded in popular language as a gift, it does not follow that the franchise is not a valuable property. The value of property does not depend on the mode by which title is acquired. . . . There is, however, a sense in which the fact that franchises are the subject of gift may be important. The value of a gift to an existing company may be destroyed by a similar gift to a new corporation or other individuals; and it is obvious that in order to determine the wisdom of investing in the enterprise, the newcomers would be under no necessity of seeking a return upon a franchise for which they were to pay nothing. Since it is in the power of the state to bring about a supply without compelling the public to pay on the franchise valuation beyond the actual cost of procuring it, it would be likely to do so, and the effect would be to destroy the value of the special franchise of the existing company. These considerations lead us to the conclusion that logically no allowance should be made for the value of the special franchise in a case where it is not legally exclusive and where the state still retains the right to fix rates. That is the present case. We are, however, referred to *Willcox v. Consolidated Gas Co.* 212 U. S. 19 [15 Ann. Cas. 1034, 29 S. Ct. 192, 53 U. S. (L. ed.) 382, 48 L.R.A. (N.S.) 1134.] The court in that case did approve an allowance for the value of the special franchise, but it was so far from holding that the valuation of the franchise was always to be included in ascertaining the value of the property upon which the company was entitled to a reasonable return, that it disapproved such a valuation made in the court below. What it approved was a valuation made more than twenty years before, and it was careful to say that the allowance rested upon the peculiar facts of that case, and that its decision could form no precedent in regard to the valuation of franchises generally, where the facts were not similar. The prosecutors urge that the present case is similar and ask that the value of the franchise as fixed at the time of the merger in 1899, be included in the present valuation of their property. It is difficult to tell from the opinion in the Consolidated Gas Company case upon what exact ground the allowance was approved. The court refers to the report of a senate committee of investigation soon after the consolidation of the companies, the recognition for twenty years of the agreement as valid, and the fact that the stock had been dealt in for more than twenty years on the basis of the validity of the valuation and of the stock issued by the company. Neither of these considerations, however, justify the conclusion that the rates must continue to be so fixed as to make good for all time that valuation. The report of the

senate committee seems to have been a mere report of the facts after consolidation was accomplished, and the fact that the stock was dealt in upon the basis of the validity of the valuation means no more than that in the general estimation of investors the state was not likely to exercise its power to reduce rates. In fact what the court said on this point was unnecessary to the decision since the result was to sustain the rate fixed by the commission; that is to say, the court held that the rate fixed was sufficient to yield an adequate return even though allowance was made for the valuation put upon the franchise in 1884. In order to make the case an authority for the contention of the present prosecutor, the rate should have been so low that its adequacy would depend upon whether the valuation of the special franchise was included or excluded. In reality the actual decision seems adverse to the present prosecutor; since the court held that the adequacy of the rate was not to be determined by including in the valuation of the company's property the actual present value of the special franchise. The argument of the present prosecutor drawn from the Consolidated Gas Company case is based on a false premise. The facts of the two cases are not similar. The controlling fact in that case was that the companies had earned such enormous dividends that it was fair to assume that they would be able to earn dividends in the future which would justify the capitalization of the franchises at the amount then fixed. The present case differs. The capitalization fixed in 1899 must have been larger than the amount upon which the companies could then expect to earn a normal return; for when the Paterson and Passaic Gas and Electric Company was leased to the Public Service Corporation in 1903, the latter corporation agreed to pay interest on the bonded debt and a dividend on the stock of one and one-half per cent for the first year, increasing one-half per cent a year until the limit of five per cent was reached. The stock for which the holders were willing to accept one and one-half per cent in 1903, and five per cent beginning with 1910 perpetually, could have hardly been worth par in 1899. Nothing is shown to have intervened to reduce its value. We are not called upon to consider the liability of holders of that stock to assessments for unpaid shares. Assuming that the shares must now be regarded as full paid, their par value is no measure of the value of the franchises in 1899, the date of the merger, as it was in the Consolidated Gas Company case."

Valuation of Depreciation.

In computing the present value of a gas plant for rate-making purposes, an estimate

for depreciation is, of course, correct, and the only question is as to the amount which should be allowed. *Bonbright v. Geary*, 210 Fed. 44. In that case the court said: "The corporation commission estimated the value of the various physical units, and then estimated that the plant had depreciated at the rate of seven per cent per annum, which for an average of, say, seven years, would be 49 per cent for the total depreciation upon the whole plant, leaving the present value of the plant only 51 per cent of its original value. The experts for the complainant made an examination of the various units of the physical properties and as far as possible made an actual valuation of each unit, and when that was not possible then an estimated depreciation was made. Turning now to the affidavit of R. S. Masson, an expert engineer, and one of the experts who valued the plant for the company, we find the following uncontradicted statement concerning the plant: 'Condition of Property. The gas and electric plants of Pacific Gas & Electric Company are in good and efficient condition. All parts of the electric generating plant are modern, up-to-date installations, including turbo-generators, water tube boilers, condensers, oil and lamp black burning apparatus, etc. There is an ample water supply obtained from wells. The new gas generating plant is a modern, up-to-date reversible Lowe water gas apparatus. Both plants are housed in brick buildings with steel truss roofs covered with fire-proof material. Neither plant could be improved upon anywhere. The electric distributing system is the most modern type for distribution in cities of this character, and all the lines, transformers, and service equipment are of the latest, most improved type. The gas distributing system includes ample mains well laid, the greater portion of which have been installed during the last three years. This distributing system is in the best possible condition and of the most up-to-date qualifications. The utility equipment of the company is also of the latest design, including automobile trucks and the latest office labor-saving devices.' It would seem that, if the plant is in the condition set forth in this statement, a deduction of 49 per cent from its original value for depreciation, or approximately that percentage, is excessive; but to what extent it is excessive we do not now determine. . . . This brings us to a peculiar feature of this case. There was on hand in the treasury of the company at the time of the valuation of the plant the sum of \$64,292.67, accumulated for the purpose of meeting the expense of current repairs and for replacing such parts of the property as had been worn out and the life of the part ended. The fund had been withheld from the stockholders that it might be used in preserv-

ing the plant in good condition and in proper efficiency. This was good business judgment on the part of the officers of the corporation and must be approved. Public service corporations are to be encouraged in maintaining their plants in a proper state of efficiency. We are of the opinion that the corporation commission was in error in its estimate of depreciation of this plant, and particularly was in error in omitting this reserve fund from its valuation of the plant."

In *Newark Natural Gas, etc. Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150, affirmed by the reported case, it was held that the evidence showed that a deduction of five per cent a year on the reasonable present value of the property would be a fair estimate for the depreciation of the plant.

In *Landon v. Public Utilities Commission*, 234 Fed. 152, it appeared that the commission, in fixing the net rates for the sales by the receiver of a natural gas company, which was directly and indirectly the owner of the pipe line extending from gas fields in the state of Oklahoma to thirty-seven cities in Kansas and eight cities in Missouri, and which was conducting natural gas from Oklahoma to these cities and their inhabitants, where it was distributed under contracts between the natural gas company and other corporations, to the public of the state, allowed one-twelfth of the present value of the company for future depreciation of its property, on the basis that the life of the company as a going concern would be twelve years. The court held that, in view of evidence of the exhaustion of the natural gas fields, of the increase in the cost of gas, and of the cost of adequate extensions to the company's pipe lines to secure an additional gas supply, which evidence was not considered by the commission, and also the fact that the probable life of the company was conceded to be temporary, inasmuch as the exhaustion of the gas fields which it could reach with permissible extensions must inevitably come, the evidence was convincing that the life of the company would not exceed six years, and that one-twelfth more each year during the six years should have been allowed by the commission for depreciation.

In *Lincoln Gas, etc. Co. v. Lincoln*, 223 U. S. 349, 32 S. Ct. 271, 56 U. S. (L. ed.) 466, reversing 182 Fed. 926, in holding that the facts, as found by the circuit court, were not full enough to enable the court to determine what sum, if any, should be annually deducted from the net income as a permanent maintenance or replacement fund, the court said: "Conflicting expert evidence has been introduced presenting radically different theories as to the necessity, character and amount of such a fund, and as to how it should be created, preserved and expended.

Some of this evidence puts the sum to be annually deducted and set aside as a permanent fund at five per cent upon the value of the plant at the time of deduction. It is obvious that if this view is sound there will be little or nothing of the net income left for distribution among shareholders, and no basis for legislative rate reduction now, and none likely until such time as the income from the permanent fund will keep up the plant. The work of reconstructing and replacing old parts by new in a plant of this kind must, in the very nature of things, be going on constantly. Heretofore it seems to have been so well and continuously done that the value of the plant as a whole has suffered less than one per cent per annum if the total depreciation be distributed through the more than thirty years of operation. So far as can be now seen, reconstruction and replacement charges have, up to the present time, been borne by current revenue, with the result that the revenue remaining in the single year of 1907 showed a net surplus of \$73,851.83, a sum large enough, if distributed to shareholders upon the basis of the value of property engaged in the business as claimed by appellant, to have paid a dividend of ten per cent, and about fifteen per cent upon the valuation settled by the circuit court. There is no finding as to the extent of the application of the revenue of 1907 to reconstruction or replacement, as distinguished from current repairs and operating expenses. It is, however, plainly inferable that the revenue of that year was used to the extent necessary. If, in the past, reconstruction and replacement charges have been met out of current expenses, the fact must be taken into consideration, both when we come to estimating future net income and in determining what sum shall be annually set aside to guard against future depreciation. This doubtless influenced the court below in settling upon the amount of \$8,000 as a sufficient annual appropriation of income as insurance against future depreciation. But if the constantly recurring necessity to do reconstruction or replacement work was in 1907 met out of the current income of that year, thereby diminishing the net income, the fact should be given weight in estimating future net income; otherwise there will be a double deduction on that account, first, by paying such charges as they occur, and thereafter by a contribution out of the remaining income for the same object. The facts found are not full enough to at all justify this court in dealing with this problem of a replacement fund. There should be a full report upon past depreciation, past expense for reconstruction or replacement, and past operating expenses, including current repairs. We should be advised as to the gross receipts

for recent years, and just how these receipts have been expended. Then the amount to be set aside for future depreciation will depend upon the character and probable life of the property and the method adopted in the past to preserve the property. It can be readily seen that the amount to be annually set aside may be such as to forbid rate reductions because of the requirement of such a fund. The matter is one first for a skilled master, who should make a full report upon the value of the property, the receipts and the expenses of operation and the sums paid out on reconstruction and replacements, and in dividends in recent years."

ADEQUACY OF RETURN ON VALUE OF PLANT.

In *Public Service Gas Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 463, 87 Atl. 651, judgment affirmed 87 N. J. L. 597, 94 Atl. 634, 95 Atl. 1079, which overruled on rehearing 87 N. J. L. 581, 92 Atl. 606, in determining whether the rate fixed for gas was a just and reasonable individual rate under the statute [Public Utilities Act, § 16 (P. L. 1911, p. 377)], it was held that a return of eight per cent on the value of the plant was adequate.

In a case wherein it appeared that an ordinance fixing ninety cents per thousand cubic feet of gas as the highest price to be charged for gas had been passed, and the state supreme court had dismissed a bill to restrain its enforcement without prejudice to a later suit after it should have been given a fair test, and the court had fixed a value on the plant that considerably exceeded its cost and estimated that under the ordinance the return would be over six per cent, it was held that the supreme court would not reverse the decree of the state court. *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 32 S. Ct. 389, 56 U. S. (L. ed.) 594, affirming decree 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299, 48 L.R.A.(N.S.) 1025. To the same effect, see *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 S. Ct. 811, 59 U. S. (L. ed.) 1244, modifying decree 199 Fed. 204.

The rate of interest which a natural gas company should be permitted to earn on its investment may be affected by the fact that its business is of a character which is necessarily temporary. *Landon v. Public Utilities Commission*, 234 Fed. 152. In that case it appeared that the commission, in fixing the net rates for sales of gas by the receiver of a natural gas company which was directly and indirectly the owner of the pipe line extending from gas fields in the state of Oklahoma to thirty-seven cities in Kansas and eight cities in Missouri, and by means of a receiver was conducting natural gas from

Oklahoma to these cities and their inhabitants, where it was distributed under contracts between the natural gas company and other corporations to the public of the state, allowed six per cent per annum for interest on the business of and the investment in the property of the company. The court held that, in view of the evidence of the exhaustion of the natural gas fields, of the increase of the cost of gas, and of the cost of adequate extensions to the company's pipe lines to secure an additional supply of gas, which evidence was not considered by the commission, and also the fact that the probable life of the company was conceded to be temporary, inasmuch as the exhaustion of the gas fields which it could reach with permissible extensions must inevitably come, and that the probable life of the company as a going concern was approximately six years, at least eight per cent annum should be allowed for interest on its present value, or an increase of the amount allowed by the commission of two per cent.

BROWN

v.

FARMERS' AND MERCHANTS' NATIONAL BANK ET AL.

Oregon Supreme Court—April 6, 1915.

76 Oregon 113; 147 Pac. 537.

Judicial Sales — Advertisement — Misnomer of Party — Effect.

An advertisement of a sheriff's sale on execution reciting judgment in favor of a creditor against certain debtors, the levy upon all their right, title, and interest in the real property described by legal subdivisions, divests the debtors of any title to the property; the use of the name "Hattie Brown," instead of "Kittie Brown," not vitiating a prior sufficient description, and this independently of L. O. L. § 241, subd. 4, which expressly makes a confirmation of sale a conclusive determination of the regularity of the proceedings for sale.

[See note at end of this case.]

Vendor and Purchaser — Contract of Sale — Evidence of Writing Insufficient.

Evidence in behalf of cross-complainant in ejectment claiming under a contract for a conveyance by defendant bank, plaintiff's grantor, is held to be insufficient to prove any written agreement or memorandum to convey the realty, as required by L. O. L. § 808, subd. 6.

Ann. Cas. 1917B.—66.

Specific Performance — Contract Lacking Mutuality.

Where there is no such mutuality in the contract to convey as entitles the vendor bank to compel the cross-complainant as purchaser to pay the purchase price of the land, the alleged contract cannot be specifically enforced against the bank.

Contracts — Formation — Withdrawal of Offer.

An offer to convey realty until accepted is subject to withdrawal without prejudice to the party making it, and where the alleged purchaser knows nothing of the offer there is no prejudice in its withdrawal, and the vendor is not under obligation to renew the offer.

Appeal from Circuit Court, Douglas county: HAMILTON, Judge.

Ejectment by E. V. Weaver against Kittie Brown et al., and cross-complaint by Kittie Brown, against Farmers' and Merchants' National Bank et al., defendants. Judgment for cross-complainant. Defendants appeal. CROSS-BILL DISMISSED.

[113] This suit had its inception in a cross-complaint in equity as a defense against an action in ejectment [114] brought against Kittie Brown and others by E. V. Weaver, who is a defendant herein. The bill alleges, in substance, that from the death of her father, Henry Wiley, until September 16, 1912, the plaintiff occupied certain lands in Douglas County as the owner thereof by virtue of a devise of the same in his last will and testament; that since that date she has been in the exclusive possession of the premises as vendee under an agreement with the defendant to sell and convey them to her. She traces the history of the title of the defendant bank in the realty in question from the giving of what she alleges was an accommodation note executed and delivered by her and her husband with one Blankenship to the bank October 18, 1905, for \$770, through a judgment on that note against herself and her husband rendered by the Circuit Court of Douglas County on May 16, 1908, upon which execution was issued, the land sold, the sale confirmed June 27, 1911, and a sheriff's deed issued to the bank September 16, 1912. Concerning the notice of the sheriff's sale, she says, in substance, that the lands were advertised "under the name of Hattie Brown," which point will be hereafter noticed. She states that on February 5, 1913, while she was still on the lands under the contract she mentions, the bank attempted to get possession of the premises by virtue of a writ of assistance, which was afterward recalled by the Circuit Court. The following allegations then appear in the complaint:

"Plaintiff further alleges that she was led to believe by the defendant bank, and by its

attorney and agent, O. P. Coshow, that they would re deed said lands first above described to her at any time after said sheriff's deed was made and delivered as aforesaid, upon the payment to the said defendant bank of their demands against her on account of said accommodation note which plaintiff signed as aforesaid, without regard to [115] the time allowed by law in which to redeem lands from execution sale, and relying upon their said promises in that behalf, the plaintiff let the statutory time for redemption expire without having redeemed said lands from said execution sale; that on the 25th day of October, 1912, and after the statutory time for redemption of said lands had expired, the plaintiff, in accord with the prior promises of the said defendant bank, offered to pay the said defendant bank in full all its demands against the plaintiff by reason of said accommodation note as aforesaid, in consideration for their deed reconveying to plaintiff said first above-described lands, and on the 6th day of November, 1912, while the said defendant bank was seised and possessed of said lands as above set forth, the said bank entered into a contract agreement to and with plaintiff, wherein and whereby it accepted the plaintiff's offer to pay all their demands as above stated, and in that behalf agreed to accept in full therefor the sum of \$1,348.66, with interest at 8 per cent per annum from said 6th day of November, 1912, until paid, and in consideration therefor the said defendant bank would make, execute and deliver their deed for said lands first above described to whomever the plaintiff designated, and in that behalf and with that purpose in view the said defendant bank did, on or about the 25th day of November, 1912, make and execute their deed to said lands, and on the 30th day of November, 1912, deliver the same in escrow with the Douglas National Bank, of Roseburg, Oregon, with directions to said bank to deliver the same to the plaintiff or her agent, as per the terms of their said agreement above mentioned, upon the payment to said bank of the sum of \$1,348.66, with interest thereon from November 6, 1912; that the plaintiff took and held possession of said first above-described lands under and pursuant to said contract agreement of purchase and sale aforesaid, and has ever since been, and is now, in the exclusive possession thereof, and has made improvements thereon, and by virtue of said agreement has farm let the same to the said J. A. Coplen, the defendant mentioned in the ejectment action against [116] which this suit is filed, for a term of three years from last fall, the year 1912."

She alleges that she duly performed "all the conditions of said contract agreement of sale and purchase" upon her part to be kept and performed, and at divers times tendered

to the defendant bank through its attorney the full amount of all its demands against the plaintiff by reason of said accommodation note, and demanded a deed, without receiving the same. She avers other tenders on May 6, 1913. Her prayer is to the effect that a deed made by the defendant bank to the defendant Weaver, whom she alleges took with knowledge of her rights, be canceled or that he be held to be her trustee of the land; that he execute to her a deed on payment of the amount that would be due the bank on its note and judgment up to the time of the tender to Weaver; and that the defendants be adjudged to account to her for damages in the sum of \$8,500. The defendants answering separately admit the plaintiff's original title in the land, the execution by her and her husband of the note in question, the commencement of the action against her, the rendition of the judgment mentioned, the execution, sale, confirmation and succeeding deed, the issuance of the writ of assistance and its recall; but deny every other allegation of the complaint. The Circuit Court, after a hearing, entered a decree to the effect that out of money tendered into its registry by the plaintiff there be paid to the defendant bank the sum of \$1,535.34, and that within 20 days from such payment the defendants execute and deliver to the plaintiff a deed reconveying to her the land in question, in default of which the decree should stand for a deed. The defendants have appealed.

Oliver P. Coshow and *A. N. Orcutt* for appellants.

Benjamin F. Jones and *Commodore S. Jackson* for respondent.

[117] BURNETT, J. (*after stating the facts*).—The admitted history of the case reveals the execution of the note to the bank, action thereon against the plaintiff and her husband in the Circuit Court of Douglas County, personal service of summons upon them, judgment for want of an answer, execution upon the judgment, sale in pursuance thereof, confirmation of sale, and, after the expiration of a year, there being no redemption, a sheriff's deed conveying the land to the defendant bank.

1. The plaintiff's criticism of the notice of sheriff's sale is not well founded. The advertisement recites the judgment in favor of the bank against Kittie Brown and C. W. Brown, defendants, and the levy upon "all the right, title and interest that the said Kittie Brown and C. W. Brown, defendants aforesaid, or either of them, had on the 16th day of May, 1908, or have had at any time since, or now have," in the real property in dispute which is described in the notice by legal sub-

divisions. The announcement then goes on with this language:

"Said land being the identical tract devised and granted to the said Hattie Brown by the last will and testament of Henry Wiley, deceased."

The reference to the judgment and the recital of the levy, together with the description by legal subdivisions of the land, all as the property of Kittie Brown [118] and C. W. Brown, is enough in that respect to carry the title of the plaintiff here in the property, and the use of the name "Hattie Brown" does not vitiate the previous sufficient description. Indeed, in the trial of the case at bar and in the argument no reliance was made upon that point. Besides all this, in the language of our Code, the confirmation of sale was a "conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, suit, or proceeding whatever." Section 241, subd. 4, L. O. L.

As before stated, the sale of the plaintiff's property culminated in a sheriff's deed September 16, 1912. That instrument operated as a matter of law to utterly divest her of her title to the realty in question. To establish any further or subsequent hold on the premises, she must allege and prove a valid contract with the then holder of the title to convey the same to her which she is entitled to have specifically performed. Without discussing the sufficiency of her narration about such a contract, but giving it its full value in her favor, she must, in order to recover in this proceeding, prove an agreement complying with the statute on such subjects together with performance or a valid offer to perform while such a contract was in force. Section 808, L. O. L. thus fixes the standard of evidence applicable:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged; or by his lawfully authorized agent; evidence, therefor, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. . . . (6) An agreement for the leasing, for a [119] longer period than one year, or for the sale of real property, or of any interest therein. . . ."

In one portion of her complaint she alleges that from September 16, 1912, the date of the sheriff's deed, she had been in possession of the lands under an agreement between her and the bank to sell the same to her; and in another portion she says, as quoted above, that the agreement was entered into November 6, 1912.

The business was conducted mainly by means of correspondence. On October 25,

1912, one C. I. Leavengood wrote to the defendant bank the following letter:

"Myrtle Creek, Oregon, October 25, 1912.

"Farmers & Merchants' Natl. Bank, El Dorado, Kansas—

"Dear Sirs: As attorney for Kittie Brown, from whom you secured a judgment some years ago, and on whose property you hold a sheriff's deed, I wish to know if you will accept the full amount of judgment, with costs and interests in cash, and release the property. I asked Mr. Coshow, your attorney, to make this inquiry, but he is so busy in politics that it may have escaped his notice or attention. This judgment was taken in default without the parties having been advised as to exemptions and both Mr. and Mrs. Brown were sick and in bed at the time when the action was brought. While it would appear from the will filed recently that Mrs. Brown has only a life estate in the land, yet if we can discharge the debt as above stated, I believe we can raise the money on 10 days' notice. An early reply will greatly oblige, "C. I. Leavengood."

The answer of the bank here follows:

"El Dorado, Kansas, Nov. 6, 1912.

"Mr. C. I. Leavengood, Myrtle Creek, Oregon:

"Yours of the 25th of Oct. at hand in regard to Kitty Brown property in which you offer to pay us what is due for redemption, and the directors have authorized [120] me to say to you that the consideration in deed is \$1,110.23; our attorney's fees and cost paid \$123.31, \$1,233.54. Interest from Sept. 6, 1911, \$115.12; total to Nov. 6, 1911, \$1,348.66. Now, if you will pay us \$1,348.66 and interest from this day at 8 per cent until paid we will make the deed to whoever Kitty Brown wishes. She seems anxious to get out of paying us, but still we ask nothing but the debt.

"Yours truly,

"Wm. I. Shriver,

"Cashier."

The reply of Leavengood is here quoted:

"Myrtle Creek, Ore., Nov. 12, 1912.

"Wm. I. Shriver, Cashier, El Dorado, Kansas—

"Dear Sir: Please execute deed to C. I. Leavengood and send to Douglas National Bank, Roseburg, Oregon, with whom I have arranged to send you check for \$1,348.66 and interest from Nov. 6, 1912, at 8 per cent. It was necessary for me to give personal security to obtain the amount and as I will be obliged to sell a part of the farm in order to reimburse the bank the title is my only security. Should you doubt my authority

make an order from Kitty Brown a condition precedent to its delivery from Douglas National Bank to me.

Yours truly,
"C. I. Leavengood."

On November 25, 1912, the defendant bank wrote to the Douglas National Bank of Roseburg, inclosing a deed to Leavengood with instructions to deliver it to him on payment of \$1,490.66, stating that he had offered to pay their claim and expenses which they had concluded to accept, but had made a mistake in computing the amount, and consequently demanded the greater sum. They close their letter with this language:

"We have added that amount to our estimate of claim in the deed and must have the full amount. We feel that Mrs. Brown did everything she could to avoid [121] paying us and when we find we have a property more valuable than our claim, she should be proud to make us whole. If this price is not satisfactory with them, please return us the deed."

Leavengood then wrote the defendant bank the following letter:

"Myrtle Creek, Oregon, Dec. 16, 1912.
"Farmers & Merchants' National Bank, El Dorado Kansas—

"Dear Sir: Doubtless you are wondering why the money is not forthcoming in the matter of deed sent in escrow to Douglas National Bank at Roseburg. Well it is about the same old story of crooked intent on the part of Kittie Brown. I have been her attorney in probation for her father's will, and after she received notice from Mr. Coshow, as your attorney, to vacate on ranch, she realized she was in trouble and for a stipulated fee offered by her I undertook to secure back the place and to sell off sufficient to pay off your claim and my fee. After she learned I had succeeded in both—or have a buyer for the hill portion on west of road who offers sufficient to pay all indebtedness, she disclaims her offer, which was made in presence of the county judge and others. I have asked Mr. Coshow to write to you asking that her consent to delivery of deed be not required, but he seems either to be unwilling or too busy to write. Her idea is to evade paying any debt and in this as well as in your case has shown her dishonesty. My action in the matter was solely as an attorney and for a stipulated fee, and as to my integrity and honesty we refer to any business firm or bank at Roseburg or the Citizens' State Bank at this place. Trusting that no other arrangements will be made nor the deed recalled until you have investigated, as my money is ready at bank.

"Your truly,
"C. I. Leavengood."

On receipt of this communication from Leavengood the defendant bank addressed the following letter to the Douglas National Bank:

[122] "El Dorado, Kansas, December 24, 1912.
"Douglas National Bank, Roseburg, Oregon—

"Dear Sir: Please return a deed sent you by us to C. I. Leavengood about Nov. 6, 1912, as we are informed they cannot comply. Return at once and oblige.

Wm. I. Shriver,
"Cashier."

In pursuance of this letter the deed was returned as requested. Other negotiations were had, but no agreement was reached on the subject, and finally on March 31, 1913, the bank conveyed the property to the defendant Weaver, who instituted the ejectment action already mentioned.

The plaintiff herself says that the first negotiation had with the bank was the letter written by Leavengood October 25, 1912, a date more than a month after the execution and delivery of the sheriff's deed. Part of her cross-examination is here set down:

"Q. Did you ever tender the money to the bank while the deed was here to take up the deed?

"A. I did not have any money to tender while the deed was here. I think the deed had gone back before then.

"Q. Now, in order to be clear on this matter, Mrs. Brown, as I understand you that personally or up to the time you went to Kansas in March, 1913, you had no personal correspondence or arrangement between yourself or the Kansas bank as to the repurchasing of this property, is that true?

"A. No, sir.

"Q. That is true, is it?

"A. I do not understand what you mean.

"Q. (Question read to witness.)

"A. No, sir; I did not.

"Q. And all the negotiations were carried on between Mr. Leavengood and the bank, is that correct?

"A. Until I went to Kansas?

[123] "Q. Yes, up to the time you went back there in March.

"A. Yes, that is all there was just between Leavengood and the bank.

"Q. So that whatever contract or agreement you had with the bank up to that time is included in the letter that passed between Mr. Leavengood and the bank? Is that right?

"A. That is all there was done, just what was done between Mr. Leavengood and the bank.

"Q. You say that pursuant to those arrangements that you went into possession of this land under your agreement with the bank?

"A. Yes, sir.

"Q. It is not a fact, then, that you went into possession under your agreement with the bank to repurchase at the date that the sheriff's deed was made to the bank?

"A. I cannot tell you anything about those dates.

"Q. That was September 12, 1912. Now these arrangements were all after that time, were they not, Mrs. Brown?

"A. I cannot remember the dates. There is too many dates for me to remember.

"Q. Had the bank made you any promises before that Leavengood correspondence in regard to what they would do?

"A. No.

"Q. In regard to this land?

"A. No.

"Q. Your only relations with the bank was through Mr. Leavengood and what you did personally while you were in Kansas?

"A. Yes, sir.

"Q. Why didn't you redeem from the sheriff's sale before the year for redemption had expired?

"A. I couldn't get the money."

The plaintiff testified that she had an interview with the bank in El Dorado, Kansas, on March 29, 1913. On that point her evidence here follows:

[124] "Q. Now, referring a moment to this trip which you say you made to Kansas, I think you testified that the bank there sent you back to Mr. Coshow to fix up some papers?

"A. They said to come out here and settle with Mr. Coshow.

"Q. Did you do it?

"A. I came out here and they were putting us out of the house.

"Q. Did you go back and see Mr. Coshow at all?

"A. I do not think that I came back to Mr. Coshow's office.

"Q. Did they put you out of the house?

"A. No, sir.

"Q. Did you go back to Mr. Coshow?

"A. No, sir.

"Q. You never have since then?

"A. No, sir; I didn't suppose it was necessary."

Further, on the subject of the deed sent by the defendant to the Douglas National Bank, her testimony is:

"Q. State when you first knew that the deed that had been deposited in escrow in the Douglas National Bank had been returned.

"A. Mr. Coshow told me that it had gone back that night that I went there to see him. That is the first I knew of it.

"Q. That is when you came down in answer to the summons in regard to the writ of assistance?

"A. Yes, in regard to the writ of assistance."

2. The utmost that can be claimed by the correspondence between Leavengood and the bank upon which plaintiff relies to prove her allegation of the contract to sell her land is that there was an offer of the bank to convey the property to Leavengood with the consent of plaintiff. She herself says she knew nothing of the deed tendered to Leavengood until after it had been returned. The offer had then [125] been withdrawn, and it is inconceivable that she could have been a contracting party to something of which she was in total ignorance. In short, there is no situation disclosed by the testimony in which the bank could have tendered to the plaintiff a deed for the property at any time and have successfully compelled her to pay the purchase price.

3, 4. The first tender which she made, as disclosed by the testimony, was in writing of date May 6, 1913, which was long after the bank had recalled the deed it had tendered to Leavengood and had conveyed the property of Weaver, on March 31, 1913. The offer of the bank having been withdrawn, as already noted, it was at an end. It is hornbook law that until an offer has been accepted it is open to withdrawal without prejudice to the party making it. The plaintiff herself says she knew nothing of the offer; hence she could not have accepted. Having withdrawn it under these circumstances, the bank was under no obligation whatever to renew it. It is in evidence that some time in March, 1913, through its attorney, the bank endeavored to get the plaintiff and her husband to attorn to it and acknowledge its title; but they refused to do so. It cannot be that she could be contracting with the bank for the purchase of the property and at the same time deny its title. The testimony utterly fails to establish any contract the specific performance of which could be enforced against the bank, for the very good reason that the bank could not at any time have compelled the plaintiff to pay the purchase price of the land. There must be mutuality in any contract to make it enforceable. It may be that in the beginning the plaintiff received nothing of the proceeds of the accommodation note which she signed, but the bank was not to blame for that. The transaction has been long [126] drawn out and the burden of interest and expenses has largely increased. The plaintiff has shown no effort to liquidate the claim until after her title in the property had been utterly extinguished by sheriff's deed. She recounts efforts after that to obtain a purchaser for the land who would take up the defendants' claim, but admits they were all unsuccessful; and the first actual offer to pay anything to the bank was made after it had sold the property.

While the circumstances viewed from the plaintiff's standpoint suggest the exercise of

magnanimity in her favor beyond the confines of law and equity, the record presents no feature which the court can consider as a basis for nullifying the title of the defendants to the land. The cross-bill must be dismissed.

Cross-bill dismissed. Rehearing denied.

Moore, C. J., and McBride and Benson, JJ., concur.

NOTE.

Misnomer of Party in Advertisement or Notice of Sale as Affecting Validity of Judicial Sale.

"The object of a notice of sale is to inform the public of the nature and condition of the property to be sold and of the time, place and terms of the sale and thus to attract bidders and prevent a sacrifice of the property. If these objects are attained, immaterial errors and mistakes will not affect the sufficiency of the notice." 16 R. C. L. tit. *Judicial Sales*, par. 39. Applying that principle it is ordinarily considered that the misnomer of a party in an advertisement or notice of a judicial sale does not affect the validity of a sale had pursuant thereto, since the error is not one which will naturally or ordinarily mislead any person desirous of attending the sale. Thus in the reported case it is held that an execution sale was not vitiated by the fact that the advertisement described one of the debtors as "Hattie Brown" instead of "Kittie Brown."

In *Miller v. Kipple*, 2 Pearson (Pa.) 118, it was held that the use of the name "Kepple" for "Kipple" in a sheriff's advertisement did not vitiate the sale. The court said: "The first exception we shall consider is that to the name of the defendants in the sheriff's advertisement. It is described as belonging to Lydia Ann Kepple and Peter Kepple, whereas the name is Kipple. We do not often interfere with process in this state because of the failure to dot the i or cross the t, unless some one has been actually misled by the failure. The doctrine of *idem sonans* applies."

In *Jeffries v. Bartlett*, 75 Ga. 230, it was held that the use of the name "Jeffers" for "Jeffries," the defendant, in the advertisement of an execution sale, would not interfere with the validity of the sale, the name being *idem sonans*.

In *Horton v. Bassett*, 16 R. I. 419, 16 Atl. 715, it was held that the use of the name

"Richard Bartlett" instead of "Richard Bassett" in a sheriff's notice of sale did not vitiate the sale. The court said: "In this notice the execution was described as one wherein Richard Bartlett of Pawtucket, instead of Richard Bassett, was plaintiff, the execution being otherwise correctly described. On February 17, 1888, the officer substituted in said notice Richard Bassett for Richard Bartlett, but never published said notice as thus corrected after February 17, 1888. No notifications were set up except those which were originally set up immediately after the levy. The sale was made as advertised, and this bill is brought to prevent the officer from making a deed according to it. This case comes before us on demurrer. The complainant contends that the sale was illegal because of the error in the notice, and ought not to be carried into effect. We do not see how the error, which seems to have been merely a typographical error, could have prejudiced the sale, and, if it could not, it is immaterial and the sale ought to be sustained. The purpose of the notice is to draw bidders by advertising what the property is that is to be sold, and what the authority is under which the sale is to take place."

In *Stephenson v. January*, 49 Mo. 465, it was held that a sale under a deed of trust was not invalidated by the fact that the advertisement in one place misnamed one of the trustees. The court said: "But it is insisted that there was an inaccuracy in this last publication that destroyed its force and rendered it altogether worthless. The advertisement was in regular form, the names of the trustees were inserted correctly in the body of it, but at the bottom James was printed instead of Joseph in Cabot's name. Certainly, place, description and time are all requisite in the notice of sale by trustees. But mere omissions or inaccuracies, not calculated to mislead and working no injury, will be disregarded. (*Gray v. Howard*, 14 Mo. 341; *Beattie v. Butler*, 20 Mo. 313.) The advertisement, as published in the Republican, contained everything that was necessary to apprise the public of what property was to be sold, the time when and the place where it was to be sold, for what debt the sale would take place, and the names of the trustees were properly and correctly printed in the body of the advertisement, but a mistake was made in the name of one of them at the bottom. This certainly could neither deceive nor operate to the prejudice of anyone, and ought not to be allowed to vitiate the sale and render it illegal."

263 Mo. 142.

EXCELSIOR PRODUCTS MANUFACTURING COMPANY

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY.

Missouri Supreme Court, Division No. 1—
December 19, 1914.

263 Mo. 142; 172 S. W. 359.

Master and Servant — Liability to Third Person for Act of Servant — Starting Fire.

Railroad laborers who are living in bunk cars provided by the railroad company, and who, when off duty, build a fire upon the right of way to heat water to wash their clothes, are not acting within the scope of their employment in building such fire, so as to render the railroad liable for their negligence to the owner of adjoining property destroyed by fire communicated therefrom.

[See note at end of this case.]

Same.

The negligence of a railroad company in permitting combustibles to accumulate on its right of way is not the proximate cause of the burning of adjoining property, where the fire was started by railroad laborers on the right of way for their own purposes, and there was no evidence that the rubbish became ignited and thereby communicated the fire to the plaintiff's property.

[See note at end of this case.]

Same.

The placing by a railroad company of bunk cars for the use of its laborers upon its right of way, adjacent to plaintiff's property, does not of itself create a nuisance so as to render the railroad liable for loss caused by a fire kindled by the laborers upon the right of way to heat water to wash their clothes, and communicated to plaintiff's property.

[See note at end of this case.]

Same.

Rev. St. 1909, §§ 3150, 3151, making railroads liable for fires started by engines and those communicated by the ignition of dry vegetation negligently permitted to remain on the right of way, does not make the railroad liable for a fire kindled by its laborers on the right of way outside the scope of their employment and communicated directly to adjoining property without the ignition of rubbish upon the right of way.

[See note at end of this case.]

Fires — Duty of Landowner — Extinguishing Fire Started by Another.

An owner of premises, who discovers fire thereon for which he is not responsible, must use ordinary care to prevent it from spreading to adjoining property.

Same.

The knowledge of railroad laborers who kindled a fire on a railroad right of way for a purpose outside the scope of their employment

is not knowledge of the fire by the railroad company, which requires it to use due care to prevent the spread of the fire.

Same.

Where the conductor of a railroad passenger train observed a fire upon the right of way kindled by laborers for their own purpose and not obviously dangerous to adjoining premises, the railroad is not liable for his failure to stop his train and extinguish the fire, since the circumstances did not impose such a duty upon him.

Appeal from Circuit Court, Jackson county: SLOVER, Judge.

Action by Excelsior Product Manufacturing Company, plaintiff, against Kansas City Southern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Cyrus Crane and George J. Mersereau for appellant.

Joseph P. Fontron and Fyke & Snyder for respondent.

[146] BLAIR, C.—This appeal is from a judgment for \$35,000 for damages by fire to plaintiff's factory and raw material.

[147] Plaintiff manufactured excelsior, and on its lot adjoining defendant's right of way had its factory and had collected a large quantity of cotton wood which was stacked north of and near plaintiff's private switch track which was on the south part of its lot. South of this was the north line of defendant's right of way and near that line defendant had a switch track on which it had placed some "bunk" cars in which were housed some laborers who were engaged in constructing for defendant a concrete subway some hundreds of yards west of these cars. One Sunday morning, in April, one of these laborers built a fire on the right of way south of the "bunk" cars for the purpose of heating water to wash clothing. A south wind was blowing and soon plaintiff's wood was discovered to be on fire and in a short time the wood and factory were in flames.

The specific allegations of negligence are as follows:

"Plaintiff further states that at said time one of two alternatives was true, and plaintiff is ignorant of which alternative was true, viz: that either said employees or concrete men were under the direct charge, care, protection and direction of a foreman, Oscar Carrington, and a subforeman or straw boss, whose name was Frank Stiles, whose general duties were to care for, oversee and watch over said cars and said employees, and to see that nothing was done by said employees in the ordinary acts of living in or about

said cars that would endanger the property of this plaintiff and others having property along the right of way of defendant; or said employees were carelessly and negligently permitted by defendant to be and remain and live in and about said cars without being placed in charge of any foreman, overseer or guard; that on said 11th day of April, 1909, said string of cars was yet standing in said place on said side track south of the cordwood piled along on plaintiff's ground some [148] thirty feet west of the factory of the plaintiff; that said day was Sunday, and the wind at said time was blowing at a high velocity from the south—from the direction in which said cars stood, toward the property and cordwood of this plaintiff; that at said time the said cars were occupied and used by the said employees of the defendant aforesaid, and said cars and employees were then and there in the charge and care of the defendant's said foreman, or straw boss, Frank Stiles, as aforesaid, or were carelessly and negligently permitted by defendant to be and remain in and about said cars without being placed in charge of a foreman, overseer or guard.

"Plaintiff further states that on said day and at about 10 o'clock a. m. of said day, one or more of the said employees or concrete men, the agents and servants of the defendant, whose names are now unknown to plaintiff, while in the employ of defendant and while in the pursuit of the ordinary duties of living in and about the said bunk cars, as provided for by defendant, carelessly and negligently built and caused to be built a fire upon the ground along the side of the east car of said string of cars belonging to defendant, for the purpose of heating some water over said fire, and built said fire within a small circle of a single tier of bricks, making said fire of wood; that said place was a dangerous place in which to build a fire as said Frank Stiles and said employees knew or in the exercise of care and caution should have known; that the water was heated by placing a bucket of water and resting same upon said bricks and the blaze of said fire arose at said time high about said bucket; that the defendant had carelessly and negligently permitted an accumulation of straw and debris on said right of way under said car and over to the property of the plaintiff; that at said time said fire blazed up fiercely and the said high wind catching said flame and sparks, caused said sparks to be passed and carried and communicated [149] across and to the said trash and debris and through the air across the intervening distance between said car to plaintiff's property, causing plaintiff's property to become ignited and burned; that the said employees of the defendant at no time after building said fire

and when they saw said fire threatening and dangerous to plaintiff's property, made any effort to extinguish said fire or to prevent said fire from spreading and being carried across the said right of way to the said cordwood of the plaintiff; that said fire spread through said cordwood with great velocity and communicated to said factory belonging to plaintiff, entirely destroying said factory and destroying said cordwood.

"Plaintiff further states that it would not have suffered said loss by said fire if it had not been for the carelessness and negligence of the defendant, its agents and servants as aforesaid, in this, to-wit:

"1. That it was careless and negligent of the said defendant, its agents and servants, to place said living or bunk cars in and upon said side track in such close proximity to plaintiff's property, as to make it highly dangerous to plaintiff's property to have said living cars so close to said plaintiff's property, in view of the necessity of said employees or said section men to do and perform the ordinary and customary duties connected with living, such as building fires for preparing meals, heating water and other necessary things for which fires are built in ordinary modes of living; and that it would so be highly dangerous and hazardous to plaintiff's property for said living or bunk cars to be so placed and used, was known to defendant, its agent and servants, or in the exercise of ordinary care and prudence could have been known by it and them.

"2. That it was careless and negligent in said defendant and its said subforeman, Frank Stiles, then and there in charge of said employees and said cars, to [150] permit said employees to build said fire at said time and place, in a position so near to plaintiff's property and in the face of such a high wind, making it a dangerous place in which to build said fire, all of which was well known to said Frank Stiles and to the said employees, or in the exercise of ordinary care and prudence could have been known; or by the other alternative, if defendant had no foreman, overseer or guard over and in charge of said employees, it was careless and negligent in not placing a foreman, overseer or guard over said employees in charge of them to prevent them from setting out or building fires alongside of or near plaintiff's property to endanger same.

"3. That it was careless and negligent on the part of the defendant, its said agents and servants, the said subforeman and said employees, to permit and allow said fires so built upon its said right of way, to be blown, spread and escape from defendant's said right of way to plaintiff's property.

"4. That it was careless and negligent in the said defendant and its said agents and

servants, the said subforeman and said employees, in failing to extinguish said fire after it had been built upon said right of way and in failing to prevent its spreading after they saw or in the exercise of ordinary care and judgment should have seen that said fire was exceedingly hazardous and dangerous to plaintiff's property.

"5. That it was careless and negligent on the part of the defendant, its agents and servants who had charge of the said tracks and right of way of defendant at said place, to permit or allow rubbish, trash or debris to gather and accumulate upon said tracks and right of way, whereby fires set out by said employees of defendant could spread and communicate from said right of way to the said property and cordwood of the plaintiff, and that such accumulation of rubbish, trash and debris would be dangerous to plaintiff's property in case of such a fire, was well known to the defendant [151] its agents and servants, or in the exercise of ordinary care and prudence, could have been known by them."

The answer was a general denial.

The evidence tended to show that on the Sunday morning when the fire occurred the wind was blowing strongly from the south and the weather had been clear for several days; defendant's bunk cars, occupied as living quarters by some fifteen laborers employed on week days in constructing a concrete subway 600 or 800 feet west of the cars, had stood for some weeks upon a switch track near the north boundary of defendant's right of way and some six or eight feet south of plaintiff's private switch track on its lot; north of this last mentioned track plaintiff had piles of cotton-wood intended for use in the manufacture of excelsior; there is some evidence that there was some loose wood near the north side of the private track; on Sunday morning, April 11, some of the laborers built a fire for the purpose of washing their clothing; this fire they built between the bunk cars and defendant's main line track at a point about 25 feet from the nearest of plaintiff's wood and about 50 feet west of its factory; pieces of bark and wood were used in building the fire and it was built around a bucket or can placed on bricks and filled with water; it appears that this fire was kindled probably about 9 a. m. and that some of the laborers were seen around it; 30 or 40 minutes later fire was discovered in the wood about 25 feet north and when discovered was nearly or quite beyond control; in a very few minutes the factory caught and was quickly consumed.

The men did not work on Sundays and were not on duty on the Sunday morning in question and had not been since six o'clock p. m. the preceding Saturday; they were free to come and go as they pleased except while at work on the subway on week days; they paid

for their own provisions and paid their cook, [152] the amounts being prorated and paid out of their wages by the foreman; there is some evidence that the stoves in the cook cars were available for heating water for washing, but it does not appear they were so used nor does it appear that any arrangement for washing or laundry work was made by defendant nor that the men made any joint arrangement concerning it; there is no evidence defendant furnished any utensils for that purpose or concerned itself with the matter further than that the foreman testifies he directed that no fire be kindled outside on April 11, his attention being drawn to this possibility by one of the men asking him on Saturday to buy him a cake of laundry soap.

The man designated as foreman superintended the work on the subway, but did not stay in or near the bunk cars at night or on Sundays, and there is no evidence defendant charged him with any duty of oversight except on the work on the subway. One Stiles, a carpenter, at times acted as "straw boss," which term seems to mean (in this instance, at least) a sort of substitute foreman, selected by the foreman to act in the latter's absence. Stiles slept in one of the cars, and there is some testimony he was in his car on the Sunday in question, though no one testifies he saw him there or that Stiles saw the fire at any time or was himself seen about the cars that morning. There is no substantial evidence Stiles had any authority to superintend the laborers outside of the hours they were actually employed on the subway. One witness did testify that when Carrington, the foreman, was not present "they looked to" Stiles, adding: "There had to be somebody around there to govern them or the deuce would be to pay. There always was a white man there usually." On motion of defendant's counsel, plaintiff's counsel consented to have this last quoted portion of the answer stricken out.

There was some evidence tending to show that the men had done some washing on previous Sundays, but [153] no evidence they had previously built a fire at the place the fire was built on the day the loss occurred. One witness testified that all previous fires had been built some distance south of the bunk cars, across the tracks therefrom. Another testified fires had previously been built "out on the tracks; that is, between the tracks." The other witnesses added nothing to this. There were at least three tracks south of that on which the bunk cars stood—and perhaps others. The country was open—a house here and there. The switch track south of the main line tracks was used for oil cars and in making up trains.

As to the condition of the right of way around and under the bunk car, one witness described it thus: "Well, there were a few

dry weeds and a few green weeds and then some scraps of cordwood bark and little chunks of coal, and everything." Another said the ground "was pretty well cleaned up around there." The other witnesses were not questioned about it.

There was no testimony that debris on the right of way caught fire or that there was any fire on the right of way except that kindled by the men to heat water for washing.

I. The workmen were off duty and in kindling a fire to wash their clothing were not acting within the scope of their employment.

"A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders and for their negligence in selecting means by which the orders are to be carried out. In determining whether the particular act is done in the course of a servant's employment, it is proper, first, to inquire whether the servant was, at the time, [154] engaged in serving his master. If the act was done while the servant was at liberty from his service and pursuing his own ends exclusively, there can be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master. [Sherman & Redfield on Negligence, sec. 63]" [Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Milton v. Missouri Pac. R. Co. 193 Mo. 1. c. 55, 56, 91 S. W. 949, 4 L.R.A. (N.S.) 282.]

This principle has been applied to facts bearing considerable resemblance to those in this case. In the United States Circuit Court of Appeals for the Fourth Circuit, the case of Southern R. Co. v. Power Fuel Co. 152 Fed. 917, 82 C. C. A. 65, 12 L.R.A. (N.S.) 472, was decided. In that case the defendant had placed near plaintiff's property bunk cars occupied by laborers engaged in building a trestle. One Ayres, a subboss, who had, in the foreman's absence, charge of the men while at work on the trestle, occupied one of these cars. Some of the negro laborers regarded Ayres as in charge at night in the foreman's absence, but the evidence all showed (the court says he was, outside of regular working hours, "a free man." His car was provided with a kerosene lamp. On the night of the fire Ayres seems to have been drunk, and when fire was discovered in his car was standing at the car window making no effort to subdue the fire. The car was filled with kerosene smoke and the bedding was ablaze. It was held that plaintiff could not recover because Ayres "was not engaged in performing any duty as an employee," and defendant was, therefore, not liable, either under

the common law or the South Carolina statute.

A case on the same facts (North River Ins. Co. v. Southern R. Co. 93 S. C. 358, 76 S. E. 1095) was instituted in the State court. The Supreme Court of South Carolina, on appeal from a judgment on a verdict directed for defendant, remanded the case on the ground that there was evidence in the record tending to show that Ayres [155] was the agent of defendant and acting foreman and in charge of the train at the time. Under a South Carolina statute railroads are liable for all loss resulting from the fire originating on their right of way from the acts of employees, negligent or otherwise. The evidence is not reported, simply the conclusion of the court as to its tendency to prove that Ayres was at the time on duty as defendant's employee. It does not appear, therefore, what difference the evidence showed when compared with that in Southern R. Co. v. Power Fuel Co. supra.

In this case there is no substantial evidence that Stiles was in charge of the cars or had any duty to perform except while at work on the subway. The evidence in this case, in this particular, is strikingly like that reported in Southern R. Co. v. Power Fuel Co.

Clark v. Kansas City, etc. R. Co. 129 Fed. 341, 64 C. C. A. 19, subsequently referred to, clearly affords plaintiff no support on the branch of the case now being considered. There the ground of liability was the negligent failure to prevent the spread of fire after notice of its presence in ample time to have prevented loss. It did not turn in any sense on any relation to defendant borne by those who kindled the fire.

In McLaughlin v. Cloquet Tie, etc. Co. 119 Minn. 454, 138 N. W. 434, 49 L.R.A. (N.S.) 544, defendant's foreman and another, by its direction, were driving a raft down a natural stream flowing through plaintiff's lands, and it became necessary, at a point near plaintiff's house, to remove from the stream a stump which interfered with their progress. To dry their clothing defendant's employees then kindled a fire which spread and destroyed plaintiff's timber, poles, etc. The court held that "the execution of the work intrusted by the defendant to its employees required them to pass over the plaintiff's land along the banks of the stream, and the defendant owed to the plaintiff the duty of exercising due care to prevent [156] injury to the plaintiff's land in the course of the work assigned to its employees. The building of the fire by the driver to dry his clothes was not, as a matter of law, a departure from the course of his employment, for it was incidentally connected therewith, and was made necessary by his going into the stream to remove the obstruction, which was a part of the work assigned to him."

The court points out the distinction between that case and *Morier v. St. Paul*, etc. R. Co. 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, saying that in the *Morier* case the facts were "that the employees of the defendant were engaged in repairing its railroad track and were charged with no duty outside of it. They usually went to their boarding house for their dinners, but on the day in question they brought their dinner with them, and at noon left their work, went upon the right of way and built the fire, which destroyed plaintiff's property, for the purpose of warming their coffee. These special facts distinguished that case from the one at bar."

In like manner is this case distinguished from the *McLaughlin* case, and for stronger reasons. The *Morier* case has been criticized in *Baxter v. Great Northern R. Co.* 73 Minn. 1. c. 191, 75 N. W. 1114, but that criticism was leveled at that part of the opinion which refused judicial notice that duties of section men included the extinguishment of fire on the right of way, in some circumstances. That criticism did not affect the decision in so far as it held that in kindling the fire the section men were not acting within the scope of their employment.

Nor is the washing of clothing by employees, for themselves, such a necessity of usual modes of living that it can be said that courts can say employment of the kind shown in this case includes it as an incident and as incidental to the employment. Such a view has been taken by some courts of eating, drinking and other absolute necessities, but none, so far as we discover, [157] has applied such a rule beyond the actual necessities of living.

The cases in which servants have negligently left water running in lavatories provided for their use are not in point or of like character. They depend upon negligence in the use of conveniences furnished by the master, for both the control and use of which he is legally responsible.

There is no principle which justifies the conclusion that the men, in kindling the wash fire, were acting within the scope of their employment, and the judgment cannot be maintained on that ground.

II. There was no evidence that combustibles negligently allowed to collect on the right of way became ignited and thus communicated fire to plaintiff's wood. As a consequence there is, of course, no support for the allegation that defendant's negligence in permitting combustibles to accumulate was the proximate cause of the fire. In these circumstances the question whether there was substantial evidence of the negligent accumulation of combustible matter on the right of way need not be discussed.

III. The contention most strongly pressed by plaintiff's counsel is that by placing the

bunk cars where it did, occupied as they were, the existing circumstances considered, defendant created a nuisance which caused loss to plaintiff, and must, consequently, respond in damages.

In this connection plaintiff relies upon some facts of which there is no evidence and some others which in no way contributed to the loss. These must be eliminated. The debris on the right of way, even if it be assumed there was substantial evidence of a negligent [158] accumulation of it, is negligible because it in no way contributed to plaintiff's injury; nor does the fact, if it be a fact, that the bunk cars were furnished in part consideration of the services of the laborers add anything to plaintiff's case; nor is there any evidence that the laborers were "irresponsible" in the sense in which counsel use the term; nor is there any evidence that fire used in the cars in cooking or otherwise contributed to the ignition of plaintiff's wood; nor is there evidence of "constant building fires around . . . or about" the cars, nor of the building, previously, of any fire outside the cars at the place the fire was built April 11 or at any other place by which plaintiff's property was endangered; nor is there any evidence that for any considerable time previous to the morning mentioned there had been any loose wood on plaintiff's lot.

Eliminating these things and looking to relevant facts supported by substantial evidence, it appears that plaintiff's real position is that living quarters for laborers near cordwood constitute a nuisance because the ordinary processes of living include the washing of clothes and the use of fire in that connection.

In support of their position counsel cite several decisions. Manifestly the rule that one may not, in blasting, cast stones upon his neighbor's property and escape liability for ensuing damage (*Scalpino v. Smith*, 154 Mo. App. 1. c. 534, 135 S. W. 1000) is not applicable. In the case cited there was a direct invasion of another's right by an act defendant did or authorized to be done. Whether done negligently or with due care, defendant did it. In the use of fire ordinary care (in the absence of a controlling statute) is a defense (*Berger v. Minneapolis Gaslight Co.* 60 Minn. 1. c. 300, 301, 62 N. W. 336), and negligence must be proved before liability for its escape arises.

Nor, for the same reason, is the rule applied in this last cited case (cited also by plaintiff) that one who [159] collects petroleum on his premises and allows it to escape and go upon those of another, is liable without regard to negligence, applicable here.

The case of *Vaughan v. Menlove*, 3 Bing. N. Cas. 468, 32 E. C. L. 209, is likewise inapplicable. In that case defendant stacked hay near plaintiff's cottage with notice that the con-

dition of the hay was such that spontaneous combustion was likely. It ensued and defendant was held on the ground of his own negligence.

St. Louis Southwestern R. Co. v. McGrath (Tex.) 160 S. W. 444, simply applied the rule that a railway consenting to the use of its road by the engines of another was liable for loss resulting from fires negligently set out by such engines.

In Rolfe v. Boston, etc. R. Co. 69 N. H. 476, 45 Atl. 251, it was decided that heating a car to prevent the freezing of vegetables was reasonable and necessary and a part "of the actual operation of the road" and that the company could not escape liability to a third person for the destruction of his storehouse by fire resulting from negligent management of fire in the car by the shipper of the vegetables, whom it permitted to maintain the fire in consideration of his relieving the company of loss to him from the freezing of his vegetables. The court said the company could not avoid liability for damages from negligent exercise of its extraordinary powers by contracting for their exercise by some irresponsible person. In other words, it held, in effect, that defendant was negligent in the *operation* of its road and was liable on that ground.

In Harrington v. Chicago, etc. R. Co. 143 Mo. App. 418, 128 S. W. 807, a judgment was affirmed in which the trial court found, in effect, that mules shipped in a car in which hay had been placed for bedding had been injured by reason of fire which caught from sparks, the car having been negligently placed too near the engine.

In Pratt v. Missouri Pac. Railroad, 139 Mo. App. 502, 122 S. W. 1125, a judgment was affirmed for damages for the death of a [160] switchman, killed at night by being thrown under the wheels of a car on which he was riding when it came into collision with another which a brakeman negligently stopped before it cleared the "lead track" along which the moving car was passing. This was a case of simple negligence of an employee, as was the preceding case.

In Ross v. Chester Traction Co. 224 Pa. St. 86, 73 Atl. 188, defendant was held liable for the death of a child of seven whose clothing caught fire from embers fanned into a blaze by the wind, the fire having been set out by defendant's servant acting in the scope of his employment, but negligently left by him before it died to the point of harmlessness.

The case of Marine Ins. Co. v. St. Louis, etc. R. Co. 41 Fed. 643, is cited. The Circuit Court for the Eastern District of Arkansas found that about 4000 bales of cotton had accumulated, filling warehouses of a compress company and sheds not intended for storing cotton, and also being piled along and across a public street (of Little Rock) leaving only a narrow passageway for public use.

The cotton was exposed to sparks from engines, and for five weeks persons smoking cigars and cigarettes were continually passing through the narrow passageway left. The cotton had caught fire more than once previously.

The court found that defendant was responsible for the accumulation of the cotton and that the cotton *in the street*, in the circumstances, constituted a nuisance, and that cotton having caught fire and that fire having been communicated to the cotton insured by plaintiff, defendant was liable for damages for the loss.

On appeal a like case (St. Louis, etc. R. v. Commercial Union Ins. Co. 139 U. S. 223, 11 S. Ct. 554, 35 U. S. (L. ed.) 154) was reversed for error in instructions submitting the question of defendant's responsibility for the accumulation of the cotton, and [161] subsequently the case cited was reversed on stipulation (154 U. S. 515).

Waiving the weakening effect of these matters, the case is nevertheless not authority for plaintiff's position. It may be conceded that the placing of combustible matter, such as cotton, in a public street and leaving it there for five weeks constantly exposed to fire dropped by careless passersby who several times set the cotton on fire, constituted a nuisance. The fire causing the loss was actually set by a boy lighting a cigarette (139 U. S. 223).

That is not this case. It cannot be said that bunk cars, properly constructed, are nuisances in all cases, though occupied as living quarters by laborers. Nor does it appear there was any danger of fire in plaintiff's wood in this case from any reasonable use of the cars themselves, nor that loss resulted from any use of the cars. Plaintiff's loss resulted from the negligence of the men in kindling the wash fire at a place at which, so far as the evidence shows, they had not kindled a fire previously.

The nuisance in this case, if nuisance it can be called, required the addition, to what defendant did, of the negligence of the men. Unless defendant is responsible for that in some way it is not responsible for the so-called nuisance of which that negligence is an essential element.

In the case of Marine Ins. Co. v. St. Louis, etc. R. Co. supra, the conditions which resulted in the ignition of the cotton were present and apparent when the cotton was put in the street, and the obstruction of a public street is in itself a nuisance. In this case the cars were on defendant's own property and the element which endangered and destroyed plaintiff's property was added by the negligent act of the men occupying the cars.

"The liability of a defendant for injuries caused by a nuisance depends solely upon whether it was [162] caused or continued by

him" (6 Labatt on M. & S. [2 Ed.] sec. 2396) and, conversely, he must cause or continue it or he is not liable.

It is suggested that the washing of clothing is a necessary incident to ordinary modes of living and that the use of fires outside the cars was a necessary means of performing this function. No cases are cited in support of this view, though there are authorities which apply such a principle to the absolute necessities of living, such as eating, drinking, etc., but none, so far as we can find, which go to the length plaintiff's suggestion goes.

So far as the argument as to the creation of a nuisance is concerned, in this case, it is clear enough that plaintiff's position can be supported only on the theory that defendant was in some way responsible for the act of the men in kindling the fire, and this depends simply upon the question of defendant's responsibility as master. That question has already been considered.

IV. It is argued, in substance, that the fact defendant did not, before plaintiff's wood was ignited, extinguish the fire kindled by the laborers, constituted actionable negligence.

As already pointed out, defendant cannot be held responsible for the act of the men in kindling the fire in the first instance. Neither is there any evidence that dry weeds or other combustible matter on the right of way contributed to plaintiff's loss. The plaintiff is not, therefore, aided in any way by the sections of the statutes (Secs. 3150, 3151, R. S. 1909) relating to fires set out by engines and those communicated by the ignition of dry vegetation and undergrowth negligently permitted to remain on the right of way. The facts of this case do not bring it within their purview.

[163] We do not understand plaintiff to contend that a railroad company is liable in every case for damages resulting from loss from fire on its right of way originating from no act of its own, negligent or otherwise. Nor could such a contention be successfully maintained. The rule is that the owner of premises who discovers fire thereon, for the origin of which he is not responsible, is bound to use ordinary care to prevent such fire spreading to adjoining property. [Baird v. Chambers, 15 N. D. 618, 109 N. W. 61, 125 Am. St. Rep. 620, 6 L.R.A. (N.S.) 882]. Apply it to this case. The knowledge of the laborers of the existence of the fire they kindled on the right of way was not defendant's knowledge, for the same reason that their act in kindling the fire was not defendant's act—they were not acting for defendant or within the scope of employment by it at the time.

The only evidence that the fire was seen by any employee of defendant before plaintiff's

wood caught fire is that which shows it was seen by a conductor of one of defendant's passenger trains which passed the spot at 9:25 a. m., but a few minutes before the wood caught and the fire therein got beyond control. When the conductor saw the fire he was engaged in taking his train into Kansas City; the fire was in charge of the laborers who had kindled it; the bunk cars were between it and plaintiff's wood, which was twenty-five feet away, and there was no fire other than that under the wash kettle. It does not appear that the conductor knew of any loosely piled wood upon plaintiff's lot or that any other employee or representative of defendant had knowledge of it, nor does it appear that the cordwood in ricks or stacks could reasonably have been expected to catch from sparks from the fire mentioned. The failure of the conductor to stop his passenger train to extinguish the fire under the wash kettle did not, in the circumstances, constitute negligence. There is no evidence defendant imposed any such duty upon its passenger conductors, and it would too much [164] endanger the lives of passengers, whose safety so much depends upon trains complying with their schedules, for the courts to require the stopping of passenger trains in order that those in charge might extinguish fires on the right of way, in circumstances like those in this case at least. [Missouri Pac. R. Co. v. Donaldson, 73 Tex. 124, 11 S. W. 163; Pittsburgh, etc. R. Co. v. Brough, 168 Ind. 378, 81 N. E. 57, 12 L.R.A. (N.S.) 401.] It is also clear there is no evidence the conductor had any opportunity to report the fire to defendant in time for it to have saved plaintiff's property. That phase of the case need not, therefore, be discussed.

In any view, consequently, there is no substantial evidence to support the contention that there was a negligent failure to extinguish the fire.

The case of Clark v. Kansas City, etc. R. Co. 129 Fed. 341, 64 C. C. A. 19, does not support plaintiff's position. In that case some of the facts bore considerable resemblance to those in this case. A gang or crew of laborers, housed in bunk cars, kindled fires, for washing clothes, near plaintiff's warehouse and maintained such fires all day. Defendant had notice, however, *in the forenoon*, of the fires and of the danger to plaintiff's property, but took no precautionary measures. The warehouse caught fire at 11 p. m., the fires first having been kindled about 9 a. m. Defendant was held liable on the ground of its failure, after "the fires became a known fact and condition on" its premises, to employ ordinary care to prevent damage to adjacent property, that question and that as to plaintiff's contributory negligence being for the jury. In that case there was notice and ample time thereafter to act. In that vital particular it differs from this case.

The judgment should be reversed. Brown, C., concurs.

PER CURIAM.—The foregoing opinion Blair, C., is adopted as the opinion of the court. All of the judges concur.

Rehearing denied December 31, 1914.

NOTE.

In the reported case it is held that railroad laborers living in "bunk cars" placed on a switch track do not act within the scope of their employment in building a fire on the right of way to heat water for the purpose of washing their clothes. The railroad company is accordingly held not to be liable for damage caused by the fire escaping from control and burning property on adjacent land. The liability of a master to a third person for damage caused by a fire started by a servant is discussed in the note to Seybold v. Eisle, Ann. Cas. 1914A 1097.

FOURTH NATIONAL BANK OF FAYETTEVILLE

v.

McARTHUR ET AL.

North Carolina Supreme Court—January 13, 1915.

168 N. Car. 48; 84 S. E. 39.

Trial — Misconduct of Judge — Reference to Failure to Call Witness.

Where, in an action on certain notes, the alleged signatures of indorsers are claimed to be forgeries, a question by the trial judge to plaintiff's counsel as to why he did not call the maker to testify as to the genuineness of the indorsers' signatures is prejudicial error.

Handwriting — Expert Witness — Test by Other Writings.

On an issue as to the genuineness of the alleged signatures of indorsers to the notes sued on, it is error to submit to witnesses, testifying to their opinion as to the genuineness of the signatures, on cross-examination, imitated signatures made by engravers in order to test the witnesses' knowledge

[See note at end of this case.]

Photographs — Admissibility — Preliminary Proof Requisite.

On an issue as to the genuineness of the signatures of alleged indorsers of certain notes sued on, enlarged photographs of the disputed writings are inadmissible without preliminary evidence of the photographer who made them as to how and under what conditions they were taken, so that the jury might

determine whether they were exact reproductions.

[See 1 Ann. Cas. 161; 10 Ann. Cas. 962; 75 Am. St. Rep. 477.]

Appeal from Superior Court, Cumberland county: ROUNTREE, Judge.

Action by Fourth National Bank of Fayetteville, plaintiff, against Adam McArthur et al., defendants. From judgment rendered, plaintiff appeals. **REVERSED.**

[49] This is an action upon two promissory notes of \$10,000 each, dated 3 and 4 February, 1913, and due respectively at sixty and ninety days after their date. They were signed by J. Sprunt Newton as maker, and apparently indorsed by Adam McArthur, Newton's brother-in-law, and Mrs. M. C. McArthur, his mother-in-law. Judgment by default for want of an answer was taken against J. Sprunt Newton, and the other defendants filed answers denying the genuineness of the indorsements and averring that they never indorsed the said notes or authorized any one to do so for them, and out of this controversy the issue in the case arose.

It may be well for a proper understanding of the exceptions considered in this Court to state, in a summary way, the nature of the testimony introduced by the parties to support their respective contentions.

The plaintiff's evidence was of the following kind:

(1) Opinions of witnesses who testified that they were acquainted with the defendants' handwriting by virtue of having seen the defendants write, or their admitted signatures in the course of business prior to this controversy, and that from such a recollection they were able to form an opinion as to the genuineness of the indorsements in controversy.

(2) Opinions of witnesses who, by virtue of experience or special study, were either admitted or shown to be experts, and had thereby become qualified to compare admittedly genuine handwritings and those in dispute and give their opinion upon the disputed signatures.

(3) Other circumstances and inferences which the plaintiff attempted to use, such as statements from their witnesses as to alleged conversations with Adam McArthur about his obligations upon notes similar to these in controversy, and some of these notes referred to in the conversations the plaintiff claimed to be old notes of which the notes in controversy were renewals. These conversations were denied by Adam McArthur, and the defendants contend that there were corroborating circumstances tending to show that the denial was true. Among the above stated

circumstances, the plaintiff contended that there was similarity between the signatures of the defendants admitted in the cases as standards of comparison and the signatures in controversy.

[50] On the other hand, the defendants relied upon the following kind of testimony:

(1) The statements of the defendants themselves that they did not sign their names upon the notes in controversy, which was corroborated by other testimony.

(2) The opinion of witnesses, who had known the defendants for many years, and had become acquainted with the handwriting of both of the defendants in the course of business with them, that the alleged indorsements were not genuine.

(3) The opinions of experts by comparison of the signatures in dispute with admitted standards to the effect that, in their opinion, the signatures in controversy were not genuine, and these witnesses gave many reasons, facts, and circumstances tending to corroborate their opinion, and to show before the jury how they arrived at such an opinion.

(4) Other facts and circumstances which tended to show the improbability that the defendants indorsed the said notes, such as the entire lack of consideration on the part of the defendants to become liable for the \$20,000 in notes sued upon, the proceeds of the notes having been paid to other parties, and evidence that some controversy had already arisen before the date of the alleged notes which tended to put the defendants upon their guard about papers coming from the source that these notes are alleged to have come, and the evidence of good character of the defendants and their witnesses, and the dissimilarity, as shown on the standards, and the signatures in controversy.

The above statement of the nature of the evidence, rather than a summary of the evidence itself which is not necessary, was taken, substantially only, from the defendants' brief, and may not be quite as strong for or favorable to the plaintiff as, perhaps, it should be. It will, however, answer our purpose, and the defendant cannot complain of it.

The jury returned a verdict for the defendants, and from the judgment thereon plaintiff appealed.

Rose & Rose for appellant.

Shaw & MacLean and *McLean, Varner & McLean* for appellees.

WALKER, J. (after stating the facts):—There are many exceptions in the record, thirty-two, we believe. The number could easily be reduced to less formidable proportions, without any sacrifice to the plaintiff, if we desired to do so; but as only two or three

of them will be examined, we will not undertake the task of reduction, but may be permitted to suggest that counsel, in preparing assignments of error, would greatly simplify and facilitate the work of this Court if after having had the time and the opportunity to carefully examine their exceptions reserved during the hurry of the trial, some of which are necessarily made inadvisedly [51] and not upon proper or sufficient study and due deliberation, they would cull out those by a process of intelligent selection or elimination, as the case may require, and thus leave only those of real or suppose merit. This method would not only be of decided advantage to the Court by excluding immaterial matter calculated to divert attention from the main questions and relieve it of useless labor, but it would also greatly conserve the interests of the appellant by presenting his case in a more solid and compact form. We respectfully commend this admonition to our brethren of the bar, in the confident hope that they will heed it in the future preparation of appeals.

The three exceptions we will consider are these:

1. The alleged expression of opinion by his Honor, when asking the plaintiff's counsel why they did not call J. Sprunt Newton.

2. The testimony of the witness O. A. Lester as to imitations of the genuine signatures of Adam McArthur made by him, he being an expert engraver, which were used and submitted to the jury, with his explanation and illustration of them, to show that the signature of Adam McArthur was easily simulated, and also similar imitations of Mrs. McArthur's genuine signature, which were permitted to be used for the purpose of disproving the genuineness of her signature to the notes in dispute. Certain of these imitations by the engraver were handed to some of plaintiff's witnesses, among others, A. L. McGowan and S. W. Cooper, D. L. Fort and R. M. Nixon, who had testified to the signatures of the two McArthurs as being genuine. They were shown to the witnesses in an envelope, with a section of the same cut out in the lower right-hand corner, sufficient only for the purpose of exhibiting the signature itself, and not the remainder of the paper. The witnesses were then asked for their opinions as to the genuineness of those signatures, and the court allowed them to be cross-examined in regard thereto, with a view of contradicting or at least weakening their former testimony.

3. The introduction of certain enlarged photographs of the disputed signatures—known as photographic-microscopic reproductions of the same, magnified 154 times by the process of photography—for the purpose of enabling David N. Carvalho and O. A. Lester

to compare or contrast them with the admittedly genuine signatures, which had not been so photographed and enlarged, and thereby show the discrepancies between the two, and otherwise to explain and illustrate their testimony as handwriting experts.

There was a vast deal of testimony in the case, and, as we have stated, numerous other exceptions, some of merit, and some having none, but the foregoing synopsis of three points will suffice for a clear apprehension of the case, so far as we will discuss it.

[52] First. We are of the opinion that the remark of the learned and unusually careful judge, in regard to calling J. Sprunt Newton, should not have been made, and was calculated, as an intimation, if not a direct expression, of opinion upon the facts, to prejudice the plaintiff, and is forbidden by the statute, which provides: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion as to whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." There have been numerous decisions upon this statute, and this Court has shown a fixed purpose to enforce it rigidly as it is written. There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious to avoid it, and to obey the statutory injunction strictly. We are absolutely sure that they fully desire to do so, and their occasional expressions which have come before this Court for review and held to be violations of the statute have evidently been inadvertent, but none the less harmful. The evil impression when once made upon the jury becomes well-nigh ineradicable. Judge Manly, who was one of the most eminent and just of our judges, said in *State v. Dick*, 60 N. C. 440, 86 Am. Dec. 439: "He (the presiding judge) endeavored to obviate the effect of his opinion by announcing in distinct terms the jury's independence of him; but this was not practicable for him to do. The opinion had been expressed and was incapable of being recalled. The object (of the statute) is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments—the one for the judging of the law, the other for the judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice, that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot

indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. The error is one of the casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury." And to the same effect did Justice Hoke speak in *State v. Cook*, 162 N. C. 586, 77 S. E. 759, citing and approving *State v. Dick*: "The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added: 'But the court has no right to express an opinion about [53] the case,' but the forbidden impression had already been made, and as to the vital portion of the prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose." So in *State v. Ownby*, 146 N. C. 678, 61 S. E. 630, we said: "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial." And again in the same case: "We know that his Honor unguardedly commented upon the testimony of the witnesses, but when the prejudicial remark is made inadvertently, it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial." Like views and cautionary requests to the judges were stated in *Withers v. Lane*, 133 N. C. 184, 56 S. E. 855: "The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his opinion of the case." The case of *Perry v. Perry*, 144 N. C. 330, 57 S. E. 1, repeats this injunction to observe the mandate of the statute, for it is there said: "Any remarks by the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment." It

is very strongly and urgently reiterated in *Park v. Exum*, 156 N. C. 228, 72 S. E. 309, as follows: "The Court has always been swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of the trial, and under numerous decisions construing the statute, we must hold this remark of his Honor, in the presence of the jury and before the verdict, to be reversible error."

We have not cited these cases for the purpose of adjudging that plaintiff can avail itself of what was said by the judge during the trial of this case, but to again emphasize the imperative necessity of keeping the statute steadily in mind and freeing trials of an adverse or injurious intimation of opinion, to the end that there may be such a fair and impartial trial as is guaranteed by the Constitution and enforced by the statute. Many more cases could be cited to illustrate the great importance of this matter, but we omit any reference to them for the obvious reason that those mentioned are quite sufficient for the purpose. It is true, we have [54] held that where, by the nature of the case, a party is called upon to prove or disprove a fact material to his success, and the witness who, if anybody, can testify to it, is accessible to him, the failure to produce and examine him is a proper subject of comment before the jury (*Powell v. Strickland*, 163 N. C. 393, Ann. Cas. 1915B 709, 79 S. E. 872; *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483); but this, of course, meant comment of counsel and not of the judge, whose slightest intimation as to whether a fact has been found or not will have the greatest weight with the jury. It is not necessary to decide whether plaintiff was prompt and diligent enough in the protection of its rights to now take advantage of this slip of the judge, as we will order a new trial upon another point. It may be that he has, under the circumstances; but we leave the question undecided.

Second. Our opinion is that there was error in permitting the witness of the plaintiff to be cross-examined in regard to the signatures which were written or engraved by Mr. Lester and exhibited to them through the aperture made in the envelope, without showing the rest of the paper in which the signature was written, it being called in this case, rather facetiously, though not inappropriately, the "cat-hole test." These papers should not have been admitted at all. They tended to introduce collateral questions; to multiply the issues, in fact, though perhaps not in form; to divert the minds of the jurors from the real and only question to be decided; to confuse them in their deliberations and to put the witness to an unfair disadvantage and to entrap him unwarily, and also to take the plaintiff by surprise and deprive him of a

Ann. Cas. 1917B.—67.

fair opportunity to know the general nature of the evidence, so that he may prepare to meet it. It tends more to muddy the waters, like the cuttle-fish, than to advance the purpose for which all judicial procedure is adopted, and that is, to conduct the trial so as to establish the truth and to adjudicate rights according to the pertinent and determinative facts, and always to adhere closely to the issue upon which the decision should turn. It was well said in *Hardy v. Harbin*, 154 U. S. 598, 14 S. Ct. 1172, 22 L. ed. 378, 1 Sawy. 194, 11 Fed. Cas. No. 6,059, that, taken at its best, evidence of experts by comparison of handwriting is very unreliable. And in *Adams v. Field*, 21 Vt. 256: "Those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon." Expert testimony is permissible in such cases, but it is not always the best proof of which the matter is susceptible, and its efficiency and probative force is sometimes easily magnified, and by it the truth is deftly concealed. It, therefore, follows that all proper precautions should be taken to prevent impositions upon the court and jury. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L.R.A. 163; *U. S. v. Pendergast*, 32 Fed. 198.

[55] We may remark *imprimis*, and for the purpose of showing the application of the authorities hereinafter cited, that it was not competent to submit specimens of the admittedly genuine and the disputed papers to the jury for their independent examination, before the passage of our recent statute. The old and strict rule had been somewhat relaxed before then, by allowing the witness to hand the papers to the jury—the standards and the questioned documents—and explain the similarities and the dissimilarities to them, so as to illustrate his own testimony and the reasons for his opinion. *Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589; *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447; *Nicholson v. Eureka Lumber Co.* 156 N. C. 59, 72 S. E. 86, 36 L.R.A.(N.S.) 162; *Thomas v. State*, 18 Tex. App. 213. But this was the extreme limit, beyond which the party was not allowed to go. The statute changes the rule, but is so carefully and explicitly worded as to exclude by clear implication the examination of any papers but those admitted to be genuine, as standards or models of the true handwriting, and the writings in dispute. It provides: "In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses,

and such writings and the evidence of the witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Before the enactment of this law, this Court held, in *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28, and other cases, that the investigation must be restricted to the writings that are genuine and those alleged to be spurious, and that other writings, not of this class, should be excluded in making the comparison. We are aware that there has been some conflict of authority upon this question, but in the midst of all the differing notions about it, we prefer, as we have the choice, not only to abide by the language of our statute as being restrictive in its nature, but to adopt what is said in *Rogers on Expert Testimony* (2 ed.), p. 342, sec. 144, which is as follows: "The question has been raised whether it is competent on cross-examination to test the knowledge of the witness by showing him real and fictitious signatures and asking him to say which of them are genuine. In those States where a comparison is only allowed to be made with writings which are admitted to be genuine, it is evident that such a comparison should not be allowed except both parties are agreed which of the signatures are real and which false, for unless so agreed, side issues are raised which complicate the case. The rule which excludes writings not admittedly genuine applies with as much force to the cross-examination as to the direct examination. To admit such writings would lead, as well in the one case as in the other, to an indefinite number of collateral issues, and would operate as a surprise to the opposite [56] party, who would not know what writings were to be produced, and therefore could not be prepared to meet them," citing *Howard v. Patrick*, 43 Mich. 121, 128, 5 N. W. 84; *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Hilsley v. Palmer*, 32 Hun. (N. Y.) 472 (1884); *Van Wyck v. McIntosh*, 14 N. Y. 439, which support the text. See also *Dietz v. Grand Rapids Fourth Nat. Bank*, 69 Mich. 287, 289, 37 N. W. 220. The case of *Hilsley v. Palmer*, *supra*, is an interesting one and decisive of this one, if we follow it as authority and adopt its conclusions, and we do not see why we should not, as it is of a very persuasive character, by reason of its clear statement and strong reasoning.

The New York Court of Appeals has considered this question in at least one famous and hotly contested case, *People v. Patrick*, 182 N. Y. 175, 74 N. E. 843, in which, with its usual convincing logic, it demonstrates the unfairness of this kind of examination when applied to an opinion witness, that is, one who testifies from actual knowledge of

the handwriting in question, or his familiarity with it acquired by business intercourse or other association with its supposed author, and concludes that "it was obviously an unfair test," and then says: "It is to be observed that Harmon was called upon to testify, by reason of his competency to form an opinion from long acquaintance with the handwriting of the deceased, and not by reason of his being a professional expert in handwriting or penmanship. I think the question is distinguishable, upon the facts, from that passed upon in *Hoag v. Wright*, 174 N. Y. 36." The case of *Hoag v. Wright*, *supra*, was distinguished from *People v. Patrick* because in the former the witness was an acknowledged expert in handwriting, and we suppose was, therefore, thought to be able to take care of himself, and to be better acquainted with the "tricks of the trade." The law is well stated in *Andrews v. Hayden*, 88 Ky. 455, 459, 11 S. W. 428: "The admissions of these spurious signatures, prepared by an experienced expert, for the purpose of being presented to the witnesses for the plaintiff, was manifestly wrong. They were executed with such skill as to deceive any ordinary observer, or those having no other experience than their familiarity with their neighbor and his handwriting. Such writings should have been excluded because tending to obstruct the proper administration of the law, and deceiving, by the skill in their execution, the minds of honest men. It was neither a just nor legal test, and threw no light on the issue presented." A strong case favoring this view is *Wilmington Sav. Bank v. Waste*, 76 Vt. 331, 336, 57 Atl. 241, where the Court held that, in cross-examination, it was competent for the defendant, for the purpose of testing the correctness of the witness's judgment, to show him signatures of the defendant conceded or proved to be genuine; but this was the limit of comparison.

[57] The defendant examined the witness as though he were an expert, when he was not. His testimony was directly upon the question whether or not the signature upon the note in suit was genuine. But if the witness had been an expert the rule required that a standard of comparison should be established before he could be examined by the use of signatures made for the purpose of the trial. It appears that the signature upon another note in evidence was conceded to be the defendant's, but the exceptions do not show that it was used in the cross-examination. The witness was required to select from the three papers the genuine signatures of the defendant, and then the papers went to the jury. It was error to permit this course of examination and to allow the papers to be submitted to the jury. *Sanderson v. Osgood*, 52 Vt. 309; *Rowell v. Fuller*, 59 Vt. 688,

10 Atl. 853; Costello v. Crowell, 133 Mass. 352; Abbott's Trial Ev. (2 ed.) 488, 489.

Speaking of collateral writings, the Court in *State v. Minton*, 116 Mo. 605, 614, 22 S. W. 808, said: "They were no part of the record in the case, not admitted to be in the handwriting of either one of the defendants, and clearly inadmissible for the purpose of comparison."

While we have noted that there is some conflict, we yet think the weight of authority, and the rule of reason, is in favor of the plaintiff's contention and against the court's ruling. We add to the authorities already cited the following: *Thomas v. State*, 18 Tex. App. 213, approved by repeated decisions in that Court; *Wigmore on Evidence*, secs. 1996, 2001, and 2002; *King v. Donahue*, 110 Mass. 155, 14 Am. Rep. 589; *Sanderson v. Osgood*, 52 Vt. 309; *U. S. v. Chamberlain*, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778; *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Hornellsville First Nat. Bank v. Hyland*, 53 Hun 108, 6 N. Y. S. 87; *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 3 S. W. 828, 60 Am. Rep. 258. And analogous cases are: *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L.R.A. 227; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Kirksey v. Kirksey*, 41 Ala. 636; *Howard v. Patrick*, 43 Mich. 128, 5 N. W. 84; *People v. Murphy*, 135 N. Y. 455, 32 N. E. 138; *Fogg v. Dennis*, 3 Humph. (Tenn.) 48. In *Rose v. Springfield First Nat. Bank*, supra, the Court said: "The rule which includes extrinsic papers and signatures is substantially the same in the direct and cross-examination. Papers not relevant as evidence to the other issues are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signature should have been excluded, whether used to test the witness as an expert or to test his knowledge of the handwriting of the plaintiff." *Wigmore on Ev.* at sections 1996, and 2001, 2002, subsec. 2, says: "The specimens, to afford a fairly trustworthy inference, must of course be genuine. But, [58] furthermore, the process of proving their genuineness may result (as in the case of the expert's use of them) in a multiplicity and confusion of issues. The specimens submitted to the jury must be genuine." 2 Elliott on Ev. sec. 1105, says: "In those jurisdictions where there are no statutes regulating the admission of opinions as to a comparison of handwriting three distinct rules seem to prevail. In a few jurisdictions the rule is that the opinions

of experts based on any comparison are improper; in other jurisdictions the rule is that opinions are admissible in case the writings to be compared are in evidence for another purpose and admitted to be genuine; and the third rule is that opinions of experts are admissible as in the rule immediately preceding and, in addition, on writings whose genuineness has been proved on the trial for the express purpose of comparison. The reason given for holding that the only papers that can be used in such an examination of an expert are those which have been brought into the case for another purpose is that such a limitation is necessary in order to avoid the evil of collateral issues, the danger of fraud in selecting specimens, and the danger of misleading the jury." It is perfectly clear that evidence of this kind may be liable to abuse, and so manipulated or used as to give the jury a false impression as to the real value of a witness's testimony. It is dangerous, to say the least of it, and may tend more to suppress than to disclose the truth. The limitation may be made so perfect as to mislead a trained expert, and it seems from the books that this has sometimes been done. How, even, can a mere opinion witness be expected to stand the ordeal of such an examination, without the benefit even of a tithe of the expert's study and experience, if the latter fails? It shows the necessity of confining the examination to the genuine specimens and the disputed writings.

The above authorities, or some of them, also hold that it is incompetent to introduce such imitations of the genuine signature for the purpose of showing how easily it may be forged or counterfeited. *Thomas v. State*, 18 Tex. App. 213. And in *Hickory v. U. S.* 151 U. S. 306, 14 S. Ct. 334, 38 U. S. (L. ed.) 170, the Court said: "In the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. *Bromage v. Rice*, 7 C. & P. 548, 32 E. C. L. 625; *Doe v. Newton*, 5 Ad. and El. 514, 31 E. C. L. 382; *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; 1 Greenleaf Ev. sec. 580. The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided."

Third. The enlarged photographs of the disputed writings should not have been used, at least without proving, by the man who made them, how and under what conditions they were taken by him, so as to let the [59] jury finally decide, from the facts, whether they are exact reproductions. It was held in *Paducah First Nat. Bank v. Wisdom*, 111 Ky.

149, 63 S. W. 467, that such enlargements of the signatures should be authenticated by the photographer. In *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540, it is said, with reference to this subject: "The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and the disputed signatures. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact facsimiles of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at least a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights and shadows which prevail whilst being taken." This principle has been sanctioned by the following authorities: *Hynes v. McDermott*, 82 N. Y. 41, 50, 37 Am. Rep. 538; *Merchants, etc. Cotton Oil Co. v. Cufkin Nat. Bank*, 34 Tex. Civ. App. 555, 79 S. W. 651; *Cincinnati, etc. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 385, 47 N. E. 249, 43 L.R.A. 777; *New York Fifth Ave. Bank v. Forty-Second St. etc. Ferry R. Co.* 137 N. Y. 242, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L.R.A. 331; *Houston v. Blythe*, 60 Tex. 512; *Eborn v. Zempelmann*, 47 Tex. 513, 26 Am. Rep. 315; *Howard v. Illinois Trust, etc. Bank*, 189 Ill. 577; *Smith v. Martin*, 135 Cal. 251, 67 Pac. 779; *Healy v. Defiance City Bank*, 160 Ill. App. 637; *Erb v. Great Western R. Co.* 42 U. C. Q. B. 90; *Baltimore, etc. R. Co. v. Wilkens*, 44 Md. 27, 22 Am. Rep. 26; *Harrison v. Annapolis, etc. R. Co.* 50 Md. 513; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 42, 48; *Burrows v. Klunk*, 70 Md. 460, 17 Atl. 378, 14 Am. St. Rep. 371, 3 L.R.A. 576; *Barabasz v. Kabat*, 86 Md. 34; *Lamm v. Port Deposit Homestead Assoc.* 49 Md. 241, 33 Am. Rep. 246; *New England Mut. L. Ins. Co. v. Swain*, 100 Md. 575, 60 Atl. 469; *Moore v. Citizens' Nat. Bank*, 111 U. S. 169, 4 S. Ct. 345, 28 U. S. (L. ed.) 385.

The Court said in *Hynes v. McDermott*, supra: "It would be carrying the matter much farther to permit an expert to compare photographic copies of signatures, and therefrom to testify as to the genuineness of a disputed signature. We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still, somewhat for exact likeness

will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand, to be put under the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we can [60] afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there was no proof here of the manner and exactness of the photographic method used. It was right not to receive Loader's evidence as that of an expert." The courts that have allowed this kind of evidence have generally held that both the admittedly genuine signature and the one in dispute shall be alike photographed and the testimony of the photographer taken as to the accuracy of the method pursued by him and the results obtained. *U. S. v. Ortiz*, 176 U. S. 422, 20 S. Ct. 466, 44 U. S. (L. ed.) 529, and other cases supra.

It is not necessary now to say more upon this question, as the deficiencies in the proof may be easily supplied. All we decide is that the photographic copies were not admissible in the then state of the evidence, and no more.

There are other errors assigned, which seem to have merit in them, but we will refrain from any further reference to them, as they may not occur again. For those already indicated, a new trial is ordered.

New trial.

NOTE.

Testing Handwriting Witness by Use of Other Writing.

I. Introductory, 1061.

II. Nonexpert Witness:

1. Use of Irrelevant or Disputed Writing:
 - a. View Rejecting Test, 1061.
 - b. View Allowing Test, 1065.
2. Use of Undisputed or Proved Writing, 1067.
3. Witness's Own Writing in Issue, 1068.

III. Expert Witness:

1. Use of Irrelevant or Disputed Writing:
 - a. View Rejecting Test, 1070.
 - b. View Allowing Test, 1071.
2. Use of Undisputed Writing, 1071.

IV. Rule in New York, 1073.

I. Introductory.

The purpose of the present note is to review the cases deciding the specific question whether it is competent or allowable to test a handwriting witness by the use of a writing other than that the genuineness of which is in issue. This question is not to be confused with that of proving handwriting by comparison, although as the note shows, the law in that regard is probably the basis of, or at least has influenced, the law as to testing witnesses by other writings. Therefore cases concerning proof by comparison of handwritings are excluded unless they involve the specific question of testing the witness. Cases in which the person whose handwriting is in issue is on the stand and is asked to write his name or to give a specimen of his handwriting are also excluded as turning on the question of comparison of handwriting, rather than on the question of testing the witness. The decisions on the question herein treated are inharmonious, especial conflict being found where the question arises in the case of an expert witness. For the reason that more uniformity is to be found in the rulings as to the testing of a nonexpert witness, the two classes of cases are treated separately, although no decision has been found which points out any clear reason for a difference between the rule as to experts and that as to nonexperts.

*II. Nonexpert Witness.**1. USE OF IRRELEVANT OR DISPUTED WRITING.**a. View Rejecting Test.*

It is the rule in a majority of the jurisdictions that a nonexpert witness, testifying as to the genuineness of a writing in question, may not, on cross-examination, be tested as to his knowledge of the questioned chirography by the use of other writings which have not been admitted or proved to be genuine writings of the person whose handwriting is in dispute. *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Andrews v. Hayden*, 88 Ky. 455, 11 S. W. 428; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Howard v. Patrick*, 43 Mich. 121, 5 N. W. 84; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47; *Wilmington Sav. Bank v. Waste*, 76 Vt. 331, 57 Atl. 241; *Pierce v. Northey*, 14 Wis. 10.

And a further general rule, which is really a part of or an incident to the foregoing rule, is that a nonexpert handwriting witness may not be tested on cross-examination by eliciting his opinion as to the genuineness of other writings not in evidence and irrele-

vant to the cause at issue. *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; *Hughes v. Rogers*, 8 M. & W. (Eng.) 123, 10 L. J. Exch. 238; *Gleeson v. Wallace*, 4 U. C. Q. B. 245; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 340; *Howard v. Patrick*, 43 Mich. 128, 5 N. W. 84; *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47. See also *Melvin v. Hodges*, 71 Ill. 424. And see the reported case. *Compare Royal Canadian Bank v. Brown*, 27 U. C. Q. B. 41.

The practical identity of the two rules is shown by the fact that they have in some cases been stated as one, viz., that it is incompetent to test a nonexpert handwriting witness by the use of other writings irrelevant to the cause, or not in evidence, unless they are proved or admitted to be genuine. *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 340.

The principal reason for the rule that a witness may not be tested by the use of irrelevant writings, or writings not proved or admitted to be genuine, is that to allow that method of testing the witness raises collateral issues as to the genuineness of the writings used for the test, and the rule is based on the strong administrative policy against allowing collateral issues to be raised. *Griffits v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104; *Hughes v. Rogers*, 8 M. & W. (Eng.) 123, 10 L. J. Exch. 238; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Howard v. Patrick*, 43 Mich. 121, 5 N. W. 84; *Rose v. Springfield First Nat. Bank*, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258. See also *Melvin v. Hodges*, 71 Ill. 424. Thus in *Bacon v. Williams*, supra, it was said: "If disputed signatures were admissible for the purpose of trying the correctness of the opinions of witnesses, a collateral inquiry would be raised concerning each signature so offered, and a case might be filled with issues aside from the real question before the jury. In the present case, the signature offered to the witness was neither proved nor admitted to be in the handwriting of the plaintiff, nor did the defendant purpose to show that it was his genuine signature. The evidence was therefore rightly excluded." And in *Rose v. Springfield First Nat. Bank*, 3 S. W. 876, 60 Am. Rep. 258, the court said: "The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross examination. . . . Papers not a part of the case and not relevant, as evidence to the other issues, are excluded mainly on the ground that, to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other

party, who would not know what documents were to be produced, and, hence, could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff."

The leading case holding that a nonexpert witness may not be tested on cross-examination by questioning him as to the genuineness of other writings not relevant to the case and not proved to be genuine is *Griffiths v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104, which shows that the rule grew, not only out of the policy of preventing collateral issues, but also out of the rule of evidence against proof by comparison of handwritings. It was reasoned in that case that to submit the witness to such a test would involve an incidental examination by the jury of the irrelevant writings, thus violating both the rule against the comparison with such writings and the rule against the raising of collateral issues. It was said per Coleridge, J.: "The case comes within the rule laid down in *Doe v. Newton*, 5 Ad. & El. 514 [31 E. C. L. 382]. We must not allow papers which are not evidence in the cause to be let in for any purpose whatever. It is said that this was offered merely for the purpose of trying the knowledge of the witnesses; but the inquiry would not stop there. It would be impossible to keep from the jury questions, whether this or that paper was or was not in fact written by the party."

In *Hughes v. Rogers*, 8 M. & W. (Eng.) 123, 10 L. J. Exch. 238, it was held to be incompetent, when a nonexpert has testified as to handwriting, to put into his hands another paper, not in evidence in the cause, to elicit his opinion as to the genuineness thereof, as a test of his knowledge, and then to introduce testimony to contradict him, since this is to raise a collateral issue.

But, it has been held in England that the rule of *Griffiths v. Ivery*, 11 Ad. & El. 322, 39 E. C. L. 104, has no application where a witness testifies that the handwriting in question is not genuine, basing his judgment on the fact of a peculiarity in the person's manner of writing his name, and is then handed a signature not showing that peculiarity, which he admits is genuine; though the court were of the opinion that if the witness had denied the genuineness of the test signature it could not have been shown because that would have raised a collateral issue. See *Young v. Honner*, 2 M. & Rob. (Eng.) 536, wherein the following facts appeared: "A witness called for the defendant swore he believed the signature not to be the genuine signature of the defendant;

and as a reason for that belief he added, that the defendant always signed his name thus—'R. W. Honner.' Upon this Lee, for the plaintiff, in cross-examining the witness, put into his hands a document purporting to be signed 'Robert Honner,' and asked him whether he believed it to be the genuine signature of the defendant: and on his answering in the affirmative, he was asked whether the document was not signed 'Robert Honner' and whether, after seeing that document, he would persevere in saying that the defendant always signed his name 'R. W. Honner?' The document was not in any way relevant to the present issue. The judge objected that this course of cross-examination was not allowable, and insisted that it was merely instituting a comparison of handwriting; he cited *Doe v. Suckermore* and *Griffiths v. Ivery*." The reported decision is as follows: "Alderson, B. (after consulting the other Barons, who were sitting in banco) said the court was unanimously of opinion that the cross-examination, as far as it had been pursued, was regular, and that the question objected to might be properly put. His Lordship added that they could not subscribe to the decision of the Court of Queen's Bench in *Griffiths v. Ivery*; but the inconvenience there suggested, viz., that the jury would have to try various collateral issues, did not arise here, for the witness had himself admitted the document now put into his hands to be genuine; and surely, if the peculiarity existed in it which he relied upon, as disproving the genuineness of the signature now in dispute, that must be a circumstance by which to test the value of his belief on the subject. But if the witness had denied the genuineness of the signature to the document now put into his hands, he should not have allowed any issue to be raised upon that point."

The ruling of the leading English cases that a witness may not be tested by the use of irrelevant writings not admitted or proved to be genuine, was followed in the case of *Gleeson v. Wallace*, 4 U. C. Q. B. 245, which case seems, however, to turn rather on the admissibility of the writing in evidence than on the competency of the manner of testing the witness. But in a later case in the same court the test was allowed. *Royal Canadian Bank v. Brown*, 27 U. C. Q. B. 41, wherein it appeared that no question as to the test was made but the question was whether, after the test had been made, the writings used for the test were evidence for the jury generally, and it was held that, being admissible for the purpose of the test, i. e., to impeach the witness, they were admissible generally. The court said: "The issue was, whether the defendant indorsed the note in suit? Frisby, the defendant's witness, after stating his knowl-

edge of the defendant's handwriting, expressed his opinion that the indorsement was not defendant's signature. A paper was shown to him—not then proved to be genuine, and certainly not direct evidence on the issue, for nothing but the defendant's name was written on it twice—and he was asked if he thought the writing was the defendant's, and he said he thought not. Afterwards the evidence in reply was received, after objection made and overruled that this was evidence to support the issue which was on the plaintiffs, and therefore could not be given in reply. We think the objection was properly overruled. But then the jury had to form their conclusion as to the value of Frisby's evidence, and, as appears to us, the paper which he said did not contain the defendant's signature, but which was satisfactorily proved to contain it, should have been submitted to their inspection to enable them to put a right estimate upon his evidence as to the indorsement. If this was, as Mr. Paterson asserts, withheld from them, we are not prepared to uphold the ruling. Nor have we been able to satisfy ourselves that if this paper was admissible as evidence for any purpose, it was not evidence generally in the cause."

In *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, it was held to be incompetent to test a nonexpert witness by submitting to him sixteen signatures of the name of the person whose handwriting was in issue, these signatures having been specially prepared and arranged for the test. The court said: "One Gattton, a witness for plaintiff, testified that some years before, he had seen Henderson E. Massey write, and that it was his impression that the signature of the name of said Massey to the note in question was in his handwriting. After then stating, on cross-examination, that it was six or seven years since he saw Massey write, and that he did not know whether he would know his signature now, and did not know that 'he could pick out his signature in the bank,' defendant's counsel handed the witness a paper having written on it the name 'H. E. Massey' sixteen times, and asked the witness to point out the genuine signatures, if any were genuine. The court excluded the question, and exception is taken to this. It is urged that this question was proper on cross-examination, for the purpose of testing the knowledge of the witness, and as authority therefore reference is made to 1 Wharton on Evidence, sec. 710, where the author says: 'There is little question that a witness may, on cross-examination, be tested by putting to him other writings not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation.' Without stopping to inquire as to the gen-

eral correctness of this observation, and especially where the rule obtains, as in this state, that evidence of the genuineness of handwriting, based on comparison of hands, is not admissible, we think that at least with reference to test papers got up for the occasion, as in the present case, there was no error in not allowing the course of cross-examination proposed. The same author, further on, in section 715, remarks: 'We have already seen that a party cannot make testimony for himself by writing specimens for the instruction of witnesses afterwards to be called, as to his handwriting. By the same reasoning a party cannot be permitted to get up in this way test papers to be used subsequently for comparison of hands.' And although the paper here offered was not to be used professedly for comparison of hands, we think its admission for the purpose declared would be alike objectionable."

In *Fogg v. Dennis*, 3 Humph. (Tenn.) 47, the court said: "One of his [the testator's] sons, a witness for the plaintiff, testified that he was acquainted with the peculiar manner of making his mark for his signature, by often seeing him do it—and that he was of opinion that the mark in the present case affixed to the signature was his father's. The counsel for defendant then offered to submit to the inspection of the witness, what purported to be other signatures of his father without having admitted or shown them to be genuine or otherwise, for the purpose of asking him whether they were his signatures or not. This was refused by the court. At a subsequent part of the trial, the defendant offered to prove, that these papers which had no relation to the case were in fact signed by the father, which was refused by the court. And it is insisted in argument here, that in these respects, the court erred. The counsel for the defendant disclaiming all right to have contradicted the testimony of the witness by a comparison of signatures; yet insists that to test the knowledge or the truth of the witness, he had a right to submit to him signatures either spurious or genuine, and ask his opinion of them. To this we can by no means agree. It would lead in practice to much inconvenience and confusion, not to say, trickery and imposition—and after all could not attain the end proposed, that is, show to the jury the ignorance or falsehood of the witness as to the handwriting, without submitting to the jury the inspection and comparison of those other writings. This is an answer to the whole case."

In *Wilmington Sav. Bank v. Waste*, 76 Vt. 331, 57 Atl. 241, it was said: "The plaintiff called Martin A. Brown as a witness, who testified that he was familiar with the signa-

ture of the defendant, that he had seen him write, and that in his opinion the signature upon the note was the defendant's. In cross-examination the defendant showed the witness a paper which had the name 'C. H. Waste' written upon it ten times, in connection with an offer to show later in the trial that certain of the signatures upon the paper were the defendant's. The defendant was permitted to cross-examine the witness as to whether in his opinion any of the ten signatures were in the defendant's handwriting, and if so, which ones; whether any of them were not in the defendant's handwriting, and how many handwritings there were upon the paper. The defendant showed the witness two other papers of the same character and used them for the same purpose, and the three papers were admitted in evidence. In cross-examination it was competent for the defendant, for the purpose of testing the correctness of the witness's judgment, to show him signatures of the defendant conceded or proved to be genuine, but this was the limit of comparison. . . . The defendant examined the witness as though he were an expert, when he was not. His testimony was directly upon the question whether or not the signature upon the note in suit was genuine. But if the witness had been an expert the rule required that a standard of comparison should be established before he could be examined by the use of signatures made for the purpose of the trial. . . . It appears that the signature upon another note in evidence was conceded to be the defendant's, but the exceptions do not show that it was used in the cross-examination. The witness was required to select from the three papers the genuine signatures of the defendant, and then the papers went to the jury. It was error not to permit this course of examination and to allow the papers to be submitted to the jury."

The case of *Pierce v. Northey*, 14 Wis. 10, apparently involved a test of a nonexpert witness, for, although the decision does not disclose whether the witness was an expert or a nonexpert, no question of his status as an expert appears to have been raised. It was held to be an improper test to submit to the witness signatures later shown to have been fabricated, in imitation of the signature in question, for the purpose of deceiving the witness. The court said: "If they were generally admitted, the opposite party would often be taken by surprise. He would be unprepared, in case he were disposed and able to do so, to establish either the authenticity or the falsehood of the signatures, by a comparison with which it was proposed to test the genuineness of that which was denied. And another and more

cogent ground of objection would seem to be, that it would open the door to great frauds and unfairness in the selections to be made. Experiments might be tried and selections made for the very purpose of tricking and deceiving the witnesses and the jury. No better exemplification of the force and correctness of this ground of objection could be found than that furnished by the facts of the present case. The papers offered were mere slips, having upon them the name of the party only, and these names were copied by others, from his genuine signature, by means of colored impression paper. They were, of course, facsimiles of the genuine, and because the witnesses testified that they believed them to be genuine, other witnesses were introduced to show that they were not, and thus to impeach their knowledge and credibility. A more naked and wanton trick, devised to entrap and impose upon the witnesses and jury, could not well be imagined; and although it was exposed in this instance, it shows the danger of receiving such papers in evidence."

Even in a jurisdiction in which proof by comparison of handwritings is allowed it has been held that it is incompetent to test a nonexpert handwriting witness by submitting to him a number of expertly imitated spurious signatures, intermingled with genuine signatures, and requiring him to select the genuine from the spurious. *Andrews v. Hayden*, 88 Ky. 455, 11 S. W. 428, wherein the court said: "When witnesses were examined by the appellant touching the genuineness of the handwriting of Hayden to the note in controversy, and who were his neighbors and some of them familiar with his handwriting, a number of spurious signatures to writings were intermingled with writings containing the genuine signature of the intestate, and on cross-examination the witnesses for the plaintiff were asked to select from those writings such as contained the genuine signatures of Hayden. This they failed in some instances to do, and, in fact, it would have been difficult for the most experienced expert to have detected the difference between the genuine and spurious signatures. This mode of testing the knowledge of the witnesses as to the handwriting of the intestate was objected to by the appellant at the time, and his objections were disregarded. Prior to the Act of May 17, 1886, the rule of evidence in this state forbade the proof of handwriting by comparison, but under that act such evidence is now competent, with certain restrictions. The genuineness of the writing with which the signature or writing in controversy is to be compared, 'should be proved to the satisfaction of the judge by other than opinion evidence.' It must also appear

to the satisfaction of the judge that the writings offered for comparison 'were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practiced in their selection.' The party proposing to introduce such writings must give reasonable notice of his intention to the opposite party or his attorney, with reasonable opportunity to examine them before the commencement of the trial. The admission of these spurious signatures, prepared by an experienced expert, for the purpose of being presented to the witnesses for the plaintiff, was manifestly wrong. They were executed with such skill as to deceive any ordinary observer, or those having no other experience than their familiarity with their neighbor and his handwriting. Such writings should have been excluded because tending to obstruct the proper administration of the law, and deceiving, by the skill in their execution, the minds of honest men. It was neither a just nor legal test, and threw no light on the issue presented."

It has also been held that a nonexpert witness may not be tested by a question as to what opinion the witness had expressed at a former time, as to the genuineness of other writings, since that would be to raise a collateral issue. *Nuckols v. Jones*, 8 Grat. (Va.) 267, wherein it was said: "The question before the jury was whether the paper offered for probate was in the handwriting of the deceased; any statements made at another time by the witness touching the matter in issue and contradicting her evidence in chief in regard to the paper, to the handwriting of which she had deposed, would have been proper as tending to impeach the credit of the witness. But what she may have said about any other paper at any other time, having no relation to the paper offered for probate, was a distinct collateral fact, as to which she could not be examined for the purpose of impeaching her testimony by contradicting her, nor was it competent after such question was put and answered to adduce evidence to contradict the answer."

In *West v. State*, 22 N. J. L. 212, while the court did not go to the length of holding a test by other writings to be inadmissible, it did hold that when it is sought to test a nonexpert handwriting witness by showing him an instrument in writing, partially covered up, and only a part of which is visible, it is not error for the trial court to require that the witness should be shown the whole writing. The court said: "The fourth exception is, that on a cross-examination, by the defendant, of a witness on the part of the state, and who had testified that the deed alleged to be forged was in the handwriting of the defendant, the witness was shown an

instrument of writing, a part of the writing being covered and concealed by a piece of newspaper tied over it, and was asked by the counsel of the defendant if the portion of the writing that was visible was West's, the defendant's. To the question and mode of exhibiting the paper, the counsel of the state objected. The court sustained the objection, and decided that the paper must be so shown that the witness could see the whole of the writing. In this there was no error. It does not clearly appear for what purpose the evidence was offered. It may have been to prove the instrument shown, for the purpose of offering it in evidence, or it may have been, as was probably the case, for the purpose of testing the value of the witness's opinion in respect to the handwriting of West, and discrediting him before the jury. If the former were the object, the witness could form and express his opinion only upon the whole writing. If the latter, the better opinion seems to be, that the party was entitled to lay the paper before the jury, to form their opinion as to the testimony of the witness, and therefore the whole paper should be shown. For the jury should not judge, from the inspection of the entire instrument, of the value of the opinion of a witness who has only seen a part of it."

b. View Allowing Test.

While there are a number of cases allowing a test of a nonexpert witness, by the use of other writings, which may be harmonized with the foregoing majority rule by drawing the distinction between the use of writings not admitted or proved to be genuine and the use of writings concerning the genuineness of which no question is raised, there are a few cases allowing the test which are not so susceptible of being distinguished on the facts, and which must, therefore, be considered as establishing a minority rule. *Kirksey v. Kirksey*, 41 Ala. 626; *Groff v. Groff*, 209 Pa. St. 603, 59 Atl. 65. Thus in the case first cited it was held to be admissible, in order to test the capacity of a nonexpert witness who had testified as to the genuineness of a disputed chirography, to show the witness a signature purporting to be that of the person whose handwriting was in issue, covering part of the signature and the paper on which it appeared, and to elicit the witness's opinion as to its genuineness. The court said: "The first assignment of error raises the question, whether, in a case involving the genuineness of the signature of the maker of a promissory note, which is the foundation of the suit or controversy, a witness may be shown a signature of the maker to another instru-

ment, purporting to have been signed by him, and, concealing a part of the name from the witness, asked, in whose handwriting is the part shown him. The appellants objected to the question being asked, 'unless the whole name shown to the witness.' Without deciding whether such evidence is admissible on the issue made up in this case, as that question is not raised by the exception, we hold, that it only raises the point, whether the witness should have been allowed to testify as to a part of the name of Isaac Kirksey, without seeing it all. The phrase, 'unless the whole name [was] shown to the witness,' serves to point out a specific objection; and the party excepting must be held to that, as the ground of his objection. If it had been admissible to make such proof in this case, we can see no reason why it was not permissible for a party to show the witness a part of the signature, concealing the balance, and ask him in whose handwriting the part shown was. Such a mode of examination may be allowable, to test the capacity of the witness to testify to the handwriting of the supposed maker of the instrument, or for other purposes."

In *Groff v. Groff*, 209 Pa. St. 603, 59 Atl. 65, it was held that when a nonexpert witness categorically asserts that he is so well acquainted with the signature of a person that he can judge as to the genuineness of an isolated signature, it is competent cross-examination for counsel to test him by the method referred to in the reported case as the "cat hole test," that is by showing him a number of signatures through apertures in an envelope, so that the other parts of the writings are hid, and eliciting his judgment as to the genuineness of those signatures. The court said: "Then, on cross-examination, counsel for plaintiff, declaring his purpose to test the extent of witness's ability to form such a judgment as he professed to possess, exhibited to him a paper on which was written the name 'Solomon C. Groff' which was placed inside an envelope, but so that through an aperture cut in the envelope the entire name could be plainly seen, and asked, 'In your judgment is that Solomon C. Groff's genuine signature?' Sometimes the witness answered it was, and at times that it was forgery. Quite often it was shown the witness was mistaken. Counsel for defendant strenuously objected to the method of cross-examination as unfair to the witness, because he was not called as an expert in handwriting but only as one familiar with the signature of Solomon C. Groff, and as such a witness he was entitled to have placed before him the whole paper containing the signature. This would have been a good objection if the witness's knowledge had been limited to a sight of the sig-

nature on a check, bill, note, bond or other such writing; the jury would have known that his familiarity with the signature was not thorough, but limited, and would have given it weight accordingly. But notice the scope of the witness's knowledge as stated by himself. That he might not misunderstand, the court itself in one instance put the question thus: 'Do you understand the question? Have you such a knowledge of this decedent's handwriting, that on being presented with a signature purporting to be his you could say on sight whether it is his or not? That is the question. Answer. Yes sir, I could form a judgment.' In every other instance either the counsel or the court put before the witness substantially the same question when the isolated name 'Solomon C. Groff' was placed before the eyes of the witness. From the mistaken answers it is clear that in most cases the witness had no such extensive or thorough knowledge of the signature as he professed. This was not untruthfulness, but to use a common term, it was only because many of the witnesses thought themselves 'smarter' than they really were; but there was no deception or unfairness, as argued, in this method of cross-examination when the real purpose is considered. If the witness had answered, 'I could distinguish the signature if I saw it appended to a note or check or other document, but standing by itself I could not be sure,' the court would doubtless have sustained the objection of defendants' counsel, but as the record stands, we see no error in the court's rulings." In *Page v. Homans*, 14 Me. 478, it was held not to have been reversible error for the trial court to allow a test of the knowledge of a nonexpert handwriting witness by the use of skillfully imitated signatures, although the trial court might in its discretion have excluded the test, as raising a collateral issue. The court said: "The question in issue was the genuineness of a disputed signature. A witness, acquainted with the handwriting of the party sought to be charged, testified that he believed it to be his. The defendant was permitted to prove that signatures could be so perfectly imitated by an adroit penman as to render detection extremely difficult. We do not regard it as clear that such testimony did not bear upon the issue, and was not proper for the consideration of the jury in determining the weight of evidence depending upon resemblance, whether deduced from a standard of comparison in the mind of a witness, or from genuine signatures before them. Such resemblance may generally be satisfactory. But if signatures proved to be spurious, may have a resemblance equally striking, it may not be sufficient to over-

balance facts and circumstances, calculated to throw suspicion upon the integrity of the instrument in controversy. That a resemblance is so far from being conclusive evidence upon this point, that it may be altogether delusive, was proved by the testimony of the two witnesses taken together. The jury were called upon to find the signature genuine, because such was the opinion of the witness. We are not prepared to determine, that the admission of testimony fairly calculated to test the accuracy of his judgment, or the force of his conclusions, in regard to handwriting, if it may be deemed collateral in its character, is an objection sufficiently important to require that the verdict should be set aside and a new trial granted."

2. USE OF UNDISPUTED OR PROVED WRITING.

It is a generally accepted rule that a writing admitted or proved to be in the genuine handwriting of the person whose signature or writing is in question, or a writing as to the genuineness of which no question is or can be made, may be used to test the knowledge or accuracy of a nonexpert handwriting witness. *Melvin v. Hodges*, 71 Ill. 422; *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679, reversing 39 Ill. App. 577; *Wentz v. Black*, 75 N. C. 491; *State v. Hopkins*, 50 Vt. 316. Compare *Fogg v. Dennis*, 3 Humph. (Tenn.) 47. In *Melvin v. Hodges*, supra, it was held that where a witness qualifies by having often seen the person whose signature is in question write, it is competent to test his reliability, and the accuracy of the mental exemplar formed by seeing the person write, by having the witness examine the person's signature attached to a plea filed in the cause, as to the genuineness of which signature there is no question. The court said: "The present case, however, is quite different. The witness had testified, on his direct examination, that he was well acquainted with Melvin; that he had gone to school with him in Tennessee; had seen him write often; was well acquainted with his writing when young; was absent from him for eighteen years; had known him and seen him write during the last four years, and would not take the signature to the note to be his handwriting. The signature to the plea was not in controversy, nor was its genuineness questioned. The object in having the witness to examine this signature, was not to prove a signature by comparison, but to test the accuracy of the witness's memory. Had there been any question as to the genuineness of the signature to the plea, it would certainly not have been competent to have asked the witness whether it was Melvin's signature or not, with a view of contradicting him, as that would have raised

a collateral issue, entirely irrelevant to the case. But the signature being admitted, no such issue could be raised; and the only effect the examination could have, would be to enable the witness to determine how accurate and reliable was the impression of Melvin's signature, as fixed in his memory, with the view of confirming or modifying his previously expressed opinion in regard to the signature in controversy."

In *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679, reversing 39 Ill. App. 577, it appeared that the witness had seen the person whose handwriting was in question sign other notes and, from the mental exemplar formed by that experience, testified as to the genuineness of the writing in question; and that counsel produced the notes which the witness had seen signed, and sought to test the witness by them. The trial court sustained an objection to the test, but the court on appeal held that it was competent cross-examination, and should have been allowed there being no question as to the genuineness of the signatures on which the mental exemplar had been formed. The court said: "In many cases, in order to ascertain the truth and arrive at a correct result, it is necessary that considerable latitude be given on the cross-examination of witnesses, in order to test the accuracy of their evidence. The genuineness of the signatures to the several notes to which the attention of the witnesses was called was not in controversy, and the purpose was not to prove a signature by comparison, but, as was done in *Melvin v. Hodges*, 71 Ill. 425, to test the accuracy of the witness's opinion or judgment, which had, in the direct examination, gone to the jury. If the witnesses called by the plaintiff to prove that the signature of Mrs. Williams on the note in question was genuine, predicated their judgment, in whole or in part, upon signatures to notes they saw her sign, and the signatures to those notes differed from the signature to the note in question, it seems plain that the defendant had the right to call out that fact in cross-examination, as it was a fact proper for the consideration of the jury in determining what weight they should give the opinions of the witnesses who gave their opinion that the note was genuine."

In *Wentz v. Black*, 75 N. C. 491, it was held that when a nonexpert witness has testified as to the genuineness of handwriting and the counsel for the party calling him has submitted to him other genuine signatures in the same handwriting, for the purpose of comparison, it is competent for opposing counsel on cross-examination, to submit to the witness still other signatures admitted to be genuine for the purpose of testing the comparison. It was said by the

court: "The witness, Elliott, had his opinion, not on the general character of Black's handwriting, but on a difference in the letter 'K' from his usual signature. After the defendant's counsel had fortified his witness by exhibiting to him two genuine signatures, it surely was only fair play to permit the plaintiff's counsel to attack him by exhibiting to the witness other signatures of Black, admitted to be genuine, either to make him change his opinion or to weaken his confidence in it, so that from his manner the jury could see that his opinion was not to be relied on. This was fair, and there is no rule of evidence to the contrary."

In *State v. Hopkins*, 50 Vt. 316, the court said: "The state introduced Charles Calderwood as a witness, who testified, from his knowledge of the handwriting of Green, that in his opinion the signature upon the draft was a forgery. In his cross-examination the witness was shown a signature of Green's which had been used upon the trial, and which was acknowledged to be genuine, and was asked to point out the difference between that signature and the signature of Green upon the draft. Upon objection being made by the state, the court ruled that the question was inadmissible, upon the ground that the witness was not an expert. That ruling we think was erroneous. The weight to be given to the opinion of a witness who bases his opinion upon familiarity with handwriting depends largely upon the extent of his familiarity: and for the purpose of testing that and his ability to distinguish between a signature that is claimed to be forged and one that has been used upon the trial and is acknowledged to be genuine, it is the right of the party accused of committing the forgery to inquire of the witness what difference there is between the two signatures."

In *Fogg v. Dennis*, 3 Humph. (Tenn.) 47, there is a dictum to the effect that even though the writings used for the test are proved to be genuine before the test is made, the testing of the witness by them is not allowable. The court said: "But if the writings in question had been proved to be genuine previously to the offer to examine the witness with regard to them, we are of opinion that it would not be proper. If the witness had been of opinion that such genuine signatures were not those of the testator, the inference of ignorance and inaccuracy to be drawn from such circumstance could have been fairly repelled by the introduction of other genuine signatures which the witness might adopt. This would lead to innumerable examinations; and after all, the degree of credit the jury should yield to the witness is entirely uncertain, unless they could inspect and compare the several documents produced."

In a jurisdiction in which it is admissible to prove signatures by comparison with writings admitted to be genuine, or which are in the case for any purpose, *a fortiori* a nonexpert handwriting witness may be tested by submitting to him signatures of the person signed to pleadings and affidavits filed in the cause. *Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. 1407, 43 N. E. 872, wherein the court said: "The appellant produced three witnesses, Albert L. Keysecker, his wife, Lugarda Keysecker, and Joseph Tillman, who each testified that they were acquainted with the handwriting of the appellee, and that the signature to the release was her genuine signature. On the cross-examination of these witnesses, the court permitted appellee's counsel, over the objection of appellant, to place in the hands of the witnesses the appellee's affidavit for a change of venue and her verified reply of non est factum, and have the witnesses compare appellee's signatures to those papers with the signature of the release. It is claimed that this was error. . . . We think there can be little doubt that in this state, after some fluctuation in our decisions, the rule is, that any writings admitted to be genuine, or writings which are properly papers in the case for any purpose, may be used, by way of comparison, to prove, or disprove, the genuineness of the writing in dispute. . . . The writings used for comparison in the case at bar, being the affidavit of appellee for a change of venue, made and signed by her long before the release in dispute was brought into the record by appellant, and her verified reply, were both 'papers in the case;' papers, too, which the appellant on the trial admitted were 'before the jury for all purposes,' and, under the rule above stated, it was not error to allow these papers to be used by the witnesses, on cross-examination, to compare the signatures of appellee thereto with the signature to the release."

3. WITNESS'S OWN WRITING IN ISSUE.

Where the person whose chirography is in issue is himself the witness as to his own writing, the majority of courts hold that he may be tested as to his knowledge of, or ability to identify, his own writing by the use of other writings, whether relevant or irrelevant to the cause, or whether proved to be genuine or disputed. *Birmingham First Nat. Bank v. Allen*, 100 Ala. 476, 489, 14 So. 335, 46 Am. St. Rep. 80, 27 L.R.A. 426; *Neal v. Neal*, 58 Cal. 287; *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112. *Compare* *Loving v. Warren County*, 1 Ky. L. Rep. (abstract) 340.

In *Birmingham First Nat. Bank v. Allen*, *supra*, it was held that where the person

whose name is signed is the witness as to the genuineness of that signature, it is admissible to test his ability to identify his own signature by submitting to him certain signatures, some of which have been admitted by him to be genuine, others of which are forgeries. The court said in that case: "The defendant took some of the checks found on the person of Tomlin, and which were forgeries, and others admitted to be genuine, and arranged them, so that nothing but the signatures of the drawer could be seen, and plaintiff was requested to point out the genuine and false checks. The plaintiff objected to this evidence and the court sustained the objection. We think this testimony admissible. It is a circumstance that the jury or court should consider in weighing his evidence. The inability of the plaintiff to distinguish the true from the false signatures would not be conclusive against him. He might be able to show by other evidence that certain checks were forged, although he could not himself determine the question by an examination of the signature. Doubtless in many cases a person's name is so skilfully forged, that he could not distinguish it from his own proper signature, and yet, he may know from the amount, or payee, or other facts, absolutely that the instrument was forged. We think however the fact that he cannot distinguish a signature which he admits to be genuine, from that alleged to be false is a circumstance. The rule which prohibits a non-expert from giving an opinion based upon a comparison of handwriting has no application where the party whose name is signed, is himself being examined as to whether the signature in question is his signature or not."

In *Neal v. Neal*, 58 Cal. 287, it was held that in such a case it is admissible to hand the witness a document purporting to have been signed by him, which has already been used in the case for comparison, and to ask him if that is his signature. It was said by the court: "A document which purported to have been signed by him [the defendant] and had been used in the case for comparison was handed to him by the counsel of plaintiff, who asked him the following question: 'Look at this signature, "Joseph W. Neal," and state whether that is your genuine signature?' To the question counsel for defendant objected on the ground that it was not legitimate cross-examination, and the objection was sustained. We think the ruling was erroneous. The question was, doubtless, asked for the purpose of testing the accuracy and judgment of the defendant, as a witness, as to his own signature, which constituted the subject-matter of his direct examination. It was, therefore, responsive to the examination in chief. A witness may

be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility. . . . Especially should courts be liberal in cross-examination of a witness who is himself a party to the suit. It may be that the answer of the witness to the question propounded would have satisfied the jury that the witness was mistaken when he testified that his signature to the instrument in controversy was not genuine. At all events plaintiff's counsel had the right on cross-examination to test the ability and judgment of the witness upon the subject of his own signature."

In *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112, it was held to be admissible when the person whose writing is disputed is on the stand, to show him a board to which are fastened several documents purporting to be signed by him, but so covered that only the signatures are visible, and to ask him, for the purpose of cross-examination, which of the signatures are genuine. The court said: "Charles E. Woodward having testified, as before stated, that the signature upon the note was not his, counsel for plaintiff upon cross-examination showed him a board, upon which were various written instruments signed with his name, and over which instruments a paper was so placed that only the signatures were visible, and against the objection of the defendant that the witness should be permitted to see documents to which the signatures were attached, allowed plaintiff's counsel to inquire as to the genuineness of the several signatures. The finding states that 'the witness testified that some of the signatures were genuine and some were not,' and that the paper having been removed in the presence of the court and jury the witness was again inquired of as to the genuineness of each signature, and that some of the signatures he admitted to be genuine, some he denied.' . . . The witness having testified, apparently from an inspection of the signature to the note, that it was not his handwriting, his ability to identify his own handwriting was a proper subject of cross-examination. If, for that purpose only, he was asked if certain signatures, other than that upon the note, were his, he was not entitled as a matter of right, or of fair treatment, to see the documents to which they were attached, before answering. When a witness may properly be thus asked whether various signatures shown him are genuine, the trial court should always see to it that he has a perfectly fair opportunity to fully examine them, before being required to answer. Just how the documents upon which the signatures are attached should be shown to the witness is largely a matter of discretion with the trial court. While we express no approval of the method

permitted in the present case, we are unable to say from the record that such discretion was improperly exercised, or that the defendant could have been prejudiced from the manner in which the examination was conducted."

In *Loving v. Warren County*, 1 Ky. L. Rep. (abstract) 340, however, the contrary rule was laid down and it was held to be incompetent to test a witness's knowledge as to his own handwriting by requiring him, from a number of signatures of his own name, some genuine, others imitated, to point out the genuine. The report of that case was as follows: "The issue herein was whether the county judge had signed certain bonds. He was produced as a witness to prove his handwriting. On cross-examination he was shown a number of signatures of his own name; some genuine, others imitated, and was required to point out the genuine. Held—proving handwriting—that this was an unfair test . . . very few persons other than experts observe their own signatures or handwriting so closely as not to be deceived by imitations written for the purpose of misleading."

It has also been held that where a witness is testifying as to his own handwriting, it is competent to test his accuracy by submitting to him his name as signed in a hotel register, if he does not question the genuineness of the signature in the register. *Hobart v. Van Aernam*, 146 Ill. App. 1, wherein it was said: "It was claimed on behalf of appellant that the signature appearing upon the hotel register did not present the point of difference between the signature to the order and his genuine signature as testified to by the witness, and that the question was competent for the purpose of refreshing the recollection of the witness and as tending to test the accuracy of his statement made upon direct examination. For this purpose we think the question was competent, and that the court erred in sustaining the objection thereto. *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302. If the witness had denied that the signature upon the local register was in his handwriting, no further examination of the witness upon that subject would have been proper, but if the witness had answered the question in the affirmative and admitted that the signature upon the hotel register was in his handwriting, counsel for appellant could have pursued a line of cross-examination for the purpose indicated."

III. Expert Witness.

1. USE OF IRRELEVANT OR DISPUTED WRITING.

a. *View Rejecting Test.*

The authorities are irreconcilably divided as to the question of whether an expert hand-

writing witness's knowledge and accuracy may be tested on cross-examination by the use of other writings than those in issue.

In a majority of the jurisdictions the rule is laid down that an expert handwriting witness may not be tested by submitting to him, and eliciting his opinion as to the genuineness of, other writings not admitted or proved to be genuine. *McArthur v. Citizens' Bank*, 223 Fed. 1004, 137 C. C. A. 380; *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; *Underwood v. Quantic*, 85 Kan. 111, 116 Pac. 361; *Tyler v. Todd*, 36 Conn. 218.

In *Underwood v. Quantic*, supra, it was held to be incompetent to test an expert by submitting to him signatures purporting to be those of the person whose handwriting is in question, but which are shown to have been fabricated by counsel for the purpose of testing and, if possible, deceiving the witness. The court said: "The plaintiff called a number of expert witnesses who testified that in their opinion the indorsement of Cress was genuine. The court permitted the attorney for the defendants, in cross-examination of these witnesses, to ask them concerning the genuineness of several signatures of Cress written on a sheet of paper, and afterward permitted the attorney to testify that some of these signatures were written by himself. This brought into the case a collateral issue and was error. The precise point was decided in *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297, where the question is discussed, and this manner of cross-examining expert witnesses respecting the genuineness of a signature was held to be reversible error."

And it has been held to be incompetent to test the knowledge of an expert in handwriting by placing before him irrelevant papers, for the mere purpose of contradicting his testimony as to the handwriting thereof. *U. S. v. Chamberlain*, 12 Blatchf. 390, 25 Fed. Cas. No. 14, 778; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046.

The reason for the rule excluding that method of testing the witness is to be found in the administrative rule against the raising of collateral issues. *Tyler v. Todd*, 36 Conn. 222; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L.R.A. 227; *Underwood v. Quantic*, 85 Kan. 111, 116 Pac. 361. In *State v. Griswold*, supra, the court said: "The questions asked in cross-examination of the witnesses Ames and Fairbanks were properly excluded, and for the reason assigned by the trial court: that they would raise a collateral issue. Take one instance to illustrate all: The witness Fairbanks was shown a collection of slips of paper, on each of which there was handwriting, and he was asked, 'How many handwritings do you find

there?" These pieces of paper had not been in the case; the writing on them was not admitted or claimed to be that of the defendant or of the witness Jackson. Any possible answer that the witness might have given to the question would have been utterly meaningless, unless other evidence was admitted to show that the answer was incorrect."

b. View Allowing Test.

In at least two jurisdictions it has been held that writings neither admitted nor proved to be genuine, and even though irrelevant otherwise, may be used to test an expert handwriting witness. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340. Thus in the case first cited it was quite broadly held that an expert may be tested on cross-examination by the submission to him of incomplete or mutilated copies which are neither admitted nor proved to be genuine, no matter by whom written, and that neither the witness nor opposing counsel are entitled to know who wrote the specimens, whether they are genuine or not, or what writings will be used. The court said: "One of the questions which arose during the trial . . . was whether certain letters, purporting to be written by Horton, were in the same handwriting as certain other documents, which latter were written by Sheppard. On this question experts were examined by defendant, and to test their skill the plaintiff's counsel interrogated them upon certain incomplete or mutilated writings which were partial copies by another hand of documents which Sheppard had written though that the copies were written by another and not by Sheppard was not avowed or proved until this test examination was concluded. These copies being some of the writings to which the expert testimony applied, and being proved to be copies not written by Sheppard, were admitted in evidence, to which defendant objected because they were not proved to be genuine nor submitted to defendant before the announcement of ready, and because they had been mutilated by plaintiff's counsel in presence of the court by cutting off matter which was neither submitted to defendant's counsel nor tendered in evidence. The purpose of the experiment was to show that the experts were not reliable; that they would mistake writings not done by Sheppard for writing which he had done. The whole object of the test would have been defeated, had other proof been required that the documents were genuine before they could be used. By what color of right could the defendant claim to see or know anything of them before the trial commenced? And why should not scraps and

fragments be used to test the experts on the mere question of manual or mechanical execution? The contents or completeness of the writings had no evidentiary relation to the hand in which they were written. The complaint that plaintiff's counsel was allowed to fold the papers and exhibit to one of the experts only the part exposed, and the further complaint that he was allowed to exhibit them to him at all for comparison with the genuine writings or other writings attributed to Sheppard, are both without merit, for the reason that to test the skill of the expert, it was reasonable and proper to grant to counsel a wide and liberal discretion in the use of means and methods. The same observation applies to cutting off and withholding such parts of the papers as counsel wished to conceal, the papers being his own and not then having been offered in evidence."

In *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340, the court held that it was competent to test an expert handwriting witness by submitting a number of slips, prepared for the occasion, some of them bearing genuine, and others imitated, signatures of the person whose handwriting was in question, and requiring the witness to select the genuine from the spurious. It was said: "We think it is proper, when a witness testifies to the genuineness of a handwriting or signature, to test the value of his evidence thoroughly, and for that purpose he may be asked to give his opinion as to the genuineness of signatures which are prepared for that purpose, and in the handwriting of any person. Opinions as to the genuineness of handwriting are, at best, weak and unsatisfactory evidence, and every reasonable opportunity should be afforded, on cross-examination, to test the value of the opinion of the witness, and we know of no better way than was resorted to in this case. Generally, testimony as to the genuineness of handwriting is the nearest guesswork. Of necessity, it is admitted, because, often, no other evidence is attainable. But it should be open always to full investigation on cross-examination, for thus only can its utter unreliability, in many cases, be established."

2. USE OF UNDISPUTED WRITING.

An expert may be tested on cross-examination by eliciting his opinion as to the genuineness of signatures appended to pleadings filed in the cause, the signatures being so folded down that the witness cannot know what the instruments are. *Brown v. Chenoworth*, 51 Tex. 469, 477, wherein the court said: "Ben Brown, one of the defendants, was put on the stand by the counsel for himself and E. A. Brown, and testified that he never signed the note sued on; that he and

E. A. Brown paid for the Kaufman county lands in cash, and never gave a note to J. S. Able for the purchase money; that he believed the signature of his codefendant E. A. Brown was not genuine, and that the note was in the handwriting of Joseph S. Able. Plaintiff's counsel then took the plea of non est factum filed by appellants in this case and signed by them, and also the depositions of the witnesses B. Brown and E. A. Brown, taken in the case, and turned down the signatures 'B. Brown' and 'E. A. Brown' on the plea of non est factum so that the signatures alone were visible to the witness, and then asked him if he signed said paper, and whether his brother, E. A. Brown, signed the same. Witness answered that he did not think that either of said signatures was his or his brother's. Counsel for plaintiff also turned down the signature 'B. Brown' to his depositions so that the signature alone was visible to witness, and asked him if that was his signature, and he replied that he did not think that it was. The same course was pursued by plaintiff's counsel, while cross-examining the witness, with reference to the genuineness of the signatures 'B. Brown' and 'E. A. Brown' attached to a receipt from B. Brown to J. S. Able, and first and second answers in chancery, made in the United States court at Austin and sworn to by B. Brown and E. A. Brown. . . . The witness not only testified as to his own signature, but, unlike the case of the North American F. Ins. Co. v. Throop, 22 Mich. 160, he also gave his opinion as to that of E. A. Brown and as to the handwriting of Joseph S. Able, thus making himself an expert. We think, under the general rule of practice, that the opposite party should have considerable latitude, on the cross-examination, to ascertain the accuracy of the knowledge, skill, and judgment of the witness; and that, under the circumstances, the test was not an unreasonable one, and particularly as on re-examination the witness had the opportunity of explanation with the papers exhibited in full before him." It will be noticed that the court in that case assumed to treat the witness as an expert, simply because he expressed his opinion as to the signatures of the other Brown and of Able. In this the court appears to have fallen into the error of thinking that any witness expressing an opinion as to handwriting is *ipso facto* an expert. A nonexpert witness however, may testify as to his opinion, basing it on a comparison with a mental exemplar formed by personal knowledge of the handwriting of the person whose signature is in issue; [see the cases cited *supra*, in subdivision II. *Non-expert Witness*] an expert gives his opinion based on a direct comparison or on a com-

parison with a mental exemplar formed by examination of admitted signatures. In the foregoing case it appears that the witness was in business with the other Brown and Able, knew them personally, and must have been testifying from personal and empiric rather than from expert knowledge of their handwritings.

It is competent to test an expert on cross-examination by eliciting his opinion as to the genuineness of two other signatures purporting to have been made by the person whose handwriting is in question, one of which is admitted by him to be genuine, the other of which was signed for him by another person at his direction. Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536, wherein it was said: "Two experts in handwriting, both of whom had never seen defendant write, were examined, and, from a comparison between the signature to the note in suit and signatures of Miller in the case admitted to be genuine, gave their opinion that the defendant signed the note. To test the value of their evidence, the counsel for the defense asked them to make comparisons between two signatures of the witness Reynolds in the case—one admitted by him to be genuine, and the other claimed by him to have been written by another than himself, but by his authority and direction. One saw a very close similarity between the letters 'yn' in the two signatures, while the other, not seeing this, insisted that the 'lds' were very much alike. The object evidently was to show the fallibility and unreliable character of the testimony. The plaintiff's counsel insists that this was error, and invokes the rule that a writing, the genuineness of which is disputed, cannot be used to test his accuracy. We do not think the rule applies in this instance. It was not claimed that one of these signatures was the genuine signature of Reynolds; but it was used, as not being his signature, in comparison with his admitted signature, for the express purpose of ascertaining what was the value of the opinions of these experts. We know of no rule prohibiting such a test, when the writings are properly in the case as they were here. The sequel showed that the opinions of the experts were of but little worth, and we are not disposed to limit or confine the opportunities for testing and determining the accuracy and value of expert evidence. These men were testifying entirely from comparisons, and it was competent by the comparison thus made upon cross-examination to show that they differed radically in their views of the similarity of letters, and that one as well as both might be easily mistaken in their assumptions from a comparison of signatures. The fact that the witnesses did not know

whether the signatures were made by one man or two but added to the value of the test."

IV. Rule in New York.

It is not clear what the state of the law of New York is as to the testing of handwriting witnesses by other writings. The cases are in conflict. Earlier cases have been in part overruled by later decisions but it is difficult to ascertain to just what extent.

It seems clear that the law formerly was to the effect that it was incompetent to test a handwriting witness by eliciting his opinion as to collateral writings. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Commonwealth Bank v. Mudgett*, 44 N. Y. 514, *affirming* 45 Barb. 663; *Hoyt v. Stuart*, 3 Bosw. (N. Y.) 447. In *Commonwealth Bank v. Mudgett*, supra, the court said: "Counsel for the defendant produced a number of checks on a bank, which, it was alleged, were drawn by him, and proposed to inquire of certain witnesses whether the signatures to them were in the handwriting of Mr. Mudgett. The court refused to allow the inquiry; and the defendant's counsel excepted. It is said that the inquiry was not for the purpose of comparison, which would be inadmissible, nor for exhibition to the jury; but for the purpose of testing the knowledge and accuracy of the witnesses. Two of the witnesses were produced by the plaintiff, and were then on cross-examination. It could be no test, unless other witnesses were so called to prove their genuineness. No precedent can be found for such a test. If allowed to call witnesses to prove these checks, others might be called by the plaintiff to prove the contrary. Such a proceeding would involve the trial of an issue wholly collateral to the main question. If the witnesses should pronounce them to be genuine, the evidence would be wholly immaterial, or would then degenerate to a comparison of signatures, and, perhaps, to their exhibition to jurors not expert in handwriting. If the witnesses said, on the contrary, that they were not genuine, it would be inadmissible to contradict them, on such a collateral issue, by showing that they were, in fact, genuine."

In a later case it seems to have been deemed competent to cross-examine expert witnesses by submitting to them a number of writings in evidence and eliciting their opinions as to the genuineness of those writings, but it was, however, held to be incompetent to introduce, thereupon, testimony to show that the specimens so submitted to the expert were not genuine, because this would multiply collateral issues. *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, wherein it was said: "Upon the cross-examination of the
Ann. Cas. 1917B.—68.

expert witnesses for the prosecution, the defendant, for the purpose of testing the accuracy of their judgment, submitted to them nine different specimens of handwriting, and each was asked to compare them with the letters and the specimens put in evidence by the people, and to say whether in his opinion, they were in the same handwriting. Each gave a different answer, and with two exceptions, each testified that some of the specimens were written by the same person who wrote the letters and the other specimens; but no two witnesses agreed as to the particular specimens which were so written. The defendant then offered to prove that these nine specimens were not in the handwriting of the defendant, but were written by his brother, and the evidence was excluded. We can discover no error in this ruling. It was a collateral matter properly used for the purposes of a cross-examination, and the defendant was bound by the replies of the witness to the questions put. It served as an impressive warning to the jury to closely scrutinize the expert evidence, because of the want of concurrence of judgment on the part of the witnesses when they were required to compare the letters with specimens, of whose authorship they were ignorant; and, to that extent, the cross-examination was valuable and proper, although it must rest somewhat in the sound discretion of the trial court to determine how far it shall be carried. But the defendant could not be permitted to go farther and to litigate the immaterial issue of the authenticity of the additional specimens submitted by him for such a purpose. . . . It would give rise to a multiplicity of collateral issues which might render the litigation interminable; for the people would have the right to disprove if they could the testimony offered, and by a comparison of handwriting show that these specimens were not written by the defendant's brother."

The earlier rule has been changed, however, by the case of *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L.R.A. 163, in so far as that case is inconsistent with the earlier cases, for the court in that case specifically limited the decisions in *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, and in *Van Wyck v. McIntosh*, 14 N. Y. 439, in so far as inconsistent with the case at bar. The specific ruling in *Hoag v. Wright* was that after an expert had testified as to the genuineness of a disputed signature it was competent to show him instruments containing spurious signatures and to ask him if, in a former trial of the cause, he had not been shown these same instruments, so folded as to leave only the signatures visible, and if he had not at that time declared them to be genuine. The court said: "The opin-

ions of experts upon handwriting who testify from comparison only are regarded by the courts as of uncertain value, because in so many cases where such evidence is received witnesses of equal honesty, intelligence and experience reach conclusions not only diametrically opposite, but always in favor of the party who called them. The right to cross-examine such witnesses is of great importance, and, while it should be confined within reasonable limits, it should not be so restricted as to deprive it of all value. The trial judge has a wide discretion in controlling the cross-examination of witnesses in order to save time, but after the time has been consumed and the evidence received, it can be stricken out only as a matter of right and not as a matter of discretion. If it is immaterial or incompetent it may be struck from the record for that reason, but the court has no right to strike it out in the exercise of a supposed discretionary power. The evidence stricken out in this case was not only competent and material, but was of decided value, and might have turned the scale toward the defendants upon an issue so closely contested. It tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion, and tended to show that it was unreliable. The defendants were deprived of the right to test, in an effective and practical manner, the accuracy and worth of the opinions of the three experts relied upon by the plaintiff. . . . There has been a change by legislation since the Van Wyck case was decided, so that writings 'proved to be genuine to the satisfaction of the court,' may be introduced for the purpose of comparison (L. 1880, ch. 36; L. 1888, ch. 555). Suppose a witness should testify that a writing, not in issue, was genuine and the court should receive it for the purpose of comparison, could it not be shown by the other party that such signature was not, in fact, genuine? Such an issue might be collateral, but is an issue as to the competency of a witness to express an opinion collateral in a vicious sense? Is not the competency of a witness upon handwriting always a relevant fact, inasmuch as his opinion is not relevant unless he is competent to express it? The competency of a witness is a fact necessary to be known in order to learn the value of his opinion. While it is not an issue raised by the pleadings, it becomes a subordinate issue by the tender of the witness as an expert. As the opinion may determine the main issue, the question whether the opinion is relevant, that is, whether it is the opinion

of one legally qualified to give it, is necessarily an incidental issue, as otherwise the main issue might be decided upon an irrelevant fact. It is incidental to the main issue, because it attacks the foundation of the evidence, and it may be the only evidence, received to establish the main issue. It is not enough to permit the opinion of an incompetent witness to be met by the opinion of a witness who is competent, for the jury may not be able, even when instructed by the cross-examination, to tell the good from the bad, unless they are guided by further evidence. . . . We think that any testimony of an alleged expert upon handwriting which bears on his competency to express an opinion, may, within reasonable limits, be contradicted by the testimony of other witnesses. We deem it our duty to limit such cases as *People v. Murphy*, 135 N. Y. 450, and *Van Wyck v. McIntosh*, 14 N. Y. 439, in so far as the conclusion thus announced is inconsistent with the views therein expressed."

In a still later case it has been held that it is an unfair test, which in the discretion of the trial court may be rejected, to elicit the opinion of a nonexpert handwriting witness as to signatures shown only through slits in envelopes, hiding the rest of the paper and then to show the whole paper to an expert and have him testify that he prepared the signature as an imitation. *People v. Patrick*, 182 N. Y. 131, 175, 74 N. E. 843, wherein the court, *distinguishing* *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L.R.A. 163, *supra*, said: "In this case, Harmon had been examined as a witness for the prosecution. He had been for many years a clerk with Swenson Sons, the bankers of the deceased. He knew the deceased and had a familiarity with his handwriting, from seeing him write and from handling his checks. He had testified to the spuriousness of signatures of the deceased upon the disputed instruments. The defendant submitted to him certain signatures, purporting to be by the deceased, which were visible only through slits, or openings, made in envelopes, and he pronounced his opinion upon them. One of the signatures, which he had pronounced genuine, had been written, inferentially, by an expert in handwriting. Being called as a witness, this expert was shown the signature, but without the envelope, and he was not allowed to testify about it, or to the effect that he had written it. The court ruled that it was unfair, when Harmon had only seen the signature through an aperture, that Trendley should be allowed to pass upon it, aided by the knowledge that it was upon a blank sheet of paper and, therefore, not a genuine one, but, presumably, one of his own making. It was, obviously, an unfair test and

the court did not abuse its discretionary power in the cross-examination. It is to be observed that Harmon was called upon to testify, by reason of his competency to form an opinion from long acquaintance with the handwriting of the deceased and not by reason of his being a professional expert in handwriting or penmanship. I think the question is distinguishable, upon the facts, from that passed upon in *Hoag v. Wright*; but were it to be considered as controlled by that case, then the error must be regarded as of negligible importance, in view of the mass of expert evidence admitted upon the subject. The defendant could not have been prejudiced; for, clearly, the jury could not but infer, from the questions and the discussion, that the purpose of the defendant was to prove that Harmon had made a mistake in undertaking to testify from comparisons of signatures."

A similar conflict appears in two cases in the supreme court, which do not seem to have been considered by the foregoing cases in the court of appeals. In the case of *Hilsley v. Palmer*, 32 Hun (N. Y.) 472, it was held that where an expert had testified as to handwriting, it was an incompetent test to submit to him thirty-three signatures for his opinion as to their genuineness, and then to introduce another witness to testify that several of the signatures deemed by the expert to be genuine were in fact prepared by him and were not the genuine signatures of the person whose signatures they purported to be. The court said: "It was not material to the issue to show whether any of those thirty-three signatures were genuine or false. The proof was not made to introduce them in evidence, because plaintiff had already exhausted her evidence on that subject. No such purpose was claimed. It is plain the signatures were prepared for the sole purpose of testing the skill of witnesses. O'Neil's attention was called to them in the belief that he would not be able to pick out the genuine from the false. He expressed his opinion. The evidence of Williams did not contradict him. It showed his opinion was in some respects inaccurate. But how was it material whether these thirty-three signatures were genuine or not? The issue was as to the signature to the note. Whether O'Neil was right or wrong as to the thirty-three signatures it did not aid in determining the real issue. It was a collateral issue and if by possibility O'Neil could have been legally permitted or required to answer the question, his answer was conclusive upon the plaintiff. She could not afterwards call witnesses to contradict him on that collateral and immaterial issue. The case of *Van Wyck v. McIntosh*, 14 N. Y. 439, is directly in point." The case of *Hilsley v. Palmer*, supra,

was criticised however, in *Hornellsville First Nat. Bank v. Hyland*, 53 Hun 108, 6 N. Y. S. 87, affirmed 125 N. Y. 711, 26 N. E. 755, wherein it was held that when an expert has given his opinion as to the genuineness of a signature, it is competent to test the correctness of his judgment by requiring his opinion as to the genuineness of other signatures of the same name which are in evidence. The court said: "The cross-examination allowed of the witness O'Meara was not improper. He had testified, in behalf of the defendant, to his opinion of the genuineness of the indorsement of the defendant's name on the note in suit. The questions put to him as to his opinion of the genuineness of defendant's signatures to other notes or indorsements which were in evidence was calculated to test the correctness of his judgment. So far as the opinion of the court in *Hilsley v. Palmer*, 32 Hun 472, can be construed to hold that such a test of the judgment of an expert may not properly be applied, we are not inclined to follow it as authority."

SIVELY

v.

STATE.

Mississippi Supreme Court—May 11, 1914.

107 Miss. 118; 65 So. 118.

Banks — Receiving Deposit When Insolvent — Criminal Intent — Deposits Identified with Intent to Return.

A cashier who, pending a decision of the board of directors to liquidate the bank because of its financial condition, receives all deposits offered, but with intent to secure their return to the depositors keeps the same separate from the funds of the bank by pinning the money received from each depositor to the deposit slip and placing the same in a box, does not receive any deposit in violation of the statute, where, after the appointment of a receiver, the identical money is returned to each depositor with a single exception, and where the failure of that depositor to call for and receive his deposit results from his failure to receive a notice to call at the bank and receive the deposit.

[See note at end of this case.]

Appeal from Circuit Court, Newton county:
DOBBS, Judge.

Criminal action. H. F. Sively convicted of receiving deposit in insolvent bank and ap-

peals. The facts are stated in the opinion. REVERSED.

R. N. Miller and Julian C. Wilson for appellant.

Geo. H. Ethridge for appellee.

[119] *COOK, J.*—Appellant was indicted and convicted for receiving a deposit of seventy dollars while he was acting as cashier of a bank he knew was insolvent, or had good reason to believe was insolvent, without informing the depositor of the bank's financial condition. There is a controversy about the insolvency of the bank at the time of the alleged deposit, but, in considering the question as to whether or not appellant received a deposit in the sense of the statute the insolvency of the bank will be assumed.

On the evening of the 18th day of June, 1912, the father of appellant, a director of the bank, left his home in Jackson, and went to Newton, where the bank was located, for the purpose of consulting with his associate directors about the condition of the bank. It appears that there were then reasons to believe that the bank was not in a prosperous condition, and it was necessary for the directors to take some action looking to the future government of same, and no doubt, appellant's father believed the bank would be liquidated. The directors of the bank were in session on the 19th and 20th of July, and on the latter date the decision to liquidate the bank was reached, and an order to this effect was entered on the minutes of the governing board.

In the meantime, on the 19th and 20th, the cashier (appellant) kept the doors open and received all deposits offered, but, upon the advice of his father, all deposits so received were kept separate from the funds of the bank; the identical money received from each depositor being pinned to the deposit slip and placed in a tin-box.

After the appointment of a receiver the identical money received during the two days was returned to each depositor, except the deposit of seventy dollars upon which the [120] indictment was based. The record shows that the depositor was notified by mail to call and the seventy dollars would be returned to him, but by some misadventure the depositor did not receive the notice, and the indictment naturally followed.

In short, pending the examination of the financial condition of the bank and the final action of the board of directors, the deposits were received in the manner stated for the purpose of returning same should the directors decide to liquidate. The depositors were not advised of this purpose of the bank, and, so far as they were concerned, the deposits were made and received in the ordinary way.

Two courses were opened to the officers of the bank pending the decision of the direc-

tors; one to close the doors and refuse to receive deposits; the other the one pursued in the instant case. If deposits had been declined, a run on the bank was reasonably certain, and this probably would have put this bank, or any other bank in the hands of a receiver, solvent or insolvent. It is easily conceivable that a bank solvent in the legal sense would be wrecked by a refusal to receive deposits; confidence once weakened is difficult to revive.

The question is, conceding that the cashier had good reason to believe the bank was insolvent when Mr. Atkinson delivered his money to the cashier: Did the cashier, under the facts of this case, "receive any deposit" in violation of the statute?

According to the undisputed intention and purpose of the cashier, the money received was not to become a deposit in case it was decided to liquidate. It was the undisclosed intention and purpose of the cashier to take the money conditionally. He never, in fact, received the money for the bank, and never mingled same with the bank's funds, nor did he record the transaction upon the bank's books. There seems to be no reason to doubt that appellant as cashier endeavored to protect the interest [121] of the depositor should disaster come. In other words, the record leaves no room for doubt of the cashier's intention to prevent any loss to individual depositors during the two days the board of directors were diagnosing the sick bank.

Under a state of facts similar to the facts in the present case, construing a statute in all essentials the same as ours, the supreme court of Pennsylvania, in *Com. v. Junkin*, 170 Pa. St. 201, 32 Atl. 619, 31 L.R.A. 124, said: "Putting aside for the present the question raised as to Junkin's unanswerability criminally for the acts of his agent, assume that he had himself been in the bank that day, had personally received this twenty dollars at the counter, and had put it in an envelope, marked with Rice's name, to be returned to him in case the bank closed, and then did return to him the same twenty dollars, would that, without the meaning of the act, have been the receipt by a banker, knowing the bank to be insolvent, of money on deposit? The peril to and loss of the depositor's money arises from the concealed insolvency of the bank; but if it never mingles with or forms part of the bank's funds, which are assets for the payment of creditors generally, remains separate from all other funds, and is capable of absolute identification, so that it may be returned, and is actually returned, that does not constitute the criminal receipt of money as a bank deposit. The real deposit, whether on time or call, when passed over the counter, is thereafter the property of the bank absolutely. It is the intention of the depositor and the bank that

the latter shall thereafter use it as its own by loaning it to others, and paying it out on checks drawn by others. The express or implied promise of the bank is that it will repay him, not that money, but that amount of money. In the case we are supposing the intention of the banker is to hand back the identical money received, and that intention is manifested, not by what he says, but by what he does, not only at the time, but [122] afterwards. This method of not receiving money on deposit by a banker knowing his insolvency, as demonstrated by the event here, is not an open, unequivocal observance of the law. He subjects himself to the peril of misconstruction of his real intention, and invites criminal accusation. But, unwise as may be the conduct, if no intention, in fact, existed to appropriate in aid of his insolvent bank the depositor's money, and he did not, in fact, so appropriate it, he is not a criminal. If such a transaction is not a deposit by a depositor, if there be no contract to which the minds of both parties assented, then it is not within the terms of the act."

In *State v. Strait*, 99 Minn. 327, 109 N. W. 598, the supreme court of Minnesota has this to say: "It is argued on behalf of the state that it was immaterial what effort appellant may have made to prevent the deposits being made, so long as it did not, in fact, result in the actual return of the money to the depositors; that what his intention may have been was immaterial, and he was bound absolutely by the technical legal result of his cashier permitting the money to remain in the bank and pass into the hands of the referee. Such is not our view of the law." This court also quotes with approval *Com. v. Junkin*, supra.

In the last analysis the question to be decided in the present case is about this: Was appellant a felon when he took Mr. Atkinson's money, having good reason to believe that the bank was insolvent at the time, even though he intended to receive, and did, in fact, receive the money as a special deposit, for the purpose of giving the directors an opportunity to kill or cure the bank, and in the former event it was his purpose to restore the money to Mr. Atkinson?

There are many ways by which the creditors of a hopelessly insolvent bank may be made secure, and there are also many ways by which a bank unable to meet all legal demands of creditors may be rejuvenated and put upon [123] its feet. It may have been, and probably was, the hope of the bank's officers that some way would be found to continue the operation of this bank upon a basis of solvency, so far as creditors were concerned, but, whether this is true or not, it is manifest that the cashier acted in perfect

good faith with the depositor, by so arranging matters as to insure the return of his money in any event.

The statute is a wise and just law for the protection of bank depositors, but to hold that appellant violated this statute when he did the very thing the statute was designed to accomplish would be a sacrifice of the spirit to the letter of the law.

Mr. Atkinson has suffered no injury; the money deposited by him never became an asset of the bank, and should have been returned to him. *Michie, Banks and Banking*, 406.

Reversed, and judgment here discharging appellant.

Reversed.

SMITH, C. J. (*dissenting*).—The jury found, as a fact, and the majority opinion concedes for the purpose of this discussion, that at the time the deposit in question was received the bank was insolvent, and that appellant either knew or had good reason to believe that this was true. The money was received by the bank in the usual and ordinary way, and became, immediately upon its receipt, the property of the bank.

Appellant claims that it was the bank's intention to return the money to the depositor in event it should be determined by its directors that it was necessary for the bank to discontinue business. In other words, his claim is that the deposit was received without any intention of defrauding the depositor. The defect in this defense is that the presence or absence of an intent to defraud is immaterial; for the statute makes it unlawful to receive a deposit into an insolvent bank with knowledge of [124] its insolvency without reference to the intent with which the deposit was received. If a fraudulent intent is necessary, few convictions can be had under this statute, for the reason that, I think I am safe in saying, few deposits are received with an intention on the part of the bank officials of defrauding the depositor. Insolvent banks are usually kept open because of the fact that, should they discontinue business, it is hardly possible for them to realize the value of their assets, and because of the hope of their officials that they will in the end recoup their losses and be enabled to discharge all of their liabilities and save harmless their stockholders. The statute was designed to prevent insolvent banks from pursuing this course, to prevent them from continuing to receive, and subject to probable loss, the money of unsuspecting depositors. What happened here is just what the statute was designed to prevent; for the depositor has lost his money when, had he been told of the insolvency of the bank, he could have prevented the loss by not making the deposit.

It is true that by a proper proceeding this depositor could have recovered the particular money deposited by him while it remained in the hands of the bank, but this results not from the fact that there existed an intention on the part of the bank officials to return it to him in event a certain condition should arise, but results from that principle of law which permits a fraudulent contract to be repudiated by the innocent party and which then reverts him with the ownership of property obtained from him by virtue of the fraudulent contract. Any depositor whose money has been received by a bank when insolvent, to the knowledge of its officials, can recover it while it remains in the hands of the bank, provided the insolvency of the bank was unknown to the depositor at the time the deposit was made. If authority is desired for this statement of the law, see 1 Bolles, *Modern Law of Banking*, 188, and, as illustrating the principle, *Meridian First Nat. Bank v. Strauss*, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

[125] The statute here under consideration was construed in accordance with the views herein expressed in *Hughes v. Lake*, 63 Miss. 552. In that case "L., a banker, having failed in business and made an assignment, H., one of his depositors, sued out an attachment against him on the ground that the debt due the plaintiff was 'fraudulently contracted.' On the trial of the issue joined to test the ground of the attachment the plaintiff adduced evidence tending to show that L. knew at the time he received plaintiff's deposit that the bank was insolvent." The plaintiff asked, but was refused, "an instruction to the effect that, if L. was guilty of violating the statute (the one here in question in receiving H.'s deposit, then he fraudulently contracted the debt therefor." This court affirmed the action of the trial court in refusing this instruction, and, speaking through Judge Campbell, pointed out the distinction between the civil and criminal liability of a banker for receiving a deposit into his bank knowing it to be insolvent, as follows: "The first instruction asked by the plaintiff was properly refused, and was correctly modified by the court. It is true that one may be guilty, and sent to the penitentiary, under paragraph 2814 of the Code, without having entertained the fraudulent purpose necessary to sustain an attachment. Guilt, under paragraph 2814, depends on the facts recited in it, and not upon intent or purpose. The object of the statute is to protect the confiding public from the victimization apt to result from depositing in an insolvent establishment, and it seeks to give protection by denouncing its penalty against him who receives a deposit, knowing, or having good reason to believe, that the establishment is insolvent, without informing the

depositor of such condition. Receiving a deposit in such circumstances constitutes the crime, no matter what may be the purpose or hope of the person receiving it. He may think all will be well, and that his insolvent condition will never be known, and that he will achieve success by the use of his [126] credit, and his purpose may be to act honestly and pay all depositors, but, if he receives a deposit, knowing or having reason to believe that insolvency exists, he is guilty of a felony, and cannot escape the just consequences of his crime because of his hopes and purposes. The legislature has determined that it is dangerous to the community for an insolvent bank to receive deposits, because of the probable result, and, in order to prevent the evil, has declared it felony for any person to receive deposits into an insolvent establishment without informing the depositor of such condition. No professed or really existing honesty of purpose will relieve against the crime, which consists in doing what is forbidden, regardless of motive. If the bank is insolvent, dare not to receive a deposit from an unsuspecting person, but tell him of the insolvent condition, that he may foresee the evil and avoid it." It is true that the criminal liability of the defendant was not there in question, but it was necessary in order that the court might intelligently decide the matter before it for it to draw the distinction between civil and criminal liability under the statute, and, while it may be that the construction there placed upon the statute is not binding upon us, it expressed the views of a very able court, and, in my judgment, is correct. The statute has been twice re-enacted since that case was decided, and for that reason the views therein expressed, whether necessary to the decision or not, should not be lightly disregarded.

Only two cases have been cited in support of appellant's contention, and these are the two referred to in the majority opinion, to wit, *Com. v. Junkin*, 170 Pa. St. 194, 32 Atl. 619, 31 L.R.A. 124, and *State v. Strait*, 99 Minn. 327, 109 N. W. 598. The first decision seems to proceed upon two grounds: (1) That the deposit was received without any intention to defraud; and (2) that no deposit was, in fact, made, for the reason that the person receiving the deposit secretly intended to return it. The [127] ground on which the second case proceeds is not clearly stated, but it refers to the first as authority for the conclusion reached. I have already discussed the first ground on which *Com. v. Junkin* proceeds, and do not deem the second worthy of consideration, for the reason that no other cases have come under my observation wherein it is held that a contract can be modified or changed by reason of an intention on the part of one of the parties thereto different

from that expressed in the contract and not disclosed to the other party. In the case of *State v. Strait*, the deposit there is question had been received by the cashier and mingled with the money of the bank before he was notified by Strait, one of the owners of the bank, to put all money received on deposit in envelopes marked with the names of the depositors, so that it might be returned to them. An amount of money equal to the deposit in question was then put in an envelope, marked with the depositor's name, and, though by an oversight it was not returned to the depositor, the court held that no crime had been committed. It would follow from this that no conviction can be had if the debt which the bank owes the depositor by reason of his having made the deposit is afterwards paid. At least one statute has come under my observation which contains a provision to the effect that loss to the depositor must result from the reception of the deposit in order for a crime to be committed, but the statute here under consideration contains no such provision.

It may be, and I am inclined to think, that the statute should be amended so as to provide for the doing of what was done by appellant here, but that is the province of the legislature, and not of the court. Should the statute be so amended, the amendment should be so framed as to protect the rights of the unsuspecting stockholder, as well as of the person receiving his deposit.

For these reasons, I think the judgment of the court below should be affirmed.

[128] REED, J. (*concurring*).—The chief justice, in his dissenting opinion, referring to the alleged deposit, says that "the money was received by the bank in the usual and ordinary way, and became immediately upon its receipt the property of the bank." I cannot agree that this is shown by the proof. I understand from the evidence that Mr. Atkinson handed to appellant, the cashier of the bank, to be deposited, seventy dollars in currency, consisting of one twenty dollar bill and ten five dollar bills, and received a duplicate deposit ticket therefor. This currency was taken by appellant, pinned to a deposit slip, placed in a tin box set apart to receive sums left by others on the same day, and never entered upon the books of the bank as a deposit nor mingled with its general funds. All of the other money left with the bank by other parties was returned after the bank's failure, except the amount which was handed in by Mr. Atkinson. It appears that the different persons were notified to call and get their money, and that Mr. Atkinson failed to receive the notice mailed to him.

I understand that Mr. Atkinson's money went into the hands of the temporary liqui-

dator of the bank, and was afterwards turned over to the receiver, and was brought into court on the trial of this case. During all of this time it was kept separate from other funds, and kept just as it was received by appellant.

The record shows that appellant did physically receive this money over the counter and into his possession, but it is not shown that when it came into his hands it was treated and disposed of as an ordinary deposit in the bank and as the property of the bank. Appellant kept it separate and apart from the funds of the bank, and purposed and endeavored to return it to Mr. Atkinson. Mr. Atkinson did not receive information as to this. However, appellant is not on trial for failure to tell Mr. Atkinson of his purpose to keep the money separate and apart from the funds of the bank and return it in the [129] event of the bank's failure. The offense charged against him is receiving a deposit into an insolvent bank.

Was this such a deposit as is meant by the statute? Surely the statute means a general deposit; that is, the placing of money in a bank to be repaid on demand "in any current money not the same pieces of money deposited." In such deposit the title to the money deposited passes to the bank, which becomes the debtor to the depositor for the amount. *Black's Law Dictionary*. It was undoubtedly the purpose of Mr. Atkinson, when he presented his money to the appellant, to make a general deposit in the bank, but the making of such deposit does not consist alone of the act of the one who desires to deposit his money. The amount offered must be received into the bank. It must become a part of the bank's funds. The entire transaction between the two parties is that which constitutes the contract of deposit. If a contract, the minds of the parties thereto must meet. I do not find that this was so in this case. Mr. Atkinson purposed to make a general deposit, but appellant did not, on his part, receive it as such. Their minds did not meet. The contract of a general deposit was not completed.

I do not know that we can term the transaction between Mr. Atkinson and appellant as amounting to a deposit. If it can be, from any view, termed a deposit at all, then I see in it a special deposit; that is, "one in which the depositor is entitled to the return of the identical thing deposited (gold, bullion, securities, etc.) and the title to the property remains in him, the deposit being usually made only for purposes of safe-keeping." *Black's Law Dictionary*, citing *Shipman v. State Bank*, 59 Hun 621, 13 N. Y. S. 475; *State v. Clark*, 4 Ind. 318; *Brahm v. Adkins*, 77 Ill. 263; *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 U. S. (L. ed.) 785.

In discussing what is a special deposit, Mr. Bolles, in his treatise on the Modern Law of Banking, vol. 1, p. 434, says: "The term 'special deposit' has a varying judicial [130] meaning. Thus a court in Illinois, when saying that a special deposit must always be returned to the owner, whether the bank is solvent or otherwise, meant a specific thing, like a bond or a specific deposit of money. To these may be added deposits marked 'special,' or which are put into a special place at the time of receiving them, because of the bank's pending insolvency, or other reason."

The facts in this case clearly show to me that this money was received into the bank by appellant, and treated and held as the property of Mr. Atkinson, and that the title thereto did not pass to the bank, but remained in him. The bank did not become his debtor for the amount. It was not a general deposit "received by the bank in the usual and ordinary way." It was not the receiving of money into the bank as a deposit, which is made a criminal offense by statute.

The chief justice quotes at length from *Hughes v. Lake*, 63 Miss. 552, and I gather from what he writes that he relies upon the discussion of the purpose of the statute in the opinion in that case to sustain his views in the present case. I do not see how this case can, in any manner, be controlled by the decision of the court in *Hughes v. Lake*. The eminent judge who delivered the opinion did very fully express his approval of the statute. I am sure we all agree that the proper enforcement of the statute will be very helpful in protecting the confiding depositors from losing their money. I believe that the great man had in mind, while writing the receiving of an ordinary or general deposit into an insolvent bank. That is what is forbidden. The wrong act condemned by the law is the taking of money from a depositor into the funds of an insolvent bank, and thereby causing him loss. The depositor must be defrauded or injured by the taking of his money. This will be so if it is taken into an insolvent bank as a general deposit and mingled with the funds of the bank. It will not be so if the money is [131] received by a teller, and not taken into the funds of the bank, but kept separate and apart as the property of the one offering to deposit it, and so that the identical money may be returned to him. We may approve the sentiments expressed by the judge delivering the opinion in the case of *Hughes v. Lake* without in any manner recognizing that there was anything decided in that case to control the case at bar.

The chief justice says in his dissenting opinion that only two cases have been cited in support of appellant's contention. We learn from the able and painstaking counsel

who represent appellant that a very thorough search of the books only disclosed two cases in point. It is significant that both of these cases sustain the position of the majority opinion in this case. The case of *Com. v. Junkin*, 170 Pa. St. 194, 32 Atl. 619, 31 L.R.A. 124, is very like the present case. This is shown in Judge Cook's reference to that case and his quotation from the opinion therein.

I think the case of *State v. Strait*, 99 Minn. 327, 109 N. W. 598, also fully sustains the decision in this case. Judge Cook quoted from the opinion, and Judge Smith referred to the facts, in that case. I will presume to make a more extended quotation, including that already made, because I deem it very pertinent in this consideration, and helpful in reaching a right conclusion in this case: "The cashier testified that he followed appellant's instructions, put the amount (though he could not say it was the identical money) received by the two depositors that morning in separate envelopes, addressed to the respective depositors, and laid the same in the safe. It appears that after closing of the bank, but before the money had been returned to the two depositors, a committee representing the bank's depositors, headed by the county attorney, visited the bank, and in the excitement the actual delivery of the envelopes was overlooked, and the receiver in bankruptcy took charge of appellant's estate, including the [132] bank and its contents. We will assume that the referee in bankruptcy acquired title to the money for the creditors as against the depositors, so that, conceding there was technically a deposit, in the sense that the depositors lost title to their money, yet is the inference warranted from the facts and circumstances stated that there was a deposit such as to constitute the criminal offense contemplated by chapter 219? It is argued on behalf of the state that it was immaterial what effort appellant may have made to prevent the deposits being made, so long as it did not, in fact, result in the actual return of the money to the depositors; that what his intention may have been was immaterial, and he was bound absolutely by the technical legal result of his cashier permitting the money to remain in the bank and pass into the hands of the referee. Such is not our view of the law. We are decidedly of the opinion that, if the evidence referred to is true, appellant took every reasonable precaution which could be taken to prevent the occurrence of the very act for which he stands charged in the indictment. The inevitable inference from the declarations and acts of appellant, and from all the evidence, is that the accused did not willfully or negligently receive, or permit his agents to receive, the money."

I do not see that the proof in this case is sufficient to support the conviction of appellant for violation of the statute.

NOTE.

Intent as Element of Offense of Receiving Deposit in Insolvent Bank.

The statutes penalizing the receipt of deposits by an officer or agent of an insolvent bank usually make knowledge on the part of the accused of the insolvency of the bank an essential element of the offense (3 R. C. L. tit. *Banks*, p. 494), and the scienter thus required has sometimes been referred to as criminal intent. See *State v. Eifert*, 102 Ia. 188, 65 N. W. 309, 71 N. W. 248, 63 Am. St. Rep. 433, 38 L.R.A. 485. But intent in the stricter sense, i. e., a specified intent to defraud the depositor, is not ordinarily required by the statutes, and a statute making the reception of a deposit with knowledge of insolvency proof of a fraudulent intent is valid. See 3 R. C. L. tit. *Banks*, p. 491. If the statute makes no requirement of a specific intent to defraud, such an intent is not an essential element of the offense. *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953; *Com. v. Junkin*, 170 Pa. St. 194, 32 Atl. 617, 31 L.R.A. 124. In the case first cited it was said: "Certain acts, in themselves innocent and indifferent, are made criminal when done under circumstances which experience has taught will probably result in some harm which the law seeks to prevent. As stated by a learned historian of the criminal law, 'it would be a mistake to suppose that in order that an act may amount to a crime the offender must intend to commit the crime to which his act amounts, but he must in all cases intend to do the act which constitutes the crime.' 2 Stephens, Hist. Crim. Law, 112. In *Reg. v. Tolson*, 23 Q. B. D. (Eng.) 168, 16 Cox C. C. 629, the court said: 'Although prima facie, and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal, whether there has been any intention to break the law or otherwise to do wrong or not. . . . Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable.' The statute under which this indictment was drawn creates a statutory crime. The act which is forbidden and made criminal is the receiving of money for deposit by a banker when he knows, or has

good reason to know, that the bank is unsafe or insolvent. The prohibited act is made criminal without reference to whether the person receiving the money intends to defraud the depositor. As a fraudulent intent is not by the statute made an essential element of the crime, it need not be alleged in the indictment."

But it seems that there must be not only an intent to receive the money but an intent to receive it on general deposit; in other words, the intent of the bank officer must be that money offered for deposit shall go into the funds of the bank and be subjected to the risk of loss which arises from the known insolvency of the bank. Accordingly if money offered for deposit is not mingled with the funds of the bank but is marked with the name of the depositor with the purpose of returning it to him in case it is found that the bank is unable to continue business, the officer so receiving it is not criminally liable. *State v. Strait*, 99 Minn. 327, 109 N. W. 598; *Com. v. Junkin*, 170 Pa. St. 194, 32 Atl. 619, 31 L.R.A. 124. And see the reported case. *Compare Com. v. Sponsler*, 16 Pa. Co. Ct. 116. The leading case of *Com. v. Junkin*, supra, is fully set out in the reported case. In *State v. Strait*, supra, it appeared that the owner of a private bank, becoming satisfied of its insolvency after the beginning of banking hours on a particular day, directed the cashier to put the amounts of the deposits received on that day into envelopes, marking each envelope with the name of the depositor, and to return the deposits at once. The cashier testified that he followed the appellant's instructions, put the amount (though he could not say it was the identical money) received from the two depositors that morning in separate envelopes, addressed to the respective depositors, and laid the same in the safe. It appears that after the closing of the bank, but before the money had been returned to the two depositors, a committee representing the bank's depositors, headed by the county attorney, visited the bank, and in the excitement the actual delivery of the envelopes was overlooked and the receiver in bankruptcy took charge of appellant's estate, including the bank and its contents. The court said: "We will assume that the referee in bankruptcy acquired title to the money for the creditors as against the depositors, so that, conceding there was technically a deposit, in the sense that the depositors lost title to their money, yet is the inference warranted from the facts and circumstances stated that there was a deposit such as to constitute the criminal offense contemplated by chapter 219? It is argued on behalf of the state that it was immaterial what effort appellant may have made to prevent the deposits being made, so long as it,

did not in fact result in the actual return of the money to the depositors; that what his intention may have been was immaterial, and he was bound absolutely by the technical legal result of his cashier permitting the money to remain in the bank and pass into the hands of the referee. Such is not our view of the law. We are decidedly of the opinion that, if the evidence referred to is true, appellant took every reasonable precaution which could be taken to prevent the occurrence of the very act for which he stands charged in the indictment. The inevitable inference from the declarations and acts of appellant, and from all the evidence, is that the accused did not wilfully or negligently receive, or permit his agents to receive, the money."

The decision in *Com. v. Sponsler*, supra, would seem to be overruled by *Com. v. Junkin*, supra. In the *Sponsler* case it does not appear from the opinion just what was done by the bank officer. The court, however, said: "It was most strenuously contended that judgment should be arrested because defendants did not receive the money as a deposit, but with the intention of returning it. The evidence of cashier Willis, a witness called by the commonwealth, does show that it was received with such intention; by an oversight it was not returned to J. W. Rice, and the identical money deposited by Rice was never returned to him, but after a true bill had been found and only a few days before the trial, a like amount was given him. If defendants are absolved from guilt by reason of this intention to return, the fact that, by oversight, such return was not made, we think, would not fasten guilt on defendants. At the trial we instructed the jury that such intention to return the money was immaterial. The very able oral argument of counsel for defendants and the clearly expressed and exhaustive briefs submitted by them have failed to convince us that such instruction was error."

ARMSTRONG ET AL.

v.

CITY OF PHILADELPHIA.

Pennsylvania Supreme Court—April 12, 1915.

249 Pa. St. 39; 94 Atl. 455.

Appeal and Error — Extent of Review — Theory Below.

A case will not be reviewed on a theory different from that on which it was tried be-

low, nor will questions argued for the first time on appeal be considered.

Municipal Corporations — Liability for Acts of Agents — Business Function — Operating Filtration Plant.

Where a city undertakes to construct and operate a filtration plant to supply water to its inhabitants, it is exercising a business, as distinguished from a governmental, function, and the maxim respondeat superior applies to the acts of its officers and agents in exercising such functions; and therefore it cannot avoid liability for the wrongful acts of its servants in holding what they believe to be the city's property.

Replevin — Damages for Detention of Property.

Where plaintiff in replevin has secured possession of property, he may ordinarily recover damages for the detention measured by interest and depreciation in value.

Exemplary Damages for Detention.

Exemplary damages may be recovered in replevin only where there have been particular circumstances of fraud, oppression, or wrong in the taking or detention of the property.

[See 4 Ann. Cas. 71.]

Value of Use of Property Detained.

Where property replevied is capable of such physical use and enjoyment as cannot be compensated for by allowing interest, the damages recoverable by plaintiff must be determined by considering the value of such use, but in determining such value, care should be taken not to permit the fixing of an amount out of proportion to the value of the thing itself.

[See note at end of this case.]

Same.

The measure of damages for the detention of rentable property is the rental value, unless the property be not used, in which case the value of depreciation by use must be deducted from the rental value.

[See note at end of this case.]

Pleading — Amendment — New Cause of Action.

An amended statement, which merely introduces an additional element of damages drawn from the circumstances alleged in the original statement in replevin, does not introduce a new cause of action and may therefore be allowed at any time.

Same.

A claim for damages for delay in payment for the detention of property cannot be first introduced by an amendment made to plaintiff's statement in replevin more than six years after the original statement was filed.

Jury — Custody and Conduct — Taking Out Papers — Calculation of Damages.

The matter of permitting plaintiff to send out to the jury a calculation of items of damages claimed, is within the trial court's discretion, where the paper contains no items not supported by evidence and the jury are instructed that the calculations are not evi-

dence but are merely to be used as an aid to their own calculation.

[See Ann. Cas. 1913C 937.]

Appeal from Court of Common Pleas, Philadelphia county: MARTIN, Judge.

Action by William J. Armstrong et al., plaintiffs, against City of Philadelphia, defendant. Judgment for plaintiffs. Defendant appeals. REVERSED.

[40] From the record it appears that the provisions of the contract between McNichol and the city relating to the tools and machinery were as follows:

GENERAL PROVISIONS.

"154. Prices to Include.—The prices specified in the accepted proposal shall include the furnishing and erection in a good, sound, substantial and workmanlike manner, of all items required for the completion of the whole work proposed for, and shall include all items shown and described in the specification; also, all dams, pilings, shorings, sheeting, forms, centering, falseworks, tramways, machinery, scaffolding, pumping, labor, workmanship, tools and materials necessary and best adapted to the efficient, prompt and safe execution of both the permanent and temporary works. All materials used must be of the best quality, and all work must be executed according to the true intent and meaning of the [41] drawings and the specification as may be necessary for the proper and entire completion of the structures.

"156. Personal Attention.—The contractor will be required to give the prosecution of the work his faithful personal attention, and will not be permitted to assign or sublet the same, excepting as herein provided, but shall at all times keep it under his control. In case of his absence he must have a competent representative or foreman on the work, who shall receive orders and directions from the engineer, or his authorized assistants and inspectors, and said representative or foreman shall have full authority to supply tools, materials, appliances and labor to carry on the work diligently and continuously until its completion.

"(The clause with reference to subletting will not be construed to prevent a general contractor from purchasing materials from approved manufacturers and dealers.) The contractor who is not a manufacturer of or dealer in materials, will be required to state the names and addresses of the manufacturers of or dealers in the materials which he proposes to supply, subject to the approval of the engineer. (See p. 101, of this book.)"

Other facts appear in the opinion.

Paul Reilly and Michael J. Ryan for appellant.

Henry P. Brown, John Kent Kane and Hampton L. Carson for appellee.

[42] FRAZER, J.—The City of Philadelphia contracted with Daniel J. McNichol for work on a filtration plant, under which contract McNichol was to furnish materials, tools, machinery and equipment for the execution of the work at the Torresdale Intake. McNichol later entered into a contract with plaintiffs by which the latter were to furnish the labor and materials in the construction of a coffer dam required in the prosecution of the work, and to furnish all tools, implements and machinery necessary for that purpose. Plaintiffs began work in 1905 and continued until June 16th of that year, when they were ordered to stop by reason of trouble between the city and McNichol in the prosecution of the work under the latter's contract. Plaintiffs then attempted to remove their tools and machinery and were prevented from doing so by officers of the city who were in charge of the work, and who contended that the property was vested in the city under the terms of its contract with McNichol.

On March 18, 1906, following both oral and written negotiations between plaintiffs and the city, plaintiffs wrote the chief of the Bureau of Filtration stating that the tools and machinery belonged to them and were not the property of McNichol and that they were needed in plaintiffs' business. This communication was not answered, and defendant persisted in its refusal to permit the tools and machinery to be removed. On April 10, 1906, a writ of replevin was issued by plaintiffs and on May 8th an agreement of counsel was filed, under which plaintiffs were to receive the property from the sheriff and retain possession under the replevin bond filed by them. Plaintiffs claim damages for loss incident to the detention of the property from June 16, 1905, to May 8, 1906, the date on which they were given possession.

Plaintiffs' original statement places the value of the property at \$4,400.00, which is based on its cost to them. In the amended statement filed, the value is increased to \$6,595.84. Mr. Latta, one of the plaintiffs, testified that [43] the articles were in first-class condition and could be bought for \$6,500. Since the property was actually delivered to plaintiffs, this item is eliminated as a measure of damage and is referred to only because of its bearing on the measure of damages for the period of detention, which the jury fixed at \$13,774.00, with \$604.34 added as compensation for delay in payment, making a total of \$14,378.34.

Defendants have laid particular stress in their argument on the contention that the property passed to them under the principle contract by which the contractor was to furnish all items required for the completion of the work, including machinery, tools, materials, etc., claiming that these articles became the property of the city upon the completion of the work and that therefore plaintiffs had no right or title therein as their right could rise no higher than that of the principle contractor. This question, as far as the record shows, was not raised in the lower court, but appears to have been an afterthought and is raised for the first time on this appeal. The charge of the court contains nothing to indicate that there was before it any disputed question of ownership of the property and the necessity of submitting such question to the jury was not suggested by counsel, nor was there any contention, as far as the record shows, that, as a matter of law under the contract, plaintiffs were not entitled to recover. It is a well established rule that the appellate court will not review a case on a theory different from that upon which it was tried by the court below, nor will it consider questions which were not raised in the lower court, but were argued for the first time on appeal. For this reason the question of ownership of the property might well be treated as settled by the acts of the parties as being in plaintiffs; however, as this case must go back for another trial, we deem it proper to state that the ownership of the property in dispute under proper interpretation of the provisions [44] of the contract was in plaintiffs and should be so treated by the parties.

It is argued by defendant that it is not liable for the acts of its officers and agents in seizing the property, for the reason that at the time there was no work being done, and therefore any wrongful act committed with reference to the property of plaintiffs was an act by the servants of the city without authority and not in the course of the performance of any duty incident to their office or employment, and that the responsibility for their acts must rest on their own shoulders, and to them plaintiffs must look for redress.

When a municipal corporation undertakes to construct and operate a filtration plant for the purpose of supplying water to its inhabitants, it is exercising a business, as distinguished from a governmental function and the maxim *respondet superior* applies to the acts of its officers and agents in exercising such function: *Philadelphia v. Gilmartin*, 71 Pa. St. 140; *Bodge v. Philadelphia*, 167 Pa. St. 492, 31 Atl. 728; *Harrisburg v. Saylor*, 87 Pa. 216; *Morgan v. Duquesne*, 29 Pa. Super. Ct. 100. Nor is it material that the actual work on the contract had been suspended. The

officers and employees, who had charge of the department under which this particular work was done, were acting as much for the city in refusing to surrender the property as in doing any other act incident to the work. It appears they acted in good faith, and for the purpose of serving the city, by holding what they believed to be the property of the city. While a city can act only through its officers, upon one of its officers necessarily devolved the duty of determining whether the municipality owned the property in dispute, and, if so, it was the duty of that officer to see that its rights were enforced. The question was one which arose immediately in connection with the performance of the work contracted for, and was as much within the scope of the duty of the representatives of the municipality as any other matter connected with the enforcement [45] of the terms of the contract: *Philadelphia v. Gilmartin*, *supra*.

The question of the measure of damages is a more difficult one. The general rule in an action of replevin, where the plaintiff has finally secured possession of the property, is that he may recover damages for detention and any costs incident thereto: *Cobbey on Replevin*, Sec. 853; *Fisher v. Whoolery*, 25 Pa. St. 197; *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. St. 24, 89 Atl. 798. These damages are usually measured by interest and depreciation in value: *Cobbey on Replevin*, Sec. 877; *McDonald v. Scaife*, 11 Pa. St. 381, 51 Am. Dec. 556; *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. St. 24, 89 Atl. 798; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Allen v. Fox*, 51 N. Y. 562. Exemplary damages may also be allowed in cases where there have been particular circumstances of fraud, oppression, or wrong in the taking or the detention of the property: *McDonald v. Scaife*, 11 Pa. St. 381, 51 Am. Dec. 556; *Wiley v. McGrath*, 194 Pa. St. 498, 45 Atl. 331, 75 Am. St. Rep. 709. There being no evidence in this case to support a claim for such damages the only question is as to the proper measure to compensate plaintiffs for the injuries sustained.

When property is capable of such physical use and enjoyment as cannot be compensated by allowance of interest, it is necessary to consider the value of such use. Thus where the property detained consists of horses, tools, implements of trade, etc., the general rule is that the party deprived of possession is entitled to the reasonable value of the use during the period of wrongful detention: *Cobbey on Replevin*, Sec. 887, 889 and the cases cited.

The general theory and basis of this rule is well stated by the Supreme Court of New York in *Allen v. Fox*, 51 N. Y. 562, which was an action to recover possession of a horse. Title was found to be in defendant, who gave evidence of the value of the use of the horse

during the period plaintiff had it in his possession under the writ. This evidence was admitted under objection. The jury found the value of the horse to be \$175 and the value of [46] its use \$75. In affirming the judgment the Supreme Court said: "In the action of replevin, the plaintiff seeks to recover the property, and is, in all stages of the case to final judgment, in pursuit of that, and not its value. And during the whole time the defendant may have the possession and the use (if it can be used) of his property. At the termination of the suit it is not optional with him to take the property or its value. If the defendant has the property, and will permit him to take it, he is obliged to take it (Code Sec. 277; *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wiman*, 9 N. Y. 559). Hence the plaintiff cannot always be expected or required, in such cases, to go into the market and supply himself with the same kind of property at its market value. Suppose the controversy be about a canal boat or a carriage, or an expensive machine. If the plaintiff should go into the market and buy another, at the end of the litigation, in case of success, he would have on hand duplicates of the article, and would thus be subjected to further loss and inconvenience.

. . . What should be the measure of damages for the detention? In many cases interest on the value from the time of the wrongful taking would be a proper measure. It would be generally in all cases where the property detained was merchandise kept for sale, grain and all other articles or property useful only for sale or consumption. In such cases, if the owner recover the interest on the value of his property from the time he was deprived of it, he will generally have complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, taken as it was before the depreciation, and the two items will furnish the amount of the damage. This damage, together with the property or its value at the time of the trial, will give the owner as complete indemnity as the law is generally able to give any person seeking redress for a wrong. But the same measure of damages would not generally furnish the owner an indemnity in [47] case the property claimed had a value for use, or, in other words, a usable value, such as horses, cows, carriages and boats. In such case the direct damage which the owners suffers is the loss of the use, and the value of the use should be the meaning of damages."

In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself; otherwise the result is not compensation for use but punishment for a wrong, in a case where exemplary damages, as such, would not

be allowed. Plaintiffs at the trial submitted a written calculation of damages, consisting of the rental value of the machinery from June 16, 1905, to April 12, 1906, the time during which defendant had possession and refused to turn it over to plaintiffs, by reason of which plaintiffs were deprived of its use. The calculation shows a claim amounting to \$13,774.00 for the use of the machinery for a period less than one year. This estimate, according to the testimony in the case, is more than twice the price at which the property could be replaced. If the true measure of damage is such amount as will compensate plaintiff for the loss sustained, the damages given in the present case are grossly in excess of such measure. For instance, it would have been extremely profitable for plaintiffs if defendant had retained the machinery indefinitely, as plaintiffs would have obtained sufficient compensation each year from the rental value to purchase two or more entire new plants. This amount of damage shows on its face that there is something radically wrong in the method of calculation, if compensation is to be taken as the proper measure: *Brunell v. Cook*, 13 Mont. 497, 34 Pac. 1015; *Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351.

In the charge of the court, the plaintiffs' second point, to the effect that damages should be allowed for detention measured by the ordinary market or rental value of the use of the property during the period of detention, was affirmed. If defendant had actually made use of the [48] property, there would naturally have been some depreciation in its value because of such use, and, when plaintiffs received possession, they would take it subject to this depreciation, for which they would be compensated in rental value. They could not recover both. There is here no evidence of the ordinary amount of depreciation by use, but in view of the fact that the rental value was so high in proportion to the amount of money invested, the depreciation, from a business point of view, must be considerable. If defendant did not use the property, the deterioration which it would have suffered by use must be deducted from the value of the use: *Brunell v. Cook*, 13 Mont. 497, 34 Pac. 1015; *Peerless Mach. Co. v. Gates*, 61 Minn. 124, 63 N. W. 260; *White v. Sheffield*, etc. St. R. Co. 90 Ala. 253, 7 So. 910, 24 Am. St. Rep. 772, and the jury should have been so instructed. They should also have been instructed to take into consideration the fact that plaintiffs might not have been able either to use or rent the tools and machinery continuously during the eleven months, and, if they so found, this fact would also materially reduce the measure of damages.

The amount of damages for detention should also bear some reasonable proportion to the value of the goods: *Romberg v. Hughes*, 18

Neb. 579, 26 N. W. 351, in the absence of evidence of extraordinary conditions or circumstances tending to enhance the damages above ordinary results: *Brunell v. Cook*, 13 Mont. 497, 34 Pac. 1015.

There was no error in the allowance of the amendment, even though the statute of limitations had run at the time it was made. It is true that the amended statement claims for an additional item of damage, to wit, the wrongful detention of the property, and alleges that, by reason thereof, plaintiffs lost the rental value to the extent of \$18,000.00. In the original statement there was no claim for loss of the use of the machinery and tools, but only for the tools themselves. The criterion adopted for determining whether or not an amendment is within the statute of limitations, is whether the cause [49] of action has been changed: *Rochester v. Kennedy*, 229 Pa. St. 251, 78 Atl. 133. The cause of action in both the original and amended statements is the wrongful taking and detention of the property. In the amended statement there is no departure from this cause of action, but merely an additional claim of damages because of the detention of the property. It is well settled law that an amendment which merely introduces an additional element of damage drawn out of the same circumstances may be allowed at any time, as it does not introduce a new cause of action: *Tassey v. Church*, 4 Watts & S. 141, 39 Am. Dec. 65; *Puritan Coal Min. Co. v. Pennsylvania R. Co.* 237 Pa. St. 420, Ann. Cas. 1914B 37, 85 Atl. 426; *Jackson v. Gunton*, 26 Pa. Super. Ct. 203.

The trial judge charged that if plaintiffs were entitled to damages for detention of their property, they were also entitled to additional damage for delay in payment not exceeding six per cent. In the original statement filed, no claim is made for damages for detention, nor was any such claim made until nearly seven years later, during which time plaintiffs were in possession of the property and failed to prosecute their claim for damages. Plaintiffs themselves were apparently in doubt as to their right to recover damages for the detention, and after waiting over six years without asserting their rights by prosecuting their claim to judgment, they are not now in a position to ask compensation for delay in payment.

There was no error in permitting plaintiffs to send out with the jury a calculation of the items of damage claimed. This is within the discretion of the court and is proper so long as the paper contains no items not supported by evidence and the jury are instructed that the calculations are not evidence but are merely to be used as an aid to their own calculations: *Person, etc. Co. v. Lipps*, 219 Pa. St. 99, 67 Atl. 1081; *Anderson v.*

Snyder, 14 Pa. Super. Ct. 424. This was done in the present case. On a new trial, however, such calculations, if submitted, should be [50] governed by the measure of damages outlined in this opinion.

Judgment reversed and a venire facias de novo awarded.

NOTE.

The reported case holds that in an action of replevin for the tools and machinery of a building contractor the plaintiff is entitled to recover as part of his damages the value of the use of the property during the time it was wrongfully detained by the defendant. In arriving at the amount to be allowed, it is held that, where the property was not used by the defendant, there must be deducted from the rental value of the property the amount of the depreciation which it would have suffered had it during that period been in use by the plaintiff. The cases discussing the right of a successful party in replevin to recover as damages the value of the use of his property during the period of its detention are reviewed in the note to *Thomas v. Tecumseh First Nat. Bank*, Ann. Cas. 1914A 376.

NORTHWEST STEEL COMPANY

v.

SCHOOL DISTRICT NO. 16.

Oregon Supreme Court—May 25, 1915.

76 Oregon 321; 148 Pac. 1134.

Public Contracts — Failure to Require Bond — Liability of Municipality to Materialman.

One furnishing material to a contractor, erecting a schoolhouse for a school district which neglected to exact a bond required by L. O. L. § 6266, of anyone contracting with any school district for the construction of any building, with the additional obligation that he will promptly pay all materialmen, has a right of action against the district for damages consequent upon the contractor's insolvency leaving a balance due for the materials furnished.

[See note at end of this case.]

Appeal from Circuit Court, Umatilla county: HARRIS, Judge.

Action by Northwest Steel Company, plaintiff, against School District No. 16 of

Umatilla county, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[321] This is an action by the Northwest Steel Company, a private corporation, against School District No. 16 of Umatilla County, Oregon, a municipal corporation. The facts are as follows:

In January, 1912, the defendant school district entered into a contract with the Advance Construction Company for the erection of a schoolhouse, exacting from the said company a bond for the faithful performance of the terms and conditions of such contract, but failed to require any bond for the protection of materialmen and laborers in the collection of their claims. Plaintiff, a private corporation, furnished certain structural steel to be used in the erection of the building at the agreed price of \$3,212. Certain payments were made by the contracting company upon the indebtedness thus incurred, but, while there was still [322] a balance of \$810.70 due and unpaid thereon, the construction company became insolvent, and made an assignment for the benefit of its creditors, and is unable to pay this claim. Plaintiff sold and delivered the steel, not upon the credit of the construction company, but relying upon the presumption that the defendant would obey the mandate of Section 6266, L. O. L., which provides that:

"Any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state . . . shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

The above covers the substance of the allegations of the complaint, except as to certain details unnecessary to this discussion. The prayer of the complaint demands damages in the amount of plaintiff's unpaid claim, with interest. A demurrer to the complaint was sustained, the action dismissed, with judgment in favor of defendant for its costs and disbursements, and plaintiff appeals.

A. R. Watzek, Platt & Platt and Raley & Raley for appellant.

Carter & Smythe for respondent.

[323] BENSON, J. (*after stating the facts*).—There is but one question to be determined, and that is: Has the materialman, under the facts stated, a right of action

against the school district for damages by reason of the negligence of the defendant in failing to exact a bond such as is required by Section 6266, L. O. L.? Defendant contends, and the trial court held, that the requirements of the statute create a public, and not a corporate or municipal, liability and therefore the defendant is not liable in damages for failure to comply therewith. There appear to be but few cases in which the question as applied to statutes similar to ours has been considered, and our attention has been called to the decisions of only three states, which are Michigan, Minnesota, and Kansas. Of these, the Michigan cases support the contention of plaintiff, while those of Minnesota and Kansas maintain an interpretation favorable to the defense.

We shall first consider the Michigan statute (Public Acts 1883, No. 94) and decisions. The title of the act reads:

"An act to insure payment of wages earned, and for materials used in constructing, repairing, or ornamenting public buildings and public works."

Section 1 is as follows:

"That when public buildings, or other public works, are about to be built, repaired, or ornamented under contract, at the expense of this state, or of any county, city, village, township or school district thereof, upon which buildings or works liens might attach for labor or materials if belonging to private persons, it shall be the duty of the board officers or agents contracting on behalf of the state, county, city, village, township or school district, to require sufficient security, by bond, for the payment by the contractor, and all subcontractors [324] for all labor performed or materials furnished in the erection, repairing, or ornamenting of such building."

Then follow various provisions for making the act effective. The first reported case under this statute is that of *Owen v. Hill*, 67 Mich. 43, 34 N. W. 649, in which the trustees of a school district were made defendants in an action, similar to the one at bar, to recover damages sustained by the negligence of the defendants to exact the statutory bond. The court held that the act of requiring the bond is a ministerial act, involving no discretion, and consequently no judicial functions. The acts of fixing the amount in which the bond shall be given and of passing upon the sufficiency of the sureties are conceded to be, in a limited measure, judicial, but these acts were not the ones of which complaint was made. The opinion then discusses the question as to whether the requirements of the act constitute a public duty or a corporate one. Upon this point the court says:

"In this case the position was assumed by counsel for defendants that the duty

imposed by the statute was a public duty, and the neglect to perform it only affected the public. If this were so, there would be no liability. But the contrary is, to my mind, the object and purpose of the law. The duty was imposed to protect individuals, and for the benefit of individual laborers and materialmen. That this is so is too plain for argument. No person can read the condition of the bond and not be satisfied that it was intended for the protection of the individuals who should furnish to the contractor or subcontractor either labor or material. Express provision of the law is that the bond shall be deposited for the use of any person interested therein, and that it may be prosecuted and recovery had by any person, etc., to whom any money shall be due and payable on account of having performed labor, [325] etc. The principle is this: 'That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed; if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it or to perform it properly, is an individual wrong, and may support an individual action for damages:' *Cooley Torts*, 379. I am aware that it may be regarded as a great hardship to impose this liability upon persons who accept office and perform burdens gratuitously. But the law makes no exceptions, and I can make none. It is presumed that they know the law, and the further presumption is that they will obey it. If they do not, on whom should the loss properly fall; on those who neglect to perform a duty enjoined by law, or those whom the law was designed to protect from loss?"

The leading Minnesota case is that of *Ihk v. Duluth City*, 58 Minn. 182, 59 N. W. 960. This was an action for damages incurred through the city's neglect to exact a bond, under the provisions of the municipal charter which are stated, in the opinion, to be as follows:

"That, whenever the board of public works shall award a contract for making any of the improvements mentioned in the subchapter, the person to whom it is awarded shall furnish to the city a bond with sufficient sureties, to be approved by the board of public works, conditioned that he will execute the work for the price mentioned in the bid and according to the plans and specifications, and that he will pay for all labor done and material furnished for said improvement."

The court holds that the city is not liable, for the reason that the duty to exact the bond is a public, and not a corporate, duty,

and cites *Dillon on Municipal* [326] Corporations, Section 967, as the controlling test. In order to make clear the application, we quote the following from the opinion:

"The distinction between these two classes of duties, i. e., municipal or corporate duties, and public duties, and that for misfeasance or nonfeasance, that in the one case the municipality will be liable, and not in the other, is well established: 2 *Dillon Mun. Corp.* §§ 966, 967. The difficulty usually lies in determining what are to be deemed municipal or corporate duties and what public duties. The test suggested by *Dillon* in Section 967, that to be a municipal duty it must relate to the local or special interests of the municipality, is the most reasonable and satisfactory test, and was applied by this court in *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31. Tried by that test, the duty to take a bond for security of laborers and materialmen was a public, and not a corporate, duty; in other words, it was imposed on the particular officers, and not on the corporation as such. It did not relate to the local or special interests of the municipality nor of its citizens. It was a matter of indifference to the city that those claims were or were not secured. Such a bond, when taken, operates as security not merely for those who reside in the city, but equally for those who reside elsewhere—in *Wisconsin*, for instance."

The leading Kansas case is that of *Freeman v. Chanute*, 63 Kan. 573, 66 Pac. 647. This was a similar action based upon a statute (*Gen. Stats. Kan.* 1901, § 5130; 1 *Code Civ. Proc.* § 638e) which reads, in part, as follows:

"Whenever any public officer shall, under the laws of the state, enter into contract in any sum exceeding \$100 with any person or persons, for purpose of making any public improvements, or constructing any public building, or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in [327] a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

The act further provides for filing such bond with the clerk of the district court, and contains other details for making the act effective. The court held that the city was not liable, for the reason that the duty imposed by the statute was a public, and not a corporate, one, expressly following the case of *Ihk v. Duluth*, 58 Minn. 182, 59 N. W. 960, calling special attention to the fact that the duty to exact the bond is imposed,

not upon the corporation itself, but upon the officer. We have set out pretty fully the holdings of the courts of the states which have passed upon the question before us for the purpose of comparison. It is noteworthy that in all three of the cases the statute places the burden of requiring the bond upon particular officers, while the Oregon statute treats of the corporation as an entity. They all agree that the controlling problem is to determine whether the duty enjoined by law is a public or a corporate one. The Michigan court takes for its test the language of Judge Cooley, which we reiterate:

"That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." Cooley Torts, 379.

The others adopt as decisive the rule as expressed in Dillon's Municipal Corporations (4 ed.) Section 967, from which we quote:

[328] "Not only is the distinction just mentioned well established, but, as practically applied in the reported judgments of the courts, it has tended, in our judgment, to promote justice and to secure individual rights. This liability on the part of municipal corporations springs, as we think, from the particular nature of the duty enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary, legislative or judicial, and from the means given for its performance, which must be ample, or such as were considered to be so by the legislature, and not from the supposed circumstance that they received and accepted their charters or grants of powers and franchises upon an implied contract with the state that they would discharge their corporate duties, and that this contract inures to the benefit of every individual interested in the performance."

We are unable to see that this section supports the contention for which it is cited, and we think that the quotation from Cooley on Torts is the authority applicable to the case at bar. It must not be forgotten that these laws were enacted for the purpose of protecting laborers and materialmen in cases wherein the lien laws are ineffective. To entertain the theory of the Minnesota and Kansas courts would be to thwart the plain purpose of the statute by invoking a doctrine whose application thereto is far fetched. We therefore conclude that the trial court erred in sustaining the demurrer.

Ann. Cas. 1917B.—69.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Harris and Bean, JJ., took no part in the consideration of this case.

NOTE.

Liability of Municipality or Officer for Failure to Take from Contractor Bond for Protection of Laborers or Materialmen.

Liability for Municipality.

The duty of a municipality to require a contractor to give a bond for the protection of laborers and materialmen being wholly statutory, any liability for the failure to take a bond necessarily depends on the provisions of the various statutes, and so under the general rule that a municipality is not liable for the breach of a public as distinguished from a municipal or corporate duty, a laborer or a person furnishing material to a contractor cannot hold the municipality responsible for his losses unless the statute imposing the duty to take the bond expressly provides for such a liability. Pike County v. Norrington, 82 Ind. 190; Rock Island Lumber, etc. Co. v. Elliott, 59 Kan. 42, 51 Pac. 894; Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647; Rhea County v. Sneed, 105 Tenn. 581, 58 S. W. 1063. See also Eaton v. Monroe, 63 Mich. 525, 29 N. W. 885.

The rule and the reason therefor were stated in Rock Island Lumber, etc. Co. v. Elliott, *supra*, as follows: "While the statute specifically requires a public officer to take the bond, it does not provide that the neglect of an officer to perform the duty so enjoined raises a liability against the public corporation for which he acts. A quasi-municipal corporation, like a school board, is never liable for the consequences of a breach of public duty or the neglect or wrong of its officers unless there is an express statute imposing the liability. Eikenberry v. Bazaar Tp. 22 Kan. 556; Marion County v. Riggs, 24 Kan. 255; 1 Beach on Public Corporations, § 739. No language in the statute imposes such liability or indicates a legislative purpose that public corporations shall suffer a penalty for the neglect of their officers. Whatever liability may be incurred by the officers themselves for a breach of public duty, it is certain that in the absence of an express statute imposing such liability the municipalities cannot be held liable for their neglect."

In Rhea County v. Sneed, 105 Tenn. 581, 58 S. W. 1063, the court, holding county commissioners to be liable personally for the failure to take a bond from the contractor

but denying the liability of the county, said: "It does not follow, however, that the county is liable for the neglect of its commissioners. The duty of requiring the prescribed bond is by the statute devolved upon the 'public officer' charged with letting the contract, and for the failure to perform that duty, the statute declares 'such officer shall be guilty of a misdemeanor' (secs. 1 and 2). The duty and liability for its breach are imposed on the same person; consequently, these commissioners, who should have taken the bond, and not the county, are responsible for the omission disclosed in this case. The mere fact that the commissioners were appointees of the county and acting for it, does not render it responsible for their failure to take the bond. Their departure from the course of duty in this regard was in no legal sense the act of the county, nor one for which any statute fixes liability upon the county. It is a general rule that a private action cannot be maintained against a county for damages arising from the neglect of its officers in connection with public highways, unless some statute confers the right to do so."

In *Pike County v. Norrington*, 82 Ind. 190, it was said: "The Act of March 14th, 1877, as its title indicates, was passed to 'indemnify counties against loss' upon contracts made by county boards for the construction or repairs of public buildings. Certainly, it was not contemplated by the legislature, in the enactment of that act, that if, from any cause, the board of commissioners of any county should fail or neglect to require of and receive from the contractor, for the construction or repairs of any county building, the bond provided for in the first section of the act, the county should be held liable to any third party for any loss or damages which might be claimed to result from such failure or neglect. There is nothing in the act which imposes any liability upon the county in such a case; and the courts are not authorized to extend the provisions of the act by construction, so as to impose such liability upon the county."

Without directly determining the liability of a municipality under the statute requiring it to take a bond from contractors, the court in *Woodward Lumber Co. v. Grantville*, 13 Ga. App. 405, 79 S. E. 221, refused to hold a town liable to a person furnishing material to the contractor on the ground that the neglect of the materialman to ascertain whether a bond had been given barred his right of action. In that case it was said: "The lumber company furnishing material to the contractor was bound at its peril to ascertain the terms of the contract and of the bond executed by the contractor. If it knew the terms of the bond, it furnished the

material at its peril. If it did not know that the municipality had failed to take the bond required by the Act of 1910, it was guilty of gross negligence, because the contract and bond were matters of public record in the office of the municipal corporation and open to the inspection of all those interested in ascertaining their terms. So that, without discussing the general liability or municipal corporations under section 897 of the Civil Code, or undertaking to determine what are legislative or judicial powers and what are ministerial duties, we are very clear that the petition set forth no cause of action; for the plaintiff has sustained loss as much on account of its own negligence in failing to ascertain the terms of the bond as on account of the failure of the municipality to take the bond required by the Act of 1910."

However, the legislature has the power to make a public corporation responsible for damages resulting from its failure to perform a governmental duty, and in some jurisdictions it is expressly provided by statute that the failure of a municipality to require a bond for the contractor shall render it liable to persons furnishing the contractor with labor or materials. *Black v. Polk County*, 97 Minn. 487, 107 N. W. 560; *Wilcox Lumber Co. v. School Dist. No. 268*, 103 Minn. 43, 114 N. W. 262; *Waterous Engine Works Co. v. Clinton*, 110 Minn. 267, 125 N. W. 269; *Scott-Graff Lumber Co. v. Independent School Dist. No. 1*, 112 Minn. 474, 128 N. W. 672; *Plumbing Supply Co. v. Board of Education*, 32 S. D. 129, 270, 142 N. W. 260, 1131; *Handelan v. Smee School Dist. No. 4* (S. D.) 159 N. W. 888; *Maxon v. School Dist. No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *Pacific Mfg. Co. v. School Dist. No. 7*, 6 Wash. 121, 33 Pac. 68; *Wadsworth v. School Dist. No. 1*, 7 Wash. 485, 35 Pac. 371; *Puget Sound Brick, etc. Co. v. School Dist. No. 73*, 12 Wash. 118, 40 Pac. 608; *Rounds v. Whateom County*, 22 Wash. 106, 60 Pac. 139; *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799; *Gate City Lumber Co. v. Montesano*, 67 Wash. 594, 122 Pac. 26; *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140; *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429. And see the reported case wherein it is held that under the Oregon statute the corporation is treated as an entity and its duty to take the bond being a corporate duty rather than a public one, it is liable for a failure to exact it. *Compare Ihk v. Duluth City*, 58 Minn. 182, 59 N. W. 960, decided prior to the enactment of the statute specifically making the municipality liable.

Under the *Minnesota* statute it has been held that the liability of a municipality does

not arise unless the laborer or materialman has been actually damaged through the inability to collect his claim from the contractor. *Wilcox Lumber Co. v. School Dist.* No. 268, 103 Minn. 43, 114 N. W. 262; *Waterous Engine Works Co. v. Clinton*, 110 Minn. 269, 125 N. W. 269; *Scott-Graff Lumber Co. v. Independent School Dist. No. 1*, 112 Minn. 474, 128 N. W. 672. In *Wilcox Lumber Co. v. School Dist. No. 268*, supra, the nature and extent of the liability under the statute was stated as follows: "The statute provides that, in case a bond is not required by the officers, the corporation shall be liable for any loss sustained by any person furnishing labor or material under the contract. This language is significant, and it seems clear that the legislature did not intend to create an absolute liability on the part of the corporation, where the bond was not given, to the full extent of the obligations incurred by the contractor, but only to the extent of the contractor's failure and inability to pay the debts incurred by him. The liability thus created is analogous to that of indemnity contracts against loss or damage or a guaranty of collection of commercial paper, and extends only to losses actually suffered by those dealing with the contractor. . . . If the contractor in any such case be able to pay all debts incurred by him in the work, no loss occurs to those trusting him and no liability attaches to the corporation. If, on the other hand, he is unable to pay and cannot be compelled to pay by resort to legal proceedings, a loss does occur, within the meaning of the law, and the corporation becomes liable therefor."

But under the *South Dakota* statute (chap. 245, Laws 1909) it has been held that the liability of a municipality does not depend on the insolvency of the contractor. *Handelan v. Smee School Dist. No. 4* (S. D.) 159 N. W. 888, wherein it was said: "It is sufficient to say that under this statute the liability of the corporation and the right of plaintiff to maintain the action are not predicated upon the insolvency of the principal contractor, as it is under a somewhat similar statute of Minnesota. . . . The statute in terms declares that a failure or neglect to require the bond creates a liability against the district in favor of any person who shall have performed labor or furnished any material that entered into the erection of the building, and such liability arises by force of the statute, without regard to the solvency or insolvency of the principal contractor."

In *Washington* it has been held that it is not necessary that the indebtedness shall have been established by prior suit against the contractor, nor is it necessary to make the contractor a party to the suit against the

municipality. *Maxon v. School Dist. No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110. And so, it was held in *Pacific Mfg. Co. v. School Dist. No. 7*, 6 Wash. 121, 33 Pac. 68, that it was not necessary that the school district should be made a party to an action against the contractor, in order later to subject the district to liability under the statute requiring bonds to be taken.

Likewise it has been held that the failure to give the notice of the claim provided for by the statute does not defeat the right of action against the city. *Gate City Lumber Co. v. City of Montesano*, 60 Wash. 586, 111 Pac. 799; *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429. In the case first cited, it was said: "It is next contended that the notice prescribed by section 3 (Id. § 1161) of the act was not given. Such notice is only required when the statutory bond has been taken. The notice is for the protection of sureties, and has no application to a case like this where no bond was in fact taken. In such cases the liability of the city is made absolute by section 2 of the act."

Though a bond is given, if it is taken for an insufficient amount, a municipality is liable for any loss that may occur. *Waterous Engine Works Co. v. Clinton*, 110 Minn. 267, 125 N. W. 269; *Puget Sound Brick, etc. Co. v. School Dist. No. 73*, 12 Wash. 118, 40 Pac. 608. And so where the bond is invalid because of improper conditions, a municipality may be held liable under the statute as if no bond had been given. *Scott-Graff Lumber Co. v. Independent School Dist. No. 1*, 112 Minn. 474, 128 N. W. 672.

Where the contract is invalid for the reason that it is in excess of the authorized limit of municipal indebtedness, it has been held that no liability attaches to the city for the failure to take the bond required by the statute. *Kettle River Quarries Co. v. East Grand Forks*, 96 Minn. 290, 104 N. W. 1077. But where the contract is one which the authorities are authorized to carry on, it has been held that the city cannot escape liability for failure to take a bond on the ground that the contract is not legally executed, particularly when the city has accepted the work. *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140.

The *Washington* statute has been held to be inapplicable to persons furnishing labor or material to a contractor for a street improvement contract on the ground that by the terms of the statute it is limited to contracts where the right to a mechanic's lien would exist provided the same work was done for an individual. *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934. And in *Wallace v. Skagit County*, 8 Wash. 457, 36 Pac. 252, the statute was held to be inapplicable where

the contract was for purely local work. The two foregoing cases were explained and distinguished in *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139, wherein it was said: "The cases from this court which are cited deserve special notice. The first is *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934, in which it was held that, where a city is grading and improving streets at the exclusive cost and expense of the abutting property, it is not required to take the bond provided by § 2415, *supra*. But an examination of that case discloses that the reason for the holding is not because the city authorities are merely statutory agents, but because it was ruled that no right of lien existed for work of that character when performed for a private individual. *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, presented a similar question, and neither of these cases is analogous to the case at bar. In *Wallace v. Skagit County*, 8 Wash. 457, 36 Pac. 252, this court held that the construction of a local ditch, the cost of which was payable solely by the district benefited, was not such a county improvement as required the commissioners to take a bond. It was there held that the construction of such a ditch was not a county improvement, but a purely local one, and that the commissioners acted as the statutory agents of the improvers. We do not care to extend the doctrine of that case beyond what was there decided, but the present case is easily distinguishable from that one. The improvement in the present case was something more than merely local improvement for the benefit of a particular district. It was a county improvement in the broadest sense of that term. The sole authority to build county roads, under our law, rests in the county commissioners of the various counties and in the boards of construction which they are authorized to appoint."

Liability of Officer.

The decisions are not in accord as to the liability of a public officer for the failure to take a bond from the contractor for the protection of laborers and materialmen. In some jurisdictions it is held that the duty to take a bond imposed by the statute is an administrative or ministerial duty, for the neglect of which an action will lie by an individual of the class for whose benefit the bond is required, for any injury sustained by him. *Stephenson v. Monmouth Min. etc. Co.* 84 Fed. 114, 28 C. C. A. 292 (construing the Michigan statute); *Owen v. Hill*, 67 Mich. 43, 34 N. W. 649; *Plummer v. Kennedy*, 79 Mich. 295, 40 N. W. 433; *Wells v. Board of Education*, 78 Mich. 260, 44 N. W. 267; *Staffon v. Lyon*, 104 Mich. 249, 62 N. W.

354; *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547; *Michaels v. McRoy*, 148 Mich. 577, 112 N. W. 129; *Michaels v. McRoy*, 158 Mich. 605, 123 N. W. 37; *C. A. Burton Machinery Co. v. Ruth* (Mo.) 186 S. W. 737; *Rhea County v. Sneed*, 105 Tenn. 581, 58 S. W. 1063; *Hardison v. Yeaman*, 115 Tenn. 639, 91 S. W. 111. See also *Alpena v. Title Guaranty, etc. Co.* 158 Mich. 678, 123 N. W. 536; *Templeton v. Nipper*, 107 Tenn. 548, 64 S. W. 889. Compare *Hydraulic Press Brick Co. v. School Dist.* 79 Mo. App. 665 (decided before the statute was amended so as to require the officers personally to take the bond).

The rule was stated in *Owen v. Hill*, *supra*, as follows: "The mere act of requiring a bond is a ministerial act involving no discretion, and consequently no judicial functions. In addition to requiring the bond the law requires that they shall first fix the amount in which the bond shall be given, and second they shall pass upon the sufficiency of the sureties. These two requirements doubtless involve in a limited measure the exercise of judicial functions. I do not think these functions are so connected with the ministerial duty of requiring the bond as to be inseparable, nor do I think that the performance of one involves the exercise of the other. In neglecting to require a bond at all, the board neglected the performance of a plain ministerial duty imposed by statute, and it is well settled that, when the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures."

And in *Rhea County v. Sneed*, 105 Tenn. 581, 58 S. W. 1063, it was said: "The object of chapter 182 of the Act of 1899, as recited in the title, is 'to protect laborers and furnishers of materials on public works.' The first section prohibits the letting of 'any public work' for the city, county, or state 'until the contractor shall first execute a good and solvent bond to the effect that he will pay for all materials and labor used in said contract.' The second and fourth sections authorize every unpaid laborer and materialman, who has given the prescribed notice of his demand, to bring an action upon that bond in his own name; and the third section makes it a misdemeanor for any officer to let a contract for any public work without requiring the bond provided for in the first section. Undoubtedly the structure erected by the Groton Bridge Company was a 'public work' within the contemplation of this act and the county's commissioners were as certainly guilty of a misdemeanor in letting the contract without first taking the required bond. Under a well-established rule of law, that marked dereliction of positive duty on the part of

the commissioners constitutes negligence per se, and renders them liable not only to a criminal prosecution for the statutory misdemeanor, but also to a civil action for damages resulting to laborers and materialmen who would have been protected by the prescribed bond if executed."

Failure to give the statutory notice of claims will not defeat the right of action against the officer for failure to take the required bond. *Hardison v. Yeaman*, 115 Tenn. 639, 91 S. W. 1111. Nor does the fact that one who furnishes materials to the contractor relies on a mistaken belief in his right to a mechanic's lien relieve the officers from liability for failure to take the bond. *Michaels v. McRoy*, 158 Mich. 605, 123 N. W. 37.

However, the officers are not individually liable where the bond taken is defective in form or the sureties are insufficient, if in taking the bond they act in good faith. *Stephenson v. Monmouth Min. etc. Co.* 84 Fed. 114, 28 C. C. A. 292; *Huebner v. Nims*, 132 Mich. 657, 94 N. W. 180; *Sailing v. Morrell*, 97 Neb. 454, 150 N. W. 195. The rule was stated in *Sailing v. Morrell*, supra, as follows: "We do not think the defendants are liable individually, for the reason that it is neither pleaded nor proved that their action was wilfully wrong. On the contrary, the evidence clearly shows that defendants acted in good faith and required the giving of a bond which they evidently thought was sufficient to protect all parties interested. For an error of official judgment they are not individually liable." And in *Huebner v. Nims*, supra, it was said: "In the case before us the board of trustees undertook to comply with the provisions of the statute, and, before accepting the bonds, sought counsel as to their duty. It was not until after the bonds had been accepted, and the contract signed, that the board learned from one of the sureties that his property was not in this state, but in Windsor, he at the same time saying he had property of the requisite value in Windsor. The record is clear, we think, that the board acted in good faith, meaning to comply with the provisions of the law. . . . While the board might be liable for neglect to act at all, if they had in good faith attempted to comply with the statute, there would be no liability. There is no safety in any other rule. It is for the board to determine the amount for which the bond shall be given, and the sufficiency of the sureties. In deciding these essentials it is acting at least quasi judicially, and for an error of judgment its members are not to be mulcted in damages."

Also, it has been held that before a materialman can recover against the officers personally he must show that he was injured

by the failure to require the bond and where he fails to show that the contractor is unwilling or unable to pay his claim he cannot recover. *Michaels v. McRoy*, 148 Mich. 577, 112 N. W. 129. And it has been held that statutes requiring officers of a municipality to take a bond from a contractor for the protection of laborers and materialmen are not applicable to subcontractors. *Avery v. Ionia County*, 71 Mich. 538, 39 N. W. 742; *Templeton v. Nipper*, 107 Tenn. 548, 64 S. W. 889. Similarly, it has been held that the Michigan statute was not applicable to the regents of the state university as the statute omitted them in its enumeration of the state, counties, cities, villages, townships and school districts as the municipalities which were required to exact the bond. *Weinberg v. University of Michigan*, 97 Mich. 246, 56 N. W. 605.

In other jurisdictions it is held that the failure of an officer to take the bond required by the statute for the protection of laborers and materialmen does not make him personally liable for any losses they may sustain. *Blanchard v. Burns*, 110 Ark. 515, 162 S. W. 63, 49 L.R.A.(N.S.) 1199; *Fore v. Feimster*, 171 N. C. 551, L.R.A.1016F 481, 88 S. E. 977; *Bushnell v. Haynes* (Okla.) 156 Pac. 343. In *Blanchard v. Burns*, supra, it was sought to hold the directors of a school district individually liable for materials furnished under the Arkansas statute (Acts 1911, p. 463) which provided as follows: "Whenever any public officer shall, under the laws of this state, enter into a contract in any sum exceeding one hundred dollars, with any person or persons, for the purpose of making any public improvements, or constructing any public building, or making any repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Arkansas, in a sum not less than double the sum total of the contract whose qualifications shall be verified, and such sureties shall be approved by the clerk of the circuit court in the county in which the property is situated, conditioned that such contractor or contractors shall pay all indebtedness for labor and material furnished in the construction of said public building, or in making said public improvements." The court construing the statute said: "It will be observed that the statute does not, in terms, impose any liability, either on the school district or the officers. If any liability exists at all, it must be by virtue of a breach of duty by the directors as individuals. The language of the statute, in referring to the officers, does so in an official, and not in an individual, capacity. It is not intended to impose any duty as individuals, but as officials representing the public. In

other words, so far as it applies to improvements made for a school district, it means the district itself, and the duty is only imposed on the officers as the representatives of the district, collectively, in their representative capacity, and not as individuals."

As a further reason why the directors could not be held liable, it was pointed out in *Blanchard v. Burns*, supra, that the statute required that bonds given thereunder should be recorded so that all persons dealing with the contractor might know whether the bond had been executed, and as no such bond was recorded it was held that the materialman was chargeable with notice thereof, and therefore could not impose liability either on the district or the directors when he knew or could have known that no bond had been given.

In *Bushnell v. Haynes* (Okla.) 156 Pac. 343, a similar reason for refusing to hold county officers liable was given, the court saying: "All men are charged with knowledge of the law, and men who sell material to public improvement contractors are charged with knowledge of that condition which the law implies as being a part of the contract of every such contractor; and, if they sell material to such contractors before their contracts have been made effective by the filing of the bond which the law requires, they do so at their own peril, and if they sustain losses thereby, the proximate cause thereof is their own negligence, and not that of the contracting officers, because if the contracting officers have neglected to write into the contract in express terms that which the law says shall be there, the law, by its own operation, puts it there by implication."

In *Fore v. Feimster*, 171 N. C. 551, 88 S. E. 977, L.R.A.1916F 481, the court based its holding that county commissioners were not liable on the wording of the statute requiring counties, cities, towns or other municipal corporations to take such bonds. In that case it was said: "These boards of commissioners, charged with manifold and important duties in the governance and well ordering of their counties, many of them legislative or quasi-judicial in their nature, serving oftentimes at great personal sacrifice, should not be held individually responsible unless clearly made so by express enactment or some imperative principle of law, and, while the duty in this case is no doubt ministerial when proper weight is given to the language of the statute itself, imposing the duty on 'counties, cities, towns or other municipal corporations,' thus in terms creating a corporate duty, and to the fact that, in the body of the law applicable, whenever individual liability has been heretofore desired, express provision has been made for it, we are of opinion that it is the correct

interpretation of this legislation that, in its coercive features, the remedy is confined to that given by the statute itself, to wit, by indictment, and that no civil liability on the individual members of the board is intended or permissible. The entire body of law applicable to this subject, being in *pari materia*, is to be construed as one and the same statute, and the fact that the legislature, having created in terms a corporate duty, has imposed the personal liability in the one case and failed to do so in the other is equivalent to a legislative declaration that, in the latter instance, the liability does not exist."

IN RE GRANING ET AL.

IN RE POWERS.

United States Circuit Court of Appeals, Second Circuit—January 11, 1916.

229 Fed. 370.

Bankruptcy — Accounting for Assets — Improbable Testimony by Bankrupt.

On a Saturday about two weeks before bankruptcy, the members of a partnership received a check for \$2,000, and instead of depositing it they drew it out in bills from the bank upon which the check was drawn. On returning to their place of business about 12:30 they dismissed their bookkeeper for the day, and, as they claimed, put the money in their safe. Though they were at the store nearly all the afternoon, and though the store was locked when they left, and though there was nothing to show that the store or the safe was broken open, or that anything unusual happened, they claimed the money was not there the following Monday. They told the bookkeeper on Monday to charge the \$2,000 to expenses, but later directed her to change the entry and charge it to materials, and one of them testified that he did this because he thought it would look better to creditors. It is held that, while the trustee, seeking to compel the turning over of this money to him, had the burden of proving that the money was in the bankrupt's possession by evidence which was clear and convincing, he did this, and the burden was shifted to the bankrupts to show what became of the money.

[See note at end of this case.]

Same.

The bankrupts utterly failed to give any satisfactory or reasonable explanation as to what became of the money, and the court erred in refusing to adjudge them in contempt for failing to restore it to the estate.

[See note at end of this case.]

Burden of Proof — Concealment of Assets.

While the burden of proving the concealment of assets by a bankrupt is upon the trustee, he is not required to produce positive proof of an agreement to conceal, followed by proof that the property was actually abstracted, and such proof is usually established by presumptions drawn from the facts.

Petition to Revise Order of United States District Court, Western District of New York.

In matter of Charles T. Graning et al., individually and as copartners doing business under firm name of Graning and Wellman, bankrupts. Motion by John R. Powers, trustee, for order adjudging bankrupts in contempt denied. Trustee files petition to revise. The facts are stated in the opinion. **REVERSED.**

Isaac Adler for trustee.

Hampton H. Halsey for bankrupts.

Sitting: LACOMBE, COXE and ROGERS, Circuit Judges.

[371] COXE, J.—This is an appeal from an order denying the trustee's motion for an order adjudging the bankrupts in contempt for not restoring to the estate \$1,975 alleged to have been fraudulently taken and concealed by the bankrupts. The referee had previously decided that the money should be returned upon the ground that the proof was insufficient to show that the bankrupts were not in possession of the money when the petition was filed.

Briefly, these are the facts. About two weeks before the petition was filed in bankruptcy the bankrupts received a check for \$2,000. This was on Saturday, January 9, 1915, about noon. Instead of depositing the money in their own bank they drew it out in bills from the Alliance Bank, upon which the check was drawn. At 12:30 they [372] reached their own place of business. The bookkeeper, Miss Coleman, was there when they arrived and she was told that she need not return again that afternoon. This was an unusual occurrence, such a dismissal not having taken place since the preceeding summer. Wellman testified that he put all the money in the cash drawer of the safe, the amount being \$1,975. The bankrupts were at the store nearly all the afternoon. This was the last seen of the money. The bankrupts concededly had this money on Saturday afternoon when it was last seen.

It is true that the trustee must prove that it was in the bankrupts' possession by evidence which is clear and convincing. This he has done. The burden is then shifted to

the bankrupts to show what has become of it. This the bankrupts have utterly failed to do. What possible reason was there for getting the money in bills Saturday afternoon when they could have deposited the check in their bank? If they deposited it in their own safe, which was a most unusual thing to do on Saturday afternoon, it must have been there when they returned the Monday following. It was not there. There is not a particle of proof that the store or safe was broken open or that anything unusual had happened at the store. So far as accounting for the money they might as well have testified that they put the bills in a box in the front window of the store expecting to find it when they returned on Monday. Their story is too improbable for human credence. It does not even have the merit of ingenuity which is sometimes shown in the attempt to conceal assets. There is not a particle of credible evidence that the store or safe was robbed. When the bankrupts left on Saturday afternoon, the doors were locked and they were the last persons to leave on that day. When they came to the store on Saturday afternoon no mention of the money was given to the bookkeeper, Miss Coleman, and of course no entry was made in the books. On her return on Monday morning she inquired of the bankrupt Wellman what entry she should make of the transaction and was told to charge the \$2,000 to expense but later he directed her to change the entry from "expense" to "materials," which was done. When asked why this change was made Wellman testified that he thought it would look better to creditors. There was no evidence that the store was entered between Saturday afternoon and Monday morning or that the safe had been opened. There was testimony that the safe might be unlocked by turning the knob, but, if this were so, it seems incredible that any sane man would place \$1,975 in such a safe and leave it there from Saturday afternoon until Monday.

In a similar case arising in the Southern District of New York, Judge Addison Brown said:

"No account is given of what disposition was made of the \$2,000, which it is said was received in bills, except that they were paid out, or deposited. There is no corresponding deposit in the bank book. In several details of his testimony the bankrupt's evidence was inconsistent and contradictory, and was in some particulars proved to be false. The referee considered it incredible that the bankrupt was as ignorant of his business and his payments as he professed to be, and he did not consider him worthy of belief. No special losses, and no special causes of loss in business, were intimated by the bankrupt in his testimony." *In re Schlesinger*, 97 Fed. 930.

[373] This court in the *In re Weber Co.* 200 Fed. 404, 118 C. C. A. 556, said:

"Upon the application to punish for contempt he made no explanation as to how or why it was that this particular sum had disappeared, merely denying that he ever had it. His statement that he had no money when the proceeding for contempt was instituted, without some such explanation, was insufficient, and the judge quite properly held him in contempt for not paying it over. To excuse disobedience of the order by such general denial would make it easy to evade the requirements of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 544]."

If such excuses as are here interposed are permitted, it will put a premium upon fraud and make deception easy. These bankrupts on Saturday afternoon had in their possession \$2,000. The drawing of this money in bills from a bank other than their own was an unusual proceeding. In the ordinary course the \$2,000 check would have been deposited in their own bank. No satisfactory explanation is given of the necessity of having so large an amount of specie at such a time. No plausible reason is given for carrying such a large sum of money over Sunday in a safe which could easily be opened. Is it credible that men possessed of ordinary intelligence would do an act so inexcusably careless? It is true that the burden of proving the concealment of assets is upon the trustee; he is not required to produce positive proof of an agreement to conceal followed by proof that the property was actually abstracted by the bankrupt. Such proof is usually established by presumptions drawn from facts. In the case at bar we have on Saturday afternoon \$2,000 in the possession of the bankrupts. On Monday morning the money has disappeared. No one else is shown to have access to the money, no robbery is shown, no fire has taken place and nothing but the most improbable suggestions are offered as an explanation for the disappearance of the money. To sustain such excuses puts a premium on fraud. The bankrupts here are shown to have been in possession of the \$2,000 and they have not shown any plausible excuse for not producing it.

The order of the District Court is reversed and the order of the referee is affirmed.

NOTE.

Improbable Testimony by Bankrupt.

I. Introductory, 1096.

II. Testimony Not Believed:

1. Incredible Ignorance of Business, 1097.
2. Property Claimed to Belong to Wife, 1100.

3. Fictitious Loan, 1101.
4. Fictitious Debt, 1102.
5. Improbable Business Loss, 1104.
6. Accidental Loss, 1105.
7. Robbery, 1106.
8. Gambling, 1109.
9. Lewdness or Drunkenness, 1111.
10. Travel, 1112.
11. Extravagant Living, 1112.
12. Payment to Trustee, 1113.
13. Miscellaneous, 1113.

III. Testimony Believed:

1. Ownership of Business Run by Bankrupt, 1114.
2. Renewal of Stock in Trade, 1115.
3. Gambling or Robbery, 1115.
4. Miscellaneous, 1116.

I. Introductory.

Bankrupts, in order to explain their disposition of money, their failure to turn over assets, or an apparent deficiency in funds, frequently adduce for the consideration of the court improbable stories, ranging all the way from the boldest and most patent inventions to fictions of the most artistic workmanship, and sometimes even adduce stories of proved truth which are stranger than fiction.

As was said in the case of *In re Leslie*, 119 Fed. 406, 408, "a witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of witnesses." And the courts have frequently, as in the reported case, applied this principle to the stories of bankrupts. The purpose of this note is to review, from the standpoint of the facts and the improbable testimony itself, cases in bankruptcy in which the decision has turned on the inherent improbability or incredibility of the testimony presented by the bankrupt. Cases of this nature arise mainly in three ways: (1) Under an order directing the bankrupt to pay assets to the trustee; (2) in contempt proceedings against a bankrupt for failure to pay assets over to the trustee under order of court; and (3) on an application by a bankrupt for discharge, when creditors file specifications in opposition to the discharge on the ground that the bankrupt has fraudulently concealed or disposed of assets.

For an interesting treatment of the general subject of incredibilities and improbabilities in evidence, see 1 Moore on Facts 179. And for a complete consideration of the question of the withdrawal of unreasonable testimony from the consideration of the jury, see the notes to *Wolf v. City*, etc. R. Co. 15 Ann. Cas. 1181, and *Louisville*, etc. R. Co. v. *Chambers*, reported ante, this volume, at page 471.

II. Testimony Not Believed.

1. INCREDIBLE IGNORANCE OF BUSINESS.

Testimony by a bankrupt that he had no remembrance of what he did with over \$24,000, drawn by him from his bank deposit shortly before the filing of this petition, has been held to show such an incredible ignorance of his own business as to be unworthy of belief. In *re Schlesinger*, 97 Fed. 930, 3 Am. Bankr. Rep. 342, wherein it was said: "In the summary of facts, the referee finds that upwards of \$12,000, which has come into the possession of the bankrupt during the seven or eight months preceding the filing of the petition, was in no way satisfactorily accounted for. Debts for merchandise to the amount of nearly \$18,000 during that period are unpaid; the stock was made up and sold, and the proceeds all collected, except the remaining stock and debts to the amount of about \$3,200. During the same period the bankrupt deposited as shown by his bank pass book, \$24,465.85, all of which was drawn out, the last on April 17th, three days before his petition was filed. The bankrupt kept no books of account. The check book was not produced, and all checks returned were destroyed. No account could be extracted from him as to what was done with these moneys, except that they were paid out. To all inquiries for particulars, his answer was, 'I don't know,' or 'I don't remember.' He was contemplating an application in bankruptcy for about a month prior to filing his petition. From the 17th of March to the 17th of April he deposited in his bank about \$4,600. His book was balanced on the 17th of April, and according to the entry in the pass book, 244 vouchers were then returned to him, amounting to \$13,300.16 from the previous December 30th. Though counsel had already been employed by him for the preparation of his petition in bankruptcy, all these 244 vouchers the bankrupt said were destroyed by him as soon as received, and nothing can be ascertained as to whom or for what these payments were made. The bankrupt further testified that in March he received \$2,000 for the conveyance of his equity in a house and lot, 34 E. Fourth street. The deed was dated March 23rd and recorded April 20th the same day his petition in bankruptcy was filed. The grantee being absent in Europe, he could not be examined. No account is given of what disposition was made of the \$2,000 which it is said were received in bills, except that they were paid out, or deposited. There is no corresponding deposit in the bank book. In several details of his testimony the bankrupt's evidence was inconsistent and contradictory and was in some particulars proved to be false. The referee considered it incredible

that the bankrupt was as ignorant of his business and his payments as he professed to be, and he did not consider him worthy of belief. No special losses, and no special causes of loss in business, were intimated by the bankrupt in his testimony. It is seldom, I think, that so open a defiance of the requirements of the bankrupt law is met with. The examination of the bankrupt was begun on May 9th, while in his business transactions were yet recent. The ignorance he professed in regard to the disposition of his money, is altogether incredible. I cannot regard his testimony on this subject as other than a tissue of perjuries. The destruction of vouchers while his papers in bankruptcy were preparing is not consistent with any other inference than the intent to conceal the facts and defraud his creditors. . . . It is no doubt correct, as the referee observes, that no order for the payment of money 'should be made unless the testimony in the case is such as to satisfy one beyond a reasonable doubt that the same is in fact in the possession or under the control of the bankrupt;' and great caution should no doubt be observed in applying this remedy. . . . A debtor, however, is not to go scot free because the precise amount of his frauds and concealments is not ascertainable; nor should the bankrupt act be suffered to be paralyzed, as respects the interests of creditors, by such means. Upon the evidence I cannot conceive that a jury of merchants would for a moment hesitate in declaring that beyond all reasonable doubt the bankrupt has concealed a large amount of his property."

In a case where the testimony showed a balance of over \$5,000 worth of goods unaccounted for by a bankrupt woman tradesman, with no further explanation on her part than that occasionally she had been absent from the store and had left it in charge of her husband and son, the court said that it was unreasonable that she should be so ignorant of her business as not to know what disposition had been made of so large an amount of stock, and held that she must either have been in possession of the goods or their value, or have known where they were, and ordered her to be committed until she accounted or turned the amount of \$3,000 over to the trustee. In *re Deuell*, 100 Fed. 633, 4 Am. Bankr. Rep. 60, wherein the court said: "By her own statement she had on hand goods, about the 1st of July, 1899, invoiced at \$1,700. Between that time and the making of her deed of assignment, about the 1st of December, 1899, she had obtained on credit from a large number of merchants, at various distant points, goods aggregating \$10,000. Of these she purchased, in October, \$2,649, and in November, \$2,282, for none of which she had paid up to the time of her assignment and

the proceeding in bankruptcy against her in the fore part of December, 1899. Taking credit for every conceivable payment, outlay, and expenditure between July and the time of the assignment, it would not exceed, \$2,300. She claims that the value of the goods by her turned over to the assignee was \$2,193.50. If this were conceded to be correct, the aggregate credit to which she is entitled would amount to \$4,493.50. But the evidence shows that the cost price of the goods turned over to the assignee did not exceed \$1,200, and the sum realized by the trustee in bankruptcy out of these assets does not exceed but little over \$500. Some of the goods surreptitiously sent away from the store during the fall of 1899, which have been traced by the trustee, would amount to about, say in round numbers, \$400. Adding this to the \$2,300, as claimed expenditure by her, and the \$1,200 worth of goods turned over to the assignee, would make an aggregate of \$3,900; or, if she were allowed \$2,193.50, claimed by her to have been the value of the goods turned over to the assignee, it would make an aggregate of \$4,893.50, which, on the most favorable view to her, would leave unaccounted for \$5,106.50. This leaves out of view the goods invoiced the 1st of July, 1899. She testified before this court that the goods shipped to her from July to the time of the assignment were put into the store, and sold. She denies that any of the goods thus unaccounted for were shipped or spirited away; thus leaving, according to her own showing, as already stated, \$5,106.50 worth of goods, at their invoice price, unaccounted for. She kept no book account, from July forward, giving an account of sales or the cash taken in; no accounts against debtors for goods sold are found; no money was deposited in the bank to her credit; and, when inquired of as to what explanation she had to make to account for such great discrepancy, her only answer was that she had none to make. When asked if she did not talk this matter over with her husband and son, who were assisting her in running the store, and ascertain what explanation they gave, or as to what theory they had to account therefor, her answer was equally uncertain and indefinite. As the goods were not on hand when she was declared a bankrupt, and as she claims the goods had not been spirited away, and testified that they had been received and sold, the conclusion is irresistible that she must have the money in her possession, or that she knows who did receive it, and who has it. The business was conducted in her name. She thus published to the world that she was capable of transacting business, and she obtained credit for these goods upon the faith of her credibility and business capacity. Shall she be permitted thus to obtain property of other

people, secrete and appropriate it, without even so much as rendering any intelligible account thereof, and escape the pains and penalties imposed by the bankrupt law, simply because she is a woman, and under the naked assumption, or bare possibility, that her husband and son embezzled the proceeds of these goods? When she assumed the office of a tradesman she became amenable to its obligations and responsibilities. She claims that part of the time—through the fall of 1899—she was sick, and was not at the store all the time; that her husband and son were, as theretofore, in charge, acting for her; but her own evidence is that these absences from the store were only occasional, and only for a few days at a time, so that it is quite inferable that during all this time she was at the store frequently enough to have been fully advised of what was going on in the business; and she must be presumed, as she is an intelligent woman, to have looked sufficiently into the daily and weekly transactions to have been fully advised of the disposition of the goods, and to have known where the money was."

A remarkable scheme of fraudulent cotton sales, by means of which a cotton company handled nearly two million dollars in less than five months, was disclosed, and the bankrupt respondent's story as to his participation in the scheme was held to be unreasonable and incredible, in the case of *Re Alphin, etc. Cotton Co.* 134 Fed. 477, wherein the money raising scheme was stated by the court as follows: "The liabilities of the cotton company about which there is no dispute are \$381,636.93. How this large indebtedness could have been incurred within so short a time seems incredible but for the fact that the evidence conclusively establishes that the entire business was conceived in fraud, and was carried on for no other purpose. At the time of the organization respondent owed over \$118,000 to banks in Little Rock, secured by fraudulent warehouse receipts for cotton which he did not own, and which had no existence, and this debt was paid off by the cotton company. Most of the cotton seems to have been purchased in El Dorado, Ark, where the respondent Lake and one Smith, cashier of the bank at El Dorado, owned a cotton compress built with the money furnished by the cotton company. Drafts would be drawn by Lake on the bank at El Dorado, not only for business purposes, but also for every other purpose requiring money, including his individual expenses, and for any other purpose that he might want it. The cashier of the bank at El Dorado would draw on the corporation, and in most instances specify that these drafts were for cotton purchased, attaching thereto warehouse receipts issued by the compress company. Upon depositing these ware-

house receipts with the banks in Little Rock as security, they would advance him the money to pay these drafts. The warehouse receipts for about 8,000 bales of cotton thus issued by the compress company and hypothecated with the banks in Little Rock during that season were fraudulent, and represented no cotton whatever. These warehouse receipts would be delivered to the railroad companies as cotton on hand in the compress, and the agents of the railroad company would issue to Lake bills of lading therefor, which bills of lading would be attached to drafts drawn on mills in the East to whom cotton had been sold by the cotton company, and these would be deposited in the bank at Little Rock as credits. As the warehouse receipts represented no actual cotton, but were fraudulently issued, of course no cotton was actually delivered." The respondent bankrupt claimed that he was ignorant of the fraudulent nature of the transactions, but the court, holding this claim to be unworthy of credence, said: "The only explanation of this deficiency that has been advanced is that the drafts for cotton drawn by the cashier of the El Dorado bank and clerks employed in buying cotton were paid by respondent in good faith, believing that the cotton was actually bought, when in fact no cotton was bought, and the warehouse receipts were fraudulently issued. If this is true, it would certainly relieve respondent of all liability in this proceeding. The mere fact that he was guilty of negligence in paying drafts for such large sums, without making any investigation whether the cotton was actually purchased, would not justify the court in finding, that he had possession or control of this money. But do the facts warrant the court in adopting this explanation? The cotton company carried on its business at El Dorado, Ark., and the city of Little Rock, Ark. Respondent was most of the time in the city of Little Rock, where probably 40 per cent of the cotton handled by the company was purchased, but visited quite frequently the town of El Dorado. As stated before, he was practically the owner of the compress company which issued those warehouse receipts. The town of El Dorado has about 3,000 inhabitants. Is it reasonable to suppose that respondent, when at El Dorado, spending there several days on some of the visits and a day or two on every visit, would not go to the compress for the purpose of examining it and making some examination of the cotton supposed to be on hand? A deficiency of nearly 8,000 bales would be apparent at once. That number of bales would cover at least an acre of ground. How, then, could he have helped noticing, after having paid for so much cotton, that there was something wrong? But, if there were any doubt in the mind of the court on

that subject, it would be removed by the fact that the same frauds had been perpetrated by respondent the preceding year, before the corporation had been organized as heretofore stated. That the cotton represented by the warehouse receipts carried by the banks of Little Rock for moneys loaned during the cotton season of 1901-02 was not in the warehouse at El Dorado certainly was known to respondent, for, if there was no cotton there when nearly 4,000 bales should have been, a man who visited the warehouse, as it is shown respondent did in the summer of 1902, could not help but notice it. Taking all the circumstances surrounding this case into consideration, the court cannot avoid reaching the conclusion that respondent well knew when these drafts were drawn on him and the warehouse receipts sent to him they were fraudulently issued, and did not represent actual cotton."

Testimony of a bankrupt showing an incredible ignorance, on his part, of his own business and transactions was rejected as unreasonable in the case of *In re Richards*, 183 Fed. 501, wherein it was said: "This record shows conclusively and beyond all reasonable doubt that when the bankrupt found he could not meet his obligations, and was sued or about to be sued, he made up his mind to convert all of his assets he could into money and first refuse to pay any creditors, and then after the bankruptcy to defy the bankrupt court by the false statement that he did not know how to account for the deficit in his assets. Indeed, he says that he sold a wholesale bill to one man for about \$300, intending at the time to pay it to one of his creditors, but upon getting it he changed his mind and decided not to pay his creditor and pocketed the money. He says he sold his interest in the second-hand store about January 1, 1910, and yet swears that he cannot tell what he got for it. The man who bought it knew and testified to the facts in detail. The conclusion cannot be escaped that the bankrupt knew it also; that he did not is incredible. He discounted a part of the commercial paper taken in part for that stock only a short time before, and to a solvent merchant, and pocketed the money; he refurnished his house out of his stock and did not schedule the furniture so taken, saying he had given it to his wife; he made no pretense she had paid for it; or that it was other than a pure gift; he closed his account at the bank early in 1910, and subsequently made no deposits; he gave in part what he took in to his wife and kept the other, keeping no account of the amount of either; he kept no account of sales or collections; he concealed the cash book he had kept before he began his scheme to swindle his creditors, and he sold goods at 25 per

cent below wholesale price, and kept no account of them, and pocketed the money; he continued to buy goods during the conduct related, and to sell and not pay those he purchased of; he paid no creditors after the scheme began. Is a court of conscience to be blind to the shamelessness and dishonesty of a man who presents himself in this attitude and makes no attempt to excuse it or explain it except by saying, 'I don't know,' or 'I can't remember?'"

2. PROPERTY CLAIMED TO BELONG TO WIFE.

The claim of a bankrupt that the amount of \$3,583.02, paid by him to his wife, shortly before proceedings in bankruptcy, was a repayment of amounts furnished by the wife, from her sole and separate estate, for the expenses of her husband's business, accompanied with evidence of inconsistent circumstances, was rejected by the court in the case of *In re Mayer*, 98 Fed. 839, 3 Am. Bankr. Rep. 533; wherein it was said: "The account of \$3,583.02 of purported payments to the wife is either fictitious, as found by the referee, or a manifest subterfuge on the part of the bankrupt to retain that amount for his own use and benefit. The assertion of advances by the wife from her own means is discredited by all the circumstances, and this amount must be regarded as within the possession and control of the bankrupt; and the finding, to that extent, is approved."

The claim made by a bankrupt that he had no financial interest in a business run by him in the name of his brother, but that the business, which had been so enormously successful as to earn profits which, invested in real estate, amounted to about a million dollars, was owned equally by his wife and brother, the wife having put only \$10,000 in the business, was held in the case of *In re Herrman*, 136 Fed. 767, 69 C. C. A. 413, to be unworthy of belief and to show a fraudulent concealment of assets from the creditors. The district judge, on whose opinion the case was decided, said: "The evidence shows that Mrs. Herrman's father gave her on the day of her marriage \$10,000. The bankrupt claims that the \$10,000 was contributed as capital by Mrs. Deborah Herrman to the business carried on under the name of Morris S. Herrman, and that he (the bankrupt) did not contribute any part of said \$10,000. The evidence of Mrs. Herrman and of her husband is explicit that she never received any other property from her father or from any other source during the first ten years of her married life, except the \$10,000 given her by her father the day she was married. The schedules in bankruptcy of the old firm of A. B. Herrman & Co., which are signed and sworn to by the bankrupt in this

case, state that that firm was indebted to Deborah Herrman for \$6,000 for money loaned in the year 1869. If that money was loaned by Mrs. Deborah Herrman to the old firm, it was loaned out of the \$10,000 given to her by her father, for she had no other money at that time, leaving but \$4,000 in the possession of Mrs. Herrman. The only way in which that \$6,000 could get back to Mrs. Herrman, to be contributed by her to the new firm carried on under the style of Morris S. Herrman, would be for the old firm of A. B. Herrman & Co. to pay her that amount after they went into bankruptcy. If they paid her that amount, and that amount was then put into a new business in which she was alleged to be a partner, the transaction was in substance nothing but a concealment by the bankrupt Herman Herrman of money which belonged to his creditors in bankruptcy with which to start in business for himself again. It is probable that all of the substantial capital of the new business carried on under the style of Morris S. Herrman was contributed by the bankrupt Herman Herrman from assets which belonged to the creditors of his old firm, but which he fraudulently concealed and appropriated to his own use; but at all events the evidence in this case shows that to the extent of \$6,000 at least that was the case. The facts that the bankrupt had the new business carried on in the name of his brother, and had the title to the real estate taken in the name of his brother, there being nothing to indicate that even his wife had any interest in the business or in the real estate, are extremely suspicious. The entire transaction has every mark of fraud. The only witnesses called, or who apparently could have been called, in the case, are the bankrupt and his wife and his brother, Morris S. Herrman. The wife's evidence shows that she substantially knows nothing about the business, and leaves it all to her husband. The testimony both of the bankrupt and his brother is extremely unsatisfactory. Its general tone is improbable, contradictory, and untrustworthy. The bankrupt admits, in substance, that during the last 30 years he and his family have lived in a large and expensive house, on a liberal scale, and that he has had whatever money he wanted from the business; but his claim all these years has been that, as everything belongs to his wife, he is not bound to pay his creditors anything. I think his claim that his wife contributed all the capital to the business, and that therefore she is the sole owner of the half interest in the real estate and of the stock of the Morris S. Herrman Company standing in her name, is invalid; that the bankrupt has always owned and now owns a substantial interest in the business and in the real estate bought with

the profits of it; and that he made a false oath by swearing to schedules stating that he had no such property."

A bankrupt's story that diamonds and cash for which he failed to account belonged to his wife was discredited in the case of *In re Lippman*, 184 Fed. 551, wherein the court said: "The bankrupt was given an opportunity, before another special commissioner, who had had nothing to do with the case, to explain these discrepancies, and to prove the credits allowed to him for the purpose of argument, but as to which his previous testimony had been held not persuasive. He has utterly failed to furnish any satisfactory proof of the alleged loss of \$800 worth of diamonds and \$1,020 cash. The testimony as to this loss and these amounts is exceedingly contradictory. He intimates that certain diamonds were left in the hands of one Breslavsky, amounting to \$315, but this is categorically denied by Breslavsky, and the evidence in corroboration of Breslavsky is stronger than that for the bankrupt. He explains a stock on hand of \$1,200 by saying now that his own and his wife's diamonds were included in this stock. But, if so, his creditors would seem to be entitled to the diamonds, if they were used as a part of the goods upon which credit was secured; and, assuming that his explanation satisfactorily states how they were disposed of, nevertheless the value which he gives for the pieces of jewelry so used (viz., \$1,100 to \$1,200) is altogether too near the exact amount of his stock in trade to make it credible. A person could not start in business with nine pieces of jewelry, and no other stock, in a store having fixtures worth \$1,000, and with over \$3,000 in cash in the bank. He also now suggests that \$1,500 of money which he had belonged to his wife, as the result of certain earnings on her part in a jewelry instalment business which she conducted. Not only is the testimony unpersuasive, but, if any such payment had been made, the time to claim it was when an explanation was demanded as to what became of the money in the bank. The presentation of testimony regarding such a loan, after a contempt proceeding has been started, when at the most the payment would have been preferential if actually made as stated, indicates that the story is an afterthought, and that the property, if ever turned over, was concealed in the contemplation of bankruptcy."

A bankrupt's claim that properties transferred to his wife were so transferred because deemed to be worthless, was rejected as improbable and incredible in the case of *In re Guilbert*, 16 Fed. 149, wherein it was said: "An examination of the record shows that the bankrupt had an interest in the properties mentioned in the fourth and fifth

specifications of objections, and that he placed them in his wife's name for the purpose of keeping them out of the reach of his creditors. The properties were owned by one Albrecht, and figured in a trade of property in the county of Montgomery. They were mortgaged for \$3,000, and played a part in the transaction which was negotiated and conducted by the bankrupt as the real estate agent. Three or four properties were involved, together with some cash, and the bankrupt was entitled to a commission. He was paid \$100, and the title to these properties was placed in the name of his wife, for which she paid nothing, and she held the title when the schedule of his property in bankruptcy was filed. There was an effort to show that during the negotiations for the exchange by Guilbert, as agent, it was discovered that the properties mentioned in the fourth and fifth specifications had no value over and above the mortgage, and that they were simply given to Mrs. Guilbert to have somebody to hold the title; in other words, they were so worthless that neither Albrecht nor any of the other parties interested in the transaction cared to have the title in their names, and that Mrs. Guilbert was willing to have the burden thrust upon her. This is such an unusual and improbable story that the mere recital of it, in connection with the other facts and circumstances established by documentary evidence and the uncontradicted testimony of witnesses, is the most convincing proof of the fact that the transfer was intended as part compensation to Guilbert for his commission as agent in bringing about the exchange of the properties."

3. FICTITIOUS LOAN.

A claim that, during days in which a bankrupt was extensively engaged in playing the races, he made a loan of some \$3,000 to a man at Sheepshead Bay for the purpose of purchasing some motor boats at a bargain, in consideration of which loan he accepted a promissory note, was held to be preposterous inherently, and it was held that the note was fraudulent and given merely for the purpose of concealing assets. *In re Vyse*, 220 Fed. 727, wherein it was said by the court: "As to the \$3,000, it seems that the bankrupt Vyse, during the days in which he was gambling extensively, says that he turned over to one Kirby, of Sheepshead Bay, \$1,700, and then \$1,300, within a few days of each other, only a short time before bankruptcy, and only a week before he consulted a lawyer with reference thereto. The ostensible reason for turning the money over was that this man Kirby might invest in some motor boats which were to be sold at a bargain. But there is no satisfactory evidence upon the

part of either the bankrupt or Kirby that this reason was then advanced seriously by Kirby, or taken seriously by the bankrupt. In fact, all the indications are that the money was given to Kirby for some kind of gambling outlay, or else to conceal it for the bankrupt, and some of it was used by him in gambling upon horse racing and promptly lost. The bankrupt and Kirby now wish the court to believe that the bankrupt placed credence in Kirby's proposition that he could make a valuable investment in motor boats, and then within a few days thereafter made another loan for the same purpose, without inquiring as to the result of the first loan. For these amounts, however, Kirby actually gave the bankrupt a promissory note, and the trustee actually started suit in the state court upon this promissory note, but immediately withdrew the action and changed to this proceeding, in which it is alleged that this promissory note is but a cover to protect the bankrupt in securing for his own purposes the \$3,000 which he says he loaned to Kirby. Some elements of the story are inherently preposterous."

4. FICTITIOUS DEBT.

A story by a bankrupt that he owed a debt of \$3,000, for various sums of \$50 to \$100 loaned to him by his sister who was 18 or 20 years of age and who appeared to have no property of any kind or to be receiving no income or earnings from any source, has been held to be so highly improbable as to create of itself the necessary inference that the alleged debt was a fiction to shield the bankrupt's household goods from his creditors. In *re Heyman*, 104 Fed. 677, wherein it was said: "I must withhold discharge in this case. The bankrupt's testimony presents so improbable a story, and is so destitute of any corroborating circumstance whatever, that I cannot resist the conviction that the alleged debt of \$3,000 for moneys loaned by the sister is largely, if not wholly, fictitious. The schedules state this debt as accruing on February 26, 1898. The bankrupt says that it was made up of sums of \$50 to \$100 loaned at various times during a year or two preceding. The sister was unmarried and at that time was only from 18 to 20 years of age. Her father and mother were dead and left her no property. She had no business and was earning nothing. No apparent means of hers are shown. The bankrupt could give no further particulars. The greatest efforts were made by the creditors to procure the attendance of the sister as a witness—all unsuccessful. Unfortunately she died in July, 1899, but until within a few weeks before that she might have been produced by the bankrupt and would have been

subpoenaed by the creditors if she could have been found. She lived at various places mostly with her brothers and sisters, from time to time. She did not prove the debt in bankruptcy. The mortgage given for it was upon the household furniture, paintings and effects of the bankrupt. I cannot conceive that a jury, upon the testimony given, would credit the bankrupt's story or uphold the mortgage as a bona fide transaction. The necessary inference is that it was given to shield the bankrupt's valuable household effects from creditors."

The testimony of a bankrupt that the sum of over \$3,000 traced into his hands was disbursed by him in paying debts to creditors of long standing, those creditors not being produced or even proved to exist, and no evidence being adduced to corroborate the story, was held to be incredible in the case of *In re Leinweber*, 128 Fed. 641, 12 Am. Bankr. Rep. 175, wherein the court said: "The creditors contend that upon the evidence, taken as a whole and critically examined, it was evident that the names were those of mythical characters, or, at best, of existing characters to whom was attributed a part in a mythical transaction. Divers efforts were made to compel the bankrupt to corroborate his story by producing the alleged payees, with their statements of such facts as would naturally be in their possession. The referee gave him unusual opportunities to raise a reasonable doubt, but he failed to do so. At a meeting in New Haven the bankrupt finally produced one man, said to be James Hurst, and another, who was expected to remove the mystery which surrounded Smith. But, just as the performance was about to begin, both witnesses vanished into thin air, and after exhaustive search they were not located, and the mystery remained, and still remains, as impenetrable as ever. Wertzel was a Meriden man, and the bankrupt succeeded in producing him, and it would seem that his testimony must have mollified the creditors, since the amount now ordered to be paid does not include the \$500 which the bankrupt testified he had paid to him. In these circumstances, the referee issued the order which I am asked to review. I have examined the testimony with care. The circumstances surrounding the alleged payments, when aggregated, fall little short of producing an irresistible inference that the bankrupt did not tell the truth. If there were room for a reasonable doubt to creep in, the creditors ought not to ask the court to apply the rack and thumbscrew, or to experiment upon the bankrupt; but the action of the referee was from every possible viewpoint quite appropriate and laudable. I am satisfied, beyond a reasonable doubt, that on the date of the order the bankrupt had in his pos-

session, or under his control, the moneys which he was ordered to pay over to the trustee, and, as I understand my duty, I must sustain and approve the order."

A story of the purchase of diamonds on credit, without any record being made in regular books of the transaction and an explanation of a deficiency of over \$18,000 in assets turned over to the trustee, by saying that this amount had been used to pay for the diamonds, was held to be unworthy of credence in the case of *In re Weinreb*, 146 Fed. 243, 76 C. C. A. 609, 16 Am. Bankr. Rep. 702. In that case the court said: "On their first examination, when asked as to what had been done with this \$18,200 drawn in cash, each of them refused to answer, on the ground that the answer would tend to incriminate and degrade him. Several months later they applied for a discharge, and one of the specifications of objection to discharge was that they had refused to answer material questions. Thereupon the bankrupts appeared before the referee and offered to answer the questions which they had previously refused to answer, and they thereupon testified, in substance, as follows: That Merker, when in Paris, in May or June, 1902, was introduced to a man named Freundlich, by a diamond broker. He does not remember the name of the broker. He does not know the residence, business address or first name of Freundlich. Freundlich told Merker that he would like to do business with him. Merker said that he would buy if the goods were right and reasonable. Freundlich said that he would send a man to him in New York with the goods, and in the package he would find a memorandum of prices. Freundlich said that he sold goods only for cash, that he didn't want any note or receipt, and didn't want his name entered in the bankrupts' books. Merker explained that they were not able to pay cash, and Freundlich thereupon agreed to sell on eight months' credit. Thereafter, in the fall of 1902, a man came to the bankrupts' office. He said that his name was Jackson. The bankrupts did not know where he lived, or where his place of business was, or what his first name was. He brought some diamonds, and said that he represented Mr. Freundlich. The diamonds had inclosed with them a memorandum stating their weight and value. The memorandum had no billhead. The bankrupts purchased the diamonds on eight months' credit. They gave no receipt, note, or writing of any kind for them. They made no entry of them in their regular books, but say they made an entry in a little book like a bank book, which the receiver did not find and which has never been produced. At the expiration of the eight months, which happened to be during the latter part of July, immediately before the

bankruptcy, Jackson appeared at the office and asked to be paid. He objected to checks and wanted cash, and thereupon both bankrupts drew the checks in question and went to the bank and drew the cash and gave it to Jackson. Jackson gave them no receipt or paper of any kind. One of the bankrupts admitted that he suspected that these goods had been smuggled, and their claim is substantially that that fact was the explanation of the circumstances under which these goods were bought and paid for. This story is extremely improbable. Of course, smuggled goods may be purchased, and, if purchased, the acts of the parties engaged in such a business are frequently stealthy and furtive. But if that is the explanation of the circumstances of this purchase, it is not enough for the bankrupts to simply say so. Their story, if true, could be corroborated in various ways. But it is entirely uncorroborated. It is precisely the kind of story which bankrupts would tell, who had been engaged in the diamond business, and had been planning a fraudulent bankruptcy, and had drawn \$18,000 in cash just before their bankruptcy, for the purpose of concealing it from their creditors. I cannot avoid the conclusion that their story is an entire fabrication, and that the bankrupts have this money concealed from their creditors, and that they should be ordered to pay it to the trustee."

In the case of *In re Nisenon*, 182 Fed. 912, 24 Am. Bankr. Rep. 915, it appeared that immediately following a judgment against him in a breach of promise suit, a bankrupt withdrew \$1,200, which he had invested in a building and loan association, and, in part explanation of his failure to turn this amount over to the trustee, he claimed to have paid \$300 of the amount to his mother for past due board. The court refused to credit this explanation, saying: "His first act upon the withdrawal of such money, according to his testimony, and that of his father and mother, was to pay over to the latter the sum of \$300 for board. If board to that amount was due from him, such payment was within his rights, and would be a satisfactory accounting, so far as this order is concerned, as such money would then be out of his possession and beyond his control. The referee did not believe this testimony in this regard, although corroborated in part by that of his father and mother. Neither do I. Even in cold type it lacks probability. If board was exacted from the son, that he should have been permitted to get so far behind, when it was known to the parents what his earnings were, and which they must have known because of their acquaintance with the character of his employment, is not likely, in view of their later attitude as testified to by the mother that they refused to give him his meals because he

would not pay for them. To my mind the matter of an unpaid board bill was an afterthought, and the bankrupt either did pay his board, week by week, if board was exacted, or he was given his board without charge. Such payment, if made, was only a subterfuge—but part of a scheme to remove the money beyond the reach of the creditors, to be returned to the bankrupt on demand.”

A story of the payment by a bankrupt of \$998 to his sister, in satisfaction of his promissory note held by her for a consideration, was rejected as incredible by the referee in the case of *In re Stokes*, 185 Fed. 994, and the court sustained the ruling on the report of the referee, quoted in the case as follows: “In regard to this note it will be noticed that, having been previously twice examined under oath, and particularly interrogated as to the disposition of this fund. Stokes failed to remember or disclose this disbursement. When confronted by the serious formal demand of the trustee in this proceeding, he descended for the first time from vague statements of payment to his commercial neighbors ‘and others’ to this particular. While he was yet testifying to the time, place, and circumstances under which this alleged promissory note was given and paid, and before opportunity to compare notes, the creditors had his sister, Mrs. C. V. Tuten, subpoenaed and brought into court. Agreeing as to the main fact of the note, its payment, her account of the details as to the time, place, and circumstances of the loan, and the execution of the note, was so discordant with his statement as to utterly discredit both. After careful consideration of the demeanor of the witnesses while being examined, their intimate relationship, their variation in testimony with regard to a sum of money which was large enough to impress the time, place, and circumstances of the loan upon the mind of the borrower and lender, the referee finds that this note was fictitious, and that no such money was loaned by the sister to the brother, and no such note was ever executed as claimed by the respondent, Stokes. The whole scheme was an afterthought, an attempt to make a showing in response to the formal demand of the trustee.”

In the case of *In re Mitchell*, 202 Fed. 806, it was held that unsupported testimony by a bankrupt that certain amounts of money had been paid to creditors, no testimony being given, however, as to the names of the creditors, was unworthy of belief. The evidence in the case was not, however, set out in detail by the court.

In the case of *In re Kempner*, 6 Nat. Bankr. Rep. 521, 14 Fed. Cas. No. 7,689, a bankrupt who, previous to the bankruptcy proceedings, had called his creditors together and had sought to secure their acceptance of twenty-five

cents on the dollar, testified before the referee in bankruptcy that most of his assets had been sold for several promissory notes amounting to about \$900, that he had sold the notes and that practically all of the amount so acquired had been spent by him in the payment of debts. The referee held that this testimony was too improbable to be believed. The court said: “The whole amount of his debts when he stopped business was only about eleven thousand or twelve thousand dollars, and his assets amounted to about two thousand seven hundred or three thousand dollars. They would pay nominally exactly thirty-two and one-half cents on a dollar of his debts (see answer to question fifty-eight). These notes comprise one-third of his assets (really nearly all of them as the result shows); that he should have got rid of this sum between Saturday afternoon and Monday, at the hour the order was served upon him, can be accounted for only upon the hypothesis that he was endeavoring to hide it in anticipation of such service, to keep it from his assignee. But that he should have used it in payment of debts, paying one hundred cents on a dollar, is contradicted by his whole course of conduct; a man who labors strenuously to obtain a compromise on Friday and Saturday by the payment of twenty-five cents on a dollar, and is expecting to succeed in this compromise up to the moment the bankruptcy papers are served upon him (fol. 72) would not be likely to use nearly all his available means during those few hours in paying one hundred cents on a dollar of his debts.”

5. IMPROBABLE BUSINESS LOSS.

An extravagant claim as to the amount of business losses by bankrupts, in explanation of their failure to turn over assets, was rejected as unbelievable in the case of *In re Greenberg*, 179 Fed. 413, 24 Am. Bankr. Rep. 943, wherein the court said: “If any items are to be allowed at all, and if such ridiculous testimony as was given by these bankrupts in estimating their business losses is to be believed, there would seem to be no reason for disputing the statements of the bankrupts as to when they made the payments in question, and their maximum estimates of loss should be used, rather than the minimum estimates thereof. It is impossible to explain the loss of goods in such wholesale manner, and such large items by ordinary expenses and mere shrinkage of business between March 1st and November 5th of the same year. Either the goods of the firm were secreted and disposed of in large quantities, or the firm had no such stock as they claimed when they attempted to show a surplus of over \$11,000 in March, 1908. But, even if that be granted them, their business from that time until No-

vember shows no such depreciation as would cause a shrinkage to a point where their liabilities exceeded their assets by over \$14,000; and if any satisfactory method of tracing the property, or of picking out the amount of assets which the bankrupts have not satisfactorily explained, had been presented, there would be abundant testimony upon which to base the referee's report. Inasmuch, however, as the referee has found in favor of the bankrupts upon all the items of testimony, with the exception of the small ones above mentioned, and as he refuses to believe the same sort of statements as those previously made by them, it is difficult to see how he reached such a conclusion. Upon the entire matter, the court has no hesitation in directing that the bankrupts turn over to the trustee in bankruptcy whatever property they have in their control or which they have secreted from the trustee, and to hold that (judged from their attempted explanation) this property amounts to much more than the sum named by the referee."

Testimony by bankrupt wholesale millinery merchants that a deficit to an amount of about \$30,000 was due to business losses, was held to be unbelievable in the case of *In re Peltasohn*, 4 Dill. 107, 16 Nat. Bankr. Rep. 265, 10 Chicago Leg. N. 10, 19 Fed. Cas. No. 10,912. The court said: "The bankrupts attempt to account for this large deficit by showing a great decline in the value of goods of this character between January 1 and November 1, and that they had to sell at great loss. Undoubtedly, the old stock—that is, the stock on hand January 1—was not worth its cost price, and sales from that were made, on the average, greatly below cost; but it is very doubtful whether there was much, if any, loss—as likely, indeed, that there was a profit—on the goods sold from the new purchases. On the whole, I am not satisfied with the explanations offered for this large and striking deficit, and I think the district court and the master were well justified in reaching the conclusions they did. Certain circumstances, pregnant with suspicion, strongly support his conclusion. I mention these without dwelling upon them. The change, during the time they had a bookkeeper, of their system of bookkeeping from double to single entry; the loss or non-production of two important books—'bills receivable and payable,' and the 'stock or sales book'—by no means satisfactorily accounted for; the alleged increase by one half of family expenses during 1873, and taking money therefor, without any real increase being shown; the alleged sending of money to Europe to poor relations, and payments to a relative in this country, not otherwise shown to be true than by the unsupported statement of the bankrupts—this at a time when they

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were claiming to be anxious to reduce expenses, and when they were embarrassed; and particularly the statement of Peltasohn, that his wife, had \$5,000 or \$6,000, and had had since 1871, or before that, which she kept in her house in bank bills and had never invested—the profits, as he alleged, of business which she had conducted on her own account, and which I must say, under the circumstances, is very improbable; and the further fact that since the bankruptcy the bankrupts have gone into business as the professed agents of their wives."

6. ACCIDENTAL LOSS.

A very remarkable story of the loss of several thousands of dollars, carried in a satchel, by the dropping out of the body of the satchel, leaving only the handle in the hands of the custodian, without the custodian's realizing the loss for some time, was held to be utterly incredible in the case of *In re Frankfort*, 144 Fed. 721, 15 Am. Bankr. Rep. 210, wherein the court said: "He accounts for some four thousand and odd dollars by the introduction of returned checks showing payments to various creditors aggregating that amount. He accounts for the balance of the amount which he should have on hand in the following way: He testified that on the 19th of April he had in his possession \$4,000 in bills and \$2,039.10 in checks of customers. This money and these checks he put into a satchel, which, as both he and his wife testified, was large enough to carry lunch for five or six people, and had been used for that purpose, and he told his wife to take this money and checks to the Borough Bank of Brooklyn where he had an account, and to have the checks certified at the various banks on which they were drawn, and have the bills changed to ones of larger denominations. The reason why, as he testified, he wished to have this done, instead of depositing this in the Borough Bank, was that he was going to change his account to the Kings County Bank and that he wanted certified checks so that a deposit could be made as if it was cash, and as he didn't propose to change his account for several days, he wanted the bills of larger denomination so that they would not occupy so much space in his safe. We are met at the outset of this story with, it seems to me, a very insufficient reason for its existence. Mrs. Frankfort testified that she took the satchel containing the money and the checks and went to the various banks to have the checks certified or cashed, and was unable on account of her not being known at those banks, to accomplish this object. She then went to the Borough Bank and there the cashier told her that she could deposit the checks and then draw a check against the

amount of the deposited checks which the bank would honor and pay to her in cash. To get the check she had to go back to the store, and so, with the satchel and the money, she went back to the store, had her husband sign the check, and then she came back again to the Borough Bank, presented the check, and the money, two thousand and odd dollars, was paid to her in cash which she put into this satchel, together with the \$4,000 already in it. She further testifies that she went to several banks in the neighborhood and changed some of this money so that she had 21 \$100 bills and the rest of the \$6,000 in smaller bills, with the exception of about \$50.10 in silver. She then started back to the store, but, as she says, thought that she would go down Fulton street and look in at the shop windows and see the bargains, and that this shopping excursion lasted from a half an hour to an hour. She said she carried the satchel lightly in her left hand, and that it was quite heavy to carry. Having carried it along Fulton street, and looked at the bargains and the shop windows she then made up her mind that she would go home, and coming to the corner of Smith and Fulton streets, where she was to take the car, she looked down to open the bag to get ten cents for her car fare when she found that she had only the handle of the satchel in her hand, and that the body of it was gone. She says that some time before, when she was looking in at Matthews' window on Fulton street, she had felt the satchel lighter, but that she did not look down to see the reason for this, and, in fact, she hadn't looked down at the bag from the time she left the Borough Bank until, wishing to open it, she found that it was gone; that she had not felt anyone grab it, or attempt to take it away from her; and that, in fact, nothing unusual had occurred while she was on her shopping expedition, so far as the bag was concerned; that then, without making any outcry, without retracing her steps, without notifying the police, she threw the handle into the street and walked home weeping. When she arrived at home she told her husband that she had lost the money, but she didn't tell him how, the circumstances, and he didn't ask her. He told her not to say anything about it, not to tell anybody anything about it; and she even testified that her brother-in-law, David Frankfort, who was in the employ of her husband, didn't know anything about the loss until he heard the story of it as she told it in court. She also testified that after she came home and told her husband of this loss that he sent her again to the Borough Bank for the purpose of withdrawing one of the checks which had been deposited and that even then she did not tell anyone at the Borough Bank that she had lost this \$6,000. The bankrupt says that he

didn't tell anybody of this loss; that he didn't notify the police; that he didn't advertise for it; in fact, that he made no effort whatsoever to recover the money. That he went over that afternoon to the market in New York, and saw some parties with whom he was in the habit of dealing, but that he said nothing to them about this loss. I think the story of both the bankrupt and his wife is false, and that the money was not lost as they say it was. It is beyond belief that this woman should have lost the money as she said she did; that she could have walked the street holding the handle only for so long a time, and not have missed it; and it seems to me that this was a bald conspiracy, hatched up between the husband and wife to defraud the creditors of this amount of money."

A bankrupt's claim that certain checks and books, which he had failed to turn over, had been left in his store when it was surrendered by him, and must have been lost, was rejected as incredible in the case of *In re Herr*, 182 Fed. 715. In that case it was said: "The only answer of the bankrupt to the rule is that he left all his books and papers in his store, and, as corroborative of this, it is urged that those of them which the trustee now has were so found. But the receiver, who took immediate possession, after the petition was filed, found nothing of the kind in the store, and it is impossible that they should have escaped him, if they had been there. Nor was there any intermediate period of occupation, when they might have been unwittingly destroyed. Enough has developed to show that the bankrupt has a motive for the concealment of these checks, and it permits of too easy an evasion to accept his statement, that he left them behind when he gave up possession of the store, in the face of the denial by those who immediately went in, that they were not there. The referee heard the witnesses and did not believe the bankrupt's story, and I am not any better impressed with its truth."

7. ROBBERY.

In the case of *In re McCormick*, 97 Fed. 566, 3 Am. Bankr. Rep. 340, testimony by a bankrupt, under an order to pay to the trustee \$1,500, to the effect that he carried that amount in cash in his pocket for two or three weeks until he lost it by having his pocket picked returning from Coney Island, was held to be unworthy of credence when accompanied by contradictory testimony as to other improbable circumstances, and the bankrupt was ordered to be committed until he should pay. The court said: "As respects the sum of \$1,500 ordered to be paid to his trustee, the explanation given by the bankrupt that he carried that money in his trousers pocket for

some two or three weeks until he lost it by having his pocket picked upon an Eighth avenue car, after a visit to Coney Island, though quite possible in itself, is accompanied by such improbable circumstances stated by him as occurring before and after, that it is difficult to be credited. I think it better to pursue the course indicated by Judge Drummond (In re Salkey, 6 Biss. 280, 11 Nat. Bankr. Rep. 516, 7 Chicago Leg. N. 195, 21 Fed. Cas. No. 12,254) to direct the bankrupt to be brought before me for further examination as to whether or not he has made a full disclosure of the facts." After a personal examination of the bankrupt, the court said: "The account of the \$1,500 given by the bankrupt not being a credible one, as given before the referee, I have spent nearly a day in a personal examination of him in court; his statements increase the previous contradictions, and his explanations are hardly better than might be expected of a lunatic, or an imbecile, or of a man without memory. My examination was largely directed to testing him in these regards; and I find he is not suffering any mental disability, and his memory is sufficiently precise and exact in whatever he seems interested in explaining. My conclusion is that his story is a fabrication, and that he conceals the \$1,500 and should be committed until payment."

A claim by a bankrupt that an amount of \$7,500 which he had failed to pay over to the trustee had been lost in a robbery, no showing being made of any breaking into the house, or any forcible opening of the safe in which the money had been contained, has been held to be unworthy of belief, and to be a mere fabrication to cover up a fraudulent disposition of property. In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723, wherein it was said: "On this issue of the alleged robbery, as on the one already disposed of, the referee's finding is fully justified by the evidence. There is no room for controversy but that the bankrupts accumulated the large amount of money, of which they claim they were robbed, for the purpose of in some way concealing it from their creditors. This and the other facts enumerated by the referee are sufficient to determine said issue against the bankrupts. Furthermore, the immediate circumstances of the alleged robbery confirm its improbability. Forcible means were not employed in opening the safe. Neither drill nor explosive was used. The safe was opened by some one familiar with the combination, or else the combination was not turned on the night of the robbery. There was no indication of a forcible entry into the house, other than an auger hole through the back door, designed, apparently, to reach a bolt which fastened the door; and this hole was

so located with reference to the bolt and a defective and unused lock as to show that the hole was bored by one who knew of the situation and use of the bolt, as well as the disuse of the lock. To my mind, the boring of this hole was a mere artifice on the part of the bankrupts to divert suspicion from themselves. Upon the competent evidence in the record, there can be no reasonable doubt but that there was on the part of the bankrupts a deliberate scheme to defraud their creditors, and that . . . the alleged robbery was fictitious, and part of said scheme. These conclusions are fully warranted by the facts which the referee enumerates in his findings, and strengthened by the further facts that the bankrupts have at other times made or attempted dispositions or arrangements of different pieces of property, which, if successful, will place those pieces of property beyond the reach of their creditors."

In *Schweer v. Brown*, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178, it appeared from the receiver's inventory and from a sworn statement by the bankrupt himself, made a few days before the institution of bankruptcy proceedings, that his stock in trade at that time was worth \$2,300. Testimony by the bankrupt that this inventory and his sworn statement were wrong, that his stock was at that time worth eight or nine thousand dollars, and that most of it had been stolen in some mysterious way by unknown persons, was held to be too improbable of truth to be worthy of serious consideration. The court said: "A few days before the institution of proceedings in bankruptcy, and in contemplation of such proceedings, the bankrupt made a statement under oath that the value of his stock of merchandise then on hand was \$2,300. The approximate accuracy of this statement was demonstrated by the inventory of the receiver, who took temporary charge of the store, which showed the value of the property to be \$2,400. The bankrupt claimed at the trial that his sworn statement was inaccurate, that at the time it was made he actually had on hand between eight and nine thousand dollars worth of merchandise, and that, during the three or four days which elapsed before possession was taken for the receiver, about two-thirds thereof was stolen in some mysterious way by persons unknown. The evidence offered in support of this contention was not unworthy of serious consideration."

Testimony that seven or eight thousand dollars in bills should be deposited, in an insecure wooden desk in a public store and left unguarded two whole nights, there to be stolen by a burglar, has been held to be transparently incredible. *Barton v. Texas Produce Co.* 136 Fed. 355, 69 C. C. A. 181, In that case the court said: "The evidence,

without contradiction, showed that on or about the 25th day of November, 1902, Clib Barton, who was the active manager of the business, went to Little Rock, Ark., and sold a lot of cotton of the firm, and received therefor between seven and eight thousand dollars in money, in packages of fifty and one hundred dollar bills, which he brought home and delivered to William P. Barton, Jr., who was the bookkeeper of the firm, who claims to have put the package containing the money in an ordinary wooden desk, with a roller top, and inside of a drawer inclosed with a door, and that he locked the door and the desk, where the money, according to the petitioners' statement, remained during Friday night and Saturday and Saturday night following, when they allege the storehouse was burglarized, and the desk opened, and the money abstracted and stolen. This was a simple question of fact for the determination of the trial court on the evidence. The function of the district judge on such a hearing is akin to that of a chancellor in an equity proceeding. Where, as in this case, the hearing was on oral testimony, his conclusions on disputed questions of fact should not be disturbed by the appellate court, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. . . . When the partners received between seven and eight thousand dollars for said cotton, their assets reduced to cash were inadequate to meet their liabilities. They had past-due obligations to creditors. This large amount of cash, without notice of its possession to their creditors, was placed in an insecure wooden desk in a public store, and left unguarded for two whole nights. This money was not entered by the bookkeeper on the cash book of the company. It was not even counted by said bookkeeper, for the flimsy reason, assigned by him, that he was busy, and for the lack of opportunity to make the count without exposing the money to the public, although two nights had intervened, when they would have had the privacy of their own counting room for such purpose. The three partners knew of the deposit of this money in said desk. There was a large safe in the storeroom, which, while it may not have been burglar proof, was a much safer place for money against an accident of fire. William P. Barton, Jr., claims to have left the store the evening before the alleged burglary, and gone to his home, where he remained all night. The other two brothers were in the store after he left, and were in there when the principle clerk left. All the doors to the storeroom were securely fastened from the inside, except the front door, which was locked from the outside. On the following Sunday morning the loss of this money was proclaimed by William P. and Ross Barton,

and when third parties reached the store the back door was open, and a window in the rear of the building was shown to be raised, and there was a goods box on the outside, below this window, to indicate that the entrance to the building might have been effected through said window. But the presence of a layer of dust on the sill of the window, and cobwebs on the inside thereof, undisturbed, disproved the entry of any person through the window. The physical condition of desk just after the loss of the money was proclaimed well warranted the conclusion that the person or persons who abstracted the money accomplished their work by having keys to the front door of the storehouse and to the desk. There was no indication of any breaking of the outside roller to the desk, nor any evidence of a violent entry into the drawer or the door inside of the desk. It is true that the door was found open and wrenched from the hinges, but as these hinges were inside of the door, and the lock of the door was unbroken, this wrenching of the door from its hinges could only have been done after the door itself was opened with a key. All of which indicated that the job was done by a bungler, who sought inconsiderately to leave evidence of a violent entry, which was transparently foolish."

An explanation that money had been lost by robbery has been held to be unreasonable where it appeared that the police recovered practically the whole amount on the person of the thief, and no showing was made as to why the bankrupt should not have received the stolen money from the police. In *re Smith*, 185 Fed. 983, wherein it was said: "Upon the reference to a special master, to allow him to explain these various transactions, he being nominally in contempt of the court's order ordering him to turn over or account for these properties, he has shown principally a course of dissipation, including a robbery and several hours' incarceration in a police station, in a state of total unconsciousness from drink, thus seeking to substantiate his story that he did not know what he had done with cash received and property on hand up to the time of this dissipation. The newspaper clipping used to prove his story shows, however, that the police took into their possession some \$170 in cash, and a gold watch and chain, found upon the person of the alleged thief. As the amount originally supposed to have been lost was but \$200, the story of this theft does not satisfactorily explain what became of the money, or why it did not get back into the hands of Smith after its deposit in the police court. The special master has reported that Smith has failed to appear, has not testified satisfactorily, and is plainly in contempt of the court."

A bankrupt's explanation of his failure to turn over \$1,310, by saying that it had been stolen from him on the morning the petition of bankruptcy was filed, was rejected as incredible in the case of *In re Speyer*, 6 Nat. Bankr. Rep. 255, 42 How. Pr. 397, 22 Fed. Cas. No. 13,239. The court said: "I am unable to accept the statements of the said bankrupts, as affording the true reason why the said sum of \$1,310.05 was not paid over to the said custodian on his demand, nor was there anything in the manner of either of the said bankrupts while under examination calculated to inspire confidence in their statements. I cannot entertain the slightest doubt that the loss of said money is a mere pretense on the part of the said Abraham Speyer."

See also the reported case, for the rejection of an improbable story as to robbery.

8. GAMBLING.

In a case wherein it appeared that before the institution of bankruptcy proceedings the bankrupt had secured large stocks of goods on credit, had conducted a slaughter sale, selling the goods at great reduction, for cash, of which an amount of over \$2,000 remained unaccounted for, and the bankrupt made no other explanation as to the disposition of that amount than that he had lost it in gambling, the court refused to accept the explanation. *Ripon Knitting Works v. Schreiber*, 101 Fed. 810, 4 Am. Bankr. Rep. 299, wherein it was said: "The decision of the court that the bankrupt has at least \$3,000 in his possession or under his control is based upon convincing evidence to the effect that a large amount of money actually came into his possession within a few months before the adjudication. Of the money so received more than \$2,000 remains entirely unaccounted for after giving full credit for all expenditures shown by the respondent's books of account, and after allowing in full the extravagant amount which he claims to have used for his personal expenses, and in dissolute practices, and losses in gambling. As to so much of the money, this is not a case of failure to give a satisfactory account, or to show in a satisfactory way how it has been disposed of, but it is a case of total failure to account in any way whatever, or to give any explanation. I am also convinced that the amount which the respondent claims to have lost in gambling is considerable in excess of the total amount of his actual losses. I am also convinced that, with a deliberately formed intention to defraud his creditors, the respondent proceeded methodically to make liberal purchases of merchandise on credit, and to dispose of his stock for cash as rapidly as possible. During the spring and summer months he conducted a slaughter sale, selling

goods so much below the market value as to create a rush of business. In the month of August he pledged a large amount of new goods as security for \$2,500, which he borrowed. In September, he purchased other goods on credit, and soon afterwards permitted the pledgee to sell the goods held as security for the \$2,500 for a price much below the market value thereof, without making any attempt to redeem them. In view of the indisputable evidence which I have to consider, it would be ridiculous for the court to permit its decision holding that the respondent has money to the amount of at least \$3,000 in his possession, or subject to his control, to be reversed by the mere denial of this bankrupt, who stultifies himself by alleging in his answer that he has squandered money which should have been paid to his creditors in gambling and indulgence in other vices."

A bankrupt's explanation that he lost \$1,000 in drinking and gambling was held by the court to be neither reasonable nor plausible, and to be unworthy of belief, in the case of *In re Wilson*, 116 Fed. 419, 8 Am. Bankr. Rep. 612. The court said: "It developed upon the examination of the bankrupt that during the months of October and November, 1901, the bankrupt had been drinking and debauching to great excess, and that about the 20th of November (eight or nine days before the petition in bankruptcy was filed against him) he left his home, taking with him about \$1,000 in money; stating to his clerks that he was going to try to get means to tide him over his business difficulties. On examination, however, he testified that he started to Texas to meet the traveling agent of one of his creditors, to see what arrangements he could make with him to aid him in his business troubles; that after he started he got drunk, and turned up in Oklahoma, where he remained drunk and gambled until he had squandered the greater portion of the \$1,000. He gives no account, however, as to who he gambled with, or how much he lost, or how much he had upon his return. The court is of opinion that this explanation is a mere subterfuge and afterthought, and wholly without any foundation in truth. It is not supported by any evidence, and is neither reasonable nor plausible."

Testimony by a bankrupt that he wasted \$13,700 between July and November in gambling, betting, and riotous living, the corroboratory evidence being of an untrustworthy and contradictory character, was held to be unworthy of belief, in *Schweer v. Brown*, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178. In that case it was said: "The claim was also made that between the 1st day of July, 1902, and the time when the receiver took possession in the following No-

vember, the bankrupt lost and squandered \$13,700 in gambling, betting upon the races, and in riotous living. But his testimony upon that subject was so vague, indefinite, and unsatisfactory as to be entitled to very little credit in a court of justice. Almost every attempt on the part of counsel for the trustee to secure from the bankrupt a statement of the details of his alleged losses was frustrated by the answer that he did not remember. Such corroboration as his testimony received—and it was only in part—was from testimony similar in character of professional gamblers, who in many instances contradicted each other and the bankrupt himself. The proper limits of an opinion forbid more than a general characterization of the mass of inconsistencies and improbable statements appearing in the record."

Uncorroborated testimony by a bankrupt as to large amounts spent by him in gambling and dissipation was not believed by the court in the case of *In re Henderson*, 130 Fed. 385, 12 Am. Bankr. Rep. 351.

Testimony by a bankrupt to the effect that he had gambled away \$2,000 in 66 days, when he showed on examination no more knowledge of the game of poker than the veriest tyro, was rejected in the case of *In re Lasky*, 163 Fed. 99, 20 Am. Bankr. Rep. 729. The court said: "Upon his examination the bankrupt, Lasky, attempted to account for this surprising condition of things by saying that he had lost some \$2,000 of the money in gambling, and that these losses were sustained upon some 14 or 17 trips to Birmingham, one trip to Montgomery, and in night games at the McLeister Hotel in Tuscaloosa. Upon his first examination he said that he could not tell the name of a single person with whom he played or a single person who ever saw him playing in Birmingham, Montgomery, or Tuscaloosa. He said upon that examination that all of his Birmingham games, except one played at the Gayety Hotel about the time of his adjudication, had been played either at the Florence or at the Birmingham hotels. He said, also, that of the numerous trips he made to Birmingham—14 in all—on 12 of these trips he put up either at the Metropolitan or the Gayety hotels, and that he registered some three or four times under an assumed name and upon all other occasions in his own name. He could not remember by whom he was invited into the games at the various hotels, and he could not remember the number of any of the hotel rooms in which he played the various games. Under Lasky's testimony, all of these losses must have been sustained between March 1st and May 5th, 66 days. It appears from his own testimony that he was in Tuscaloosa a very considerable portion of the time attending to his business. About one-half of this time

he was running the store alone, as his partner had decamped. The testimony of his young lady clerk shows that he was in Tuscaloosa four out of the nine weeks, with the exception of three days, during which time he was said to have been sick. He was there regularly, because he opened the store every morning and was there awaiting her when she arrived for the day's work. With the four weeks accounted for by this clerk out of the reckoning, his testimony claims 17 trips to Birmingham, 1 trip to Montgomery, and numerous night games at the McLeister Hotel in Tuscaloosa, that is to say, that out of the 35 days in which he was out of town he was engaged in gambling 18 days, and that during the 17 days he was at home he was doing heavy night gambling, and losing uniformly. This is remarkable, to say the least. But his claim is that numbers of the Birmingham trips lasted at least two days, so that, if his story is true, he was out of town substantially all of the time accounted for by his clerk, leaving him no opportunity to have attended to his business after Goldberg left, as he testified he did quite closely for some six months, and he is unable to remember the name of one single individual with whom he played at any time or to whom he lost so much money. To believe this story would tax my credulity beyond endurance. But Lasky is further discredited when the Metropolitan Hotel register is produced, covering the entire period from March 1st to May 5th, and it shows no registration of Joseph Lasky at all, and when the register is laid before him, and he is called upon to identify the registration under assumed names, he points out a few names entered on the register prior to March 26th, which he claims to believe were his registrations, but would not identify them positively as such. Further than this, the testimony shows that, upon the examination of Lasky as to his knowledge of the game of poker at which he claims to have lost his money, he seemed to have no real acquaintance with the game, but only knew the simpler hands which any tyro might know, and he fails to meet a test of knowledge which any player of his claimed experience ought certainly to be able to meet."

The rejection as unreasonable of a bankrupt's explanation that he had lost between eleven and thirteen thousand dollars in eight months at poker, was affirmed in *Seigel v. Cartel*, 164 Fed. 691, wherein it was said: "The only tangible explanation of this shortage of funds by the petitioner is that he lost the money in gambling at poker. His evidence was that he had long indulged this habit of gambling, and estimated that he had probably at different times lost an aggregate of \$100,000. As he seems to have been a most unlucky gambler, to say the least, it was

not honest for him to thus take the proceeds of the goods he had purchased on credit to indulge his passion at the expense of his confiding creditors. . . . He kept no book account of the withdrawal of this money or its disbursement. He did not introduce any evidence corroborative of the losses at gaming. He failed on close inquiry to give the name of one person with whom he played or the name of the proprietor of the establishment where he played, save one who was out of the state and last heard of at the St. Louis World's Exposition, thus making it quite impracticable, if not impossible, for the objecting creditors to contradict him. He could give no particular dates or particular sums lost at 'the sittings.' The credibility and reasonableness of his story were addressed to the judicial discretion of the district judge. As there was, in our judgment, reasonable ground for discrediting his explanation, we will not review the exercise of that discretion."

A claim by a bankrupt, of proved thrifty disposition, that he had spent about \$900 in gambling, riotous living, and consorting with lewd women, was not credited in the case of *In re Nisenson*, 182 Fed. 912. The court said: "The bankrupt's testimony is uncorroborated either by human testimony or by the circumstances detailed by him, accompanying the expenditure of such moneys. He says he took this money with him to Providence, R. I., for the purpose of investing it in business. He accepted employment at \$12 a week, but made no such investment. He spent such money in riotous living, gambling—playing dice and shooting crap—and consorting with lewd women. He fails to give the names of persons with whom he gambled, the places where, the times when, or the names of any of the persons present when he gambled. His explanations of how he was accosted by the person who took him to the gambling place, his introduction to the game, his repeated visits and losses, is a recital that has the possibility of truth, but is improbable as applying to a man of his thrifty disposition. His explanations as to the meeting of the particular woman that he names, and the unnamed others whose acquaintance he made through her instrumentality, is of the same character, and does not commend itself to the unprejudiced mind. The failure of the bankrupt to remember the details of these transactions such as would impress themselves upon the ordinary mind, suggest purposed evasion or untruthfulness. Is it evasion? If so, to hide what? Gambling and consorting with lewd women are frequently indulged in by persons who would not care to have such conduct brought to light, and evasive answering in an attempt to cover up such profligacy may be well understood, but the bankrupt seeks to such cover.

He not only admits his profligacy, but asserts it in his defense. His resort, therefore, to the answers which indicate a lack of observation of the things that impress themselves on the ordinary person, or to a failure to remember, was not for the purpose of hiding his shamelessness. Like acts of profligacy have been frequently asserted in explanation of disappeared assets, and as frequently repudiated."

In the case of *In re Goodman*, 196 Fed. 566, 27 Am. Bankr. Rep. 697, the court held to be incredible testimony by the bankrupt that over a thousand dollars had been spent by him in gambling and other dissipations, no attempt being made by the court to elaborate the evidence or the reasons for the holding.

For evidence held to be highly suspicious, regarding gambling, see *In re Cunney*, 225 Fed. 426, cited in the following subdivision.

9. LEWDNESS OR DRUNKENNESS.

Uncorroborated testimony by a bankrupt, in explanation of his failure to pay to the trustee an amount of \$6,500, that the money was expended as the result of an intrigue with a woman, the bankrupt claiming that he got in a scrape with a woman to get out of which he paid her \$6,000 and that he paid \$425 to a doctor for his services in connection with the scrape, but refusing to name either the woman or the doctor, has been held to be so preposterous as to be worthy of no credence by the court. In *re De Gottardi*, 114 Fed. 328, 7 Am. Bankr. Rep. 723, wherein the court said: "De Gottardi's claim that he gave \$6,000 to a woman and \$425 to a doctor involves the admission that he did have that amount of money in his possession, belonging to the estate of the bankrupts. This fact, however, is also testified to by Righetti, as well as evidenced by the books of the firm. The only question, therefore, to be determined on this branch of the case, is whether or not De Gottardi's statement of his disposition of the money is to be believed. . . . Can it be claimed that De Gottardi has accounted in a reasonable manner for the \$6,500 which he admits to have been in his possession but a short time before the petition in bankruptcy was filed, by asserting that he gave \$6,000 to a woman and \$425 to a doctor, when he refuses, on cross-examination, where there is no immunity from self-criminatory evidence, to name the woman or the doctor to whom he says the money was given? Such a claim would be preposterous. If his testimony in this regard had been true, its corroboration would have been within his power. In the absence of such corroboration, under all the circumstances of this case, the issue cannot be otherwise found than against him."

For discredited testimony by a bankrupt to the effect that assets traced to him had been spent in consorting with lewd women, see *In re Nisenson*, 182 Fed. 912, cited and quoted, *supra*, in subdivision 8, *Gambling*.

When, in a hearing on an order committing a bankrupt for contempt for refusal to pay over assets amounting to \$2,106.44, he attempted to explain his refusal by testifying that a considerable part of the money had been spent in a drunken spree, the court refused to credit the testimony or to make any allowance for such expenditure. *In re Tudor*, 100 Fed. 796, 4 Am. Bankr. Rep. 78.

In the case of *In re Cunney*, 225 Fed. 426, testimony by two bankrupts, journeymen tanners working at fifteen dollars a week, that they drank and gambled away \$7,200 within about four months was held to be highly suspicious, and the judgment of the referee was reversed and remanded to him to hear further evidence.

For testimony as to loss by drinking, rejected as improbable, see the case of *In re Wilson*, 116 Fed. 419, 8 Am. Bankr. Rep. 612, cited and quoted, *supra*, in subdivision 8, *Gambling*.

10. TRAVEL.

In the case of *In re Tudor*, 100 Fed. 796, 4 Am. Bankr. Rep. 78, a story by a bankrupt, in explanation of his refusal to turn over an amount of over \$2,000, to the effect that he spent a considerable part of it in a trip from Denver to Cincinnati, looking for a position, was deemed unworthy of credence by the court, and it was held that, even though credited, testimony of that nature showed no allowable expenditure. The court said: "If he chooses to make a journey to Cincinnati for the purpose of finding a position, no court is bound to allow him the expenses of such a journey. He may have concluded that a good place for him to seek employment would be in China or the Philippine Islands, and he would go there to renew his fortunes. So, also, as to his going to Cincinnati and preparing for that journey; the referee is not required to allow expenses for that. It is not true that a bankrupt failing in business is at liberty to go on and spend money as seems to him either expedient or necessary. If he does conduct himself economically, quietly, and properly, the court would undoubtedly allow him the reasonable expense and cost of living. If he fails in that, he cannot claim indulgence as to his vices or his habits of living. I do not care to go into this testimony to find whether one of these items or another has been properly disallowed. I am not called upon in behalf of a man in the situation of this man, who has conducted himself as he has, to scrutinize his testimony to the last

item to find out whether there is any dollar or cent yet to be accounted for. The court is not engaged in that business. People who pursue such a course as this must know that they do it at their peril; that the law of the land does not uphold them in such practices. I have no doubt but that the referee in this instance is fully within the law as to the amounts which this man should be required to pay over for the use of his creditors."

11. EXTRAVAGANT LIVING.

For a bankrupt to try to explain her failure to turn over a balance on hand of over \$24,000 by claiming that it was spent by her and her children in various forms of extravagance in living and other expenses, has been held to be too highly incredible to be accepted. *In re Gerstel*, 123 Fed. 166, 10 Am. Bankr. Rep. 411, wherein the court said: "These accountants agreed in the statement that the bankrupt should have had on hand at the time of her adjudication \$24,871.76, in addition to the \$14,000 shown by her schedules, and this without allowing anything for the profits of the business. In explanation of this large deficit, the bankrupt, by her testimony and that of her children, seeks to explain the dissipation of the funds by various forms of extravagance in living and other expenses. The testimony utterly fails to satisfy the court. It is in many respects highly incredible, and I am unable to bring my mind to the point of accepting it as at all satisfactory to discharge the rule."

Testimony by a bankrupt in very reduced circumstances that the whole of a sum of \$690 traced into his hands was used and expended for the benefit of him and his family within the space of about six weeks, before the bankrupt secured a job as a motorman, was held to be incredible, in the case of *In re Kane*, 125 Fed. 984, 10 Am. Bankr. Rep. 478. In that case it was said: "Assuming, as testified, that the money turned over to him was \$1,340 although the amount left with the bank was somewhat more than this—and taking out that which the bankrupt paid to his attorney and to his brother, there was left in his hands, including that returned to his wife, the sum of \$690. The only thing he has to say of this is that he gave it to his wife, and that it has been spent for the benefit of himself and family. This, however, is not a sufficient accounting for it, nor does it seem at all probable. He stayed at Milville, according to his story, about six weeks, and then got work at Philadelphia as a motorman, and went there to live, by which time his earnings, as we have the right to assume, would largely support those dependent on him. He was only called

to draw upon this money, therefore, for a brief period; and he was likely, from his reduced circumstances, to be somewhat saving of it. It is hardly to be believed that by the middle of October, when he was examined before the referee, he had made away with the whole of it, as he testifies. Money having been traced directly into his hands, he cannot swear himself free from liability by any such general and sweeping statement."

An explanation by a bankrupt that he had spent \$400 in a short time in "car fares," "shoe shines" or "milk for the baby" was called a contemptuous one by the court in the case of *In re Lesaius*, 163 Fed. 614, 618, 21 Am. Bankr. Rep. 23.

12. PAYMENT TO TRUSTEE.

Where both a bankrupt and the trustee testified that a sum of \$113 was paid over by the bankrupt to the trustee, but that the trustee gave no receipt for it, and where the trustee testified that he did not know when or where it was so paid, the court held that the inherent improbabilities of the testimony were so great that it was not to be believed. In *re Leslie*, 119 Fed. 406, wherein it was said: "A witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of witnesses. This court is not inclined to believe, and does not believe, on the evidence now produced, that this money was ever turned over by the bankrupt to the trustee. It is satisfied from the evidence now before it that the bankrupt and the trustee were in collusion. . . . It seems incredible that an officer of this court, receiving that amount of money belonging to the creditors of this bankrupt estate, would allow it to lie around loose in his office in the manner described."

13. MISCELLANEOUS.

Testimony as to the bona fides of a sale of the bankrupt's business was held to be so incredible as to refute itself, and the transaction was held to be in fraud of creditors, in the case of *Main v. Glen*, 7 Biss. 86, 16, 1 Fed. Cas. No. 8,973, wherein it was said: "But I do not wish to rest my decision alone upon the legal presumption. The evidence supports the charge that the sale was made with intent to defraud the bankrupt's creditors. I do not believe the testimony that the defendant paid \$13,000 in cash at that time. The evidence of the defendant and the McDonalds on that question is incredible, and cannot be true. The transaction as stated by defendant was substantially this: Siegrist on the 10th of December went to New York to see about making some arrangement about his debts, leaving the defendant in charge of his business at Wausau. He wrote

to defendant once while there to send him money to pay his expenses; that he returned on the 27th of January following about noon, and that before tea-time of that day the agreement to sell his entire stock of goods, together with his accounts and all other effects at the price of \$13,000 was made; that defendant had \$5,000 in cash in his possession at that time, \$1,500 of which had been paid to him that day by Mr. Siegrist for gold sold to him while in New York; that before tea he went out and found two young men by the name of McDonald, and borrowed of them \$7,000—\$4,000 of one and \$3,000 of the other; that he also borrowed \$1,000 of one Kemp, and that the money was placed in the safe for Siegrist that night. The defendant was a saloon keeper, and his wife kept a small millinery and dressmaking shop. He, in company with another party bought the saloon of the McDonald boys in July previous, for \$1,500, and paid down \$600 and got time for the balance by giving a chattel mortgage on property as security. He claims that he had then in his possession \$5,000, among which there were three \$1,000 bills. He says he got in the money borrowed from the McDonald boys, four more \$1,000 bills, and that he paid Siegrist seven \$1,000 bills, that on the morning of the 28th he had a formal bill of sale prepared by his attorney, and that the parties and his attorney went to another attorney's office where it was executed and witnessed, and the money was handed over in a package said to contain \$13,000, but not counted then by anyone, in the presence of this attorney who was used as a witness of the execution of the paper and the passing over the package; that this was before the parties had breakfasted; that the defendant engaged the evening before, at the livery stable, a team to take Siegrist to the railroad at Stevens Point in the morning; that after getting the money Siegrist went away, claiming that he was going to Milwaukee and Chicago to settle his debts, but never returned; that he was owing his clerks and various parties, including his banker, quite a large sum, which he did not pay, and thereupon defendant took possession of the goods; that he did not give the McDonalds any security for the \$7,000, nor Kemp for the \$1,000, but gave Kemp notes for about \$700 against customers and paid him \$270 in money the next day, and took up his own note. Now this story is so strange and unusual, not to say absurd, as to effectually refute itself."

In the case of *In re Kramer*, 210 Fed. 977, the court said, without, however, disclosing the details of the testimony: "A careful examination of the testimony of the two bankrupts taken before the referee shows numerous inconsistencies, evasions, and deliberate false-

hood in their explanation of the purposes for which the money was withdrawn and of the disposition made of it. The more the bankrupts attempted to explain the depletion of the firm's assets, the more hopelessly they convicted themselves of intentional falsehood. Under these circumstances their present naked denial that they now have in their possession or control the funds abstracted is unworthy of belief."

III. Testimony Believed.

1. OWNERSHIP OF BUSINESS RUN BY BANKRUPT.

Where an application for discharge is resisted on the ground that the bankrupt has fraudulently concealed his ownership of a corporate business run by him, testimony standing alone, without any further proof of fraud, is not unreasonable and incredible which tends to show that the bankrupt is not the owner of the corporate business, that the shares therein are the property of relatives, who furnished the capital for the purpose of setting the bankrupt up in business but expect to be paid back in full out of the profits of the concern, although suspicion is cast on the transaction by the fact that, although a dividend of fifteen per cent could have been paid out of the earnings of the business none has been paid, no meetings of stockholders have been had, and no accounting has been made to the stockholders. In *re Meyers*, 96 Fed. 408, wherein the court said: "The principle shareholder was his brother-in-law, who frankly testifies that he furnished the money (some \$1,800 or \$2,000) to establish this corporation, for the purpose of setting his brother up in business, as a family affair; that the stock was distributed among the relatives for the purpose of having the amount of money repaid to the brother-in-law, or to those shareholders to whom he gave it, whenever the business would justify it. He testified that he expected and hoped, and still expects and hopes, that at some time his brother-in-law, through the profits of the business, would be able to repay the money, but that he and the other relatives are still the bona fide holders of the stock. There is not a particle of evidence to show to the contrary of this statement—such as that it was a mere device, and that the capital stock of the company was really furnished by the bankrupt, directly or indirectly. It is contended by counsel in argument that this was a loan by the brother-in-law to the bankrupt, and that the organization of the corporation was an ingenious device to cover up the real transaction; but this is only an inference, and there is no reason why the brother-in-law who furnished the money

might not secure himself in the advances made, in the form of stock in a corporation, as well as in the form of a loan and chattel mortgage on the goods, or in any other way. The only question is whether it is or is not a bona fide transaction, and it does not appear to the court, however suspicious it may seem, that upon the evidence it can be fairly said that it was a device or fraudulent transaction, and not a legitimate and honest way to help a broken-down relative. He is paid a salary of \$1,500, and he testifies that the business has been prosperous enough to enable him, if desired, to pay as much as fifteen per cent dividend on the amount of the capital stock; but no dividends have been paid, no meetings of stockholders or directors have been held, and the brother-in-law who made the advances frankly testifies that he has had nothing to do with the business, except in the manner above stated. If there were any proofs tending to show that the money actually came from the bankrupt himself, or that it was an out and out gift to him by his brother-in-law, there would be some foundation for the alleged fraudulent transaction; but it is not even pretended that there is any proof of that kind in this case. . . . There is no denying the force of the fact that this was a family affair, and that he was receiving, through the processes mentioned, the benefits of this business, but it is not at all inconsistent with the most honest intentions and the utmost good faith that a business should be conducted in that way. If a bank, or other capitalist, or other friends than his relatives, had done for him just what his relatives have done, in the absence of any proof to show that it was a simulated transaction and that he was the real owner of the stock or corporate property, there could be no objection taken to the transaction. It would be giving undue weight to the circumstance that those who came to his relief were relatives, to pronounce the whole transaction fraudulent upon that circumstance alone."

Testimony by a bankrupt that the business run by him was not his but was owned by his sister, was held not to be incredible, in the case of *In re Miller*, 212 Fed. 920, 129 C. C. A. 440, reversing decree 203 Fed. 170. It appeared in that case that the bankrupt had been engaged in a small business of buying up photographers' used plates, cleaning the film off, and selling the glass to frame makers; that he became financially embarrassed and sold the business; and that the bankrupt's sister then put \$600 or \$700 into a similar business, which the bankrupt ran for her. The court said: "This transaction left Miller without remunerative occupation. He had a sister who had saved \$600 to \$700. She, we may presume at his suggestion, decided to go into the same sort of business he had been

engaged in for several years. She took out a certificate for doing business as the Williamsburg Glass Works and put her money into it, employing him to conduct the business on a salary of \$15 a week and another man to clean the plates. There is certainly nothing novel, or startling, or necessarily suspicious about this. Countless men, who have gone broke, have had wives, or mothers or blood relatives who have done the same thing for them. Believing the experience and business enterprise of their relative would make their capital fruitful enough to insure him a living wage and possibly an additional profit for themselves, they have taken the risk. Sometimes, no doubt, the arrangement is merely a cover under which the person thus accommodated himself shares in the profits beyond his salary, but the ostensible arrangement is such a natural one that there must be some proof to indicate that it is a mere cover for something else. It is not sufficient proof of that, as the petitioning creditor seems to contend, that the female does not herself conduct the business about which she knows little or nothing. The vital question is who gets the profits and there is nothing in this record to indicate that during the two years that the 'Williamsburg Glass Works' continued, Miller drew anything from it except his weekly salary."

2. RENEWAL OF STOCK IN TRADE.

Testimony by a bankrupt that \$450 which he had been ordered by the referee to pay to the trustee was given by him to his clerk some three weeks before the selling out of the business, while he was sick at home, to be used by the clerk for the renewal of the stock in trade of the business, was held not to be so improbable as to authorize its rejection as a fabrication. *In re McCormick*, 97 Fed. 566, 3 Am. Bankr. Rep. 340.

3. GAMBLING OR ROBBERY.

Statements on examination by a bankrupt that he did not have on hand the sums mentioned in reports he had previously made to commercial agencies, that he had expended part thereof in gambling on horse races, and that he had lied in his statements to the commercial agencies as to the amount thereof, have been held not to be so improbable as to be unworthy of belief and to raise the inference that he did actually have the sums in question in his possession. *In re Adler*, 129 Fed. 502, 12 Am. Bankr. Rep. 19. The court said: "This examination shows substantially what is alleged in the petition—that the bankrupt had made the reports stated to the commercial agencies, and that he had expended the sums of money that were mentioned in the examination, and, according to his statement, other sums not so definitely

shown, and in his examination he gave as an excuse for not having more money on hand that he had wasted it in gambling on the horse races by buying pools at the pool room on the other side of the river in Arkansas, kept for the use of those participating in this city in such gambling enterprises. The creditors undertook to prove that the bankrupt had never been seen in this pool room, and, from such facts and circumstances, that this story of losing the money on the races was untrue. In a general way, it may be said that the proof shows that as late as November before the filing of the petition of the bankrupt in January he had on deposit in the banks some \$400 in money, and at one time he drew out of the bank as much as \$1,400 in money. The bankrupt explains his affairs by saying that the statements that he made to the commercial agencies were untrue, that they were exaggerated for the purpose of making a good showing for his credit, that he kept no books of account except a scratcher to show to whom he had sold goods on a credit, that his accounts with his creditors were simply kept by placing his invoices on a file wire, that he kept only a small store or shop, and that his business did not amount to anything like the sums of money indicated by the creditors. There is no more conclusive proof than this as to the possession of the money, and it is not claimed by counsel that any more conclusive proof is available, but only that it is a necessary implication from these facts that the bankrupt is concealing the money and withholding it from his trustee. The court does not think that this is at all a necessary presumption, and is of the opinion that upon such proof it is not within the powers of the bankruptcy court to direct the bankrupt to pay the money into court under the penalties for contempt."

A story of the loss of assets of the value of \$3,000 or more, by burglary, was held not to be so inherently improbable as to necessitate its rejection, in the case of *In re Chamelin*, 184 Fed. 553, 25 Am. Bankr. Rep. 570, wherein it was said: "The bankrupt had practically nothing to represent this when he was put into bankruptcy, and he is called on, in consequence, to overcome the discrepancy. His explanation is that on the night of December 15, when he and his wife were at a ball, his rooms were broken into and his goods were stolen. This is an easy story to set up, and a difficult one to refute, and the burden is on him to substantiate it. And yet, considering the nature of the goods and the opportunity afforded, it cannot be said to be inherently improbable. It is also sustained by considerable testimony, some of which, at least, is apparently disinterested. It is said to be discredited by the inconsis-

encies to be found in it, which have been discussed in argument. I agree, however, with the referee, that they are not enough to do more than arouse a suspicion. It is of no great significance, for instance, that, while the jewelry cases disappeared, the watches of customers were left undisturbed on the workbench. There was some scattering of things around the room, according to the evidence, as though parties had rummaged about in it. But, even if no custom work was taken, the explanation would not be difficult. The watches and jewelry belonging to different individuals would be easy to trace, and no experienced thief would be likely to burden himself with any such means of detection. And whatever may be otherwise said of the story, it has stood this important test: That there is nothing in the circumstances of the bankrupt or his family or friends, following the robbery, to suggest that any of them have profited by it. It is true that \$541 turned up, not long afterwards, in his wife's bank account. But \$541 falls far short of \$3,300. And it is further explained that she borrowed this to meet the possible prosecution of her husband, which was threatened. Besides this, three full years have now elapsed, and abundant opportunity has been given to observe the consequences, which in no wise call in question the bankrupt's conduct. To all appearances he is in the same impecunious condition that he was immediately after the alleged robbery; and the case is thus devoid of those signs of prosperity which sometimes follow a fraudulent failure."

4. MISCELLANEOUS.

Evidence that an illiterate bankrupt, running three stores in different places, was unable to account for large amounts of money which he claimed to have lost through the dissolute habits and lax business methods of his sons who conducted two of the stores, was held to be credible, under the circumstances, in the case of *In re Switzer*, 140 Fed. 976, 16 Am. Bankr. Rep. 468, wherein it was said: "The bankrupt, it appears, is an illiterate man, speaking the English language with difficulty, and no motion was made for any examination before me. It appears that he kept no books; that his business was loosely conducted; that during the busy season of 1904 he called in a great many additional clerks, selling goods below cost, and expending a good deal of money in advertising; that his son, who was in charge of the Laurens store, was of dissolute habits, addicted to gambling, and that he lost a good deal of money in various ways. The son in charge of the Greenville store was, it appears, also a youth. That a person conducting a mercantile business in three places, as loosely

as this business seems to have been conducted, and keeping no book of account, should fail to be able to satisfactorily account for his affairs, was to be expected, and that bankruptcy should follow such methods was natural, and if the bankrupt is to be held to the liability of a trustee liable to account for all the property purchased by him, as though it were trust funds, his failure to keep books and to account satisfactorily for every article of merchandise traced to his possession would make, upon the proofs here, a strong case against him; but I do not conceive that upon this motion I can judge him by that standard. . . . Upon the whole case I am of opinion that the testimony is insufficient to prove beyond a reasonable doubt that the bankrupt is now in possession of any money or goods. It shows that the business was very loosely conducted, and there is ground for suspicion from the conduct of the bankrupt during the autumn of 1904 that he was conducting his business in such a way as to convert his stock into cash without regard to the interests of his creditors; but suspicion is not proof, and, in the absence of clear evidence that the bankrupt is now in possession of money or goods belonging to his trustee, I cannot feel justified in committing him to jail."

In the case of *In re Walder*, 142 Fed. 784, 16 Am. Bankr. Rep. 41, it was held that testimony of the bankrupt as to his disposition of assets, as that testimony was outlined in the opinion, was not so inherently unworthy of belief as to justify its rejection and the issuance of an order to turn over assets. The court said: "The real question, then, is whether or not the bankrupt has accounted for the disappearance of the goods which he has been ordered to return, or, to put it more definitely, whether his explanation leaves the matter in such a shape that the court can find beyond a reasonable doubt that he now has possession or control of the goods, or of the money into which they have been converted. The referee defends the order by saying that he does not believe the bankrupt's explanation, because he has testified to some very bad things which he did, and that, uncorroborated, it is no explanation at all. The inference would seem reasonable that if the bad bankrupt had produced his relatives, and if they had told the same story, the order would not have been issued. The bankrupt testified that he sent \$10,500 worth of goods to his brother-in-law in New York, who sold the lot for \$5,250, which went as follows: \$2,350 retained by his brother-in-law to liquidate an old debt; \$1,700 to his sister-in-law to pay an old debt; \$1,000 to Yale National Bank to take up notes indorsed by relatives; \$200 gone in expenses. The referee apparently accepts the statement that the notes at the

bank were paid and that \$200 was expended personally. It is probable that he thinks the \$2,350 and \$1,700 were retained by the New York relatives, but believes that the bankrupt did not owe them that, or, indeed, any amount. Unless he had some such notion, it is not easy to understand how he came at the sum of \$4,000, which he has ordered turned over to the trustee. Indeed, at the oral argument before the court, it was conceded by counsel for the trustee that the question all hinges upon the disposition of the \$10,500 worth of goods, and is not affected by the matter of other goods let out upon lease, about which uncertainties exist. The referee, then, believes that the goods went back to New York, but disbelieves the rest of the story, and intimates that, if the others had sworn as the bankrupt did, he could not (although he might still have disbelieved the story) have found facts upon which to base the order under review. The court cannot avoid the feeling that, when a bankrupt comes forward and deliberately tells a story so degrading, he is entitled to have it count for something as tending to show what has become of the goods which he owns up to having disposed of so wantonly."

OWENS

v.

MUNDEN.

North Carolina Supreme Court—February 17, 1915.

168 N. Car. 266; 84 S. E. 257.

"Father" — Meaning of Term — Stepfather Not Included.

Under Revisal 1905, § 2088, providing that, where either party to a proposed marriage is under 18 and resides with the father, mother, uncle, etc., the register of deeds shall not issue a license for such marriage until the consent in writing of the relation with whom the infant resides shall be delivered to him, while the consent of the persons named, and in the order named, must be obtained, and where the infant is living with the father and mother the written consent of the father is necessary, where the infant is living with her mother and stepfather, the mother's consent is sufficient, and the stepfather's consent is not required, since the words "father" and "stepfather" are in general use and well understood, the difference in the relationship and the marked distinction between their duties and liabilities are well known, and the word "father" does not include a "stepfather," de-

fined as the husband of one's mother, who is not one's father.

[See note at end of this case.]

Appeal from Superior Court, Pasquotank county: CARTER, Judge.

Action by Joseph G. Owens, plaintiff, against J. W. Munden, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[266] Action against a register of deeds to recover the penalty for issuing a license for the marriage of a girl under 18 years of age without the written consent required by the statute.

The plaintiff is the stepfather of Julia Irene Jones, formerly Julia Irene Barber, the plaintiff having married her mother in 1903. From the time of said marriage until her own marriage to Jones, with the exception of two very short intervals, Julia Irene lived with the plaintiff and her mother as a member of the family, the plaintiff feeding her, clothing her, and treating her as if she were his own child. Julia Irene was married to Claude Jones in 1913, when only 16 years of age. The license for this marriage was issued by the defendant. It was admitted that prior to the issuance of such license the defendant had been, in writing, notified by plaintiff that said Julia Irene was only 16 years old and forbidden to issue a license for her marriage. It was further admitted that at the time of issuing said license defendant had in his possession the written consent to such marriage of Julia Irene's mother, plaintiff's wife, who also resided with plaintiff. The usual issues were submitted. The judge charged the jury peremptorily to answer the first issue "No" and the second issue "Nothing." Plaintiff excepted and appealed.

P. W. McMullan for appellant.

Ward & Thompson and J. Kenyon Wilson for appellee.

ALLEN, J.—The Revisal, sec. 2088, provides that where either party to a proposed marriage is under 18 years of age and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, . . . the register of deeds shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom the minor was placed at school, "and under whose custody or control he or she is," shall be [267] delivered to him, and the written consent shall be filed and preserved by the register; and it was held in *Littleton v. Haar*, 158 N. C. 566, that the consent of the persons named in the statute, and in the order named, should be obtained, the effect of the decision being that

if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient.

If so, the only question presented by the appeal is whether the word "father" includes the stepfather within the meaning of the statute, and gives the stepfather the right to dispose of the daughter in marriage to the exclusion of the mother.

The two words, "father" and "stepfather," are in general use and well understood, and the difference in the relationship of the two to the child, and the marked distinction between their duties and liabilities, are well known.

If, therefore, we should hold that the stepfather has a prior right to the mother, we would have to insert in the statute a word not used by the General Assembly and having a meaning different from any word in the statute.

A stepfather is defined to be "The husband of one's mother who is not one's father" (31 Cyc. 1275, 26 Am. & Eng. Enc. of Law (2d ed.) 784, Rapalje and Lawrence L. Dictionary), and this was approved in *Thornburg v. American Strawboard Co.* 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334, where the Court, after quoting the definition, says, in construing a statute giving a right of action to the father if living, and if not, to the mother: "The word 'father,' therefore, does not mean stepfather, nor does the word 'child' mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the statute in controversy."

In *Hennessey v. Bavarian Brewing Co.* 145 Mo. 105, 46 S. W. 966, 68 Am. St. Rep. 554, 41 L.R.A. 385, the same question was decided, the Court denying the right of action in the stepfather for the wrongful death of his stepson under a statute conferring the right of action on the father and mother.

We are therefore of opinion that the word "father" used in the statute does not include stepfather, and that the written consent of the mother, the father being dead, authorized the issuing of the license.

No error.

NOTE.

"Father" as Including Stepfather.

It seems to be a general rule of construction that a term referring to parenthood is confined to natural parents and does not include a step-parent. Thus "parent" does not include a stepfather or stepmother (see the note to *Coakley's Case*, Ann. Cas. 1915A 867) and "mother" does not include a stepmother. See the note to *Jones v. Mangan*, Ann. Cas.

1914B 59. By a parity of reasoning it is held in the few cases passing on the point that the term "father" does not include a stepfather. *Thornburg v. American Strawboard Co.* 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560, 5 Detroit Leg. N. 177; *Hennessey v. Bavarian Brewing Co.* 145 Mo. 105, 46 S. W. 966, 68 Am. St. Rep. 554, 41 L.R.A. 385. And see the reported case. See also *Citizens' St. R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319. Thus in *Hennessey v. Bavarian Brewing Co.* supra, wherein there was involved a statute providing for the institution of an action on the part of the father and mother for the death of a child by wrongful act, it was held that a stepfather had no right of action for the death of his stepson. The court said: "In this case the father was dead, and the mother as survivor, alone had a right to maintain this action. Her second husband was not the father of the deceased and hence has no right to maintain the action, and her marriage a second time did not sever her relation of mother to her son nor take away from her the right which the statute transmitted to her as mother to recover damages which her son might have recovered if he had survived the injury." In *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560, 5 Detroit Leg. N. 177, the respondent was convicted of statutory rape. The complaining witness was at the time under sixteen years of age. When she was called to the stand she was interrogated by counsel for the respondent as to her competency. From examination it appeared that she had gone through a form of marriage with the respondent before the judge of probate of one of the counties. The evidence showed that the complaining witness was an orphan, and that her stepfather did not give his consent to the marriage. The court held that that fact did not overcome the presumption of the regularity of the marriage, saying that the stepfather was not a natural guardian of the child. In *Thornburg v. American Strawboard Co.* 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334, the action was brought by a man who married the mother of a bastard child to recover for the death of the child under a statute which provided as follows: "A father (or, in case of his death or desertion of his family or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward." Holding that the word "father" did not include a stepfather the court said: "As generally understood, the husband of one's mother by a subsequent marriage is a stepfather, strictly speaking, therefore, a

man who marries the mother of a bastard child does not become the stepfather of such child. . . . Applying the principles stated to this case, it is clear that appellant cannot maintain this action. If it were conceded that he was the stepfather of the child named in the complaint, he would not come within the terms of the statute. Indeed, the definition given by Wharton, of the word stepfather would be decisive of the question: "Stepfather—The husband of one's mother who is not one's father."

In *Hitch v. Wells*, 8 Beav. (Eng.) 576, it was held that a notice of an application to appoint a guardian ad litem for infants, whose father was dead, served at the house of their stepfather, with whom they were residing, was sufficient.

HEWSON

v.

SHELLEY.

England—Court of Appeal, Chancery Division—March 14, 1914.

[1914] 2 Ch. 13.

Executors and Administrators — Revocation of Administration by Discovery of Will — Effect.

The discovery of a will after the appointment of an administrator does not make the appointment void ab initio, and accordingly a person purchasing realty from the administrator prior to the discovery of the will takes a good title.

[See note at end of this case.]

[13] Appeal from a decision of Astbury, J. [1913] 2 Ch. 384.

On January 30, 1899, George Francis Hewson, the owner in fee simple of the Ovington Glebe Estate, Southampton, died without issue.

On June 13, 1899, after a diligent but unsuccessful search had been made for a will, general letters of administration were granted to his widow, who applied therefor under a genuine belief that her husband had died intestate.

On May 31, 1900, the estate (less four acres purchased by the administratrix) was offered for sale by auction "by order of the administratrix" subject to certain particulars and conditions of sale.

The property was not sold at the auction, but by a contract [14] dated August 23,

1902, embodying the same particulars and conditions of sale, the administratrix agreed to sell the property to the defendant Sir John Shelley for 3500*l*.

By a conveyance dated October 13, 1902, and made between the administratrix of the one part and the purchaser of the other part, the administratrix "as personal representative of the said George Francis Hewson deceased by virtue of the powers conferred on her by the Land Transfer Act, 1897, and of every other power in this behalf her enabling and also in her individual capacity as to all estates or interests therein (if any) so vested in her" conveyed the estate to the purchaser in fee simple, and the purchaser took possession on the same day.

The administratrix died on September 2, 1911, having by her will, dated November 22, 1910, appointed one Davis to be her executor.

On November 11, 1911, in going through her papers her executor found a holograph will of G. F. Hewson which had slipped down between the back and shelves of certain pigeonholes in a desk or bureau in which G. F. Hewson had apparently placed it.

By this will, dated April 24, 1894, the testator G. F. Hewson bequeathed the Ovington Glebe Estate in trust for his wife for life and after her death to the plaintiff George Hewson on certain conditions therein mentioned. He appointed the plaintiffs, his wife, and another person, who renounced, his executors.

On February 9, 1912, the letters of administration were revoked and probate was granted to the plaintiffs.

On January 14, 1913, the plaintiffs as executors brought this action against the purchaser, his mortgagees, and the tenant of the property for possession and an account of the rents and profits since the widow's death. It was subsequently arranged that the tenant's name should be struck out as a defendant.

The defendants relied on the sale by the de facto administratrix, which they were entitled and indeed bound to assume was made in due course of administration and which they said was in fact so made.

The following additional facts relating to the actual administration of the estate were proved at the trial.

[15] The statutory next of kin of G. F. Hewson were his widow, two nephews, and four nieces, three of the nieces being his coheirresses.

On June 16, 1899, the solicitors of the administratrix wrote on her behalf to each of the three coheirresses stating that at the time of G. F. Hewson's death it was confidently believed that he had made a will. They stated that it was known that at one time

such a will was in existence and on his deathbed G. F. Hewson informed his wife that he had left everything to her. Every effort, however, to find any will had so far failed, and though it was possible that it might at some future time be found, the presumption at present was that G. F. Hewson must have destroyed his former will with the intention of making a new one, but that this intention was never carried into effect. In these circumstances and acting on this presumption the widow had taken out administration and was now about to administer unless prior to the actual division a will came to light. They then pointed out that the real estate would devolve on the coheirresses subject to the widow's dower and informed them that it was of the poorest description and untenanted and was being farmed by a bailiff at a considerable loss, and that it was therefore imperative that it should be sold with as little delay as possible, and asking them to sign an enclosed authority for its sale, which was desirable if any advantage was to be derived from it.

The defendants objected that this letter was not evidence against them, but the objection was overruled.

It was also proved that prior to March, 1900, the estate duty, 188*l.*, on the realty was paid mainly out of the proceeds of sale of the four acres, and a small balance, about 15*l.*, out of the shares of personalty to which the widow and the coheirresses were entitled, and that the debts and funeral expenses, which were trifling, had been discharged. The succession duty was also paid out of the shares of personalty.

On March 1, 1900, the real estate still remained subject to six half-yearly instalments of a land improvement charge against which G. F. Hewson had covenanted to indemnify his vendor. The total instalments amounted to 23*l.* 13*s.* 1*d.* These [16] instalments were regularly paid by the administratrix in March and September.

On May 31, 1900, the date of the abortive auction, the liability was only 19*l.* 14*s.* 3*d.*

On August 23, 1902, the date of the contract, there was only one instalment left, namely, 3*l.* 19*s.*, which was paid by the administratrix on September 24, 1902, before completion, and on completion on October 13, 1902, the administratrix became entitled to a return of 40*l.* estate duty and 10*l.* succession duty overpaid on the real estate. The administratrix had, however, incurred a liability of 69*l.* 10*s.* to the auctioneers and solicitors for the abortive auction, and certain solicitors' charges, about 45*l.*, for subsequent attempts to sell the property and in connection with the final winding up of the estate, and which were quite independent of the scale fee on the actual purchase.

One-third of the net proceeds of sale was invested in 1394*l.* 11*s.* 8*d.* Consols to provide dower for the widow's life, and the residue was divided among the coheirresses. The widow's dower fund was still intact and stood in the name of Davis, her executor, a member of the firm of solicitors acting for the plaintiffs and formerly acting for the widow. The plaintiffs were willing to hand over this fund in exchange for the title deeds.

Upon these facts Astbury, J., gave judgment for the plaintiffs, on the ground that the title of the executors related back to the death of the testator, and that the grant of letters of administration and all acts done by the administratrix were void and of no effect. He considered that he was bound to come to this conclusion having regard to the authorities of *Graysbrook v. Fox*, 1 Plowd. 275, and *Abram v. Cunningham*, 2 Lev. 182, which were followed by *Warrington, J.*, in *Ellis v. Ellis* [1905] 1 Ch. 613.

From this decision the defendant, Sir John Shelley, appealed.

Mioklem, K. C., W. M. Hunt and H. S. Preston for appellant.

Jenkins, K. C. and Arnold Herbert, K. C. for respondents.

Solicitors: *Withall & Withall; Hedges & Davis.*

[27] COZENS-HARDY, M.R.—This appeal raises an important question as to the operation and effect of letters of administration granted by the Probate Division of the High Court, on the assumption that there was no will, to the widow of the deceased, where afterwards a will was discovered which has been admitted to probate, the letters of administration being recalled. It has been held by Astbury, J., that the executors' title relates back to the death, and that the grant of letters of administration was, and all acts done by the administratrix were, void and of no effect. The question arises upon a conveyance by the administratrix in 1902 of a freehold estate purchased by Sir John Shelley. The will was discovered in November, 1911, and proved in February, 1912. The executors have recovered the property in this action. It is not disputed that there was absolute good faith in all parties concerned. It will be convenient, in the first place, to consider the position if the property sold had been held for a term of years, and, in the second place, to consider what, if any, difference is made by reason of the property being held in fee simple. The learned judge held himself bound by *Graysbrook v. Fox*, decided in the Common Bench, in the 7th Elizabeth, and reported in 1 Plowd. 275, and *Abram v. Cunningham*, decided in the King's Bench in the 28th Charles II., which au-

thorities were recently followed by Warrington, J., in *Ellis v. Ellis* [1905] 1 Ch. 613. It may well be that the learned judge was justified, having regard to these authorities, in deciding as he did. Having had the advantage of very able arguments from counsel and having carefully considered all the authorities which have been called to our attention, I have arrived at the conclusion that the judgment under appeal ought to be discharged.

[28] I have read the judgment Phillimore, L.J., is about to deliver, in which he has fully considered the history of the law and the old authorities. I agree with that judgment. But, having regard to the importance of the case, I think I ought to state generally the line of reasoning by which I have reached the conclusion that the appeal should be allowed.

The earliest authority is in the Year Book 7 Edw. 4, where Littleton, with the concurrence of two other judges, said that where an executor has been appointed unknown to himself he may, when he has become aware, wholly take upon himself the powers of administration "and, Sir, the Ordinary may well grant administration in the mean time as he did here, but by the proving of the will the powers of the administrator are now determined." This authority has been recognized in Fitzherbert's Abridgment, 1577, in Brooke's Abridgment, 1587, in Rolle's Abridgment, in Viner's Abridgment, and, so far as I am aware, in every text-book of authority, including Williams on Executors, 10th ed. p. 199. It was referred to, and not disputed, in *Graysbrook v. Fox*, 1 Plowd. 275. The decision of the majority of the judges in that case is illogical because they admitted that a sale by the administrator for the purpose of paying funeral expenses and debts should not be avoided but should remain indefeasible, a principle which it is impossible to reconcile with the theory that a grant of administration was void ab initio. Side by side with *Graysbrook v. Fox*, 1 Plowd. 275, there are a series of authorities establishing that the Ecclesiastical Courts could grant and did grant limited administration even where there was an executor, for example (a) where an executor was a minor (*Pigot's Case*, 5 Rep. 29a) (b) where there was litigation and it was doubtful whether there was a will at all or which of two wills was valid, and (c) where an executor was out of the country. If there were any serious doubt as to the law before the Statute of Distributions (22 & 23 Car. 2, c. 10), I think the form of bond provided by the statute in cases of administration goes far to remove it. It contemplates the possibility of there being a will which may subsequently be proved. It imposes an obligation upon the administrator to pay debts and to distribute

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the surplus. All this could not be done [29] unless the administrator had, by virtue of the grant, the personal property vested in him. The bond under the Probate Act is substantially in the same form.

The contention which prevailed in the Court below leads to startling results. A debtor of the deceased man might pay the administrator and would get a good discharge. If sued by the administrator he would not be allowed to challenge the title of the administrator. A purchaser could not resist a decree for specific performance of a contract for sale by the administrator. In short, it seems to me that the person for the time being clothed by the Court of Probate with the character of legal personal representative is the legal personal representative, and enjoys all the powers of a legal personal representative, unless and until the grant of administration is revoked or has determined. If this view is not right no person could safely deal with, or accept, a title from an administrator, for it is impossible to prove that there may not be a will. The decision of Gorell Barnes, J., in *In the Goods of Wright* [1893] P. 21, is a direct authority in favour of the view which I have taken. In that case administration was granted until the original will or an authentic copy should be brought into the registry for the very purpose of enabling the sale of leaseholds to be completed and limited to that purpose. In my opinion *Graysbrook v. Fox*, 1 Plowd. 275, *Abram v. Cunningham*, 2 Lev. 182, and *Ellis v. Ellis* [1905] 1 Ch. 613, must be regarded as no longer law.

It remains to consider the effect of the Land Transfer Act, 1897, s. 2. I think it confers upon the legal personal representative for the time being the same powers with reference to real estate as he would have as to personal estate, subject to some exceptions not material for the present purpose. If, as I hold, the administratrix could have sold and conveyed a leasehold, I think she could convey, as she did, the freehold property to Sir John Shelley. I prefer to base my decision on the general grounds above stated, and not upon any special provisions in the Court of Probate Act, 1857, although I think there is a good deal in that Act which assists the appellant.

There is, however, a separate point under s. 70 of the [30] Conveyancing Act, 1881. It seems to me that the order granting administration to the widow was a judicial act, and even if that grant could be held void on the ground of want of jurisdiction the title of the purchaser would be protected under that section.

In my opinion the appeal succeeds and the action must be dismissed with costs here and below.

BUCKLEY, L.J.—On January 30, 1899, G. F. Hewson died seised. On June 13, 1899, letters of administration were granted to his widow. On October 13, 1902, she as administratrix conveyed the land to a bona fide purchaser for value without notice. On September 2, 1911, the widow died. On November 11, 1911, in going through her papers a holograph will of G. F. Hewson was found. It appointed the plaintiffs and two others to be executors. Until that time every one bona fide believed that he had died intestate. On February 9, 1912, the letters of administration were revoked and probate was granted to the plaintiffs. In this action, commenced on January 14, 1913, the plaintiffs have recovered in ejectment against the purchaser. We have to decide (standing as we do in a position in which we are more at liberty than was Astbury, J., to review the law) whether this is right.

If it is right it is difficult to see how any one could ever accept a conveyance from a legal personal representative. The situation is not confined to the case of no will found or believed to exist, nor to that of lost will and letters of administration granted in any such case. If the deceased died leaving a will whereby he appointed executors and they proved and sold, the case would be the same if subsequently a later will came to light by which the former will was revoked. Further, if in any case a purchaser declined to complete and the legal personal representative de facto brought his action for specific performance and recovered judgment, the purchaser would nevertheless be liable to ejectment although in the specific performance action he could not have been heard to deny that the plaintiff was legal personal representative. If an administration action were brought in which an order was made for sale and a vesting order obtained, [31] the purchaser would have no title. *Jones v. Barnett* [1900] 1 Ch. 370, would not apply to such a case. To take possession and administer without probate or administration within a limited time is a statutory offence visited with a penalty (55 Geo. 3, c. 184, s. 37), but at the same time acts done under letters of administration bona fide taken are according to the argument void. If such be the law it urgently requires to be set right by legislation. We have to consider whether it is the law.

An inquiry which it is convenient to make in the first instance is whether the purchaser under such circumstances has obtained the legal estate. If he has, and if, as is here the case, he is bona fide purchaser for value without notice, is there any ground to take it from him? If the legal estate was in the administratrix it has passed to the purchaser. Was it under s. 1 of the Land Transfer Act,

1897, in the administratrix? Upon G. F. Hewson's death leaving a will appointing executors, it is contended and I assume that the legal estate vested in the executors, although no one knew that there were such. This is so unless "executor" in s. 24, sub-s. 2, of the Land Transfer Act means "executor who has proved." It is not so defined in the Act of 1897. The definition is in contrast with that in s. 8, sub-s. 4, of the Conveyancing Act, 1911. For the present purpose I do not find it necessary to decide, but assume, that in the language of the Land Transfer Act an executor is before probate personal representative. But when on June 13, 1899, letters of administration were granted to the widow the legal estate, by virtue of the 1st section, vested in the administratrix if she thereupon became within the section the deceased's personal representative. Did she become such personal representative? The respondents contend that she did not. By their contention as ultimately evolved in the argument I understand them to mean not that the order of the Probate Division and the grant to her were for all purposes void ab initio, but that the effect of the order was that notwithstanding she became administratrix yet no property vested in her. Having regard to ss. 77 and 78 of the Court of Probate Act, 1857, they say that for the purposes of those sections the order was a good order. But they add that the order did not operate to [32] pass the property because the property was, they say, in some one else, namely, the unknown executors. I find it difficult to understand an administrator who as regards ownership of the property to be administered is nobody but at the same time is a person owing the duties expressed in the bond, namely, well and truly to administer all the estate which by law devolves to and vests in the personal representative of the deceased, but having no property in that which he has to administer. However, the argument is that there was no jurisdiction in the Court of Probate to make such an order as would reach the property. I shall presently examine the cases to see whether this can be maintained.

There are many cases in which notwithstanding the existence of an executor the Court of Probate may grant administration, for instance *durante minore aetate* (In re Cope, 16 Ch. D. 49); *durante absentia* (in which case 38 Geo. 3, c. 87, s. 7, would, I agree, confer such power as would exist in an administrator *durante minore aetate*): *pendente lite* even where the *lis* is touching an executorship (*Walker v. Woollaston*, 2 P. Wms. 576, 589; *Bacon's Abridgement. Executors (G)*); until the will (which was in India) can be brought here for probate (In the Goods of Metcalfe, 1 Add. Ecc. 343); or

until the will be found (In the Goods of Campbell, 2 Hagg. Ecc. 555; In the Goods of Wright [1893] P. 21); and may clothe the administrator with the office and cast upon him the duties of administrator. Sect. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), includes amongst other events in which an administrator may be appointed the event of the executor being resident out of the United Kingdom. Such an administrator is and an administrator appointed for a limited time such as above mentioned is, I think, personal representative within s. 1 of the Land Transfer Act. If there be an executor and he has acted (so that he cannot subsequently renounce), but the Court does not know it and grants letters of administration to another, the administration may be revoked, but until revoked is valid according to *Doyle v. Blake*, 2 Sch. & Lef. 237. Lord Redesdale there observed that "some of the old cases could [33] scarcely be supported on principle, they were decided whilst a great jealousy of the Ecclesiastical Court prevailed," and added that "the administration was void only as a protection to the executor but in no other sense."

In *Allen v. Dundas*, 3 T. R. 125, 129, 131, a receipt given by the executor of a forged will which had been admitted to probate was held to be a good discharge although the probate was afterwards declared null and administration granted to the next of kin. Ashhurst, J., said: "Every person is bound to pay deference to a judicial act of a Court having competent jurisdiction," and Buller, J., said: "Here there was an executor *de facto* who had obtained a probate and the defendant neither knew nor could tell whether he was rightful executor or not further than he was informed by the probate which he could not dispute." And again: "Evidence that another and not the plaintiff was executor or that the testator was non compos mentis or that the will was forged could not be admitted, for that would be to falsify the proceedings of the Ordinary in cases of which he was judge."

The appellant says, and I think with justice, that the order of the Court of Probate is within s. 70 of the Conveyancing Act, 1881, an order which as against a purchaser is not to be invalidated on the ground of want of jurisdiction. So that even if (as I think is not the case) the Probate Court had not jurisdiction to grant administration, the purchaser is entitled to say that as against him no one can say the order was invalid.

The decision which is said principally to create difficulty is the case of *Graysbrook v. Fox*, 1 Plowd. 275. The dates were: Death on December 27, administration granted to the son on January 15, sale by the administrator at some date before January 27, pro-

bate of the will by the son-in-law who was executor on January 27, goods delivered to Fox the purchaser on February 1. In the action the executor recovered from Fox, who had purchased from the administrator. Walsh, J., and Dyer, C.J., held for the plaintiff, Weston, J., for the defendant. Dyer, C.J., says that "the executor takes his commencement by a temporal act namely, by the making of the will of the testator, which is a temporal act, but takes its perfection by a spiritual act, namely, by probate in the [34] spiritual Court, and the executor's authority is over a thing temporal. But the Ordinary or administrator have no authority or interest unless the deceased die intestate" (meaning seemingly die without appointing an executor) (p. 280). Again at p. 281: "At the death the law vests the property in the executor and consequently never vests it in the Ordinary and therefore never through him in the administrator." Dyer, C.J., however, cites *Littleton* in 7 Edw. 4, 12b: "presently by the probate the power of the administrator is *determined*." The passage in the Year Book is as follows: "A man may make me his executor unknown to myself, etc., and then when I have become aware of it I may well take upon myself the power of administration disposition, etc., and, Sir, the Ordinary may well grant administration in the meantime as he did here, but by the proving of the will the powers of the administrator are determined unless the executors have at one time refused before the Ordinary, then perchance the law may will otherwise." In *Fitzherbert's Abridgment* (1577), *Administrators* (folio 13), and *Brooke's Abridgment* (1586), *Executors*, the passage is found in similar terms. If "*determined*" here means, as I think it does, "*brought to an end*" and not "*declared to be void*," the passage is no authority for saying, as Dyer, C.J., said, that the property never has vested in the administrator. That is for the purposes of the Land Transfer Act the material question. Further, in 1 *Rolle's Abridgment*, p. 907, and in 11 *Viner's Abridgment*, p. 66, the case is referred to as authority for the proposition that "If a man makes an executor, but it is not known, or concealed, the Ordinary may grant administration, and this shall be good till the other prove the will." In this state of things it seems to me that *Graysbrook v. Fox*, 1 Plowd. 275, is not an authority that such an order for administration creates no title in the administrator, and having regard to the passage in *Plowden* at p. 282 it seems impossible that it can be so. That passage affirms that a sale by the administrator to raise money for funeral expenses or debts is good. How can a sale of goods in which the vendor has no property be good? Either the property is or it is not in the administrator.

If, as *Graysbrook v. Fox*, 1 Plowd. 275, affirms, the administrator [35] has the property for some purposes, it must be that the property passes to him although he may be restricted in his power over it, and when probate is granted to the executor that power "is determined." The result of the decision I think is at most that the property does vest in the administrator, but with restrictions upon his power of dealing with it. This view is borne out by such cases as *Prince's Case*, 5 Rep. 29b, where it was held that the administrator *durante minore aetate* could sell, but not unless it be of necessity for payment of debts or on the ground of *bona peritura*, and is I think consistent with all the cases. *Graysbrook v. Fox*, 1 Plowd. 275, looks very much like a case in which there was a race between son and son-in-law and the title under the executor was preferred to that derived under the administrator. Upon the facts moreover it appears that the goods only "came to" Fox on February 1 after probate granted. In *Abram v. Cunningham*, 2 Lev. 182, 2 Mod. 146, Freem. K. B. 445, counsel conceded that *Graysbrook v. Fox*, 1 Plowd. 275 had decided more than I think it did decide, that the court held that administration taken when there was an executor "was void at first and was not made good by the renunciation of the executor." The case is treated, however, as one of concealed will, not of unknown will.

Woolley v. Clark, 5 B. & Al. 744, 7 E. C. L. 249, was again a case of concealed will. The defendants were two, namely, the executor of an earlier will and the auctioneer who sold by his direction, and they had notice of the later will previously to the sale of the goods. The purchaser was no party. Best, J., in giving judgment says that in the case of a judgment irregularly obtained "the sheriff is justified," and applies that illustration by saying that the party who obtained the probate was not justified in selling, "but a creditor who paid a debt while the letters of administration were unrepealed would be protected."

In *Boxall v. Boxall*, 27 Ch. D. 220, the will contained no appointment of executors, so that the question as between executor *de facto* and administrator suppressing a will did not arise.

These are the cases relied upon as supporting the proposition [36] that a disposition by the administrator when there is in fact an executor is void. To these is to be added *Ellis v. Ellis* [1905] 1 Ch. 613, which Astbury, J., in fact followed in the judgment now under appeal.

I do not think that *Graysbrook v. Fox*, 1 Plowd. 275, supports the above proposition, and if *Abram v. Cunningham*, 2 Lev. 182, 2 Mod. 146, Freem. K. B. 445, supports it I

think it is wrong. The true view of these cases is I think that the property does pass, that the authority of the administrator is not a void but a determinable authority, and that for certain purposes at any rate he has a power of disposition over the property to be administered. In *Packman's Case* (1595) 6 Rep. 18b, and *Blackborough v. Davis* (1701) 1 P. Wms. 41, it was decided that letters of administration granted contrary to the statute (e. g., not to the nearest of kin) when repealed were not void, but all dispositions of goods pending the administration were good. From this it seems to follow that the order of the Ecclesiastical Court is not void *ab initio*, and that the property does pass to the administrator for the time being.

There is clear authority that payments to as distinguished from dispositions by what is called the "visible administratrix" (*Stephens v. Langley*, Finch 40, as, e. g., the executor of a forged will *Allen v. Dundas*, 3 T. R. 125, or the administrator when there existed a will *Prosser v. Wagner*, 1 C. B. (N. S.) 289, 87 E. C. L. 289) are valid.

I arrive, therefore, at the conclusion that where an administrator has been appointed by an order of the Probate Court the visible administrator, as he is called in *Stephens v. Langley*, Finch 40, is a person who is within s. 1 of the Land Transfer Act a "personal representative." From this it results that the real estate which was vested in the person of whom he is personal representative vests in him by virtue of the words "become vested in his personal representatives or representative from time to time," and that a purchaser for value without notice from him conveying as administrator obtains a good title.

It follows that this appeal must be allowed.

[37] PHILLIMORE, L.J.—On January 30, 1899, one George Francis Hewson died leaving a widow, no children, three nieces who were his coheirresses at law, and the same three with three other nephews and nieces his next of kin. He appears to have stated to his wife shortly before his death that he had made a will and left everything to her. But after diligent search no will could be found. The widow therefore took out general letters of administration, collected and divided the personal estate, and ultimately on October 13, 1902, sold and conveyed his real estate, being a farm in Hants, to the defendant Sir John Shelley for 3500*l*. A part of the proceeds was retained to secure the widow's dower, and the rest was divided between the coheirresses. The sale was apparently made with the consent of the coheirresses but in exercise of the legal title of the administratrix. It does not distinctly

appear whether it would or would not have been necessary for payment of debts.

On September 2, 1911, the widow died. Her executor, looking over and for papers, discovered at the back of a bureau a holograph will of George Francis Hewson. This discovery was made on November 11, 1911. The will had been made on April 24, 1894. By it the testator appointed four executors, one being his wife, and devised his estate to his wife for life with remainder to a relative who was not heir-at-law, nor one of the next of kin. On February 9, 1912, the two surviving executors, one being the devisee of this estate, obtained recall of the letters of administration and probate of the will; and on January 14, 1913, they brought this action against the purchaser, Sir John Shelley, his mortgagees, and the tenant in occupation to recover the estate.

Astbury, J., has decided with reluctance and in obedience to authorities, which were probably binding upon him as a judge of first instance, in favour of the plaintiffs, and it is from this judgment that the present appeal is brought.

The principle upon which the learned judge decided was that this administration, there being in existence though unknown a will appointing an executor, was void—not voidable but void.

Before us the counsel for the respondents have preferred to support the judgment on the ground that the administratrix in the circumstances acquired no title to any property, at any rate [38] not to the real property of Captain Hewson, and having no title could pass none on. The case has been most ably and learnedly and, I might add, courageously argued by counsel on both sides; and it necessitates a research into first principles.

I propose, in the first instance, to deal with the matter apart from the effect of the Land Transfer Act, 1897, and to consider the case as if we were dealing with a conveyance of leaseholds, chattels real.

It is said for the respondents that the property of a deceased person vests in the executor immediately upon the death and by the mere effect of the will. In some senses this is true. It is true that an executor can properly act at once, that he can collect his testator's goods, receive and give discharge for debts due, and alien the goods including chattels real in due course of administration, subject always to the condition that he will some time or another satisfy the Court that has jurisdiction over the subject-matter that there is a will and that he is the executor. But till he has proved it or till it has been proved to the Court, till it has become probatum, his title is not certain, and in that way is not complete.

The Statute of Westminster the Second, c. 19 (A. D. 1285) recognizes that the personal property of a person dying intestate passes to the Ordinary, making provision that in future the Ordinary shall be responsible for the deceased's debts so far as the assets extend. Subject to this provision the Ordinary remained as before entitled to dispend the goods of the deceased to such pious uses as he thought fit. Before and after this Act an administrator was the mere bailiff or deputy of the Ordinary whom he selected at his will and pleasure, who had no independent right and could not bring an action any more than a sequestrator appointed by the Ordinary: *Harding v. Hall* (1842) 10 M. & W. 42; *Phillimore on Ecclesiastical Law*, 2d ed. p. 375.

The Act 31 Edw. 3, c. 11 (A. D. 1357) restricted the power of selection and gave the administrator, called in the Act the deputy, power to sue as an executor could: see *Hensloe's Case*, 9 Rep. 40a. The Act 21 Hen. 8, c. 5 (A. D. 1529) further limited the Ordinary in his choice of an administrator.

[39] At some stage in the history of our law (when it is not necessary to determine) the Ordinary became bound to allow a *pars rationabilis* to the widow and next of kin.

But it was not till the Statute of Distributions (22 & 23 Car. 2, c. 10, A. D. 1670) that the Ordinary became bound to distribute "the surplusage" (those are the words of the statute) to the widow and next of kin in shares and in an order of succession statutorily defined. By the same Act the Ordinary was directed to take bond with sureties in a form provided by it from the administrator to insure the latter's due administration. The condition of the bond is important for another part of the argument. I rather think that though the word "administration" is used in the Act of Henry VIII. the Act of Charles II. is the first which uses the word "administrator."

From the date of the Act of Charles II. the Ordinary ceases to have any interest in the administration of the estate of an intestate. He has no discretion as to the distribution of the "surplusage." He becomes a mere judicial officer, declaring the intestacy, determining it *inter partes* if there is a dispute, appointing as administrator the person who is entitled by law to be appointed, determining in what was called "an interest" suit who is the person entitled, if there is a dispute, and taking his established fees of office or Court.

As soon as the temporal Courts had come to appreciate this position their jealousy of the Ordinary ceased, as is stated by Lord Redesdale in *Doyle v. Blake* (1804) 2 Sch. & Lef. 231. It is perhaps unfortunate that *Abram v. Cunningham*, 2 Lev. 182, should

have come up for decision a year or two before the Act of Charles II.

I will deal with the authorities later on, but before beginning with them in detail, I would observe that in some of them it is put as if the jurisdiction of the Ordinary was conferred upon him by the statute 31 Edw. 3, c. 11, and was restricted by that statute to cases of intestacy. The jurisdiction was not conferred by that statute or even by the earlier one of Westminster the Second. The jurisdiction, or, more properly, the vesting of the estate of an intestate with power to distribute it subject to certain provisions as he thought proper, is recognized by the [40] Statute of Westminster the Second as already existing. The statute of Edward III. requires the Ordinary where the estate has become vested in him to pass it on to an administrator, whereas before the administrator was only his deputy created for his own ease and convenience. Still, however, if a special construction be put upon the word "intestate," there is no objection to saying that it is only in case of an intestacy that the estate vested in the Ordinary, and could be committed or passed on by him to an administrator. That some special meaning must be put upon the word "intestate" is obvious. No one has ever denied the power of the Ordinary to grant administrations cum testamento annexo or de bonis non; and it will appear as I proceed that though administrations lite pendente, durante minore aetate, and durante absentia have been disputed, ultimately the power of the Ordinary to grant them was established, and when I say this I do not mean established by 38 Geo. 3, c. 87, or by the Court of Probate Act (20 & 21 Vict. c. 77) but by decisions.

The question, therefore, narrows itself down to this, if we look at it from the point of view of jurisdiction, whether a deceased who leaves no known will, or at any rate no known executor, may be treated as intestate. If he may be so treated, in other words, if a general administration may lawfully be granted and not be void, though it appear afterwards that there is a will with a living executor who consents to act, it will be strange if the acts of that administrator validly appointed must be deemed invalid, and if though authorized to administer the estate of the deceased he has no such title to it as to enable him to dispose of it in due course of administration.

Now I come to the cases.

I have read and reread the case of *Graysbrook v. Fox*, 1 Plowd. 275, and I think there is no explaining of it away. It was there held on a clean case raised by demurrer that, as against an executor who subsequently obtained probate, the title of a purchaser to goods sold to him by a previous administra-

tor was worthless. And in the case of *Abram v. Cunningham*, 2 Lev. 182, a title given by an administrator de bonis non was held worthless as against the claim of an administrator to the executor. It is true that in both cases [41] the Court may have well thought that the merits were with the successful party and that this might possibly account for neither case going further on appeal. In the first, the defendant could only allege that he had bought the goods from the administrator a month after death and twelve days after the letters of administration. And in the second case the sale was made after the administrator had been cited to bring in his letters so that they might be revoked, and only two days before they were revoked. But as I have said each case purports to be a clean decision on the point of law. The criticism on the judgment of the majority of the Court in the first case is that they had not the courage of their opinions. They start by saying that the administration was merely void, and yet one of them, Walsh, J., with the concurrence of Dyer, C.J., and with the concurrence of the minority judge, Weston, J., said (p. 282) if the defendant had pleaded that the goods had been sold to him to raise money in discharge of the funeral or of the debts of the deceased, the sale had been good and indefeasible. On what principle it is difficult to see. If the estate of the deceased had been vested in the Ordinary and had been passed by him to the administrator because there was an intestacy in the sense that there was no will, surely the administrator could make a good title, and it would not be for the purchaser to inquire the object of the sale; but if the estate vested by law in the executor immediately on the death without probate and probate is only necessary to perfect the evidence of title, one does not see how the administrator got title or could pass a title for any purpose. Another criticism is that Lord Dyer seems in part to found himself on a case in the Year Book 7 Edw. 4 which is in apparent contradiction to the decision which he gives.

Abram v. Cunningham, 2 Lev. 182, is a more extreme case because there the title was in fact tried between two administrators. However, those cases have found their way into the text-books, and have been recognized as law in comparatively recent times. Kay, J., distinguished the second in *Boxall v. Boxall*, 27 Ch. D. 220, where there was the fortunate accident that the will appointed no executor. Neville, J., escaped from it by proceeding on the [42] Indian Succession Act, 1865, in *Craster v. Thomas* [1909] 2 Ch. 348; *Woolley v. Clark*, 5 B. & Al. 744, 7 E. C. L. 249, is, I think, distinguishable. It was not an action against the purchaser from an administrator, but against the adminis-

trator himself, who under an administration cum testamento annexo sold property at his peril at a time when he had notice of a later will which ultimately received probate. Warington, J., moreover, in *Ellis v. Ellis* [1905] 1 Ch. 613, purported to follow the two old cases, and added his sanction to their authority.

On the other hand, there has been a current of opinion in an opposite sense. In the Year Book 7 Edw. 4, 12 and 13, Littleton, J., with whom Newton, J., and Danby, J., agreed, held that the Ordinary may well grant administration in the meantime, that is, before the will is known, or it may be even before the executor has come forward and sought for probate, but by the probate of the testament the power of the administrator is determined; and the decision appears to have been to that effect. This means that the administrator gets and can give a good title subject to its being determined by the production of a will with an executor and perhaps also probate. Whether it be necessary, as is the modern practice, first to recall the letters of administration, or whether the power of the administrator ceases ipso facto upon his knowledge that there is a will, is a point immaterial for the present discussion.

The effect of *Graysbrook v. Fox*, 1 Plowd. 275, no doubt is given in Rolle's Abridgment at p. 919, but the doctrine of the Year Book case already cited appears at p. 907. I have mentioned the bond required by the Statute of Distributions. That contemplates that administration may be committed though there be a will, and only requires of the administrator that he should bring in his letters upon knowledge of it. Again the Courts have held that such an administrator or an executor under a forged will can give a good discharge to the deceased's debtors: see *Allen v. Dundas*, 3 T. R. 125, *Woolley v. Clark*, 5 B. & Al. 744, 7 E. C. L. 249, and *Prosser v. Wagner*, 1 C. B. N. S. 289, 87 E. C. L. 289. And then there are the peculiar cases of administrations *lite* [43] *pendente*, *durante minore aetate*, *durante absentia*, *durante animi aut corporis vitio*.

As to administration *lite pendente*, consistently with the view that the Ordinary has no jurisdiction, or, if it be put the other way, no property to vest, where there is an executor, a Court of common law held in the case of *Frederick v. Hook*, Carth. 153, that such an administration passed no title. But in *Walker v. Woollaston*, 2 P. Wms. 576, the contrary was decided by the Court of Common Pleas after an able and suggestive argument by Mr. Peere Williams, and has since obtained as law. Sir George Lee, Judge of the Prerogative Court, remarks somewhat drily in *Maskeline v. Harrison*, 2 Lee Ecc.

258, on the change of view of the Common Law Courts in this matter. Lord Redesdale in *Doyle v. Blake*, 2 Sch. & Lef. 231, has some pertinent observations to the effect that some of the old cases could scarcely be supported on principle. He appears to have held that an administration was not a mere nullity but only repealable.

As to administration *durante minore aetate*, no doubt it rested after a time upon the express words of the statute 38 Geo. 3, c. 87. But it had been established before in *Piggot's Case*, 5 Rep. 29a, with which the next case—*Prince's Case*, 5 Rep. 29b—when properly considered agrees. See also *Sir Finch's Case* (1606) 6 Rep. 63a, 67b.

As to administration *durante absentia*, the case of *Webb v. Kirby*, 7 DeG. M. & G. 376, was relied upon for the plaintiffs, because there the Court held that a title derived from an administrator *durante absentia* was not certain enough to be forced upon a purchaser; but the reason given is not that such an administrator had no estate, but that his estate only lasts during the absence and life of the executor, and there could be no constat that the executor was still alive.

As to administration *durante animi aut corporis vitio*, no direct authority as to its validity or otherwise has been cited; but it is classed with the other special administrations in [44] *Oughton's Ordo Judiciorum*, titulus 219, note A; and in *Burn's Ecclesiastical Law* (the edition by the late Sir Robert Phillimore, vol. iv. p. 386), where authorities are cited.

Both administrations *durante minore aetate* and *durante absentia* seem to be recognized by the Court of King's Bench in *Slaughter v. May* (1704) 1 Salk. 42. With regard to administrations *durante absentia*, there is this remarkable observation, that they were granted concurrently with the practice of giving administration to the attorney of an absent executor: see *In the Goods of Earl*, L. R. 1 P. & D. 450.

Then there are some isolated and remarkable cases which one may almost call cases of administration *quousque*: In the *Goods of Metcalfe*, 1 Add. Ecc. 343; In the *Goods of Campbell*, 2 Hagg. Ecc. 555, and the more recent case in the Probate Division of the High Court of Justice. In the *Goods of Wright* [1893] P. 21, which, if sound, must be supported on the principle that administration can be validly granted limited to the time when a will known to have been in existence after the death of the testator is brought in for probate.

How any of these administrations could be other than traps for the unwary if they did not enable the administrator to pass property, how if they do enable an administrator to pass property they are consistent with a

theory that the property immediately on death vests in the executor and cannot be divested, even temporarily, by the Ordinary or the Court of Probate, I fail to understand. It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of the deceased for the repose of which masses were to be provided, the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a will. No doubt there is much hardship upon legatees who may find that possibly owing to the supineness of an executor, or the fraud of those about the deceased at his death, a will is not proved till the estate has been [45] already dispersed amongst the next of kin. I quite recognize this. I observe that in Oughton in the same place which I have quoted it is said that by the course of the Prerogative Court letters of administration were never granted till at least fourteen days after death, and in one of the authorities I saw it stated that an administrator ought not to distribute among next of kin under a twelve-month, or does so at his peril. Sect. 5 of the Statute of Distributions seems to support this. If this be the law I am well satisfied. To hold otherwise than as we are holding would make all titles of the representatives of dead persons uncertain. It is not only that an administrator may be succeeded by an executor, but the executor under one will may oust the executor of another, and the executor of a will which turns out to be forged may have to give place to an administrator, as in *Allen v. Dundas*, 3 T. R. 125. It is not as if we were asked to decide that the mere discovery of a will avoided all the acts of the administrator. If the will names no executor, if the executor be dead leaving no executor, if he or his executor if he takes his place refuses to take out probate and accept the executorship, the title of the administrator would, I gather, confessedly prevail. Those who have purchased goods from an administrator may find their title depend on the caprice of an executor or of an executor's executor.

In the Court of Appeal I am not prepared to follow the actual decisions in the cases of *Graysbrook v. Fox*, 1 Plowd. 275 and *Abram v. Cunningham*, 2 Lev. 182, in spite of the amount of authority and acceptance which they have enjoyed. Because:

(1) The reasoning in the principal case lays down no consistent rule.

(2) It is in conflict with the earlier case in the Year Book.

(3) The two cases were decided at a time of unfortunate jealousy of the Courts Christian.

(4) They are in conflict with the principles established by a body of unquestioned authorities.

(5) So to decide would be to establish that a number of void orders are made as matters of course by the High Court of Justice.

[46] (6) Such a decision would put serious difficulties in the way of the realization of the estates of all deceased persons.

If this, therefore, were a case of chattels real I should hold that the administrator had a valid title and could make a good sale.

It being a case of freehold I have next to consider the Land Transfer Act, 1897, ss. 1, 2, 11 and 24.

It was not to be supposed that this Act would give an executor or administrator a better title to freeholds than he had to leaseholds. But it is to be supposed and is, I think, the case that it gives him the same title. This being so, the Act seems to me of value as supporting the view which I have taken as to the previous state of the law. Freeholds are to vest in the personal representative from time to time. Personal representative is defined to mean executor or administrator. The words are apt for this very state of circumstances. He who for the time is clothed by the Court with authority as personal representative is to have the freeholds vested in him.

I have not thought it necessary to consider the arguments of counsel for the appellant founded on the provisions of the Court of Probate Acts of 1867 and 1868 or upon s. 70 of the Conveyancing Act, 1881.

I am of opinion that this appeal should be allowed and that judgment should be entered for the appellant.

NOTE.

Validity of Acts of Administrator Whose Appointment Is Revoked by Subsequent Discovery of Will.

General Rule.

"At one time the rule seems to have been firmly established that if administration was granted on the supposition that no will existed, and it subsequently developed that there was a will, all the proceedings under the administration were void and could be assailed collaterally. And this was true whether the will was suppressed, or its existence was unknown, or it was doubtful who was executor, or he was concealed or abroad at the time administration was granted. Now, however, the rule seems to be firmly established to the contrary. So, in nearly all jurisdictions where letters testamentary or of administration have been revoked or va-

cated as having been improvidently granted, the acts of the executor or the administrator, done in good faith, are valid. They are binding upon the estate, though his letters are subsequently revoked and it appears that the administration was obtained by fraudulently suppressing a will. Persons dealing with the administrator in good faith prior to the revocation of the letters will be protected. And a similar protection will be extended to rights acquired under a previous grant of administration. In many jurisdictions statutes regulating the matter have been enacted, their general tenor being that the lawful acts of executors and administrators who subsequently are removed, or whose letters are revoked, done in good faith, shall remain valid and effectual. Usually a bona fide payment to an administrator to whom letters have been regularly issued by an authority having jurisdiction to grant letters testamentary or of administration is a legal discharge to the debtor." 11 R. C. L. tit. *Executors and Administrators*, § 102. So, letters of administration granted as in case of intestacy, where a will is afterwards produced and probated, are held to be voidable only and not void. *Jennings v. Moses*, 38 Ala. 402; *Floyd v. Clayton*, 67 Ala. 265; *Sands v. Hickey*, 135 Ala. 322, 33 So. 827; *Clark v. Holt*, 16 Ark. 257; *Shephard v. Rhodes*, 60 Ill. 301; *Kittredge v. Folsom*, 8 N. H. 98; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L.R.A. 541; *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Patton's Appeal*, 31 Pa. St. 465; *Foster v. Brown*, 1 Bailey L. (S. C.) 221, 19 Am. Dec. 672; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61; *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415. See also *Bradley v. Broughton*, 34 Ala. 694, 73 Am. Dec. 474; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213. And see the reported case.

Therefore, where administration has been granted and proceeded with, before the discovery of a will, the acts of the administrator, in which third persons have an interest, performed before the probate of the will and not in derogation of the provisions thereof, are valid and effectual for the purposes of administration, and cannot be attacked collaterally. 2 Kent Com. 413; *Fidelity*, etc. Co. v. *Freeman*, 109 Fed. 847, 48 C. C. A. 692, 54 L.R.A. 680; *Floyd v. Clayton*, 67 Ala. 265; *Martin v. Dix*, 134 Ga. 481, 68 S. E. 80; *Shephard v. Rhodes*, 60 Ill. 301; *Rebhan v. Mueller*, 114 Ill. 343, 2 N. E. 75, 55 Am. Rep. 869; *Ragland v. Green*, 14 Smedes & M. (Miss.) 194; *Kittredge v. Folsom*, 8 N. H. 98; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L.R.A. 541; *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Patton's Appeal*, 31 Pa. St.

465; *Zeigler v. Storey*, 220 Pa. St. 471, 69 Atl. 894, 17 L.R.A. (N.S.) 878; *Foster v. Brown*, 1 Bailey L. (S. C.) 221, 19 Am. Dec. 672; *Benson v. Rice*, 2 Nott & McC. (S. C.) 577; *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221; *Hunt v. Wilkinson*, 2 Call (Va.) 49, 1 Am. Dec. 534; *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415. See also *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61.

The early English decisions on the question of the validity of the acts of an administrator whose appointment is revoked by the subsequent discovery of a will, are in conflict. Thus, it was held that until a will was found, the court had power to grant letters of administration, and that when the will was found and proved, the powers of the administrator ceased, but his acts, done in due course, were valid. That rule was based on the decision in the Year Book (7 Edw. IV, 12b) wherein Littleton, with the concurrence of two other judges, said: "A man may make me his executor unknown to myself, etc., and then when I have become aware of it I may well take upon myself the power of administration, disposition, etc., and, Sir, the ordinary may well grant administration in the meantime as he did here, but by the proving of the will the powers of the administrator are determined unless the executors have at one time refused before the ordinary, then perchance the law may will otherwise." To the same effect, see *Fitzherbert's Abridgement*, tit. *Administrators*, fol. 13; *Brooke's Abridgement*, tit. *Executors*, fol. 308. The foregoing decision has been referred to as authority for the proposition that "if a man makes an executor, but it is not known, or concealed, the ordinary may grant administration, and this shall be good till the other prove the will." 1 Rolle Abr. tit. *Executor*, p. 907; 11 Vin. Ab. tit. *Executors*, p. 66. See also *Boxall v. Boxall*, 27 Ch. Div. 220, 53 L. J. Ch. 838; *Craster v. Thomas* [1909] 2 Ch. 348, 78 L. J. Ch. 734, 101 L. T. N. S. 66, 25 Times L. Rep. 659. But, on the contrary, there were decisions to the effect that where administration had been granted, but subsequently a will appointing an executor was found, the probate of the will superseded the administration and rendered it absolutely void ab initio; so that any dispositions made of the assets by the administrator were also void. *Graysbrook v. Fox*, 1 Plowd. 275, 75 Eng. Rep. (Reprint) 419; *Abram v. Cunningham*, 2 Lev. 182, 83 Eng. Rep. (Reprint) 508, 3 Keb. 725, 84 Eng. Rep. (Reprint) 975, T. Jones 72, 84 Eng. Rep. (Reprint) 1152, 1 Vent. 303, 86 Eng. Rep. (Reprint) 195, 2 Mod. 146, 86 Eng. Rep. (Reprint) 992, *Freem. K. B.* 445, 89 Eng. Rep. (Reprint) 333; *Woolley v. Clark*, 5 B. & Ald. 744, 7 E. C. L. 249, 106 Eng. Rep. (Reprint) 1363; *Ellis v. Ellis*

[1905] 1 Ch. 613, 74 L. J. Ch. 296, 92 L. T. N. S. 727 [1905] W. N. 44, 53 W. R. 617. Under such rule the acts of the administrator could not be made good by the subsequent refusal of the executor to act as such. *Abram v. Cunningham*, 2 Lev. 182, 83 Eng. Rep. (Reprint) 508, 3 Keb. 725, 84 Eng. Rep. (Reprint) 975, T. Jones 72, 84 Eng. Rep. (Reprint) 1152, 1 Vent. 303, 86 Eng. Rep. (Reprint) 195, 2 Mod. 146, 86 Eng. Rep. (Reprint) 992, Freem. K. B. 445, 80 Eng. Rep. (Reprint) 333. In *Graysbrook v. Fox*, 1 Plowd. 275, 75 Eng. Rep. (Reprint) 419, the title of a purchaser to goods sold to him by a previous administrator was held to be worthless as against an executor who subsequently probated a will of the deceased. But in the same case it was said that the alienation by the administrator of the assets in discharge of the funeral expenses or the debts of the deceased, or the necessary expenses of the administrator should not be avoided, but should remain indefeasible as against the subsequent executor. To the same effect, see *Woolley v. Clark*, 5 B. & Ald. 744, 7 E. C. L. 249, 106 Eng. Rep. (Reprint) 1363. In *Ellis v. Ellis* [1905] 1 Ch. 613, 74 L. J. Ch. 296, 92 L. T. N. S. 727 [1905] W. N. 44, 53 W. R. 617, the court held that the essence of the foregoing statement in *Graysbrook v. Fox*, *supra*, was that the act in question was one which the administrator was compellable to do, and though as between the administrator and the executor of the will which was suppressed, but subsequently probated, the payment of a debt might well be treated as proper, so as to entitle the former to credit, yet the payment of the mortgage stood on a different footing, being a voluntary act, whereby no title was conferred.

However, by the decision in the reported case, which expressly overrules the holdings in *Graysbrook v. Fox*, *Abram v. Cunningham*, and *Ellis v. Ellis*, *supra*; the English rule is now declared to be that a grant of letters of administration is not rendered void *ab initio* by the subsequent discovery and probate of a will appointing executors, and that the acts of the administrator, prior to the revocation of his letters, done in good faith and in the due course of administration, are valid, which is in accord with the rule in the United States.

Application of Rule.

In the reported case it appears that the widow of the deceased was granted letters of administration, no will having been found. Thereunder she sold certain of the real property by virtue of the power conferred on her by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). Later a will was found appointing others as executors, which

was probated. It is held that the act of the administratrix was to be deemed valid and that the letters granted her were not void *ab initio*, so that the purchaser of the lands acquired a good title from her. The court also holds that under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, § 70), the order granting administration to the widow was a judicial act, and that even if that grant could be held void on the ground of want of jurisdiction, the title of the purchaser would be protected thereunder.

In *Zeigler v. Story*, 220 Pa. St. 471, 69 Atl. 894, 17 L.R.A. (N.S.) 878, the court held that a bona fide payment of a debt due to a decedent's estate made to the administrator before the discovery and probate of a will, was valid and discharged the indebtedness. The court said: "This is the rule announced in every jurisdiction, and for the reasons assigned in the numerous cases which we have already cited. The subsequent discovery of a will after the granting of letters of administration will not void or invalidate acts performed by the administrator prior to such discovery. The authority conferred by the letters granted by the register authorizes him to administer the estate, to collect moneys due and disburse them in discharge of the legal indebtedness of his decedent. Those dealing with him in good faith and by virtue of the authority contained in his letters will be fully protected. Our statute requires the register, on being advised of a will, to revoke letters of administration previously granted. . . . But there is nothing in any of our decisions which warrants the conclusion that the acts of the administrator, done in pursuance of the authority granted him, are not of valid and binding force on the executor subsequently appointed and acting under the will. The reason of the rule is that the register in granting the letters of administration acts in a judicial capacity and that his decree cannot be impeached collaterally, but if void or voidable must be attacked directly and in the manner provided in the statute. Unless such conclusiveness is given to the decree of the register and the action of the administrator appointed by it, confusion would result and no person would be safe in dealing with an administrator. A contrary doctrine would result in litigation which would be necessary to protect parties dealing with the administrator."

In *Floyd v. Clayton*, 67 Ala. 265, the court said: "The creditor here had no knowledge of the existence of the will; he was never put on inquiry whether the decedent died testate or intestate. Upon the records of the court of probate as to the grant of administration, a court of general jurisdiction, its judgments imparting verity and jurisdiction, he found a grant of administration. Until

that grant was revoked he could safely deal with the administratrix as the rightful representative, and rely upon its validity. It was his right to make presentment of his claim to her, and the presentment is as operative against the executor subsequently taking probate of the will, and obtaining letters testamentary, as if the administration had been rightful, and he was a succeeding administrator de bonis non. From the administratrix the creditor could rightfully have received payment, and payment by her would have been an extinguishment of the demand as to the estate. Having the right to demand and receive from her payment, he had a corresponding right to make presentment to her, and the presentment saved the bar of the statute of nonclaim, though it was not renewed to the executor. The statute does not contemplate renewed or repeated presentments as often as there may be changes of the administration."

In Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L.R.A. 541, it was said: "Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will and its admission to probate render the prior appointment of an administrator absolutely void, so as to give no protection to persons who, in dealing with the administrator, have acted on the faith thereof."

In Perkins v. Owen, 123 Wis. 238, 101 N. W. 415, the court said: "If letters of administration be issued on the mistaken idea that no will was left, and a will be afterwards found and proven, the letters of administration will of course be revoked, and all acts of the county court inconsistent with the due administration of the estate under the terms of the will will doubtless be revoked upon motion, but such action will not be based on the idea that all such acts have been void for lack of jurisdiction, but rather on the ground that they have been erroneous. The county court has administered the estate in the wrong way; it has not administered an estate over which it had no jurisdiction. . . . It will be noticed that the statutes of the state (secs. 3815-3817, Stats. 1898) contemplate just such a situation, namely, the situation created by the discovery of a will after the partial administration of the estate as intestate, and these statutes recognize as legal the acts of the administrator done prior to the revocation of his letters, and provide for the continuation of the settlement of the estate from the point at which the administrator leaves it. It seems that these statutes may not have been necessary, but the very fact of their existence is valuable as demonstrating the legislative idea and intention on the subject."

Payment made to an administrator, before the probate of the will, bona fide, operates as a discharge of the debtor; and payment by him of a debt which the deceased owed, would be a valid act, for which he might retain, if the estate was solvent. Kittredge v. Folsom, 8 N. H. 98.

The probate of the will of the decedent in the state of his domicile does not, ipso facto, revoke and annul letters of administration previously granted by a competent court in another state, without any application to the latter court to probate the will there, and for authority to act under it, within that jurisdiction, and enforce its provisions. Clark v. Holt, 16 Ark. 257. In Shephard v. Rhodes, 60 Ill. 301, it appeared that the deceased died testate in Pennsylvania where his will was proved and recorded, but that, without any knowledge of the existence of the will, letters of administration were granted in Illinois, which were revoked after the discovery of the will. The court held that the letters of administration were voidable and the acts of the administrator thereunder were binding when attacked collaterally.

A sale, by an administrator to whom letters have been granted as in case of intestacy, of the decedent's land under an order of the ordinary authorizing the sale is not rendered ipso facto void by the subsequent propounding and admitting to probate of a will of the decedent. Nor can such an order of sale be attacked by a legatee under the probated will in an action of ejectment, by evidence that both the purchaser and the administrator knew of the existence of the will, and that the latter fraudulently concealed the fact in applying for and obtaining his appointment as in case of intestacy. Martin v. Dix, 134 Ga. 481, 68 S. E. 80. To the same effect, see Foster v. Brown, 1 Bailey L. (S. C.) 221, 19 Am. Dec. 672.

Letters of administration, issued by the probate court having jurisdiction of the subject-matter, on proper representations made, must be regarded as a protection to the administrator in a contest between him and the executor of a will offered for probate and rejected prior to his appointment, and which is subsequently and after protracted litigation admitted to probate, as to the bona fides of the acts of the administrator in the discharge of his duties under his letters. Meek v. Allison, 67 Ill. 46; Crocker v. Crocker, 198 Mass. 401, 84 N. E. 476; Barkaloo v. Emerick, 18 Ohio 268; Price v. Nesbit, 1 Hill Eq. (S. C.) 445. And as between the administrator, whose administration is subsequently revoked by the admission to probate of a will, and the executor of the will, the fact that the former buys at his own sale does not render the sale invalid, where

there is no fraud. *Price v. Nesbit*, 1 Hill Eq. (S. C.) 445.

The Illinois statute (R. S. 1845, p. 551, § 71) clearly indicates that letters of administration issued under such circumstances are only voidable, since it provides that the letters shall be revoked and repealed, but does not state that they are declared void, thus necessarily implying by revocation and repeal a previous valid existence for the purposes of the due administration of the estate. *Meek v. Allison*, 67 Ill. 46.

the owner, claiming subrogation to the rights of the mortgagee against the owner, and seeking to foreclose the security and recover the amount of the debt. It is held that the insurance company could not recover, since by the policy it agreed with the owner to pay a certain designated person, the mortgagee, in case of a loss, but did not agree to pay the owner's debt to the mortgagee as such.

[See note at end of this case.]

Appeal from Circuit Court, Tillamook county: HOLMES, Judge.

Action by Milwaukee Mechanics' Insurance Company, plaintiff, against A. Ramsey et al., defendants. Judgment for defendants. Plaintiff appeals. **AFFIRMED.**

MILWAUKEE MECHANICS' INSURANCE COMPANY.

v.

RAMSEY ET AL.

Oregon Supreme Court—June 22, 1915.

76 Oregon 570; 149 Pac. 542.

Fire Insurance — Insurance on Mortgaged Property — Subrogation of Insurer to Rights of Mortgagee.

Where a mortgagee insures the hypothecated property at his own expense, the insurer, paying a loss by fire to such mortgagee to the amount of the debt, is subrogated to the mortgagee's right in such debt, since the insurance contracted and paid for by the mortgagee in effect makes the insurance company a surety to the holder of the mortgage for the payment of the debt.

[See note at end of this case.]

Subrogation to Rights against Tortfeasor.

Where insured property is burned by the tortious act of one not a party to the contract, the insurer, paying the loss, is subrogated pro tanto to the chose in action the payee has against the tortfeasor by reason of his insurable interest.

[See 16 Ann. Cas. 635; 44 Am. St. Rep. 732.]

Subrogation to Rights of Mortgagee.

Realty was insured against fire, the loss being payable to a mortgagee as its interest might appear; otherwise to the insured. Within the term of the policy the property was destroyed by fire, and upon the mortgagee and owner suing the insurance company the mortgagee recovered judgment for the amount of its secured debt, while the owner failed to recover because he had contracted to sell, violating a policy restriction. The insurance company paid the mortgagee's judgment, and demanded that the mortgagee assign to it the owner's note and mortgage, which was refused. Thereupon the company sued the mortgagee and

[571] This is an action by the Milwaukee Mechanics' Insurance Company, a corporation, against A. Ramsey, E. U. Wagy, Tillamook County Bank, a corporation, and Tillamook City, a municipal corporation.

The plaintiff, a Wisconsin company engaged in the business of insurance against loss by fire in this state, insured the laundry of the defendant Ramsey in the sum of \$2,000, making the loss payable to the Tillamook County Bank, mortgagee, as its interest might appear; otherwise to the insured. The policy contained the usual restrictions rendering it void if the interests of the insured should be other than unconditional and sole ownership, if the subject of insurance were a building upon ground not owned by the insured in fee simple, if any change, other than by the death [572] of the insured, should take place in the interest, title or possession of the subject of insurance, or if other insurance, whether valid or not, should be effected upon the property without the consent of the company. This insurance was in consideration of a premium of \$60 paid by Ramsey, and the policy was executed and delivered to him. Afterward, during its period, not being so permitted by the company. Ramsey entered into an agreement in writing with Bailey and Wagy, defendants, whereby he agreed to and did sell to them, and they agreed to purchase from him, all the property described in the policy, together with the land upon which it was situated: they paying \$1,000 on account, assuming the mortgage to the bank, and agreeing to pay an additional balance of purchase money. They also subsequently insured the property without the consent of the company. It was provided in the policy issued to Ramsey:

"That if with the consent of the company any interest under the policy shall exist in favor of a mortgagee, . . . the conditions of said policy shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest

as shall be written upon, attached to, or appended to the policy."

But there was no such stipulation attached to that instrument. During the term mentioned in the policy the insured property was destroyed by fire, entailing a loss in excess of the amount of insurance. It is disclosed that afterward Ramsey and the Tillamook County Bank, mortgagee, instituted an action against the company to recover the insurance, in which litigation Ramsey failed, and the bank obtained judgment for the amount of its secured debt. The company paid this judgment, and demanded that the bank assign to it the note and mortgage of Ramsey, which was [573] refused. As a consequence the plaintiff brings this suit, claiming that it is entitled to be subrogated to the rights of the bank under the note and mortgage against Ramsey, and seeks to foreclose the security and recover the amount of the debt. A general demurrer to the complaint was sustained by the Circuit Court, and, as plaintiff refused to plead further, a decree was entered dismissing the suit at its cost, and it appeals.

Veazie, McCourt & Veazie for appellant.

H. T. Botts and Sidney S. Johnson for respondents.

BURNETT, J. (*after stating the facts*).—We note at the outset that the insurance was effected by the mortgagor at his own expense under the policy, in which he is designated as the insured, and which insures his property, and appoints the mortgagee as the one to receive payments of the loss to the extent of its interest; otherwise, it is to be paid to Ramsey.

1. It is well settled that if a mortgagee, having, as he does, an interest in preserving the property pledged to him as security, insures the same at his own expense, and a loss by fire occurs, the insurer, paying the loss to the insured mortgagee to the amount of the debt, is subrogated to the means of enforcing payment of the original obligation by the debtor. In such instances the claim is not extinguished until payment by the one primarily liable. All that has happened in [574] that respect, is a change of creditors. The reason is that the insurance contracted and paid for by the mortgagee has the effect of making the insurance company a surety to the holder of the mortgage for the payment of the debt. Having liquidated the same, the insurer is subrogated to the rights of the one to whom payment is made, which is the same as though he had signed as surety and paid the promissory note, for the debt is really what is insured in such cases. In very truth the mortgagee has nothing else to insure, and when the debt

is paid his policy lapses. The transaction is an instance of a contract directly between the mortgagee and the insurer, and is worked out like any other surety stipulation, with the resulting subrogation.

2. Again, if insured property is burned by the tortious act of one not a party to the policy, the insurance company, paying the loss to anyone to whom by the terms of the policy payment must be made, is subrogated *pro tanto* to the chose in action the payee has against the tort-feasor. The reason in such a case is that, but for the wrong resulting in destruction of the property, no liability would have accrued against the insurance company; but as it has neither privity of estate or contract with the incendiary, and is nevertheless compelled by the policy to pay for the result of the tort, its reimbursement is accomplished by subrogation.

3. The transaction described in the complaint, of which a *résumé* has been given, does not fall within either of these classes. We read in the complaint that the company is empowered to engage in the business of insurance against loss by fire. The policy which appears in the record insures Ramsey, not the plaintiff, against "all direct loss or damage by fire, except as otherwise [575] provided," upon the building and contents described in the instrument. By it the company agrees with Ramsey, and not with another, to pay a certain designated person in case of a loss. It does not agree to pay Ramsey's debt. The application to his obligation of the proceeds of the insurance in case of loss is a matter between Ramsey and the bank. What became of the money is no concern of the plaintiff after it paid the bank. It did not insure the debt. It insured the building. If Ramsey had burned the house, the mortgagee would have had an action against him for the tort, in that he damaged it by depreciating the value of the mortgaged property. Because such burning would have resulted in the company being compelled to pay the loss, it would have been entitled to subrogation to the rights of the bank to recover damages from Ramsey under the second illustration given at the outset. It is not charged in the complaint that Ramsey was in any way to blame for the fire. He incurred no liability on that account to the company or to the bank. The plaintiff did not pay Ramsey's debt, and hence has no privity with that obligation entitling it to subrogation. As Ramsey did not burn the building, there is no transaction of his which entails liability upon the company, either directly or indirectly, and which would give rise to the privity entitling it to subrogation. If there is to be any subrogation, it must be for the reason that the mortgagee has some hold upon the mortgagor to

make him perform the duty which the plaintiff was compelled to discharge. The latter was obligated to pay for the fire, but Ramsey was not. Having no power to make Ramsey reimburse it for the burning, the bank could not impart any such authority to the plaintiff by subrogation. [576] *Philadelphia F. Assoc. v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L.R.A. (N.S.) 420.

In brief, for a consideration, the company agreed with Ramsey to pay a loss, and not a mortgage to the bank. We cannot import into the contract a stipulation to the effect that Ramsey should not only pay the premium, but also reimburse the company for the loss. It is not the intention of the parties that Ramsey should thus carry all the risk, besides paying the premium. The plaintiff was paid for assuming the risk, and has only complied with its contract by payment of the loss. It is not entitled to anything beyond its stipulation. We have examined all the authorities cited by the plaintiff to sustain the postulate that where the policy has become void as to the interests of the mortgagor, but remains in force as a protection to the mortgagee alone, the insurer, upon paying the mortgage, is entitled to subrogation. Without exception the adjudicated cases noted in the plaintiff's brief rest upon a separate contract between the mortgagee and the insurer, or the insurance was paid for by the mortgagee, or the policy was assigned to him, and hence became his property the same as though originally made to him. In *Carpenter v. Providence-Washington Ins. Co.* 16 Pet. 495, 502, 10 U. S. (L. ed.) 1044, cited by plaintiff, Mr. Justice Story says:

"If, then, a mortgagor procures a policy on the property against fire, and he afterward assigns the policy to the mortgagee . . . as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due, in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account."

[577] There are respectable precedents holding that the stipulation must be indorsed upon or appended to the policy, stating the manner in which the conditions of the instrument will apply to a mortgagee to whom loss is payable, if his right to receive payment is to be in any wise limited by the restrictions imposed upon the insured. *Boyd v. Thuringia Ins. Co.* 25 Wash. 447, 65 Pac. 785, 65 L.R.A. 165. This seems to be the theory upon which the bank recovered, and Ramsey did not, in their joint action upon

the policy. Under this construction of the insurance agreement the company contracted with Ramsey to pay the bank in case of loss as its interest might appear absolutely and without reference to its violation of other terms of the policy. Hence in paying the loss to the bank the company was fulfilling its stipulation with Ramsey. It was complying with that part of its engagement with him which remained impossible of rescission, although he violated other portions thereof already mentioned. The company is before us contending that it has a right to enforce subrogation against Ramsey as an incident of a contract with him under which it says he has no rights. It maintains it was compelled to pay because of the terms of the policy. That feature, however, was a condition favorable to Ramsey, which was not affected by his selling the property. That much of the benefit for which he contracted remained unimpaired. The fallacy of the plaintiff's argument consists in assuming that Ramsey forfeited all his rights, when in truth there remained the one compelling the plaintiff to pay the bank in case of loss.

This action proceeds on the hypothesis that the plaintiff was obliged to pay; but, even so, it was because of its covenant with Ramsey for which he had paid a [578] premium of \$60. The payment of the loss was a compliance with the company's engagement to Ramsey, with whom it contracted, but for which no liability of the company would have accrued. The result is not different as to Ramsey's liability in this action, if his sale of the property worked an utter avoidance of the policy in all its terms. There are cases giving such construction to similar policies on the ground that, as the mortgagee must claim under a contract made for his benefit, he cannot occupy a better position than the one who made the contract: that the creditor must take the insurance agreement with its burdens, as well as with its benefits; and that if the maker of the contract, the mortgagor, cannot recover directly, neither can one who claims under him: *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137; *Brecht v. Law, etc. Ins. Co.* 160 Fed. 399, 87 C. C. A. 351, 18 L.R.A. (N.S.) 197, and note. However this may be, yet if such a meaning should be given to the policy, the company, being exonerated from payment by Ramsey's breach of the contract, was not bound to pay anything, so that its disbursement was voluntary, and not recoverable.

The decree of the Circuit Court is affirmed. Affirmed.

Moore, C. J., and McBride, J., concur.

Bean, J., concurs in the result.

NOTE.**Subrogation of Insurer to Rights of Mortgagee.**

- I. Introductory, 1135.
- II. Under Policy Issued to or at Expense of Mortgagee, 1135.
- III. Under Policy Issued at Request or Expense of Mortgagor:
 1. In General, 1137.
 2. On Transfer of Property by Mortgagor, 1138.
- IV. Under Policy Providing for Subrogation:
 1. In General, 1140.
 2. Under Clause Giving Subrogation on Claim of Nonliability to Mortgagor:
 - a. Policy Invalidated as to Mortgagor, 1140.
 - b. Policy Not Invalidated as to Mortgagor, 1143.
 - c. Burden of Proof and Trial of Issue, 1143.

I. Introductory.

The general principle governing the right of an insurer who has paid a fire loss on mortgaged property and thereby extinguished the mortgage debt to be subrogated to the rights of the mortgagee is that the mortgagor cannot equitably be compelled to pay the premiums on the policy and then reimburse the insurer for its loss. Accordingly where the policy is taken out by or at the expense of the mortgagor there is no right to subrogation. On the other hand if the insurance is paid for by the mortgagee and covers only his interest, the insurer on paying a loss is entitled to subrogation, since by any other rule either the mortgagor would be gratuitously exonerated or the mortgagee would be given a double recovery. By the application of the same principle, if a policy taken out by the mortgagor provides that it shall not be invalidated by his act so far as the interest of the mortgagee is concerned, the insurer is entitled to be subrogated as to the amount paid to the mortgagee when, and only when, an act of the mortgagor has invalidated the policy as to him, so that he has forfeited the benefit of his payment of premiums.

II. Under Policy Issued to or at Expense of Mortgagee.

It is generally held that where a mortgagee insures the mortgaged property at his own expense and for his own benefit and a loss occurs, the insurer on paying the loss to the mortgagee is subrogated, to the extent of the amount thus paid, to the means of enforcing payment of the original obligation

by the debtor, the claim not being extinguished until payment by him.

United States.—Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 U. S. (L. ed.) 1044. See also Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 U. S. (L. ed.) 473.

Illinois.—Honore v. Lamar F. Ins. Co. 51 Ill. 409. See also New England F. etc. Ins. Co. v. Wetmore, 32 Ill. 221; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618.

Maine.—See Stinchfield v. Milliiken, 71 Me. 567.

Maryland.—Washington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149.

Massachusetts.—See Davis v. Quincy Mut. F. Ins. Co. 10 Allen 113. Compare Suffolk F. Ins. Co. v. Boyden, 9 Allen 123; King v. State Mut. F. Ins. Co. 7 Cush. 1, 54 Am. Dec. 683; Clark v. Wilson, 103 Mass. 221, 4 Am. Rep. 532; International Trust Co. v. Boardman, 149 Mass. 161, 21 N. E. 239.

Missouri.—Dick v. Franklin F. Ins. Co. 81 Mo. 103, affirming 10 Mo. App. 376. See also Loewenstein v. Queen Ins. Co. 227 Mo. 100, 127 S. W. 72.

New Jersey.—Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. 555; Leyden v. Lawrence, 79 N. J. Eq. 113, 81 Atl. 121, affirmed 80 N. J. Eq. 550, 85 Atl. 1134.

New York.—Thomas v. Montauk F. Ins. Co. 43 Hun 218, 5 N. Y. St. Rep. 481. See also Excelsior F. Ins. Co. v. Royal Ins. Co. 55 N. Y. 359, 14 Am. Rep. 271.

North Carolina.—Stuyvesant Ins. Co. v. Reid, 171 N. C. 513, 88 S. E. 779.

Oregon.—See the reported case.

Pennsylvania.—Thomas v. Curran, 20 Pa. Dist. 857; Thornton v. Enterprise Ins. Co. 71 Pa. St. 234. See also Rex v. Insurance Companies, 2 Phila. 357, 14 Leg. Int. 332.

South Carolina.—Rawls v. American Cent. Ins. Co. 97 S. C. 189, 81 S. E. 505.

West Virginia.—Baker v. Monumental Sav. etc. Assoc. 58 W. Va. 408, 52 S. E. 403, 112 Am. St. Rep. 996, 3 L.R.A. (N.S.) 79.

Canada.—Westmacott v. Hanley, 22 Grant Ch. (U. C.) 382. Compare The Montreal Loan, etc. Co. v. Denis, 14 Quebec Super. Ct. 106.

In Nelson v. Bound Brook Mut. F. Ins. Assoc. 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308, reversing 41 N. J. Eq. 485, 5 Atl. 590, the reason for this rule was tersely stated as follows: "That insurance by the mortgagee, such as gives the debtor no benefit of money recovered on a loss, would, without subrogation, convert what is designed as a contract of indemnity into a wager policy. The mortgagee could demand payment of the loss to the extent of his mortgage without reducing the mortgage debt. Public policy condemns such contracts."

So in Washington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149, it was said: "The

mortgagor and mortgagee may each insure his own interest—the first insures the property, which he may do for its full value as the owner thereof; the latter, to the extent of his debt, and no farther. The first, notwithstanding the incumbrance on his property, is entitled to recover the full amount of his loss, within the limits of the insurance; the latter, if the premises are destroyed by fire before the extinguishment of the mortgage, has the right to be paid his debt by the insurers, if not more than the insurance; and the underwriters, in such case, become entitled to the debt, and can recover the same from the mortgagor, and are subrogated to the rights of the mortgagee. 2 Marshall on Ins. 64, ch. 2, p. 789. The payment of the insurance does not discharge the mortgagor from the debt, but the insurers become his creditors, and have the right to an assignment of the debt from the mortgagee. There is no privity in law or fact between the mortgagor and the mortgagee in the contract of insurance, and the mortgagor can take no advantage of the policy of the mortgagee for his debt, for he has no interest whatever therein, but is bound to pay the debt to the insurers where they become his substituted creditors. . . . But the contract of insurance is strictly a contract of indemnity, and the mortgagee is not entitled to recover from the insurers the value of the property lost, and his whole debt besides, from the mortgagor. When his debt is paid, and he is indemnified, it seems more in consonance with the just principle of indemnity, that the insurers should have the right to be substituted in his place and allowed to collect the debt from the mortgagor. The policy of insurance, from its legal effect, according to judicial decision, must receive such reasonable construction as imports with its true character as a contract of indemnity."

In *Honore v. Lamar F. Ins. Co.* 51 Ill. 409, the facts were stated in the opinion of the court as follows: "The appellant executed his note to Rutter, Endicott & Whitehouse, for \$2,146.50, and deposited with them, as collateral security, 74 barrels of whisky. They effected an insurance on the whisky in the Lamar Fire Insurance Company, appellees herein, at their own expense, and in their own name, and without the authority, or even knowledge, of appellant. The whisky was subsequently destroyed by fire, and the company paid the policy to Rutter, Endicott & Whitehouse, first requiring an assignment of appellant's note. The note was accompanied by a power of attorney to confess a judgment, and the company having caused a judgment to be confessed, the appellant filed a bill to enjoin its collection. On the hearing the circuit court dismissed the bill." An appeal was prosecuted on the ground that in

all cases where a mortgagee insures the mortgagor's property, the mortgagor is entitled to the benefits of the policy. The appellate court in answering this contention said: "This position is maintainable neither upon principle nor authority. The contract of insurance, it has been often remarked, is one of indemnity merely. Any person having an interest in property may, through an insurance, indemnify himself against loss by fire. Mortgagor and mortgagee have each an insurable interest. The interest of both may be covered in one policy, or each may take out a separate policy. In this case the mortgagees insured at their own cost, without privity with the mortgagor and without his knowledge, and when the company paid the debt due them from the mortgagor, it indemnified them against loss and was entitled to be subrogated to their claim. The mortgagor, having had no connection with the insurance, cannot claim its benefit. As the premium was not paid by him or chargeable to him, as he was not aware even that an insurance had been effected until after the fire, it is difficult to see how such insurance, even when paid, can affect his liability upon his note.

. . . In *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 452, where the assured had voluntarily assigned his claim to the insurance company upon payment by it, as in the present case, the court held the company entitled to recover. The question of the right to subrogation against the will of the mortgagee was not presented in that case, nor is it in this, because the assignment was made by the mortgagee upon payment of the loss. The only question strictly presented here is, whether the mortgagor has been discharged from his debt by the payment of the mortgagee's policy, and on this point there is no disagreement among the authorities. The debt is still in existence, and the strong equity of the insurance company has been united to the legal title."

So in *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779, it appeared that there was a sale of a piano on the installment plan, the purchaser agreeing to bear all loss in case of fire. The piano was insured by the seller and was destroyed by fire before the payments had been completed, whereupon the insurer paid the amount still remaining unpaid and took a receipt from the seller subrogating it to his rights. In an action brought by the insurer to enforce his right of subrogation as to the amount remaining unpaid under the contract, the court said: "As to the piano sold and delivered by the purchaser, the Stieff Company, in the absence of some arrangement with the mortgagor or some obligation growing out of the relationship between them, could only insure the property in reference to their in-

terest in it; that is, against loss or damage by fire to the extent that the same diminished the value of their security. And on the facts in evidence showing that the mortgagee insured on his own account, paying the premiums himself, and without reference to the rights and interests of the mortgagor in the property or any agreement with him concerning it, it must be held that the mortgagor has no claim to the insurance money and no protection from plaintiff's right of subrogation arising by reason of its payment, a position that derives force, we think, from the stipulation also appearing in the contract of sale 'that the purchaser is to bear all loss in case of fire.'

In *Thornton v. Enterprise Ins. Co.* 71 Pa. St. 234, it appeared that the policy by which mortgaged property was insured recited that the insurer was to indemnify the mortgagee for damage or loss to the property. It was held that on a payment of a loss to the mortgagee the insurer was entitled to an assignment of the mortgage. But in *Baker v. Fireman's Fund Ins. Co.* 79 Cal. 34, 21 Pac. 357, it appeared that the mortgagee of property had a policy of insurance covering the property issued to him as the owner, the insurer having notice of the fact that he was only a mortgagee. After the loss of the property it was agreed between the insurer and the mortgagee that the latter should receive from the insurer the amount due from the mortgagor less what he had already paid, the mortgagee agreeing to transfer all his interest to the insurer. An action to redeem was brought by the mortgagor and it was held that by the payment of the insurance policy the insurer was estopped to rely on a clause in the policy avoiding it in case of untrue representation as to the ownership of the insured property. It was also held that the payment of the insurance to the mortgagee under the agreement between them operated as a payment of the indebtedness of the mortgagor pro tanto and that the latter in a determination of the amount owed by him was to be credited with the amount of the insurance paid.

It seems that the insurer's right of subrogation to the rights of the mortgagee cannot be exercised until a payment of the loss has been made to the latter. *Carroll v. Hartford F. Ins. Co.* 28 Idaho 466, 154 Pac. 985; *Aetna Ins. Co. v. Baker*, 71 Ind. 102; *Morrison v. Tennessee Marine, etc. Ins. Co.* 18 Mo. 262, 59 Am. Dec. 299. See also *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 U. S. (L. ed.) 473. In *Phenix Ins. Co. v. Harrisburg First Nat. Bank*, 85 Va. 763, 8 S. E. 719, 17 Am. St. Rep. 101, 2 L.R.A. 667, it was held that an insurer who paid a loss to a mortgagee that covered only a part of the mortgage debt did not acquire as against the

mortgagee a right to demand and take from him the evidence of the debt secured to the amount of the loss paid by the insurer, it being obliged to pay the creditor's debt in full before it could take any part of the debt by subrogation.

III. Under Policy Issued at Request or Expense of Mortgagor.

1. IN GENERAL.

Where insurance on mortgaged property has been obtained by the mortgagor, or at his request and expense, the insurer is not entitled to subrogation to the rights of the mortgagee on a payment of the loss to him in the absence of a specific provision therefor in the policy. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 501, 10 U. S. (L. ed.) 1044; *Hackett v. Ash* (Ala.) 72 So. 52; *German Ins. Co. v. Smelker*, 38 Kan. 285, 16 Pac. 735; *Home Ins. Co. v. Marshall*, 48 Kan. 235, 29 Pac. 161; *Gardner v. Continental Ins. Co.* 75 S. W. 283, 25 Ky. L. Rep. 426; *Stinchfield v. Milliken*, 71 Me. 567; *Graves v. Hampden F. Ins. Co.* 10 Allen (Mass.) 281; *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97; *Havens v. Germania Ins. Co.* 135 Mo. 649, 37 S. W. 497; *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811; *DeWolf v. Capital City Ins. Co.* 16 Hun (N. Y.) 116; *Robert v. Traders' Ins. Co.* 17 Wend. (N. Y.) 631, reversing 9 Wend. 474; *Waring v. Loder*, 53 N. Y. 581; *Excelsior F. Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343, 14 Am. Rep. 271; *Rockwood First Nat. Bank v. Insurance Co.* 2 Tenn. Ch. App. 90; *Provincial Ins. Co. v. Reesor*, 21 Grant Ch. (U. C.) 296. See also *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Leyden v. Lawrence*, 79 N. J. Eq. 113, 81 Atl. 121, affirmed 80 N. J. Eq. 550, 85 Atl. 1134; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619. And see also the reported case. *Compare Thomas v. Montauk F. Ins. Co.* 43 Hun 218, 5 N. Y. St. Rep. 481. Thus in *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97, it was said: "If, . . . the policy contains no stipulation for subrogation in case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee, either verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to the benefit thereof, and to have it applied in liquidation of the mortgage debt pro tanto; and his right in this respect does not depend upon the fact that he has paid for the insurance, nor whether the mortgagee procured the insurance intending to look to the mortgagor for reimbursement of the premium, but it depends upon whether he is liable to the mortgagee therefor under any agreement, ex-

press or implied. And in such case, if the insurer receives the premium knowing it is paid by the mortgagor, or for him, he will not, in the absence of a stipulation therefor in the policy, be entitled to be substituted to the rights of the mortgagee against the mortgagor."

In *Havens v. Germania Ins. Co.* 135 Mo. 649, 37 S. W. 497, in discussing the right of subrogation of an insurer to the rights of a mortgagee to whom it had paid a judgment against itself on several policies of insurance, the court said: "By no rule of law with which we are familiar did the payment by the defendant insurance companies of the judgment rendered in favor of plaintiffs Havens & Richardson entitle them to be subrogated to the rights of Havens & Richardson's claim as mortgagees, against Sage as mortgagor, or to demand an assignment of said claim of plaintiffs against Sage in whole or to the extent of the amount of the payment to the plaintiffs on their judgment. These policies did not insure the claim of Havens & Richardson against Sage, but insured the mill property only. The policies were upon the mill property, and were for the benefit of Sage, the equitable owner thereof, who paid all the premiums thereon to the company, and only by reason of the agreement made by Sage with Havens & Richardson and the insurance companies were the companies authorized to pay to Havens & Richardson the sum that might at the time of the loss by fire be due from Sage to Havens & Richardson."

The rule denying the subrogation of the insurer to the rights of the mortgagee where the insurance is obtained by the mortgagee or at his request and expense, seems to apply although the insurance is taken in the name of the mortgagee. *Phenix Ins. Co. v. Chadbourne*, 31 Fed. 300; *Honore v. Lamar F. Ins. Co.* 51 Ill. 409; *Nelson v. Bound Brook Mut. F. Ins. Co.* 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308, *reversing* 41 N. J. Eq. 485, 5 Atl. 590; *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428; *Reesor v. Provincial Ins. Co.* 33 U. C. Q. B. 357. Thus in *Nelson v. Bound Brook Mut. F. Ins. Co.* *supra*, it was said: "There is neither reason nor good policy in compelling a mortgagee to assign his security where, through an arrangement between the mortgagor and mortgagee, insurance on the mortgaged premises is effected for their common benefit, although the policy be taken in the name of the mortgagee. Where a policy is so taken out, under the insurance clause in a mortgage, payment of a loss to the mortgagee inures to the benefit of the mortgagor, and it is immaterial under such stipulation in whose name the policy be procured. *Waring v. Loder*, 53 N. Y. 581, and cases cited. A pol-

icy effected under such agreement, in the name of the mortgagee, to secure the mortgaged premises against loss by fire will protect the mortgagor, and payment to the mortgagee, pro tanto, discharges the debt. Such an agreement between the mortgagor and mortgagee is not regarded as any infringement upon the rights of the underwriters. The mortgagee becomes bound to give the credit to his mortgage debtor. His right is not to withhold it, and subrogation is only to such rights as he has."

2. ON TRANSFER OF PROPERTY BY MORTGAGOR.

The cases are in conflict as to the right to subrogation in case the mortgagor, by a transfer of the property before loss, leaves the mortgagee as sole beneficiary of the insurance, each case being controlled by its own facts and the terms of the policy in suit. In *Matter of Kip*, 4 Edw. (N. Y.) 86, it appeared that a mortgagor obtained an insurance policy on the mortgaged property and assigned it to the mortgagee. The mortgagor sold the property, the vendee assuming the mortgage but not taking an assignment of the vendor's interest in the policy. After the destruction of the property it was held that the insurer was entitled to be subrogated to the rights of the mortgagee on the payment of the loss. To the same effect see *Aetna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90.

In *Merchants' Ins. Co. v. Story*, 13 Tex. Civ. App. 124, 35 S. W. 68, in discussing the right of the insurer to subrogation to the rights of the mortgagee where there was a transfer of the insured property in violation of a clause in the policy, the court said: "The transfer of the property by the original mortgagors to a vendee who assumed payment of the mortgage debt, with the consent in writing of the insurance company, trustee and the mortgage company, taken in connection with the subsequent receipt by the mortgage company of interest payments from the vendee, and the recognition in this suit, of these transactions by the insurance company in suing the vendee on his contract of assumption, operates to convert the original mortgagors from principals to sureties, not only as between them and their vendee, but also as between them and the trustee, insurance company and mortgage company, and such original mortgagors thereby became entitled to all the rights of sureties. The effect of the transaction was to create a new contract, by which the purchaser who, with the consent of the other parties in interest, assumed the mortgage debt, became the mortgagor within the meaning of the term as used in the subrogation clause in the policy. . . . The proper construction of the subro-

gation clause is that a violation of the policy will invalidate it as to the parties at fault, but not as to the parties not at fault, or who could not have foreseen or prevented such violation of the policy. In this regard, the sureties, who had parted with the property, and had no means of knowing or preventing a violation of the policy, stand in principle in the same position as the mortgage company itself."

In *Graves v. Hampden F. Ins. Co.* 10 Allen (Mass.) 282, the facts were referred to in the opinion of the court as follows: "The present case is to be treated as a policy on the interest of the mortgagor, but payable in case of loss to the mortgagee, qualified by a provision that no sale of the property shall affect the right of the mortgagee to recover in case of a loss. We are then to assume that this policy was procured by the mortgagor and at his cost, and was one which he might cause to be enforced for his benefit, and the avails to be applied, first, to discharge the mortgage debt, and the surplus to his own benefit, unless that right has been lost by alienation of his interest. It is conceded that such alienation has been made. In September, 1863, Plumb, who obtained this policy, parted with all his interest in the property insured, and the same was transferred to Chaffee, Plumb surrendering to his own grantor the unrecorded deed to him by Foster, and Foster thereupon conveying the equity to Chaffee. After the loss, the right in equity was conveyed to Graves the plaintiff. Thus Plumb ceased to have any interest in the property insured. The sale to Chaffee of the equity would not pass this policy to Chaffee. It was a mere personal contract of indemnity made with Plumb for the benefit of himself and the mortgagee Bigelow." It appeared that after the loss of the property the insurer paid the amount of the loss covered by the policy to the mortgagee and took an assignment of his interest, and an action to redeem the property from the mortgage was brought by the vendees of the equity of redemption. The court in granting relief said: "As to the Hampden Fire Insurance Company, they certainly can stand in no better situation than Bigelow, having received the transfer of the mortgage with full knowledge of the existence of the policy, and that a loss had accrued thereon by reason of which he was entitled to receive from them the sum of \$2,500 as mortgagee. . . . In the opinion of the court, the money which the mortgagee was thus entitled to receive from the insurance company and as to payment of which no objection intervened, the same having accrued under the circumstances we have stated, should be applied in part payment of the mortgage debt. A bill in equity may properly be maintained in behalf of the

plaintiff, and a decree must be entered to the effect that the defendants be required to receive the amount due upon the mortgage over and above the amount due and payable upon the policy of insurance; and thereupon to cancel and discharge the mortgage and execute proper releases thereof."

In *Nelson v. Bound Brook Mut. F. Ins. Co.* 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308, reversing 41 N. J. Eq. 485, 5 Atl. 590, the facts were stated in the opinion of the court as follows: "Mrs. Nelson, the appellant, took out from the respondent company a policy of insurance against a loss by fire on certain buildings on the farm owned and occupied by her at the time. The buildings were burned, and the company paid to her the amount of the loss. Before the destruction of the buildings, the appellant, Mrs. Nelson, by a verbal agreement with her two sons, bargained for a sale to them of the entire property for \$3,000, one-half to be paid in cash or its equivalent, the balance to be secured to her by bond and mortgage on the property. It was further stipulated between them that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and reassign it to her as collateral security upon her mortgage. In the interim, the policy should remain for their joint protection on the building, the vendees engaging to pay all subsequent assessments on the policy. No time was appointed for concluding the transaction, but the parties chancing to meet at the office of a conveyancer had the deed and mortgage drawn. The deed was signed and acknowledged by the vendor, and left by the parties with the county clerk to be recorded. The mortgage was signed and acknowledged by the vendees and the wife of one of them who was present, and its custody given to the vendor to hold until the absent wife could be brought to sign it, when the balance of the purchase money was to be adjusted and the insurance as arranged for effected in completion of the bargain. Before the parties met again after the execution of the papers the fire occurred. Upon paying the insurance money by the company, an assignment of this mortgage to it was formerly demanded of Mrs. Nelson. She refused to assign it, and the respondents filed a bill praying subrogation to her rights under the mortgage, and that she be decreed to assign it to the company. The court below so decreed, and from that decree the defendants below appealed." In reversing the decree of the lower court the appellate court said: "The contract with Mrs. Nelson on the part of the company was an indemnity against loss in the destruction of the buildings for which the usual premium and obligation required by the company for such insurance was de-

manded and received. On this policy unchanged in its terms the loss was paid. Now, the respondent claims a different status from that assumed in its contract, and claims its liability to be of a different nature, because of the new attitude which the insured assumed through her contract to sell. Yielding that to the respondent, certainly it must take its new position, not upon a partial view or selected part of her contract. When it puts itself on her agreement, it does and must accept it as a whole, because her rights under that agreement, and those of her vendees, are to be determined on the entire terms of it. Among these, she engaged to hold her policy for the joint protection of herself and her vendees, and the latter assumed to pay all subsequent assessments upon it. She cannot, under her contract with him, refuse to allow the proceeds of the insurance to reduce, pro tanto, her claim against them, and her rights in this regard are the respondent's rights. For these reasons the decree below should be reversed, and the bill be ordered dismissed, with costs."

In the reported case it appears that the mortgagor insured the mortgaged property, making the loss payable to the mortgagee as its interest might appear, otherwise to the insured. The policy was subsequently invalidated as to the mortgagor by his contracting to sell the property in violation of the policy. A loss occurring, and the insurer being compelled to pay the insurance to the mortgagee to the amount of the mortgage, it demanded an assignment of the note and mortgage, which was refused, and it then brought a suit to enforce its demands. But it is held that the insurer was not entitled to subrogation, the court saying that the insurer agreed with the mortgagor to pay a loss and not a mortgage.

IV. Under Policy Providing for Subrogation.

1. IN GENERAL.

A clause in an insurance policy subrogating the insurer to the rights of the mortgagee on a payment of the loss to him to the extent of his debt, will be enforced. *Stinchfield v. Milliken*, 71 Me. 567; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544. See also *Dick v. Franklin F. Ins. Co.* 10 Mo. App. 376, affirmed 81 Mo. 103. In *Foster v. Van Reed*, supra, it appeared that property was mortgaged by an instrument providing that the property should be insured by the mortgagor and in case of his default in that respect the mortgagee could insure the property and the premiums paid should be deemed to be secured by the mortgage. The mortgagee procured insurance on his interest in the property, the policy containing a clause

for the subrogation of the insurer to the rights of the mortgagee on payment of the loss. It was held that the agreement for subrogation could be enforced.

2. UNDER CLAUSE GIVING SUBROGATION ON CLAIM OF NONLIABILITY TO MORTGAGOR.

a. Policy Invalidated as to Mortgagor.

Insurance policies frequently contain so-called mortgage clauses which provide in effect that the policy shall not be invalidated as to the mortgagee by the acts of the mortgagor, and that if the insurer shall make a claim of nonliability as to the mortgagor or owner it shall be subrogated to the rights of the mortgagee on a payment of the loss to him to the extent of his debt. Under this clause it is held that where the policy has been invalidated as to the mortgagor, the insurer is entitled to subrogation to the rights of the mortgagee on a payment of the loss to him to the extent of his debt.

Alabama.—*Hackett v. Ash* (Ala.) 72 So. 52.

Illinois.—*Traders' Ins. Co. v. Race*, 142 Ill. 338, 29 N. E. 846, 31 N. E. 392, affirming 31 Ill. App. 625.

Indiana.—*Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361.

Kansas.—*Ft. Scott Bldg. etc. Assoc. v. Palatine Ins. Co.* 74 Kan. 272, 86 Pac. 142.

Massachusetts.—*Allen v. Watertown F. Ins. Co.* 132 Mass. 482; *Flint v. Westchester Fire Ins. Co.* 207 Mass. 337, 93 N. E. 646. See also *Amory v. Reliance Ins. Co.* 208 Mass. 378, 21 Ann. Cas. 1143, 94 N. E. 677; *Canton Co.-Op. Bank v. American Cent. Ins. Co.* 219 Mass. 132, 106 N. E. 635.

Minnesota.—*Sterling F. Ins. Co. v. Befrey*, 48 Minn. 9, 50 N. W. 922.

Nebraska.—*Etna L. Ins. Co. v. National Union F. Ins. Co.* 98 Neb. 446, 153 N. W. 553, L.R.A.1916A 784.

New Hampshire.—*Badger v. Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572.

New Jersey.—*Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149.

New Mexico.—See *Philadelphia F. Assoc. v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L.R.A.(N.S.) 421.

New York.—*Springfield F. etc. Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161, 20 Am. Rep. 115; *Heilbrunn v. German Alliance Ins. Co.* 150 App. Div. 670, 135 N. Y. S. 769, appeal dismissed in 206 N. Y. 683, 99 N. E. 1103. See also *Eddy v. London F. Ins. Assoc.* 65 Hun 307, 20 N. Y. S. 216, affirmed 143 N. Y. 311, 38 N. E. 307, 25 L.R.A. 686.

Pennsylvania.—Utter v. Lewis, 10 Pa. Dist. 50; Molaka v. American F. Ins. Co. 29 Pa. Super. Ct. 149.

South Dakota.—See Moulton v. Globe Mut. Ins. Co. 36 S. D. 339, 154 N. W. 830.

Texas.—Alamo F. Ins. Co. v. Davis, 25 Tex. Civ. App. 342, 60 S. W. 802.

West Virginia.—Gillespie v. Scottish Union, etc. Ins. Co. 61 W. Va. 169, 56 S. E. 213, 11 L.R.A.(N.S.) 143.

Canada.—Howes v. Dominion F. etc. Ins. Co. 8 Ont. App. 644, reversing 2 Ont. 89. See Guerin v. Manchester F. Assur. Co. 29 Can. Sup. Ct. 139, 156.

Thus in *Sterling F. Ins. Co. v. Beffrey*, 48 Minn. 9, 50 N. W. 922, it was said: "The contract was in explicit terms that, after acts of the mortgagor or owner of the property which invalidated it as to them, the insurance should be exclusively for the indemnity of the mortgagee; that the mortgagor, or those claiming under him, should have no beneficial interest in the policy; that payment to a mortgagee should not discharge the mortgage lien, but subrogate the insurer to the rights of the mortgagee; and, further, that if, instead of paying the amount of the loss to the mortgagee and securing rights through subrogation, the plaintiff company elected so to do, it could pay the entire debt to the mortgagee, and by means of a transfer and assignment thereof, and of the securities, succeed to her claim and interest, without restriction. *Allen v. Watertown F. Ins. Co.* 132 Mass. 480; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161; *Stinchfield v. Milliken*, 71 Me. 567. This was the contract between the parties, as found in the policy, and there is no reason why it should not be enforced as made."

In *Allen v. Watertown F. Ins. Co.* 132 Mass. 482, it was said: "The policy in the case at bar seems to have been drawn expressly to meet the decision in *Graves v. Hampden F. Ins. Co.* 10 Allen 281. After specifying matters which shall render the policy void, it provides that the insurance, 'as to the interest of the mortgagee only therein,' shall not be invalidated by acts of the mortgagor, and that, when a loss after a forfeiture is paid to the mortgagee, the company shall be subrogated to his rights under the mortgage to the extent of such payment, and may pay the full amount of the debt to the mortgagee and require an assignment of the mortgage. In other words, the policy provides that the amount due for a loss after a forfeiture shall not be a fund for the payment of the mortgage debt, but that, upon payment of the loss, the mortgage shall be a fund for the reimbursement of the defendant. The contract is, that after a forfeiture the insurance shall be exclusively for the benefit of the mortgagee: that the mort-

gagor and those claiming under him shall have no beneficial interest in the policy, and that payment to the mortgagee shall not discharge the mortgage, but subrogate the defendant to the mortgagee's right in it. It was a contract which the parties were competent to make, and we know no reason that they should not abide by it. The plaintiff cannot redeem the mortgage without paying the full amount of the debt."

So in *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361, it appeared that mortgaged property was alienated in violation of the terms of an insurance policy covering the property. The policy contained a mortgage clause. After the destruction of the property the insurer paid the loss to the mortgagee and secured from him an assignment of the debt and mortgage lien. In holding that the denial of liability to the mortgagor was sufficient, the court said: "In answer to the insistence of appellees that the complaint does not disclose that appellant denied its liability to the mortgagor or owner of the property at the time it paid the loss to the mortgagee, it may be said that it is true, as the authorities affirm, that appellant was not entitled to subrogation upon its mere denial of liability, but to entitle it to this right the facts in the case must justify such a denial. It does appear, however, from the averments of the complaint, that after the fire in question the mortgagee, under the policy, demanded of appellant payment for the loss of the house, and that the latter, in accordance with the policy and the provisions of the mortgage clause, paid said loss to the former and took from it an assignment of the debt and mortgage lien, to the extent of the amount paid. These facts, we think, sufficiently show a denial of liability by appellant to the mortgagor or owner of the property."

In *Molaka v. American F. Ins. Co.* 29 Pa. Super. Ct. 149, the facts were stated in the opinion of the court as follows: "The defendant company issued to George Molaka, the legal plaintiff, a policy of insurance upon a dwelling house of which the latter was the owner. The policy contained a provision that, unless otherwise provided by agreement indorsed thereon, it should become void 'if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.' The insured, shortly after the policy was issued, executed a mortgage upon the property in favor of Fredericka Klein, the equitable plaintiff, to secure the payment of a loan of \$1,000; and, on July 10, 1901, the defendant company noted upon the policy, 'Loss, if any, under this policy first payable to Fredericka Klein, mortgagee, subject to mortgage clause at-

tached,' and at the same time attached the usual mortgage clause. The mortgage clause so attached provided that the insurance as to the interest of the mortgagee only therein should not be invalidated by any act or neglect of the mortgagor or owner of the property; and that 'whenever this company shall pay the mortgagee any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made.' Molaka procured a new policy of insurance upon the building from the Hamburg-Bremen Fire Insurance Company, in a like sum of \$1,600. The building was subsequently, on August 25, 1903, destroyed by fire. George Molaka, on August 31, 1903, assigned to Fredericka Klein, the mortgagee, \$1,000 of the amount covered by the policy of the Hamburg-Bremen Fire Insurance Company, which assignment was duly indorsed upon the policy and recognized by said company. The Hamburg-Bremen Fire Insurance Company subsequently paid upon said policy the \$1,000 which Fredericka Klein was entitled to receive." In discussing the rights of the defendant insurer, the court said: "The liability of the company to the mortgagee arose the moment the loss occurred, but, under the terms of the policy, the defendant was not required to pay until sixty days had expired. While the liability existed and before the day of payment arrived, the mortgagor, the principal debtor, assigned to the mortgagee a security collateral to the mortgage, from the proceeds of which her claim ought to have been fully paid. The collateral security thus placed in her hands was the property of the principal debtor, Molaka, and to it there was no defense either as against the mortgagor or mortgagee. We are not now dealing with a case where a mortgagee has parted with a security collateral to his mortgage before a loss covered by a policy of insurance has occurred; the status of the parties in this case had been fixed. Fredericka Klein was the creditor of Molaka, she had a present claim, which was certain to become due in the near future, against the insurance company for a loss upon the property of Molaka, for which, however, the latter had no valid claim against the company. The fact that the policy of the Hamburg-Bremen Fire Insurance Company was not assigned to the mortgagee until after the fire is immaterial; the defendant company was entitled to the benefit and advantage of every collateral security which she acquired subsequently to the loss down to the day when she could legally call upon it to pay."

In *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445, it appeared that after the loss of

mortgaged property insured under a policy containing a mortgage clause the mortgagor failed to give notice of the loss and to render proofs as required by the policy. The loss subsequently was adjusted and paid to the mortgagee, and it was held that this was not a waiver of the right of the insurer to a forfeiture of the policy as to the mortgagor, so that the insurer was not defeated of his right of subrogation to the rights of the mortgagee. But in *Anderson v. Saugeen Mut. F. Ins. Co.* 18 Ont. 355, it was held that the failure of the mortgagee to file proofs of loss and bring an action did not avoid the policy as to the mortgagor but only affected his remedy; so that the mortgagee could recover the amount of the loss due him under the policy without any subrogation to his rights by the insurer.

In *New Hampshire F. Ins. Co. v. National L. Ins. Co.* 112 Fed. 199, 50 C. C. A. 188, 57 L.R.A. 692, in discussing the right of an insurer to subrogation under a mortgage clause where the mortgagee had made a settlement with other companies who had insured the same property, the court said: "The provision found in the mortgage clause . . . provided, in substance, that when they paid the mortgagee any sum for a loss under the policy, and claimed that they were not liable to the mortgagors, then, and not before, they should be subrogated to the rights of the party to whom payment was made as respects all securities held by such party on the 'property in question' to secure the payment of the debt. This doubtless gave to the appellants the right to pay their proportion of the loss to the mortgagee, and claim subrogation as respects the mortgage existing on the property; but it did not give them the right to contest the payment of their own policies, denying all liability thereon, and at the same time insist that the mortgagee should not make a settlement with other insurers for less than the face of their policies, without their consent. If the appellants desired to avail themselves of the right of subrogation which was reserved to them by the mortgage clause, and to acquire an interest in the mortgage, so as to be able to dictate or control settlements with other insurers, they should first have paid their respective losses. Until they did pay their own losses, the mortgagee was entitled to make any settlement with the other insurers which it deemed fair and just without consulting the wishes of the appellants."

In *Palmer v. McFadden* (N. J.) 98 Atl. 462, it appeared that a mortgagor procured insurance for the benefit of herself and her mortgagee. As the property was insured in other companies it was provided that the insurer should be liable only for a proportionate share of the loss. The policy also contained a clause providing for the subro-

gation of the insurer to the rights of the mortgagee where a claim of nonliability to the mortgagor was made. The property was destroyed and the insurer paid the claim of the mortgagee and took an assignment of his rights, the insurer, however, not making a claim of nonliability as to the mortgagor. In an action brought against the insurer to have the mortgage canceled, the court denied the right of the insurer to subrogation, saying: "From the facts stated it is apparent that neither of the requisites to entitle the insurance company to subrogation, viz., an insurance effected by the mortgagee at his own expense, or a denial of liability to the owner or mortgagor, is present in this case. The insurer by its contention is asking the court in effect to add a provision to the contract of insurance, which it neglected to impose when the mortgage clause was attached to the policy; that is, it asks that a contribution clause be read into the mortgagee clause, limiting its liability thereunder as a similar clause limits its liability to the owner under the policy. It is a matter of common knowledge that insurance companies issue the standard form of mortgagee clause both with and without the clause for full contribution from other insurers, and limiting liability thereby. In the present case the Niagara Fire Insurance Company saw fit to issue and to attach to complainant's policy the mortgagee clause, without the provision for contribution by other insurers, and without limiting thereby its liability for a greater proportion of any loss or damage sustained than the amount its policy bore to the whole amount of insurance upon the property, whether such insurance was issued to or held by the owner or mortgagee, and it now asks the court by its contention to supply this omission from the mortgagee clause under consideration. This, of course, cannot be done, and as complainant procured the insurance at her own expense, and as the insurance company does not disclaim, but admits liability to her as owner and mortgagor, she is entitled to have the amount paid the mortgagee credited in satisfaction of the mortgage debt."

In *Washington F. Ins. Co. v. Cobb* (Tex.) 163 S. W. 608, it was held that an insurer was entitled to be subrogated to the rights of the holder of a builder's and mechanic's lien on the payment of the loss to him to the extent of his debt, under the mortgage clause, where the policy had been invalidated as to the owner. Compare *Philadelphia F. Assoc. v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L.R.A. (N.S.) 421.

The right of the insurer to subrogation under the mortgage clause on the invalidation of the policy as to the mortgagor and the payment of the loss to the mortgagee

to the extent of his debt is not affected by the fact that the premiums are paid by the mortgagor. *Washington F. Ins. Co. v. Cobb* (Tex.) 163 S. W. 608.

b. Policy Not Invalidated as to Mortgagor.

But the insurer is not entitled to subrogation to the rights of the mortgagee under the mortgage clause, where the owner or mortgagor of the property has done no act sufficient to avoid the policy. *Moulton v. Globe Mut. Ins. Co.* 36 S. D. 339, 154 N. W. 830; *Howes v. Dominion F. etc. Ins. Co.* 2 Ont. 89; *Bull v. North British Canadian Invest. Co.* 15 Ont. App. 421, affirming 14 Ont. 322, and affirmed 18 Can. Sup. Ct. 697; *Klein v. Union F. Ins. Co.* 3 Ont. 234.

Neither is the insurer entitled to subrogation to the rights of the mortgagee, where by its acts it has waived its right to invalidate the policy as to the mortgagor. *Scottish Union, etc. Ins. Co. v. Colvard*, 135 Ga. 188, 68 S. E. 1097; *Eliot Five Cents Sav. Bank v. Commercial Assur. Co.* 142 Mass. 142, 7 N. E. 550; *Amory v. Reliance Ins. Co.* 208 Mass. 378, 94 N. E. 677; *Prinz v. Citizens' Ins. Co.* 80 App. Div. 638, 81 N. Y. S. 141; *McKay v. Norwich Union Ins. Co.* 27 Ont. 251; *Bull v. North British Canadian Invest. Co.* 15 Ont. App. 421, affirming 14 Ont. 322, and affirmed 18 Can. Sup. Ct. 697. Thus in *Bull v. North British Canadian Invest. Co.* supra, it appeared that proofs of loss of the insured property were made by the mortgagees and the insurer paid them the loss without objecting to the sufficiency of the proofs. It was held that this was a waiver of a clause in the policy requiring the mortgagor to make proofs of loss and that consequently the policy was not invalidated as to him, and the insurer was not entitled to be subrogated to the rights of the mortgagee. And in *Eliot Five Cents Sav. Bank v. Commercial Assur. Co.* 142 Mass. 142, 7 N. E. 550, it was held that the right of the insurer of mortgaged property to elect under a provision both in the policy and the statute either to pay the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt in case of nonliability to the mortgagor or owner, was a right dependent on the condition of being exercised within a reasonable time. To the same effect see *Amory v. Reliance Ins. Co.* 208 Mass. 378, 94 N. E. 677.

c. Burden of Proof and Trial of Issue.

The insurer is not entitled to subrogation under the mortgage clause on a mere claim of nonliability to the mortgagor, but must show a state of facts which would entitle it to exemption from liability to the mortgagor.

Sun Ins. Office of London v. Heidener, 44 Cal. 293, 99 Pac. 39; Traders' Ins. Co. v. Race, 142 Ill. 338, 29 N. E. 846, 31 N. E. 392, *affirming* 31 Ill. App. 625; Insurance Co. of North America v. Martin, 151 Ind. 209, 51 N. E. 361; Loewenstein v. Queen Ins. Co. 227 Mo. 100, 127 S. W. 72; Aetna L. Ins. Co. v. National Union F. Ins. Co. 98 Neb. 446, 163 N. W. 553, L.R.A.1916A 784; Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445; O'Neil v. Franklin F. Ins. Co. of Philadelphia, 159 App. Div. 313, 145 N. Y. S. 432.

In *Aetna L. Ins. Co. v. National Union F. Ins. Co.* *supra*, the facts were stated in the opinion of the court as follows: "This action was brought by the Aetna Life Insurance Company against the National Union Fire Insurance Company and Ebenezer D. Harris. Harris was the owner of a house on which a policy of insurance for \$1,500 had been issued by the National Union Fire Insurance Company, hereinafter termed the insurer. He had borrowed from the Aetna Life Insurance Company, termed the mortgagee, \$1,500. A mortgage clause was attached to the policy in the usual form, providing that in case of loss, the policy was payable to the mortgagee 'as its mortgaged interest may appear.' The house burned down, and the insurer refused to pay the loss on the ground that the policy was obtained by fraud and misrepresentation." It was held that the right of subrogation of the insurer depended on the question whether the policy had been procured by fraud and that the mortgagor was entitled to a jury trial to determine that issue.

PENNSYLVANIA RAILROAD COMPANY

v.

TOWERS ET AL.

Maryland Court of Appeals—April 16, 1915.

126 Md. 59; 94 Atl. 330.

Carriers — Regulation by Public Service Commission — Commutation Rates.

Although the public service commission has no power to make any order except so far as authority is conferred by the legislature, under Code Pub. Civ. Laws, art. 23, § 435, creating the commission, as amended by Acts 1912, c. 162, the commission has full power, so far as the legislature could grant it, to supervise all railroad tariffs and transportation charges within the state, including commutation rates.

[See note at end of this case.]

Same.

The action of the state in establishing, through the public service commission, a single fare rate does not exhaust its power to regulate transportation charges, and, after establishing a single fare rate, it may thereafter make any reasonable regulation affecting mileage or commutation rates, leaving them so as to bring a proper return to the railroad for the specific service, independent of the return to it from other services.

[See note at end of this case.]

Same.

In determining whether the action of the public service commission in fixing a railroad commutation rate was reasonable, the entire net revenue of the road, from whatever character of service derived, is not to be looked to, since the specific service regulated must have its charges so fixed as to return the road a normal profit on such specific branch of the service by itself, to avoid confiscatory action, which would ultimately defeat the end the regulation was intended to accomplish, the promotion of the public good and convenience.

[See note at end of this case.]

Same.

The mere fact that the rate fixed by the public service commission for commutation tickets is discriminatory, is not conclusive of its invalidity.

[See note at end of this case.]

Same.

In fixing railroad charges for any specific class of service, the point of injustice is reached before that of confiscation, and to give the constitutional prohibition against confiscation any beneficial effect, it must be read to prohibit the fixing of rates at a point at which the railroad property will return to its owners enough to pay operating expenses and a fair profit on the investment.

[See note at end of this case.]

Review of Public Service Commission.

Upon application to the court to restrain the execution of an order of the public service commission fixing railroad rates, the power of the court is limited to the determination of the question whether the rates fixed are unreasonable or unlawful, which must be clearly made to appear before the court may restrain the execution of the order, since a court under the guise of exerting judicial power may not usurp administrative functions by setting aside an administrative order upon its own ideas as to whether the administrative power was wisely exercised.

[See generally Ann. Cas. 1914D 795.]

Same.

In a suit by a railroad to enjoin enforcement of an order of the public service commission fixing the maximum charge for commutation tickets, evidence is held to be insufficient to show that such rate was unreasonable and confiscatory.

Same.

Where a railroad sought to restrain the enforcement of an order of the public service commission fixing the maximum charge for commutation tickets, and the evidence as to whether such rate was unreasonable and con-

fiscatory was unsatisfactory and inconclusive, the rate should be allowed to go into effect to determine by actual experience its character, subject to the right of the road at any future time to seek its abrogation by judicial action for cause shown.

Appeal from Circuit Court No. 2 of Baltimore city: AMBLER, Judge.

Action by Pennsylvania Railroad Company, plaintiff, against Albert G. Towers et al., constituting Public Service Commission of Maryland, defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Shirley Carter and John J. Donaldson for appellant.

Wm. Cabell Bruce and Washington Bowie, Jr., for appellee.

[61] STOCKBRIDGE, J.—The Pennsylvania Railroad Company as lessee, operates as a part of its system, the line known as the Northern Central [62] Railway. The Baltimore division of this extends from Baltimore to Harrisburg, Pennsylvania, lying thus in two States. Through traffic over this is accordingly interstate traffic. In addition to this through business, there is also local business, which between Baltimore and Parkton is wholly in the State of Maryland, and this business being intrastate is subject to State control, in so far as it is subject to any control at all in the interest of the public. For some time past there has been a demand on the part of the railroads of this country for an increase of their revenues, on the ground that as the result of a number of contributing causes they were either making no net revenue at all or at best one inadequate to meet the requirements for the upkeep of their roadbed and rolling stock, or extensions rendered desirable by the increase of population or development of new localities, and also yield any adequate return on the capital employed in the enterprise. Among the causes contributing to this condition were the hostile legislation in many States, placing new and additional burdens on such companies, the great increase in wages paid to employees, and the enhanced cost of requisite supplies of all kinds.

As a means to in part overcome the unfavorable condition, there has been throughout the eastern States at least, an increase in the rates for passenger transportation. Such travel may be roughly divided into four general classes, though this will not include all varieties of the passenger transportation, each one of which has its own distinctive characteristics, which clearly differentiate it from the others. These classes are single rate fares, mileage rates, commutation rates and party

rates. It is with the third of these, commutation rates, that this case has to deal.

For a number of years there had been in force on the Northern Central Railway commutation rates from Baltimore to points on the line of the railway as far as Parkton. On November 25th, 1914, the railway company filed with the Public Service Commission of this State a proposed tariff of new passenger rates for such commutation service involving [63] an entire revision and increase of the rates over those theretofore charged for such service. This was followed by a "petition and complaint" by a number of those to be affected by the changes, and the question thus came before the Public Service Commission, which heard testimony on behalf both of the petitioners and the railroad, and by its order of December 21st, 1914, granted certain increases, though in no instance to the full extent asked by the railroad company. Then the bill in this case was filed to enjoin the commission from enforcing or attempting to enforce the order of December 21st. It is from the decree dismissing the bill of the railroad company that this appeal is taken.

The question is not now presented whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by a railway company in a case where no such rates had theretofore existed. Upon that no opinion is now expressed. What the Court is now called to pass upon is the reasonableness of commutation rates, where such a system of rates has long been in operation by the action of the company, and where a modification of those rates was proposed by the railway company and by it submitted to the Commission. Whether commutation rates shall be established at all is a question of policy upon the part of the company, but if such a policy is adopted there will still remain the reasonableness of the manner in which that policy is carried out.

What was endeavored to be done by the railroad with regard to rates, and how far the same was gratified by the order of the Commission will be best understood from the following table:

[64]

<i>Rates Prior to Nov. 25, 1914.</i>	<i>Rates as per Schedule Filed Nov. 25, 1914.</i>	<i>Rates under Or- der of P. S. Com., Dec. 23, 1914.</i>
1: Round trip, 10 day, 24c. per M.	Round trip, no limit. 24c. per M.	Round trip, 24c. per M.
2: Exc. 2-10 days, 24c. per M.	Discontinued.	No ruling made.
3: 10-strip ticket, 1 yr., 1 8/10c. per M.	10 trip, 3 mos., 24c. per M.	10 strip, 3 mos., 2c. per M.
4: 60-trip 1 mo., 2c. for first 3 M., 1c. for ea. addl. 1/2 M.	60 trip 1 mo., former rate plus 25c. flat.	60 trip 1 mo., former rate plus 25c.

<i>Rates Prior to Nov. 25, 1914.</i>	<i>Rates as per Schedule Filed Nov. 25, 1914.</i>	<i>Rates under Or- der P. S. Com., Dec. 23, 1914.</i>
5: 100-trip 1 yr. at double 60 trip.	Discontinued.	100 trip 4 mos., former rate, plus \$1.
6: 180-trip 3 mos. same as 4, less 10%.	180 trip 3 mos. at 3 times 60 trip.	180 trip 3 mos., former rate, plus 75c.
7: 46-trip School, 1 mo., 46/60 of 60 trip.	46 trip School 1 mo., 46/60 of 60 trip.	46 trip School. 1 mo., 46/60 of 60 trip.

At or about the same time the railroad company made increases in the single rate fares, and also in the mileage ticket, but as both of these forms of transportation involved under the circumstances of this case, interstate rather than intrastate carriage, the jurisdiction over them belonged to a different [65] tribunal, and did not and cannot properly enter into the consideration of this case at all.

The first prayer of the bill is that the action of the Public Service Commission may be declared void and set aside. When couched in so general terms the ground for such a prayer is not clearly evident. A body like the Public Service Commission has of course no power or authority to make any order, except in so far as the authority is distinctly conferred upon it by the Legislature. But the Act creating the Public Service Commission, now codified as sec. 413, etc., or Article 23, when taken in connection with the Amendatory Act, Chapter 162 of the Acts of 1912, clearly confers upon the Commission full power, so far as it was within the province of the Legislature to grant it, to supervise and regulate all tariffs and transportation charges within the State, including by its very terms, commutation rates. Or the contention of the plaintiff may have been in this regard upon a somewhat different theory, namely, that while it might be within the power of the Legislature and therefore, by delegation, within the power of the Public Service Commission, to regulate and establish the single rate fare, yet when it had done so, it had exhausted its power and could not thereafter make any regulation whatever to affect either mileage or commutation rates, and for this claim there is warrant to be found in the language used in the decision of the Lake Shore, etc. R. Co. v. Smith, 173 U. S. 684, 19 S. Ct. 565, 43 U. S. (L. ed.) 868, in which Mr. Justice Peckham elaborately discusses the question of the validity of an Act of the Michigan Legislature, which was intended to regulate the price of 1,000-mile tickets, and holds that in attempting so to do the Michigan Legislature had exceeded its powers. Without citing his argument in full, the following language to be found in the opinion will indicate its trend: "If unhampered by contract, there is no doubt of the power of the State to provide by legislation for maximum rates of charges for rail-

road companies, subject to the condition that they must be such [66] as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and whether they are or not, is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. . . . The question is presented in this case whether the Legislature of a State has also the right after having fixed a maximum rate for the transportation of passengers to still further regulate their affairs and to discriminate and make an exception in favor of certain persons and give them a right of transportation for a less sum than the general rate provided by law. . . . The Act is not a general law upon the subject of rates establishing maximum rates which the company can in no case violate. The Legislature having established such maximum as a general law, now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rate, it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of a company without due process of law. We speak of the general right of the company to conduct and manage its own affairs, but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the Legislature in the exercise of its power to provide for the safety, the health and the convenience of the public, and to prevent improper exactions or extortionate [67] charges from being made by the company. . . . The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation."

The Act was further criticised for the reason that it compelled the company to carry not only those who might purchase the mileage tickets, but also the length of time during

which the company should be obliged to honor them, the forfeiture of the ticket under certain conditions and the redemption of any unused portion of it at the expiration of two years. This Act applied in a case with regard to a mileage ticket, and in regard to the same class of ticket the decision above quoted was followed and adopted in *Beardsley v. New York, etc. R. Co.* 162 N. Y. 230, 56 N. E. 488; *State v. Great Northern R. Co.* 17 N. D. 370, 116 N. W. 39; *State v. Bonneval* 128 La. 902, Ann. Cas. 1912C 837, 55 So. 569; *Com. v. Atlantic Coast Line R. Co.* 106 Va. 61, 9 Ann. Cas. 1124, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L.R.A.(N.S.) 1086; *Chicago, etc. R. Co. v. Ketchum*, 212 Fed. 986.

It was contended in argument on behalf of the Public Service Commission that, while not in terms overruled, the effect of the decision in the *Lake Shore* case, *supra*, had been very much weakened, if not entirely done away with, by other and later decisions. Since the argument of this case, however, the Supreme Court of the United States has rendered opinions in three cases, which clearly show that in the view of that Court the decision in the *Lake Shore* case is still in full force. The first two of the cases referred to are the *Northern Pac. R. Co. v. North Dakota*, and the *Minneapolis, etc. R. Co. v. North Dakota*, 236 U. S. 585, Ann. Cas. 1916A 1, 35 S. Ct. 429, 59 U. S. (L. ed.) 735; the proceedings in each of these cases were instituted by the Atty.-Gen'l. of the State, for a mandatory injunction against the railroads to require them to put into effect an Act of the Legislature of North Dakota, establishing a maximum coal rate [68] in that State. In the case of the *Northern Pac. Ry. Co.* it was shown that out of a total revenue derived from the carriage of coal of \$58,953.07, there was a surplus income over and above expenses of \$827.61, and that in the case of the other road the carriage was conducted at an actual loss. In the course of that opinion, Mr. Justice Hughes uses the following language:

"The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry out reasonable terms, and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to in-

sure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience. . . .

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest [69] cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. . . .

"We have, then, to apply these familiar principles to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost or without substantial compensation in addition to cost. We say this, for we entertain no doubt that in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the

burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic [70] must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account. . . . But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. . . .

"But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. . . .

"In *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 549 [32 S. Ct. 108, 56 U. S. (L. ed.) 308, 312] in speaking of the carriers' concession that they were unable to determine the cost of the particular traffic in question and that a former rate had not been 'less than cost,' the Court said: 'Whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, [71] that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.' . . .

"To repeat and conclude: It is presumed,—but the presumption is a rebuttable one—that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitability of the intra-

state business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes, outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

The third case of those recently decided by the Supreme Court was the case of the Norfolk, etc. R. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437, 59 U. S. (L. ed.) 745, in which the Court had under consideration an Act of the Legislature, of West Virginia, establishing a maximum rate for passengers on railroads at two cents a mile and in that case after reference to the two cases last cited, the Court says:

[72] "The fundamental question presented is, whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company separately considered. It is not necessary that there should be uniform rates or the same percentage of profits on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.

"These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organiza-

tion and management, and of necessity its own rates. In making a reasonable adjustment of the carrier's charges, the State is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the State may not select either of these departments for arbitrary control. Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost."

From these citations it will be apparent that the limitations placed upon legislative action do not go to the extent [73] of saying that the establishment by State authority of a maximum single rate exhausts the power of State regulation, or that there may not be different rates for different characters of service. In the interest of the public there subsists and must subsist in the State the power to control and prevent exorbitant or extortionate charges for services performed. While at the same time that regulation must be reasonable in its character and so framed as under ordinary or normal conditions to bring about a proper return to the railroad for the service performed independent of the return to the railroad from other and a different character of service.

The contention was made upon the part of the Public Service Commission that in determining the reasonableness of the charge the entire net revenue of a railroad must be looked to, from whatever source derived, whether passenger, freight, express or investments held by the company, and there are undoubtedly cases which tend to support that view, among which may be named *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *Pensacola, etc. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L.R.A. 661; *People v. St. Louis, etc. R. Co.* 176 Ill. 512, 52 N. E. 292, 35 L.R.A. 656. These cases, however, are not in accord with the general trend of decision. In *Louisville, etc. R. Co. v. Alabama Railroad Commission*, 208 Fed. 35, certain passenger rates were complained of, and the evidence tended to show that the operation of the road as a whole was unprofitable. mainly because it was transporting iron and coal at or below cost and it was there held, that the intrastate passenger rate could not be attacked because the entire business of the road did not yield

a fair return. In the *Board of Railroad Commissioners v. Illinois Cent. R. Co.* 20 Int. Com. C. Rep. 181, the question arose with regard to certain tolls of the Dunleith & Dubusque Bridge Company, of twenty-five cents per passenger, for local traffic, when the same charge was not made on through tickets, and it was there said that the fact that the net earnings of the carrier may be large does not of itself justify us in fixing a rate at less than is reasonable for the service, all other things being considered. In *The Commutation Rate Cases*, 21 Int. Com. C. Rep. 428, [74] the Interstate Com. Com. had under consideration the commutation rates of eight railroad companies, running into New York, most of them from points in New Jersey. In the opinion which was filed, Commissioner Harlan said:

"In our judgment, the carriage of a commuter differs in many respects from other passenger traffic and is an independent, special service."

He reviews at length the history of commutation transportation, and shows wherein it differs from transportation by mileage tickets or other forms of carriage, and there holds that for commutation service the carrier is entitled to receive a reasonable compensation, and no more. In that case he found that the commutation rates charged by the New Jersey Central were fair and reasonable, while those charged by the Pennsylvania were not, and accordingly required a reduction in the commutation rates of the latter road; but in so doing no account was taken of the passenger returns from the entire Pennsylvania system, nor of the net revenue derived from the combined receipts of freight, passenger and express business. So in the *Minnesota Rate Cases*, 230 U. S. 352, Ann. Cas. 1916A 18, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151, it was held that where a carrier does both interstate and intrastate business, in order to determine whether a scheme of maximum intrastate rates afforded a fair return for the value of the property employed in intrastate business, the rates prescribed must be considered separately, and that the profits and losses on interstate business cannot be offset. And the same principle underlay the decision in the *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 32 S. Ct. 108, 56 U. S. (L. ed.) 308, and the *Interstate Commerce Commission v. Louisville, etc. R. Co.* 227 U. S. 88, 33 S. Ct. 185, 57 U. S. (L. ed.) 431. The same question was before this Court in the case of the *Public Service Commission v. Northern Cent. R. Co.* 122 Md. 355, 90 Atl. 105, and on page 390. Judge Thomas, speaking for this Court, said: "We cannot adopt the view that common carriers may be required to perform services at rates less than the actual cost of such services, for that would amount to confiscation,

and would ultimately defeat the very end they [75] are designed to accomplish, namely, to subserve the public good and public convenience."

One of the grounds upon which the Court was asked to enjoin the enforcement of the order of the Public Service Commission was that it was discriminatory. But it is not all discriminations which are condemned by the law. As illustrating the distinction, it is sufficient to cite the case of *State v. Omaha, etc. Ry. etc. Co.* 113 Ia. 30, 84 N. W. 983, 86 Am. St. Rep. 357, 52 L.R.A. 315, in which an ordinance of the City of Council Bluffs was held void for this reason, and the case of the *Interstate Commerce Commission v. Baltimore, etc. R. Co.* 145 U. S. 263, 12 S. Ct. 844, 36 U. S. (L. ed.) 699, commonly known as the *Party Rate* case, in which a not dissimilar discrimination to that now presented was involved, and yet was held to be a valid act.

When we turn to the testimony offered before the Public Service Commission to determine the reasonableness or unreasonableness of the rates as fixed by the order of the Commission, we encounter serious difficulties. It is conceded that the increase in the straight fare ticket will produce an increase of revenue to the railway, but of what amount or how far it may operate to diminish the present passenger operating ratio, there is no means of determining. As the accounts of the railway company have been kept, there has been an attempt to apportion the receipts and expenditures as between freight and passenger business, both over the entire Northern Central system, and also over the Baltimore Division. But that is as far apparently as the effort at apportionment has gone. In this, 65% of the expenditures has been apparently readily apportioned as between the freight and passenger business, while the remaining 35% has been allocated arbitrarily. In this is included much in the way of expense which pertains to both of these classes of business, such as maintenance of way, bridges, and the like, but, taking the apportionment as made to have been measurably fair, there is this further difficulty remaining—no attempt has been made to subdivide the receipts upon the [76] passenger business of the Baltimore Division, as between the portion which lies within the State of Maryland, and the territory between Parkton and Harrisburg, still less to furnish anything like exact figures of the relative receipts and expenses arising from commutation business. Numerous and elaborate tabulations were offered on behalf of the company, tending to show that the passenger business of the Baltimore Division had been operated at an actual loss for a number of years. Without going into these in detail, the subjoined extract from Plaintiff's Exhibit No. 5 will show the claim of the railway in this regard:

Revenues.	Passenger.	Ratio of Expenses to Revenues.
	Expenses (Inc. Taxes). Passenger.	
1908..\$ 931,858	\$ 985,001	105.70
1909.. 1,012,340	1,045,904	103.32
1910.. 1,089,574	1,319,213	121.08
1911.. 1,096,251	1,363,141	124.35
1912.. 1,160,982	1,244,285	107.18
1913.. 1,265,595	1,387,306	109.62

But in this connection it must be borne in mind that the figures in the expense column and in the column of ratio of expenses to revenue might be materially modified by a slightly different apportionment of the 35% which, as already stated, was necessarily arbitrarily allocated, and might be still further modified if we had absolute figures in regard to that portion of the passenger business of the Baltimore Division conducted over the part of that division lying between Baltimore and Parkton.

From what has already been said the rates charged to the general public must be reasonable, not, however, to the point of being confiscatory. But "the point of injustice is reached long before that of confiscation, and to make the word 'confiscatory' really appropriate it must be read not in the sense of producing actual confiscation, but of having an inevitable [77] tendency thereto." *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L.R.A. (N.S.) 108. "Public service corporations are entitled to look to a rate of return, if their property will earn it, not less than the legal rate of interest, and a system of charges that yields no more income than is fairly requisite to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. . . . While the public has certain rights which in case of conflict must prevail, yet it must not be forgotten that even so-called public service corporations are private property, organized and conducted for private, corporate profit. And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusiness-like way, with a resulting loss. If part is unprofitable, it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest." *Ibid.*

This plainly follows for the reason stated in *Boston, etc. R. Co. v. State*, 77 N. H. 437, 93 Atl. 306, 310, where it is said: "Although the plaintiffs are common carriers, engaged in a public service, they are entitled to compensation for the service performed. Authority for requiring them to render service for less than fair compensation, if it exists, must be found in some preceding stipulation of the

parties. It must be rested in contract, not upon the police power of the State."

Though less explicit, to the same effect will be found the decision in *St. Louis, etc. R. Co. v. Gill*, 156 U. S. 649, 15 S. Ct. 484, 39 U. S. (L. ed.) 567.

The general principles applicable to a case of this character have already been stated, and the conclusion to be drawn from the evidence as to what is and what is not proved with regard to the confiscatory effect of the tariffs as embodied in the order of the Public Service Commission. The next step is as to the force and effect which should be given to the findings of the Commission, as contained in the order of December 21st, 1914. Analogy is sought to be drawn from the provision in the Interstate Commerce Act, which [78] provides that the findings of that commission are *prima facie* correct, and this has been recognized in a number of cases. *Cincinnati, etc. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995; *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128.

While this provision of the Interstate Commerce Act has no exact counterpart in the Public Service Commission Act of this State, the function of the courts, when called on to review an order of the Public Service Commission, was clearly and aptly stated by Judge Thomas, in *Public Service Commission v. Northern Cent. R. Co.* 122 Md. 388, 90 Atl. 105, where he said:

"Upon an application to the Court for an injunction restraining the execution of an order of the commission, the Court has no authority to determine what would be a reasonable rate for the service required, or to establish rates, but its power is limited to the determination of the question whether the rates fixed by the commission are unreasonable or unlawful, and until it is made to appear by *clear and satisfactory* evidence that the action of the commission is unreasonable or unlawful, the Court is without power to impose any restrictions upon the execution of the commission's order."

And the same view has been adopted in *Wisconsin in Minneapolis, etc. R. Co. v. Wisconsin Railroad Commission*, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821, and it is there stated that the function of the Court "is not to determine whether a rate or service fixed by it is reasonable and just, but to determine whether the order is unreasonable or unlawful. If the order be found by the Court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable."

The whole duty, power and function of the Court in such cases was well summed up by Chief Justice White in *Interstate Commerce*

Commission v. Illinois Cent. R. Co. 215 U. S. 470, 30 S. Ct. 155, 54 U. S. (L. ed.) 288, when he said:

"Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative [79] order is within the scope of the delegated authority under which it purports to have been made, and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule, that the substance and not the shadow determines the validity of the exercise of the power. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions, by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

As already pointed out the increase in the passenger tariff, including straight fares and the return from commutation and mileage tickets is an uncertain quantity. It is perfectly evident that in the estimation of the railroad accounting officials an increase of revenue was expected to be derived under the tariff as proposed by them on November 25th, and if this estimate is correct, it necessarily follows that the revenue to be derived under the tariffs established by the order of the Public Service Commission of December 21st, must also bring an increase in revenue over that previously received. With the increase in straight fares the Public Service Commission has not attempted to deal, yet some portion of this when received, is properly to be apportioned to the receipts of the Baltimore Division and the effect will necessarily be to produce an increase in revenue derived from passenger traffic beyond that received for the last five years, other conditions remaining normal. The same is true with regard to commutation rates. It may turn out as the result [80] of the revision of these tariffs that there will be more monthly tickets sold and fewer of the one hundred trip tickets, but all of this is to a very considerable degree a matter of conjecture merely. The true test of the effect upon the revenue of the changes

made must and can only be the test of time and practical experience. The bill in the present case was filed almost immediately upon the passage of the order by the Public Service Commission, and we are of opinion that before that order is disturbed by the Court it should be given the test of a practical trial. The most that the evidence gives us is the opinion of certain railway experts, and yet their evidence shows that they are far from having such complete data as to enable them to give anything more than an opinion. As was said by Woods, Justice, in *Tilley v. Savannah, etc. R. Co.* 5 Fed. 641, 662, in a case where the evidence had been conflicting or uncertain as to the probable remunerative effect of a new tariff, "which view is the correct one it is impossible to decide. There is, however, a conclusive way and one only in which this controversy can be settled and that is by experiment. A reduction in railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right, the railroad company's officers or the railroad commission, in their view of the effect of the Commission's tariff of rates by allowing the tariff to go into operation."

This view was cited with approval and adopted in the case of *Chicago, etc. R. Co. v. Dey*, 38 Fed. 656, and again by the Supreme Court of Florida, in *Pensacola, etc. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L.R.A. 661; again in the case of *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 29 S. Ct. 148, 53 U. S. (L. ed.) 371; Mr. Justice Moody concludes the opinion as follows: "The Courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. If hereafter it shall appear under the actual operation of this ordinance (an ordinance fixing maximum water rates for the City of Knoxville) that the return allowed by it operates as a confiscation of property nothing in this judgment will prevent [81] another application to the Court, but as the case now stands there is no such certainty that the rates will necessarily have the effect of denying to the company such a return as would avoid confiscation." And in the case of *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 15 Ann. Cas. 1034, 29 S. Ct. 192, 48 L.R.A. (N.S.) 1134, Mr. Justice Peckham, uses this language: "Where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, a Court of Equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating as far as is possible the doubt arising from opinions as opposed to facts."

In the case in which this opinion was rendered just as in the case now under considera-

tion, the Court was asked to intervene before there had been any actual experience of the practical result of the rates established.

So in the present case the test of experience will soon make it clear whether the rate imposed by the order of the Public Service Commission can in any proper sense be termed confiscatory or compensatory; if the latter, no injunction ought to issue, while if not compensatory, beyond any doubt an injunction should be granted.

It was suggested in the argument that the effect of putting into operation the tariff established by the Commission would be to require a lowering of interstate tariffs as well; but this by no means follows, because the two services are radically different, and the one is by no means a conclusive measure for the other, and among the points decided by the *Minnesota Rate Cases*, 230 U. S. 352, Ann. Cas. 1916A 18, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151, were the following: 1st. That Congress has not by the creation of the Interstate Commerce Commission sought to establish a unified control over interstate and intrastate rates; 2nd, that the fixing of reasonable rates for intrastate transportation was left with the States, and the agencies created by the States to deal with; and 3rd, that the inter-blending of operations in the conduct of interstate and local business, and the exigencies that are said to arise with respect to the maintenance of interstate rates by [82] reason of their relation to intrastate rates are considerations for the practical judgment of Congress. And in connection with this last point, it is to be observed that up to the present time Congress has not undertaken or seen fit to attempt to regulate or interfere with the establishment, maintenance or exercise of supervision over intrastate rates.

It was perhaps unfortunate that the Public Service Commission in its order used the following language: "That its said order of December 21st, 1914, shall continue in force for a period of ten years unless earlier modified or abrogated by the said commission." It certainly will not require ten years' time of practical experience under the tariff adopted by the commission to demonstrate whether the rates fixed are confiscatory or compensatory. And while it is true that the order expressly reserves the right to modify or abrogate the order of December 21st prior to the expiration of ten years, it would have been far better to have avoided even the impression of determining in advance the effect of a new scheme of rates for a definite period of time. Therefore, in affirming the decree of the Circuit Court, it will be with a reservation of the right of the railroad company, after the lapse of a reasonable time, to apply to the commission for a rescission or modification of its order, if experience shall demon-

strate that the revenue derived under the tariff as established by the commission is not properly compensatory for the service performed.

Decree affirmed, with costs.

NOTE.

Validity of Order by Public Service Commission Regulating Commutation Rates.

The reported case sustains the power of a public service commission to establish a rate for commutation tickets different from and lower than that charged for regular single trip transportation. While no other case seems to have passed directly on the point, there is a considerable line of authority which seems to be inconsistent in principle with the reported case, maintaining the rule that a state legislature has no power to require the sale of mileage books at a reduced rate. *Lake Shore, etc. R. Co. v. Smith*, 173 U. S. 684, 19 S. Ct. 565, 43 U. S. (L. ed.) 858, followed practically without discussion, in the following cases: *State v. Bonneval*, 128 La. 902, Ann. Cas. 1912C 837, 55 So. 569; *Beardsley v. New York, etc. R. Co.* 162 N. Y. 230, 56 N. E. 488; *State v. Great Northern R. Co.* 17 N. D. 370, 116 N. W. 89; *Com. v. Atlantic Coast Line R. Co.* 106 Va. 61, 9 Ann. Cas. 1124, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L.R.A.(N.S.) 1086. The case first cited is commented on at length in the reported case and its inconsistency with later holdings of the same court is pointed out. See to the same effect *Reeder on Rate Regulation*, p. 327.

In *Sprigg v. Baltimore, etc. R. Co.* 8 Int. Com. Rep. 443, the interstate commerce commission held that it was without power to compel the granting of commutation rates, the decision being however rendered before the enactment of the Hepburn Act (Fed. St. Ann. 1909 Supp. p. 265) by which the rate-making power was given to the commission. The commissioners said: "The prayer of the petition in effect is that the carriers be directed to make special contract arrangements with certain residents of Baltimore and Washington, which shall secure to them, because they travel daily between those cities, very much lower rates than are paid by other passengers having less frequent occasion to make the same journey. The commission has no power to impose such a requirement. It would be beyond our jurisdiction to make the order asked for in this proceeding, even if satisfied of the justice and equity of complainants' demands. The theory and purpose of the law are opposed to privileges not enjoyed by all persons alike, and we have no authority to attempt the enforcement of special agreements for the benefits of a par-

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ticular class. Under the provision in the 22d section above quoted, carriers are allowed to issue mileage, excursion and commutation tickets, but ordinarily they cannot be compelled to do so. The permission does not create an obligation. To the extent necessary for their use, tickets of the description named are exempt from the general rules of the statute. Compliance with those rules may be directed by us, but requiring exceptions there-to is not within our province; and this applies as well to the restoration of such tickets where they have been withdrawn as to the refusal to furnish them where their introduction has been requested." In *Field v. Southern R. Co.* 13 Int. Com. Rep. 298, the foregoing decision was followed. See in this connection, 8 Columbia Law Rev. 636, wherein the general subject of commutation tickets and rate regulation is discussed.

In the *Commutation Rate Cases*, 21 Int. Com. C. Rep. 428, however, it was held that the requirement of reasonableness applied to commutation rates, and that rates of that character stood on a distinct footing with respect to the conditions affecting their reasonableness. The commissioners said: "But it will not do to say that as section 1 cannot be enforced with respect to excursion and mileage book tickets it therefore has no application to commutation tickets. Nor does it follow, because the act provides that nothing therein shall prevent the issuance of commutation tickets, 'that no other provision of the act applies to such tickets, and that we are without power under section 1 to regulate the reasonableness of the fares demanded for such a service. Necessarily that must depend somewhat upon the character of the service. Unlike excursion traffic, commutation traffic is neither occasional nor sporadic, but on the contrary is characterized by an unusual regularity in volume; it may be accurately measured and provided for more readily than in the case of any other kind of passenger traffic. It is ordinarily constant, except as it may gradually grow in volume. Its stability is established by the juxtaposition of a community of homes and a community of workshops; and this separation of the place of residence from the place of work is in many cases the direct result of the efforts of the carrier. It has been encouraged, developed, and fostered by the carriers, and large and numerous suburban communities have grown up in the belief, not that some fare less than the normal full passenger fare would be demanded in the future, but in the belief, as heretofore stated, that no more than a just and reasonable fare would at any time be exacted, considering the special character of the traffic and of the service and the conditions that differentiate both the traffic and the service so completely and absolutely from all other

kinds of passenger traffic and service. That it has been regarded as a different class of traffic conducted under entirely different conditions and a different kind of service is shown not only by the origin of commutation and the subsequent traditions that have accumulated with its growth but by the general recognition of it by the carriers themselves as an independent and a special service. Suburban communities have grown into existence on the theory voluntarily accepted by the carriers as well as by the public that one who makes daily use of an agency of transportation between his place of business and his home must necessarily be accorded a special and a low rate. This theory is firmly fixed in the history and traditions of transportation by rail and must therefore be regarded as embraced in the law under which such transportation is regulated." In *Chicago, etc. R. Co. v. Ketchum*, 212 Fed. 986, it was said, obiter, in reference to the foregoing opinion: "This opinion has never been passed upon by the courts, but the reasoning of Mr. Commissioner Harlan is quite cogent and persuasive." See also *Commutation Rate Case*, 21 Int. Com. C. Rep. 428.

In *Delaware, etc. R. Co. v. Board of Public Utilities Com'rs*, 84 N. J. L. 619, 87 Atl. 801, a regulation respecting an existing commutation rate was sustained, the court saying: "It is further contended that the order before us is violative of the Fourteenth Amendment of the Federal Constitution because it requires carriers to establish special rates for the service therein referred to, and, further, is invalid because it interferes with interstate commerce. But this contention is based upon a manifest misunderstanding of the scope of the order. It deals with existing conditions, viz., an existing commutation service and an existing special rate service. It does not require the carriers affected by it to establish special rates for a commutation service, or any other service, but merely requires the publication of the rates which are being charged for such service, and the filing of schedules thereof with the commission. If, after this is done, the respondent board shall attempt to regulate those rates, the question of its power to do so, which is the matter discussed by counsel for the appellant under this point, will become a living one, but until then it is merely academic."

HOCKING VALLEY RAILROAD COMPANY

v.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL.

Ohio Supreme Court—March 16, 1915.

92 Ohio St. 9; 110 N. E. 521.

Carriers — Regulation by Public Service Commission — Requiring Particular Class of Service.

A provision, whether made by statute or order of a commission, which fixes rates for the carriage of passengers or freight by a railroad company is to be distinguished from an order which requires it to furnish a particular facility or perform a duty imposed by reason of the exercise of rights and franchises which it has acquired from the state; the fact that some loss would result from compliance with the latter does not in and of itself conclusively establish the unreasonableness of the order, but is an important element to be considered with all the other facts bearing on that question.

[See note at end of this case.]

Same.

In a proceeding before the public utilities commission to compel a railroad company to continue, on a portion of its road, an interurban service which it has voluntarily established and maintained for many years, during which the personal and business relations of the people of the communities served, relying on the continuance of such service, have become adjusted thereto, the burden of showing a state of facts which justify the discontinuance of the service is on the company.

[See note at end of this case.]

Regulatory Power in General.

The franchises, rights and privileges of a railroad company are granted because of the public nature of the business carried on by it; the resulting benefits to the public constitute the consideration of the grant, and the company while exercising such rights and franchises is subject as to its state business to state regulation, either by direct statutory provision or by an administrative body authorized to act.

Requiring Particular Class of Service.

An order of the public utilities commission requiring a railroad company to continue an interurban service on a portion of its road, under the circumstances of this case, is not unlawful or unreasonable and is not a denial of due process of law or the equal protection of the laws or a taking of property without compensation.

[See note at end of this case.]

Review of Public Service Commission.

In the consideration of a petition in error filed in this court to reverse, vacate or modify an order of the public utilities commission on

the ground that it is unlawful or unreasonable, the court will examine the entire record to determine whether a finding of facts made by the commission is so involved with and dependent on questions of law as to be in effect a decision of the latter.

[See generally Ann. Cas. 1914D 795.]
(Syllabus by court.)

Error to Public Utilities Commission.

Complaint filed before Public Utilities Commission, by John E. Hayes et al., plaintiffs, against Hocking Valley Railway Company, defendant. Judgment for plaintiffs. Defendant brings error. **AFFIRMED.**

[10] John E. Hayes and certain other citizens residing in the vicinity of Jackson and Wellston, in Jackson County, Ohio, filed their complaint before the public utilities commission. The petition sets forth in detail the interests and lines of business in which the different complainants respectively are engaged, each showing that his business is of such a character as to be closely related to and dependent upon the transportation facilities referred to thereafter in the complaint.

It is alleged that the defendant in the year 1896 established a line of railway between Hamden, in Vinton county, through the city of Wellston and the villages of Glen Roy and Coalton to the city of Jackson, in Jackson county, a distance of about fifteen miles, and placed in operation upon said line of railroad electric cars propelled by electric motor; that certain franchises were given by Wellston and Jackson to operate said cars over certain streets in said cities and that from about 1896 the company continued to operate electric cars between the points above referred to up to the time of the filing of the complaint, and was then doing [11] so; that said electric-car service is used by the complainants and the traveling public in general for means of transportation to and from their residences and places of business in said cities and villages and at numerous points at and near the line of service so established; that at all times since the date of establishment the company has maintained and operated a line of railway and the electric-car service, and that the general public, recognizing such service and with the full expectation and understanding that the same would be continued, has established residences and business places and occupations at various points along said line of electric-car service and expended large sums of money in establishing the same, and that the workmen employed in and about such places of business so established use the electric cars for transportation to and from their work.

It is alleged that the defendant had a schedule in operating electric cars on the rail-

road, that the company had given notice of its intention to discontinue the operation of electric cars and that if the service is discontinued it will leave the traveling public in the cities of Wellston and Jackson and in the villages of Glen Roy, Coalton and Hamden without sufficient and adequate service for the purpose of reaching their various places of business and residences.

In the answer it is admitted that the defendant has for some time maintained electric-car service for the transportation of persons and property; that on said line of railway, from Hamden through the towns named to Jackson, the defendant has [12] heretofore operated electric cars and that said electric car service has been used by the complainant and other persons; that the schedule set forth in the petition is the one upon which the cars were operated; that the defendant intends to discontinue the operation of said electric cars and the supplying of electricity for light and power purposes.

Further answering, it is alleged that in the spring of 1896 what was known as the Wellston and Jackson Belt Railway was completed and came under the supervision of the defendant. The defendant since said time has provided steam service on said road for handling freight and certain through passenger-train service between Jackson, Dundas and Logan, where connections were made with the main lines. At about said time electric service was introduced for the handling of local passenger traffic between Jackson and Wellston and was later extended to Hamden. About the year 1910 a marked falling off in the number of passengers carried on the electric lines was noticeable, due to the almost complete exhaustion of coal in the several mines adjacent to said line. Said decrease in patronage continued throughout the subsequent years and was augmented by the removal from Jackson county of large numbers of men formerly employed about the mines, and said electric service is operated solely for the convenience of a few commercial travelers or other people making trips to and from Wellston and Jackson; that steam service on said road will answer all requirements of the traffic; that the board of directors of defendant had resolved to discontinue the use of electric-car service [13] and to install a service of cars operated by steam to furnish facilities equal to that provided by the defendant on any other of its lines within the state; that the operation of said electric-car service for the last three or four years has resulted in a loss, and that electric service is not necessary and steam service is all that is required.

The cause was heard upon evidence by the commission and on June 24, 1914, the commission, after a finding of facts hereinafter set out, made the following order:

It is, therefore, ordered that defendant be and it is hereby notified, directed and required to establish and furnish the same interurban passenger service for the benefit and use of the public on its leased properties between Jackson and Hamden on the schedule for such service that was in effect at the time of the filing of this complaint, or upon some other schedule equally efficient.

These proceedings are brought to reverse this order of the commission.

Wilson & Rector for plaintiff in error.

Timothy S. Hogan, Joseph McGhee, Clarence D. Laylin, E. E. Eubanks and A. E. Jacobs for defendants in error.

JOHNSON, J.—The judicial article of the constitution, as recently amended, after defining the original and the appellate jurisdiction of this court, provides that it shall have "such revisory jurisdiction [14] of the proceedings of administrative officers as may be conferred by law."

Section 33 of the act of April 18, 1913 (103 O. L. 804), to create the public utilities commission, provides in effect that such jurisdiction may be invoked by petition in error, and that a final order of the commission shall be reversed, vacated or modified if the court is of opinion that the order was unlawful and unreasonable. In order to give full validity to the proceedings and orders of the utilities commission, it was necessary that some adequate provision for their judicial review should be made; because if an administrative order results in the taking of property, such as the company claims results in this case, the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the constitution. *Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702, 33 U. S. (L. ed.) 970.

The legislature is not required to confine such revisory jurisdiction to this court, but would be authorized by Section 4 of Article IV. of the Constitution to confer it on the courts of common pleas. By the provisions of the public utilities act all of the powers of the public service commission are conferred on its successor. Full provision is made in Section 524 et seq. General Code, for notice to the defendant of the filing of the complaint and of the time and place of hearing. Full opportunity is given it to be heard and to show that the order asked for is unlawful or unreasonable. It has the benefit of compulsory process to [15] require the attendance of witnesses to testify under oath and to secure the production of documents. Provision is made for the taking of depositions and for a certified transcript of all the evidence,

findings and orders. On petition in error here it leaves for consideration the contention that the record shows that the order of the commission was unlawful or unreasonable.

The court in *Washington v. Fairchild*, 224 U. S. 510, 528, 32 S. Ct. 535, 56 U. S. (L. ed.) 863, 869, where a similar administrative order was under consideration, say: "This necessitates an examination of the evidence not for the purpose of passing on conflicts in the testimony or of dealing upon pure questions of fact, but, as said in *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* 223 U. S. 573, 32 S. Ct. 316, 56 U. S. (L. ed.) 556, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.'"

Various grounds are set out in the petition in error in this case on which it is claimed that the orders complained of are unlawful and unreasonable. They are comprised in the contentions of the company hereinafter referred to. It is urged that the findings and orders are against the manifest weight of the evidence. The findings, as shown by the entry of the commission, are: That the defendant has, since 1896, operated electrically propelled cars and furnished an interurban passenger service to the public over its leased properties between [16] Jackson and Hamden, Ohio, a distance of about fifteen miles, and at the time of the filing of the complaint said service was being rendered substantially on the schedule set out therein; that by reason of the establishment and maintenance of said service by defendant large numbers of individuals, firms and corporation were influenced in the establishment, location, maintenance and operation of their business enterprises, and the personal and business relations of the various communities, individually and with each other, were and have become and are now adjusted to and in accordance with the service so furnished; that public convenience, welfare and necessity require that defendant continue to furnish the service; that the defendant has not shown that the furnishing of the service would entail any financial loss upon it or that the service has not been, or will not be, remunerative.

We have carefully examined all of the evidence and considered it in the light of the conflicting claims of the parties with reference to it, and we are not able to say that the findings of the commission are against the evidence.

It is clearly shown that during the eighteen years while the service was continued, the personal and business relations of the communities served became adjusted in the manner set forth.

It is conceded by counsel on both sides that the order made by the commission does not require that the interurban service be maintained by means of electricity. No particular motive power is made the criterion of compliance by the defendant with [17] the order of the commission. The question of motive power is thus left for the determination of the defendant itself. Therefore, the only question left relates to the validity of the order requiring the company to furnish interurban service. The defendant contends that the regular steam-train schedule between the points named will supply all the needs of the community and that to operate interurban service would be a source of constant and increasing financial loss to it. Its position is that it will have performed its duty when it shall install a service of cars which will furnish transportation facilities equal to that provided by it on any other of its lines in the state, and that the order of the commission requires the defendant to discriminate unlawfully and unreasonably in favor of the points named.

As to the sufficiency of the proposed substitute service, the witness Sellers, whose testimony disclosed that he was well acquainted with the entire situation, testified that it would depend on the nature of the service and whether the substituted service would make stops of the character that were made by the already established service. To the same effect was other evidence in the case.

It is important that an adequate conception should be had of the meaning of the term "interurban service." It is obvious that the commission used the term as meaning a service consisting of cars or trains which are run more frequently than any through steam-passenger service, and also a service in which frequent stops are made, so that [18] patrons need not walk far along the line to arrive at the nearest stopping place. Such a service is to be distinguished from the ordinary passenger trains of steam railroads in that the latter do not stop except at regular stations located in cities or villages, which are at intervals much greater than the stops which the evidence shows were made by the defendant on the portion of its line involved in this proceeding. The question is, therefore, presented whether, in view of the fact that the personal and business relations of these communities had become adjusted to the kind of transportation service known as interurban service as distinguished from ordinary steam service, all of which had been done by residents in those communities, who had relied upon the fact that the defendant had voluntarily entered the field and had offered to furnish and had furnished the particular service referred to, the defendant can now withdraw or discontinue the service, while still retain-

ing its corporate franchises and rights, without itself assuming the burden of making a showing of facts which justify the withdrawal or discontinuance. It is a matter of common knowledge that the business and personal relations of the people of the country necessarily become adjusted to its transportation facilities, and that these constitute a very important factor in determining the direction and scope of the development of particular sections.

It is not shown that there is any special franchise provision or any contract by which the defendant expressly agreed to render the service in question. Therefore, the order of the commission must find [19] its validity, if at all, by reason of the fact that the defendant is a public utility, incorporated and organized under the laws of the state, and that while exercising the rights and privileges accruing to it as such, it has by its acts and conduct created the situation found by the commission to exist; and that from this situation a duty is imposed upon it which it cannot disregard in the absence of such a showing on its part as above indicated.

It is well established that the benefits which result to the public constitute the consideration for the grant by the state of the franchises, rights and privileges held and exercised by a railroad company, and that their acceptance by the company imposes on it the obligation to operate the railroad which it was incorporated to construct, when constructed, and of doing so in the manner and for the purposes contemplated in its charter. One of the obligations thus imposed is to so operate its trains that they will reasonably serve the needs of the public.

The court in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 11 Ann. Cas. 398, 27 S. Ct. 585, 51 U. S. (L. ed.) 933, said: "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

[20] In *Gates v. Boston, etc. R. Co.* 53 Conn. 342, 5 Atl. 695, it is said: "It is true that the charter is permissive in its terms, and properly no obligation rests upon the corporation to construct the railroad . . . when that option has been made, and the corporation . . . has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their personal and business relations, upon that state of affairs; by so accepting and acting upon the

chartered powers a contract exists to carry into full effect the objects of the charter.

. . . Having exercised these powers the corporation has no right against the will of the state to abandon the enterprise."

The defendant, however, contends substantially that in spite of the state of facts shown in the record, as to the adjustment of the community relations to the service, the conditions in the communities had so changed at the time the complaint was filed that the present needs do not require that the service be maintained; that electric service, considered as a separate operation, is conducted at a loss and that the enforced continuance of the service would be a discrimination against other communities served by the defendant which would not enjoy similar advantages. Defendant offered testimony tending to show that it would be necessary to install new equipment at considerable expense, which could be operated only at a loss if it is required to continue the electric service.

So far as the matter of the electric service is concerned, that is eliminated by the concessions of [21] counsel on both sides that such service is not required by the order of the commission. So far as the changed conditions and the lessening demands are concerned, the witness Connors, called by the defendant, testified that there had been a decrease in the number of passengers, but was not able to give the extent to which this had gone. He stated that it was true, in a general way, but said "I haven't the figures, but if estimates will answer I can give an estimate, if not I will get the figures." It was then suggested by a member of the commission, which suggestion was agreed to by the witness, that a detailed statement showing the condition in relation to the traffic, which would disclose the facts with reference to the matter testified to by the witness, should be produced. Counsel for the commission state in their brief and at the bar that the statement was never furnished and that the general statement by Mr. Connors was all the testimony touching the subject, and we find no denial of that statement in the brief of opposite counsel. We have not found in the record anything to contradict this claim.

It is undoubtedly true that the question whether or not the interurban service is a paying service should be considered with respect to its bearing on the question whether the public necessities require such service. The presumption is that where there is such a condition and such demand for the service as to amount to public necessity, the rendering of the service would not result in loss. The finding of the commission was that the defendant had not shown that the furnishing of the service will entail [22] loss upon it, and the finding was that the public con-

venience, welfare and necessity require the continuance of the service.

Much testimony was offered touching this question, and, as already indicated, we are not able to say from an analysis of it that the finding of the commission was not sustained by the evidence.

Under the state of facts shown by the testimony and found by the commission the presumption is that there is a present necessity for the continuance of the service which has been in existence for about eighteen years, in the absence of a showing by the defendant to the contrary.

In *Colorado, etc. R. Co. v. State R. Commission*, 54 Colo. 64, 129 Pac. 506, the company discontinued the service over a certain division, about sixteen miles in length, on the ground that because of heavy grades and curves operation of trains was attended with severe loss. On the other hand, it appeared that deprivation of this service inflicted greater loss on the people of the community affected. On this point the court say: "At the time it purchased the South Park System it purchased other lines. . . . It has not surrendered its franchise, and continues in the enjoyment of all its corporate rights. It does not claim that the service ordered [by the commission] is more than sufficient to accommodate the traffic between Denver and Leadville. In such circumstances, the question of loss must be considered in connection with its duties and the productiveness of its corporate business as a whole." At page 94 of the opinion it is [23] said: "Of course, that a service ordered will entail a loss is a circumstance to consider in determining the reasonableness of the order; but a common carrier cannot successfully complain that a loss will thus be occasioned when it appears that the ordered service requires nothing more than necessary transportation facilities."

In *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, *supra*, the carrier was ordered by the commission to arrange its schedule so that one of its passenger trains would make connections with a certain passenger train on another line at a given point. The company contended that on account of other connections made by the train in question that train could not be operated so as to make the required connection, and that thus the order would require the operation of an additional train. The company objected to this on the ground that the public convenience did not require the additional facility and, second, that it would entail a daily pecuniary loss.

It will be observed that in that case the requirement was that facilities additional to those already in existence be furnished, while here the order requires the maintenance of existing service or its equivalent. The court

sustained the commission and held that its order was not inherently unjust and unreasonable because the running of such train would impose some pecuniary loss on the company.

Mr. Justice White said: "This proposition is based on the hypothesis that the order, by necessary [24] intendment, directed the Coast Line to operate an additional train, although such train could not be operated without a daily pecuniary loss. . . . The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order."

After conceding that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, such legislation would be so inherently unreasonable as to constitute a violation of the due-process and equal-protection clauses of the fourteenth amendment, the court further say: "Let it also be conceded that a like repugnancy to the constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor even if, considering rates as a whole a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly [25] involve any question whatever of the power to fix rates . . . but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates . . . is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness. . . . Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the

order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

In *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 30 S. Ct. 330, 54 U. S. (L. ed.) 472, the principle announced in the *Atlantic Coast Line* case was reaffirmed. The *Missouri Pacific* case involved an order which directed the railroad company to run a regular passenger [26] train over its line instead of a mixed passenger and freight train. The company objected that the service could not be rendered without a loss. The court say: "When the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers." It was also held that the order was not, even if such train is run at a loss, a deprivation of property without due process of law or a taking of property for public use without compensation, nor was such an order an unreasonable exercise of governmental control.

It must not be overlooked that a requirement, whether made by a statute or by the order of a commission, which denies a railroad company proper compensation for the carriage of passengers or freight, is entirely different from an order which compels the railroad company to perform duties to the public which are imposed upon it by reason of its exercise of the franchise, rights and privileges which it has acquired from the state.

We think it must be conceded that in a case of this character it would not be necessary for the defendant, in order to justify a withdrawal of the service, to show that such a service entails a pecuniary loss upon its railroad operated as a whole. There is a distinction between withdrawal from a service of this character and from such a [27] service as is offered to all other communities served by the carrier. Where there is a special service, such as the interurban service involved in this case, the loss, if it were shown on the particular operation, is entitled to consideration in the manner above indicated.

We are not constrained to think, however, that this rule should have conclusive effect in connection with the facts shown in this case. Here the public needs were created and grew up in view of the voluntary action of the defendant itself. The finding of the commission is that the public necessity still exists. An

unusual and abnormal situation was developed under the lead of the defendant. The moving by the people away from central points to places scattered along the line of the defendant, and all of the things pointed out in the testimony and the findings, being done while the people relied upon the continuance of the voluntary service by the defendant, present a situation which clearly estops it from invoking the rule above stated.

Counsel for the railroad company urge that the case of Delaware, etc. R. Co. v. Van Santwood, 216 Fed. 252, declares the principles which should rule this case. It was there held that where a railroad company discontinued two trains a day each way and was ordered by the service commission to restore them, and it appeared that the people residing in the terminal cities were amply served without it, the question of the right of the commission to order the trains restored depended on whether the convenience and [28] necessities of the residents of certain small intervening towns demanded the restoration and operation of the trains in question, and that where two steam trains a day each way were run, which reasonably served the convenience and supplied the reasonable necessities of four small intervening points, the residents of which also had the convenience of a through interurban trolley line, complainant would be considered as having performed its whole duty to the public and could not be compelled by the public service commission to operate two trains over the road each way per day at a net loss of over \$3,000 per annum. After showing that a number of trains were run each day between the points named in the complaint, the gross receipts of each day and the existence of a trolley line between some of the points, the court recites the gross revenues of the defendant prior to the existence of the trolley line. It is said in the opinion: "It seems to me that when steam trains enough are run between the city of Oswego and the city of Syracuse to accommodate and serve the necessities of the people of those cities and the intervening city of Fulton, and two steam trains per day each way are run which reasonably serve the convenience and supply the reasonable necessities of the four small intervening points, and these people also have the convenience of the trolley line as described, the complainant has performed its whole duty to the public."

We think that the situation in this case is so substantially different from the situation described [29] by the court in the case referred to as to clearly distinguish it.

The order complained of will be affirmed.

Order affirmed.

Nichols, C. J., Wanamaker and Matthias, JJ., concur.

Jones, J., not participating.

NOTE.

Power of Public Service Commission to Compel Carrier to Furnish Particular Class of Service.

It is thoroughly established that a state may, either directly by legislative action or by a public service commission to which the power is delegated, compel a railroad to furnish service reasonably adequate to the needs of the portion of the public residing in the territory adjacent to its line. To that end the furnishing of needed facilities may be required and the character and extent of the service may be regulated. Thus the maintenance of depots may be required (see Southern R. Co. v. State, Ann. Cas. 1912A 225), and their location prescribed (see the note to Vicksburg, etc. R. Co. v. Louisiana Railroad Commission, Ann. Cas. 1914C 1168). Two railroad companies may be required to make a physical connection of their tracks (see the note to Pacific Telephone, etc. Co. v. Eshleman, Ann. Cas. 1915C 822), and to make train connections at meeting points (see the note to Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 11 Ann. Cas. 398). The running time of trains may be regulated (see the note to Northern R. Co. v. Laird, Ann. Cas. 1916D 1030) and the stopping places within the limits of a municipality prescribed (see the notes to Excelsior v. Minneapolis, etc. R. Co. 17 Ann. Cas. 550, and Camden v. Public Service R. Co. Ann. Cas. 1914D 1090). The extent of the train service which shall be rendered to a particular station is likewise a proper subject of regulation. See the note *In re Minneapolis*, etc. R. Co. reported, post, this volume, at page 1217.

The reported case presents a somewhat unique application of this established regulatory power, holding that a railroad company may be compelled to continue an interurban service if such a service is reasonably necessary to the welfare of a community which has been built up in part by reason of the facility of travel thus afforded. In a similar case at the same term, *Adena R. Co. v. Ohio Public Service Commission*, 92 Ohio St. 1, 110 N. E. 631, another unique application of the same principle was made, the court holding that a railroad engaged wholly in freight traffic could be compelled to provide passenger service if the needs of the community required such a service. The principle applied in that case was well stated in *Colorado, etc. R. Co. v. State R. Commission*, 54 Colo. 64, 129 Pac. 506, wherein an order requiring the restoration of train service on a branch on which service had been abandoned, was sustained, the court saying: "The consideration for the franchise, rights and privileges granted a

railroad company by a state is the resulting benefits to the public, and the acceptance by the company, generally speaking, imposes upon it the obligation to operate, when constructed, the railroad it was incorporated to construct, and of doing so in the manner and for the purpose contemplated by its charter." In *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 30 S. Ct. 330, 54 U. S. (L. ed.) 472, in sustaining an order requiring a passenger service on a certain railroad branch in lieu of a previous mixed train service, the court said: "It may not be doubted that the road by virtue of the charter under which the branch was built was obliged to carry passengers and freight, and therefore as long as it enjoyed its charter rights was under the inherent obligation to afford a service for the carrying of passengers. In substance this was all the order commanded, since it was confined to directing that the road put on a train for passenger service. True it is that the road was carrying passengers in a mixed train, that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. But when the necessary result of the contention is thus defined its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort and safety between travel on a passenger service train and travel on a mixed train—that is, a train composed of freight cars with a passenger car attached—as to cause any exertion of legislative authority for the public welfare based on a distinction between the two to be repugnant to the Constitution of the United States. The demonstration as to the want of foundation for such a contention might well be left to the consensus of opinion of mankind to the contrary." See to the same effect *People v. St. Louis*, etc. R. Co. 176 Ill. 512, 52 N. E. 292, 35 L.R.A. 656.

In *Chesapeake, etc. R. Co. v. Public Service Commission*, 75 W. Va. 100, 83 S. E. 286, it appeared that a railroad company having constructed a branch line operated it for freight traffic only. Sustaining an order requiring the establishment of passenger service the court said: "Evidently, the branch line was constructed under the provisions of § 2983, Code 1913, authorizing the building of lateral lines. The company intended the line

to Ansted chiefly for the haulage of freight, and not for the transportation of passengers. But the purpose then contemplated avails not as an excuse for avoiding duties imposed by law upon common carriers. When built, the line became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it; for ch. 9, Acts 1913, clearly evinces an intention on the part of the legislature, through the commission, to control both main and lateral lines, whether operated under the same or different management or ownership. What, then, did the legislature intend when it required the establishment and maintenance of adequate and suitable facilities and the performance of reasonable, safe and sufficient railroad service? Surely, one important purpose was to secure adequate facilities and conveniences for serving the public. Failure or refusal of the company to perform any service, or to provide the facilities therefor, cannot be deemed adequate, reasonable or sufficient. To be adequate, the service and facilities must be commensurate with the duties to be performed, the extent of the demand for transportation, the cost and returns of the additional service when properly ascertained and found to be consonant with the various other circumstances and conditions under which performance is required. That such conditions exist, necessitating the additional service, is obvious."

While the service which a railroad company may be compelled to furnish is coextensive with its duty as a common carrier it does not extend beyond the limits of that duty. Hence a railroad company may not be required to establish at its stations a commercial telegraph service for the accommodation of the public. *Atchison, etc. R. Co. v. State*, 18 Ann. Cas. 102, and note. See also *Moody v. Denver*, etc. R. Co. 17 N. M. 686, 132 Pac. 250, 47 L.R.A. (N.S.) 974.

BOWEN

v.

DAUGHERTY ET AL.

North Carolina Supreme Court—February 17, 1915.

168 N. Car. 242; 84 S. E. 265.

Husband and Wife — Liability of Husband for Wife's Funeral Expenses.

At common law a husband is liable for the funeral expenses of his deceased wife and

for necessities furnished to her during their married life, including the cost of clothing, food, ordinary household supplies, medical attendance, expenses of sickness, and articles of comfort suitable to the condition and style in which the parties were accustomed to live.

[See note at end of this case.]

Same.

At common law neither a wife nor her estate is liable for necessities furnished to her or for her funeral expenses, though courts at times enforce such claims against her estate on equitable principles.

[See note at end of this case.]

Same.

Under Laws 1911, c. 109, authorizing a married woman to contract as if she were unmarried, a married woman or her estate after her death is liable for her express contract, or in the common counts in assumpsit when goods are furnished on her credit, but where there is no express promise by a wife or circumstances showing that the expenses of her last sickness and her funeral expenses were furnished on her credit, or that of her estate, the husband is primarily liable therefor, and the estate of the wife cannot be charged with claims for such expenses if they can be collected from the husband.

[See note at end of this case.]

Same.

Revisal 1905, § 87, providing for the order of the payment of claims against the estate of a decedent, was designed only to fix the order of such payment, and does not render a married woman's estate liable for necessities furnished during her last sickness and for her funeral expenses, which otherwise would be a debt of the husband.

[See note at end of this case.]

Appeal from Superior Court, Washington county: BOND, Judge.

Action by G. W. Bowen, administrator of Deborah Stocks, plaintiff, against E. L. Daugherty et al., defendants. Judgment for plaintiff. Defendants appeal. **REVERSED.**

[242] Petition to sell land for assets, instituted before the clerk Superior Court and transferred to civil-issue docket on denial of any and all indebtedness.

[243] On the hearing it was properly made to appear that Mrs. Deborah Stocks, formerly the wife of John Stocks, died intestate, December, 1913, leaving a tract of land and very little or no personal property, and the petitioner, G. W. Bowen, duly qualified as administrator and instituted present proceedings to sell her land for assets to pay debts; that claims had been presented amounting to more than \$300, consisting of funeral and burial expenses, tombstone, doctor's bills and nursing during her last illness, the latter part of 1913, from September to 31 December.

"Third. That all of the said accounts were made since an act was passed giving married

women the right to contract and were made between September, 1913, and 31 December, 1913, the period covered by the last illness of the said Mrs. Stocks.

"Fourth. That at the time of the death of Mrs. Stocks and during the time that said accounts were contracted the said Mrs. Stocks and her husband were living together as man and wife, and the said Mrs. Stocks was at home during said period.

"Fifth. John Stocks, husband of Deborah Stocks, died shortly after the death of Deborah Stocks, leaving a last will and testament by which he devised and bequeathed all of his property to Mrs. Kitty Brown (one of the claimants) for life, and after her death to the children of Mrs. Kitty Brown, and appointed Mrs. Kittie Brown executrix, and that the said Mrs. Kitty Brown had duly qualified as executrix of said will.

"Sixth. That Mrs. Deborah Stocks did not leave sufficient personal property to pay the claims above referred to, but did leave sufficient real estate, if her estate is liable therefor.

"Seventh. That John Stocks, her husband, left sufficient property to pay all of the above claims, if they are properly chargeable against his estate, in addition to all other debts of his estate.

"Eighth. That all of the items in all of the above claims were necessary to the comfort, the proper care and proper apparel of the deceased lady, and the amount due the two Mrs. Browns, if anything, for nursing, were also necessary for the comfort and proper care of the said Mrs. Stocks during her illness.

"Ninth. That Mrs. Deborah Stocks left no children, but did leave sisters, nephews, and nieces, all of whom have been properly made parties defendant to this proceeding.

"Tenth. That there was no evidence of any express contract on the part of Mrs. Stocks for any of the supplies, etc., or medical attention, etc., nursing, etc., represented by the claims filed."

On these facts, the court below being of opinion that the real estate of the deceased wife was liable, there was verdict establishing indebtedness and judgment directing that the clerk proceed accordingly in the proper administration of the estate.

Defendants, having duly excepted, appealed.

Rouse & Land and *E. R. Wooten* for appellants.

Louis W. Gaylord for appellee.

[244] HOKE, J. (*after stating the case*).—At common law the husband was liable for the funeral expenses of his deceased wife and for "necessaries" during their married life; the term including "the cost of clothing, food,

ordinary household supplies, medical attendance, expenses of sickness, etc., as well as articles of comfort suitable to the condition and style in which the parties were accustomed to live." *Smyley v. Rees*, 53 Ala. 89, 25 Am. Rep. 598; *Ketterer v. Nelson*, 146 Ky. 7, 141 S. W. 409, 37 L.R.A.(N.S.) 754; *Waesch's Estate*, 166 Pa. St. 204, 30 Atl. 1124; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; *Sears v. Giddey*, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139, 21 Cyc. pp. 1219-1224.

As a general rule, neither the wife nor her estate was legally liable for such claims, though courts, empowered to administer her estate on equitable principles, have enforced them in certain instances (In re *McMyn*, 33 Ch. D. (Eng.) 575), a position which has been allowed to obtain, in this country, where the husband has failed to pay and, being insolvent, payment from him or his estate could not be enforced. *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666; *Gould v. Moulahan*, 53 N. J. Eq. 341, 33 Atl. 483; *Fogg v. Holbrook*, 88 Me. 169, 33 Atl. 792, 33 L.R.A. 660 and note.

This being the law formerly existent here, the Legislature enacted the statute known as the Martin act (ch. 109, Laws 1911) and which provided, in effect, that except in conveyances of her real estate and in case of contracts with her husband, a married woman was authorized to contract and deal as if she were unmarried; and it is chiefly contended that, under and by virtue of the provision of this statute, the wife and her estate have become absolutely and primarily liable for the claims filed in this proceeding.

The law having removed the inability of married women, in ordinary instances, to bind themselves by contract, they can be held liable under their express agreement and when the goods are sold to them on their credit. This was held in *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820, and undoubtedly in proper instances married women may now be held liable in the common counts in *assumpsit*. *Hinkson v. Williams*, 41 N. J. L. 35; *Ackley v. Westervelt*, 86 N. Y. 448; *Stewart on Husband and Wife*, secs. 375 and 381. But, in the absence of such express promise and of any evidence tending to show that credit was given to her or of any facts or circumstances to make her exclusively or primarily liable under the general equitable principles of *indebitatus assumpsit*, we see no reason, before or since the statute, why a debt of the husband should be imputed to the wife. True, the general rule is that when goods are supplied or services rendered by one person for another, the law implies [245] a promise to pay what they are reasonably worth: but the principle, in our opinion, should not control

when the goods were acquired or services rendered under circumstances which created a recognized liability in some one else. In such case there should be additional proof showing an express promise, or, as stated, facts and circumstances bringing the demand under the equitable principles of *indebitatus assumpsit*. This, we think, is the correct view as to the effect of the statute in such cases, and the position is in accord with authoritative decisions on the subject in other States. *Moore v. Copley*, 165 Pa. St. 294, 30 Atl. 829, 44 Am. St. Rep. 664; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168; *Nelson v. O'Neal*, 11 Ind. App. 296, 39 N. E. 207; *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243.

We are aware of a number of decisions, and by courts of eminent ability and learning, to the effect that the estate of the deceased wife is primarily liable on claims of this kind by reason of their statutes as to the proper administration of estates, and which provide, in differing terms, that debts for funeral expenses, medical bills, and services within a stated period, etc., shall be paid, etc. In re *Skillman*, 146 Ia. 601, 125 N. W. 343, 140 Am. St. Rep. 295; *Schneider v. Breier*, 129 Wis. 446, 109 N. W. 99, 6 L.R.A.(N.S.) 917; *Constantinides v. Walsh*, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311; *McClellan v. Filson*, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814.

It may be that, owing to special phraseology of these statutes, a position of that kind can be upheld, but, so far as our own enactment is concerned (*Revisal 1905*, sec. 87), we do not hesitate to hold that the statute is only designed to recognize priorities and to establish the order of payment as between claimants who have valid debts against the estate, and was never intended by the law-makers to create a liability which did not otherwise exist.

As heretofore stated, if the husband, liable for indebtedness of this kind, should fail to pay, or, his estate being insolvent, payment could not be enforced, authority is to the effect that an equity might arise to the creditor enabling him to collect from the wife's estate; but otherwise, and except under conditions formerly referred to, the debt is and continues to be that of the husband and enforceable against him or his estate.

From the case on appeal it appears that all of these claims are for funeral expenses or for necessities, and that these last were supplied to the wife when she was living with her husband and without any express promise on her part to pay for same, and, further, that the husband died shortly after the wife, leaving an estate sufficient to pay all of his debts, including those involved in this proceeding, and that he devised his property to Kitty Brown for life and, after her death, to her

children, she being one of the principle claimants against the wife's estate. Applying the principles, as above stated, we are of opinion that there was error in holding the wife's estate liable, and the judgment to that effect must be

Reversed.

[246] CLARK, C. J. (*concurring*).—The statute, ch. 109, Laws, 1911, known as the "Martin act," in no wise enlarges or restricts the common-law liability of the husband for the support of his wife.

While that statute authorizes a married woman to contract and deal as if she were unmarried, and while chapter 13, Laws 1913, authorizes her to receive and collect her earnings and damages for wrongs done her, either to her person or property, neither of these acts relieves her husband of his common-law liability for her support nor renders her liable therefor except in such cases as she shall have contracted obligations upon her own responsibility.

The husband does not become liable as surety for his wife's contracts, nor responsible for debts contracted by her, except for her support, as above stated. And she is not made responsible for articles bought for such support except where by contract, express or by her conduct she leads the seller reasonably to understand that she is assuming individual responsibility. In the latter case the husband would still remain liable, and the seller can recover against either or both.

Brown, J., did not participate in the decision of this case.

NOTE.

Liability of Husband for Wife's Funeral Expenses.

Introductory, 1164.

General Rule, 1164.

Modification of Rule, 1166.

Introductory.

With the disappearance of the common-law conception of the merger of husband and wife into one legal entity, the relative rights and liabilities of husband and wife have in many instances undergone a change. This is to some extent true of the common-law doctrine that the husband is liable for the payment of his wife's funeral expenses. Some jurisdictions have adhered to this doctrine without change, while others have departed from it in varying degrees. The present note purports to review the recent cases passing on the question. For a collection of earlier cases on the same subject see the notes to Kenyon

v. Brightwell, 1 Ann. Cas. 172, and Wana-maker v. Weaver, 98 Am. St. Rep. 621, 639.

The closely related subject of the liability of the estate of a deceased married woman for a tombstone or monument erected over her grave is treated in the note to *Matter of Estate of Lester*, reported, ante, this volume, at page 267.

General Rule.

The reported case follows the common-law rule that a husband is liable for his wife's funeral expenses. To substantially the same effect see the following cases:

England.—Ambrose v. Kerrison, 10 C. B. 776, 70 E. C. L. 776, 20 L. J. C. Pl. 135.

Indiana.—Scott v. Carothers, 17 Ind. App. 673, 47 N. E. 389.

Kentucky.—Brand v. Brand, 109 Ky. 721, 60 S. W. 704, 22 Ky. L. Rep. 1366; Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409, 37 L.R.A. (N.S.) 754; Long v. Beard, 48 S. W. 158, 20 Ky. L. Rep. 1036. Compare *Towery v. McGaw*, 56 S. W. 727, 982, 22 Ky. L. Rep. 155; *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 231.

Maryland.—Stonesifer v. Shriver, 100 Md. 24, 59 Atl. 139.

Michigan.—Stone v. Tyack, 164 Mich. 550, 129 N. W. 694.

New Jersey.—Gould v. Moulahan, 53 N. J. Eq. 341, 33 Atl. 483.

Ohio.—Humphrey v. Huff, 35 Ohio Cir. Ct. Rep. 117.

In *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139, the court said: "But we must also indicate to the orphans' court our views upon the chief subject of contention, being the allowance to the husband as executor for the sums paid by him for his wife's medical attendance, funeral expenses, and tombstone. In overruling the objections to these allowances, the court was in error. The question in this state is not an open one, this court having decided in *Willis v. Jones*, 57 Md. 368, that 'the husband is chargeable with funeral expenses of the wife, and is bound to pay them, but they constitute no charge upon her separate estate.' At common law the legal existence and identity of the wife was merged in that of the husband who became entitled to hold and to reduce into his possession all her personal estate, and as a consequence the law cast upon him the duty of supplying her with necessities suitable to their station in life. The duty of a husband to bury his wife in a suitable manner is involved in the obligation to maintain her while living, and rests also upon a due regard for the decencies of life, and the health of the public. It has been generally held where the subject has been considered by the courts of this country that statutes creating the wife's statutory estate

do not absolve the husband from his common-law obligation to provide suitable burial for the wife, and that he is not entitled to any credit on the settlement of his administration of her estate for such expenditures. *Smyley v. Reese*, 53 Ala. 89; *Sears v. Giddey*, 41 Mich. 590; *Staples Appeal*, 52 Conn. 425; *In re Weringer*, 100 Cal. 345. Rhode Island and Ohio, upon a verbal construction of the language of their respective statutes, hold that a husband who administers upon his wife's estate is entitled to be allowed for reasonable funeral expenses. *Moulton v. Smith*, 16 R. I. 126; *McClellan v. Filson*, 44 Ohio St. 184. The present Massachusetts statute, carefully framed, expressly declares the husband to be so entitled. *Constantinides v. Walsh*, 146 Mass. 281. But before that enactment, an earlier case, *Cunningham v. Reardon*, 98 Mass. 538, held otherwise. In *Gregory v. Lockyer*, 6 Madd. (Eng.) 90, such an allowance was made, but that decision does not seem to have been followed in England, nor to have been accepted in this country except in Rhode Island and Ohio. Our own Code, art. 45, § 20, provides that 'nothing in that article shall be construed to relieve the husband from liability for necessities for the wife, or for his or their children, but that as to all such cases, his liability shall be or continue as at common law,' and this reservation we think forbids us to question the decision in *Willis v. Jones*, supra. If a tombstone be regarded as part of a suitable burial, according to the station of the parties in life, it comes directly within the principle of necessities as applicable to ordinary funeral expenses. If it cannot be so regarded, the husband in providing it does so at the risk of objection by her distributees, and in such a case, not being a debt of the wife's, nor in any manner a charge upon her estate, it can only be regarded as a tribute, or gift, by him to her memory."

In the case of *Re Sea*, 11 British Columbia 324, that court emphatically affirmed the liability of the husband to pay the wife's funeral expenses and his inability to claim reimbursement from his wife's estate. In that case it was said: "The husband's duty to bury his dead wife at his own charge is neither based upon nor incidental to his marital proprietary right. It is founded in the marital relation itself. Its true correlative is his right to nominate the place of his wife's burial and to prescribe the manner of her obsequies. The Married Woman's Property Acts do not expressly or by necessary implication deal with this obligation; nor do they affect the marriage status. I am therefore unable to agree with the view tentatively advanced by Mr. Lush in his book on 'Husband and Wife' (which is also the view held by so distinguished a jurist as Mr. Justice Holmes respecting the effect of the paralled legislation

of the state of Massachusetts), that the reduction of the *jus mariti* effected by these acts involves the relief of the husband from the burden of this last act of piety and charity. Such an interpretation would, in my judgment, be legislative in its character. With respect to the weighty authority of Mr. Justice Holmes' opinion—one may observe that eminent American judges, in the application of legislative enactments, do permit themselves a latitude of interpretation which a Canadian court would not feel itself free to exercise. It is equally clear that there is no right of indemnity out of the wife's estate." To the same effect see *Re Montgomery*, 20 Manitoba 444, 17 West L. Rep. 77.

In *Ketterer v. Nelson*, 146 Ky. 7, 141 S. W. 409, 37 L.R.A.(N.S.) 754, the rule was laid down that the husband was primarily liable for the funeral expenses of his deceased wife, the court at the same time reviewing and reconciling the other decisions in Kentucky previously passing on this question. The court said: "Appellant's claim to be reimbursed out of the proceeds of the property for the wife's physician and nurse bills and burial expenses cannot be sustained, these items being demands in the nature of necessities for the wife for which he was primarily liable. We do not think the case of *Carpenter v. Hazelrigg*, 103 Ky. 538, relied on by appellant militates against this conclusion. It is true the wife's physician's bill and funeral expenses were in that case ordered to be paid out of the proceeds of her land, but it was because the husband had failed to pay them. In the opinion it is said: 'Whilst the husband is bound in law to pay the necessary physician's bill for his wife and her funeral expenses, yet if the husband fail to pay them, her estate is liable therefor. The husband seems to have failed to pay them and it was not error for the court to order the land sold subject to the husband's curtesy right to pay these expenses. If the land is sold to pay them, the husband can be compelled by appropriate proceedings to reimburse those to whom her estate descends.' Appellant also relies upon the case of *Towery v. McGaw*, 22 Ky. L. Rep. 155, in which it was held that the wife's personality should first be subjected to the payment of funeral expenses, but also held that medical services and the care of the wife were necessities within the meaning of the statute providing that the husband shall be liable for necessities furnished the wife. The holding that the wife's personality should be subjected to the payment of funeral expenses seems to have been based upon the ground that the bills for medical services and care of the wife had not in fact been paid by the husband, the claims therefor being asserted by the creditors directly against the wife's es-

tate. These facts seem to distinguish *Towery v. McGaw* from *Carpenter v. Hazelrigg*, supra, with which it is apparently in conflict, and also distinguishes it from the case at bar. In *Long v. Beard*, 20 Ky. L. Rep. 1036, it was held that the husband is bound in law for the physician's bill and burial expenses of his deceased wife as these are obligations for which he is primarily liable. In *Brand v. Brand*, 116 Ky. 785, it was held that the share of the husband in the wife's estate may be charged with the funeral expenses and physician's bills of the wife, as he is primarily liable for debts contracted by her, for necessities, after marriage. The opinion in *Brand v. Brand* is the last decision of this court on the question under consideration, and we adhere to the conclusion therein expressed."

In *Stone v. Tyack*, 164 Mich. 550, 552, 129 N. W. 694, it was declared that the liability of the husband for the wife's funeral expenses was not altered by the fact that they were living apart, the court saying: "That the husband is primarily legally liable for the ordinary funeral expenses of his wife is not open to question. *Sears v. Giddey*, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; *Gallaway v. McPherson*, 67 Mich. 546, 35 N. W. 114, 11 Am. St. Rep. 596; *Gleason v. Warner*, 78 Minn. 405, 81 N. W. 206; 21 Cyc. p. 1233, and cases cited; 15 Am. & Eng. Enc. of Law (2d ed.) p. 880. . . . The liability of the husband, in the case at bar, is not altered by the fact that at the time of his wife's death they were living apart. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776, 20 L. J. C. Pl. 135."

However in *Beck's Estate*, 19 Pa. Dist. 620, wherein it appeared that a wife made provision for the payment of her funeral expenses out of her own estate, it was held that although a husband is ordinarily liable for his wife's funeral expenses, he may be relieved by the will of his wife, and such a provision in her will should be construed as a legacy to the husband. The court said: "There is no doubt as to the liability of a husband for the funeral expenses of his wife, but she may (the rights of her creditors not being affected) relieve him of this liability by will and the relief given will be treated as a legacy to the husband. *Wheeler's Estate*, 4 Pa. Dist. 265."

In *Watkins v. Brown*, 89 App. Div. 193, 85 N. Y. S. 820, wherein it appeared that the deceased wife left no separate estate, the court held the husband liable to a third person who had properly incurred the expenses of burial. The court said: "A surviving husband is under a legal obligation to bury the corpse of his wife, being allowed to reimburse himself from the separate estate of his deceased wife if she has left any such estate.

Patterson v. Patterson, 59 N. Y. 574; *McCue v. Garvey*, 14 Hun 562; *Freeman v. Coit*, 27 Hun 447. If the husband fails to perform this duty he is liable to an action to recover the reasonable value of its performance by any person who, on account of his absence or neglect, has properly incurred the expense of the necessary burial. This rule applies to the present case."

Modification of Rule.

Some jurisdictions have held that the separate estate of a wife is liable for her funeral expenses, even though her husband first pays them, he being entitled to reimbursement from her estate. In *re Van De Walker*, 79 Misc. 661, 141 N. Y. S. 325; *Matter of Stadtmuller*, 110 App. Div. 76, 96 N. Y. S. 1101; *Re Gibbons* 31 Ont. 252. See also *Morrissey v. Mulhern*, 168 Mass. 412, 47 N. E. 407, 60 Am. St. Rep. 404; *Hatton v. Cunningham*, 162 N. Y. S. 1008. Compare *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670.

The rule that the wife's separate estate is primarily liable for her funeral expenses was emphatically laid down in the case of *In re Skillman*, 146 Ia. 601, 609, 125 N. W. 343, 140 Am. St. Rep. 295, wherein the court, in reviewing some of the earlier decisions touching the question, said: "While in England the law cast on the husband the duty of burying his deceased wife, this was not always at his own expense. In *re McMyn*, 33 Ch. D. 575, the wife was engaged in a separate business, and by the will left her husband a legacy and named him as executor, but made no provision for funeral expenses. The court, speaking through Chitty, J., said that 'in most cases, the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him out of his own moneys in a case like the present, where the wife exercised the power of appointment and made the fund general assets for her creditors, but has omitted to mention her funeral expenses, would be too hard. I think therefore the husband is entitled to retain the sums expended for her funeral.' This would seem to hold that the interest of the husband in the wife's property may have had something to do in fixing the husband's liability, but in *Gould v. Moulahan*, 53 N. J. Eq. 341, 33 Atl. 483, wherein the court held the wife's estate liable for funeral expenses where the husband was unable to pay, said: 'His liability for the expense of the interment does not arise in virtue of any interest he may have in the wife's property, but from the personal advantage it is to himself to have those *personae conjunctae* with him, his wife and lawful children, properly maintained during life and suitably buried at death.' In *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891,

27 Am. St. Rep. 728, the husband was administrator of his deceased wife's estate, and as such paid the expenses of funeral and last sickness. Upon his death, the administrator of his estate presented a claim therefor and expenses of administration, and the court held that though the husband was entitled to settle the estate as if no such relation existed, and if he so elected to pay therefor from the funds of the estate, but as she might not contract a debt, being covert, for physician's services, claim therefor was held not allowable. In *Towery v. McGaw* (Ky.) 56 S. W. 727, the husband as administrator was allowed a credit for moneys paid out of his wife's estate for funeral expenses, but the hospital expenses of her last sickness were held to be 'necessaries' within the statute of the state for which he was liable and not a proper credit. These decisions were independent of statutory provisions like those of this state but in *Constantinides v. Walsh*, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311, the precise question before us was under consideration. The wife had died possessed of a separate estate and left a will naming her son executor. The husband without knowing this paid for her necessary funeral expenses, and, his claim against her estate therefor was allowed. The statutes of Massachusetts, though in different language, are in substance like those of this state in directing that 'when a person dies possessed of personal estate, the necessary expenses of his funeral and last sickness and charges of administration' be first paid, and the court, speaking through Holmes, J., said: 'The funeral expenses of the testatrix were a preferred charge upon her estate. Public Statute, ch. 135, § 3; ch. 137, § 1; Statutes 1882, ch. 141. Under these statutes, those establishing the independent position of married women with regard to their property, we think, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events as necessities, irrespective of any fault on his part. If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases when a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death. It was the plaintiff's legal duty to do what he did, nevertheless, we are of opinion that he stood on no worse ground than a stranger would have done.

A stranger could have recovered against the estate of a man, if he was justified in intermeddling. . . . The legislative design in enacting the statute quoted was to assure to every person care in his last sickness and appropriate burial by declaring the charges therefor preferred claims and exacting their payment as soon as funds enough to satisfy them come into the possession of his personal representative. It is mandatory in form. It contains no discrimination as between creditors to whom such charges may be owing and the duty to pay is declared independently of any obligation which may exist on the part of others. Its language obviates the inference otherwise to be drawn that it was intended merely to declare a preference as between claims against the estate. As seen, it may be deemed the basis for the allowance of such expenses, and we are of the opinion that the legislative intent was to impose on the estate of every deceased person a primary liability for the charges of the last sickness and funeral. If so, the obligation of either husband or wife therefor is secondary thereto in character, and, in event of payment by either, such charges may be established as claims against the estates of the deceased. This construction is not only reasonable, but is well calculated, in a case like this, where both husband and wife are dead, and each has left an ample estate, to protect the property of one against the unseemly efforts of the heirs or devisees of the other to evade the satisfaction of the reasonable charges of the last sickness and funeral from the state of the decedent under whom they take."

In *Matter of Stadtmuller*, 110 App. Div. 76, 96 N. Y. S. 1101, it was said: "There is little dispute as to the facts. George Lee and Catherine T. Lee were husband and wife, and resided together. On the 29th day of July, 1902, the wife died, and the husband, who was then ill, followed her three weeks later. Both left estates. The will of the wife directed that all her just debts and funeral expenses be paid. A short time after the death of his wife Mr. Lee sent for several parties who had claims and requested them to present their bills. They were paid on the 15th of August, 1902. George Lee paid the physician who attended his wife during her last illness the sum of \$248.50, one Maxiner for flowers furnished at her funeral \$80.50, and one Collier, an undertaker who had charge of her funeral, \$281. The administratrix with the will annexed, etc., of George Lee, claims to recover these sums from the estate of his wife. The surrogate, however, rejected these claims, and the administratrix of the husband's estate appeals from the decree. That the items paid Collier and Maxiner are legitimate funeral expenses cannot be doubted. In *McCue v. Garvey*, 14 Hun 562, there were

allowed, in addition to the undertaker's bill, disbursements for a wake and a priest. A reasonable charge for tombstone is part of funeral expense (section 2749, Code Civ. Proc; Matter of Shipman, 82 Hun 108, 116, 31 N. Y. S. 571), as are carriages for the funeral, flowers, music, and other incidental expenses. Matter of Ogden, 41 Misc. 158, 83 N. Y. S. 977. It is equally clear that, where the wife leaves a separate estate, although a surviving husband is under a legal obligation to bury the body of his wife, her estate is liable to the charge. It has been held that where expenditures of this sort have actually been made by the husband, his wife's separate estate, if she had one, should reimburse him. . . . The point made by the respondents that because George Lee assumed these claims without the expectation of being reimbursed from the estate of his deceased wife can have no force. Unless he did some positive act indicative of an intent to make a gift of such moneys to the estate, or actually released the wife's estate, no legal impediment existed to prevent his claiming reimbursement in case, for one reason or another, he changed his mind about filing a claim."

CAMINETTI

v.

UNITED STATES.

DIGGS

v.

UNITED STATES.

HAYS

v.

UNITED STATES.

United States Supreme Court—January 15, 1917.

242 U. S. 470; 37 S. Ct. 102.

Statutes — Aids to Construction — Name Given to Statute.

The name given to a congressional enactment by way of designation or description in the act or the report of the committee accompanying the introduction of the bill into the House of Representatives cannot change the plain implication of the words of the statute.

White Slave Traffic Act — Scope of Act.

Transportation of a woman in interstate commerce in order that she may be debauched

or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, is condemned by the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Fed. St. Ann. 1912 Supp. p. 419), making it an offense knowingly to transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute, or to give herself up to debauchery, or engage in any other immoral practice.

[See note at end of this case.]

Validity of Act.

Construing as applicable to transportation, unaccompanied by the expectation of pecuniary gain, the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Fed. St. Ann. 1912 Supp. p. 419), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, does not render the statute invalid as in excess of the constitutional power of Congress over interstate commerce.

[See note at end of this case.]

Criminal Law — Instructions — Comment on Scope of Testimony of Accused.

An accused who takes the stand in his own behalf and voluntarily testifies for himself may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is fully informed, without subjecting his silence to the inferences naturally to be drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.

Failure to Give Cautionary Instructions — Accomplice Testimony.

A conviction under the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Fed. St. Ann. 1912 Supp. p. 419), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, will not be reversed because of the refusal of the trial court to instruct the jury that the testimony of the women was that of accomplices, and was to be received with great caution, and to be believed only when corroborated by other testimony.

Certiorari to United States Circuit Court of Appeals, Ninth Circuit.

Criminal action. F. Drew Caminetti convicted in United States District Court, Northern District of California, of violation of White Slave Traffic Act. Judgment affirmed by Circuit Court of Appeals. Defendant

brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

Certiorari to United States Circuit Court of Appeals, Ninth Circuit.

Criminal action. Maury I. Diggs convicted in United States District Court, Northern District of California, of violation of White Slave Traffic Act. Judgment affirmed by Circuit Court of Appeals. Defendant brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

Certiorari to United States Circuit Court of Appeals, Eighth Circuit.

Criminal action. L. T. Hays convicted in United States District Court, Western District of Oklahoma, of violation of White Slave Traffic Act. Judgment affirmed by Circuit Court of Appeals. Defendant brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

Joseph W. Bailey, Marshall B. Woodworth and Robert T. Devlin for petitioners Caminetti and Diggs.

Harry O. Glasser for petitioner Hays.
Assistant Attorney General Wallace for United States.

[482] DAY, J.—These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910, 36 Stat. 825 (Fed. St. Ann. 1912 Supp. p. 419), the judgments were affirmed by the Circuit Courts of Appeals, and writs of certiorari bring the cases here.

In the Caminetti case, the petitioner was indicted in the United States District Court for the Northern District of California, upon the sixth day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported and aiding and assisting in [483] obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500.00. Upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed. 220 Fed. 545, 136 C. C. A. 147.

Ann. Cas. 1917B.—74.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the defendant with transporting and causing to be transported and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of \$2,000.00. As in the Caminetti case, that judgment was affirmed by the Circuit Court of Appeals. 220 Fed. 545, 136 C. C. A. 147.

In the Hays case, upon June 26th, 1914, an indictment [484] was returned in the United States District Court for the Western District of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the City of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over a line of railway, to wit, the Atchison, Topeka and Santa Fé Railway, and did then and there and thereby knowingly entice, and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery and other immoral practices at and within the State of Kansas, and that they enticed her and caused her to

go and be carried and transported as a passenger in interstate commerce from Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to wit, the Atchison, Topeka and Santa Fé Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the Circuit Court of Appeals for the Eighth Circuit, judgment was affirmed. 231 Fed. 108, 145 C. C. A. 294.

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women [485] for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which convicted was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the court is to enforce it according to its terms. *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 15 S. Ct. 508, 39 U. S. (L. ed.) 601, 610; *U. S. v. Lexington Mill, etc. Co.* 232 U. S. 399, 409, 34 S. Ct. 337, 58 U. S. (L. ed.) 658, 662, L.R.A.1915B 774; *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 258, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298, 1304.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 20 S. Ct. 155, 44 U. S. (L. ed.) 219, 222. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the

meaning commonly attributed to [486] them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *U. S. v. Bitty*, 208 U. S. 393, 28 S. Ct. 396, 52 U. S. (L. ed.) 543, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one [487] man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy v. Ramsey*, 114 U. S. 15, 45, 5 S. Ct. 747, 29 U. S. (L. ed.) 47, 58. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importa-

tion of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland Stat. Const. § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist be-

tween man and woman in the matter of sexual intercourse."

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and [488] must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act¹ set forth in the margin.)

[489] But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body, *U. S. v. Fisher*, 2 Cranch

¹Sections 2, 3, and 4 of the act are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl

to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years, from any State or Territory or the District of Columbia, to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

358, 386, 2 U. S. (L. ed.) 304, 313; *Goodlett v. Louisville, etc. R. Co.* 122 U. S. 391, 408, 7 S. Ct. 1254, 30 U. S. (L. ed.) 1230, 1233; *Patterson v. The British Bark Eudora*, 190 U. S. 169, 172, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002, 1005; *Cornell v. Coyne*, 192 U. S. 418, 430, 24 S. Ct. 383, 48 U. S. (L. ed.) 504, 509; *Lapina v. Williams*, 232 U. S. 78, 92, 34 S. Ct. 196, 58 U. S. (L. ed.) 515, 520, the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes, of women and girls, and for other purposes." It is true that [490] § 8 of the act provides that it shall be known and referred to as the "White-slave Traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villianous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful intpretation *Blake v. National City Bank*, 23 Wall. 307, 319, 23 U. S. (L. ed.) 119, 121; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42, 15 S. Ct. 508, 39 U. S. L. ed. 601, 613; *Chesapeake, etc. Telephone Co. v. Manning* 186 U. S. 238, 246, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144, 1148; *Binns v. U. S.* 194 U. S. 486, 495, 24 S. Ct. 816, 48 U. S. L. ed. 1087, 1091. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *MacKenzie v. Hare*, 239 U. S. 299, 308, Ann. Cas. 1916E 645, 36 S. Ct. 106, 60 U. S. (L. ed.) 297, 300.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such consid-

erations are more appropriately [491] addressed to the legislative branch of the government, which alone had authority to enact and may if it sees fit amend the law. *Lake County v. Rollins*, supra, p. 673.

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons v. Odgen*, 9 Wheat. 1, 6 U. S. (L. ed.) 23, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke v. U. S.* 227 U. S. 308, Ann. Cas. 1913E 905, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906; *Athanasaw v. U. S.* 227 U. S. 326, Ann. Cas. 1913E 911, 33 S. Ct. 285, 57 U. S. (L. ed.) 528; *Wilson v. U. S.* 232 U. S. 563, 34 S. Ct. 347, 58 U. S. (L. ed.) 728. In the *Hoke Case*, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pp. 308 et seq.). It is true that the particular case arose from a prosecution of one charged with [492] transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke Case* as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case*, 188 U. S. 321, 357, 23 S. Ct. 321, 47 U. S. (L. ed.) 492, 502, and other cases in this court de-

aided since the decision of that case, it was said in the Hoke Case (p. 323):

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States;' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 5 S. Ct. 826, 29 U. S. (L. ed.) 158, 166; *Cooley*, *Constitutional Limitations*, 7th ed. 356. We have no hesitation, therefore, in pronouncing the Act of June, 25, 1910, a legal exercise of the power of Congress."

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the Diggs case, after referring to the fact that the defendant had taken the stand in his own behalf and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with [493] which that trip was taken, contenting himself with merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may

be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself in derogation of rights secured by the Fifth Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the [494] Circuit Court of Appeals in the First Circuit. See *Balliet v. U. S.* 129 Fed. 689, 64 C. C. A. 201; *Myrick v. U. S.* 219 Fed. 1, 134 C. C. A. 619. We think the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (*Act of March 16, 1878*, c. 37, 20 Stat. 30; 7 Fed. St. Ann. 1120), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances and intent with which that trip was taken, and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden [495] of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the Circuit Court of Appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See in this connection *Brown v. Walker*, 161 U. S. 591, 597, 16 S. Ct. 644, 40 U. S. (L. ed.) 819; *Sawyer v. U. S.* 202 U. S. 150, 165, 6 Ann. Cas. 269, 26 S. Ct. 575, 50 U. S. (L. ed.) 972; *Powers v. U. S.* 223 U. S. 303, 314, 32 S. Ct. 281, 56 U. S. (L. ed.) 448.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren v. U. S.* 217 U. S. 509, 19 Ann. Cas. 778, 30 S. Ct. 588, 54 U. S. (L. ed.) 861, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 *Bishop's Criminal Procedure*, 2nd ed. § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial [496] courts. Other objections are urged upon our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is Affirmed.

McReynolds, J., took no part in the consideration or decision of these cases.

MCKENNA, J. (*dissenting*).—Undoubtedly in the investigation of the meaning of a

statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their significance or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which [497] precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "Act shall be known and referred to as the 'White-slave traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act it has especial weight. *U. S. v. Union Pacific R. Co.* 91 U. S. 72, 82,

23 U. S. (L. ed.) 224. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "White-slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not [498] the purpose of the bill to interfere with or usurp in any way the police power of the States, and further that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practiced, which were said to be matters wholly within the power of the States and over which the federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been "so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution." And again:

"The White Slave Trade. A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." House Report No. 47, 61st Cong. 2d sess. pp. 9, 10.

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where

a woman of 24 years went from Illinois, where she lived, to Minnesota at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the [499] transaction and that therefore, in his opinion, it was not "within the spirit and intent of the Mann Act."¹ Replying, the Attorney General expressed his concurrence in the view of his subordinate.²

Of course, neither the declarations of the report of the Committee on Interstate Commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed besides of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared.

[500] This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *Holy Trinity Church v. U. S.* 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226, there came to this court for construction an act of Congress which made it unlawful for any one in any of the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform

¹ "Careful consideration of the facts and circumstances as related by Miss Cox fails to convince me that her case came within the spirit and intent of the Mann Act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of *Ejusdem Generis*. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs

the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain."

² "I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you."

labor or *service of any kind* [italics mine] in the United States, its Territories or the District of Columbia." The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the City of New York and enter its service as rector and pastor. The church was proceeded against under the act and the Circuit Court held that it applied and rendered judgment accordingly. 36 Fed. Rep. 303.

It will be observed that the language of the statute is very comprehensive, fully as much so as the language of the act under review, having no limitation whatever from the context; and the Circuit Court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." And the learned Justice further said: "This has been often asserted, and the reports are full of cases illustrating its application."

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

[501] Another pertinent illustration of the rule is *Reiche v. Smythe*, 13 Wall. 162, 20 U. S. (L. ed.) 566, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other *live animals* imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver v. Ladd*, 7 Wall. 219, 19 U. S. (L. ed.) 138, where the benefit of the Oregon Donation Act was extended by making the words "single man" used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity, a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most

masterfully used, may miss sufficiency and give room for dispute. Is it a wonder therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of [502] women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "White-slave traffic." And it was such immorality that was in the legislative mind and not the other. The other is occasional, not habitual—inconspicuous—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction.

U. S. v. Bitty, 208 U. S. 393, 28 S. Ct. 396, 52 U. S. (L. ed.) 543, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls, a statute, therefore, of broader purpose than the one under review. Besides, the stat-

ute finally passed upon was an amendment to a prior statute and the words construed were an addition to the [503] prior statute and necessarily, therefore, had an added effect. The first statute prohibited the importation of an alien woman or girl into the United States "*for the purposes of prostitution.*" The second statute repeated the words and added "*or for any other immoral purpose*" (italics mine). Necessarily there was an enlargement of purpose, and besides the act was directed against the importation of foreign corruption and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the Chief Justice and Mr. Justice Clarke concur in this dissent.

NOTE.

In the reported case the Federal Supreme Court reaffirms the validity of the "White Slave Traffic Act" (Act June 25, 1910, Fed. St. Ann. 1912 Supp. p. 419) and holds that the act is not confined to "commercialized vice" or the traffic in women for pecuniary gain, but inhibits as well the interstate transportation of a woman for the purpose of concubinage. The validity of the "White Slave Traffic Act" is discussed in the note to Hoke v. U. S. Ann. Cas. 1913E 905, its construction in the note to Athanasaw v. U. S. Ann. Cas. 1913E 911, and its effect on state legislation in the note to State v. Harper, Ann. Cas. 1915D 1017.

SCANDINAVIAN AMERICAN NATIONAL BANK

v.

KNEELAND.

Manitoba Court of Appeal—March 16, 1914.

24 Manitoba L. R. 168.

Conflict of Laws — Discharge of Surety.

The effect of acts of the creditor to discharge a surety is to be determined by the law of the place where the contract of suretyship is made.

Suretyship — Discharge — Effect of Release of Cosurety.

By the law of Minnesota the release of a surety by the creditor does not discharge a cosurety.

[See note at end of this case.]

Appeal from judgment of CURRAN, Judge.

Action by Scandinavian American National Bank, plaintiff, against E. M. Kneeland, defendant. Judgment for defendant. Plaintiff appeals. APPEAL ALLOWED.

[169] The plaintiff was a National Bank, incorporated under the United States banking laws, doing a general banking business at the City of Minneapolis, in the State of Minnesota, one of the United States of America.

The defendant was manager of an elevator company and resided at the City of Winnipeg, and had so resided for the past six years.

The plaintiff sued the defendant upon a guaranty in writing given by the defendant and three others in respect of an indebtedness of the T. M. Roberts Co-operative Supply Company to the Bank. This guaranty was in the words and figures following:

Minneapolis, Minn., Sept. 27th, 1909.

In consideration of the T. M. Roberts Co-operative Supply Company having obtained credit with the Scandinavian American National Bank of Minneapolis, Minnesota, and is now indebted to said Bank for money borrowed, and in consideration of said Bank extending the time for payment of said money so borrowed and giving additional credit to said Company.

The undersigned do hereby guarantee, each one to the extent of the amount set opposite his signature below, the payment at maturity or at such time or date to which such payment may be by the Bank extended (the Bank to be at liberty to extend such time without the consent of the undersigned), of any and all sums of money now, or which may hereafter be owing to the said Bank of said Company.

This guaranty shall be binding on each of the undersigned until he shall revoke the same in writing.

Witness: Chas. J. Hedwall.

E. W. Kneeland \$40,000

Witness: C. L. Grandin.

H. H. Berge \$10,000

Witness: C. L. Grandin.

H. K. Richardson \$65,000

Chas. J. Hedwall \$5,000

The action was tried before Curran, J., who dismissed same.

Plaintiff appealed.

C. P. Wilson, K. C., and O. H. Clark, K. C.,
for appellant.

H. Phillipps and C. S. A. Rogers for ap-
pellee.

[170] HOWELL, C. J. M.—The twenty-first paragraph of the statement of defence is that the plaintiff represented to the defendant that one Chase was to be one of the guarantors and this representation induced the defendant to sign the agreement.

The learned trial Judge has not found this fact. He merely found that the defendant believed Chase was to be a party and in this respect he does not find that the plaintiff wronged or deceived the defendant, unless by finding that Hedwall, the president of the company, was really acting for the Bank, and the evidence is overwhelming against this finding. The defendant, according to his evidence, had forgotten about this alleged representation, first when he wrote two letters to the banker, again when he instructed his solicitor to put in his defence and again on his examination for discovery. This defence was apparently discovered long after this suit began and the defendant's memory of it was apparently refreshed by reading the defence of one of the guarantors filed in the Minnesota Court. The defendant is contradicted clearly and the weight of evidence is overwhelming against him. The contract is complete on its face, and it is sought to answer it by the vague memory of the defendant as to facts which occurred years before without the support of other witnesses or by any written documents. I think it unsafe to set aside a written document upon such testimony and especially as the learned Judge had a poor opinion of the defendant's [171] memory during the course of the trial. I think the defendant should not succeed on this branch of the case.

The learned Judge has found as a fact that there was an agreement for further advances by the Bank. If there was any evidence to support this allegation the promise was that, after the Bank had increased its capital and was legally in a position to make a further advance, this would be done. There is no evidence of a demand for further advances after this increase of capital that I can find in the evidence.

It is difficult to see how or why parol evidence was got in to vary the express terms "giving additional credit" in the written contract; but, if this alleged parol promise varying the written agreement is admitted in evidence, it can only be got in as a collateral verbal independent agreement arising out of and not a part of the written agreement, as in *Byers v. McMillan*, 15 Can. Sup. Ct. 194, and to be enforced as a separate agreement. Even if the evidence supports the finding of the fact, I cannot see how the breach of this con-

tract to do something in the future for the benefit of the company can be a defence to this action.

In the construction of the contract of guaranty much can be urged in favor of it being construed as several and not joint and several. It was complete on its face with many signatures or one signature; it contemplated different amounts of liability and, although it was a continuing liability, any one by notice might terminate it. See *Tyser v. Shipowners Syndicate* [1896] 1 Q. B. (Eng.) 135; *Ex p. Harding*, 12 Ch. D. (Eng.) 564; *Collins v. Prosser*, 1 B. & C. 682, 8 E. C. L. 287. And, if several, the discharge of one surety will not discharge the co-sureties: *Ward v. National Bank*, 8 A. C. (Eng.) 755. However, without deciding this point, I think the statute law of Minnesota referred to by the learned trial Judge applies to his contract.

[172] With deference, I think the cases relied on by the learned trial Judge do not apply to the facts in this case. The contract was made in Minnesota to be performed there and the release of the co-surety given there and this act performed there did not affect the contract there. In other words, they entered into a contract there whereby it was agreed, amongst other things, that the plaintiff might release one of the sureties and not thereby release the others. The law of the contract was that a liability existed and was to continue, although the plaintiff might thereafter discharge one of the sureties so far as the plaintiff was concerned. I have had the advantage of reading the opinion on this branch of the case of my brother Cameron, and I concur with him as to the law.

No doubt, if the defendant had been prejudiced by the plaintiff's disposition of the assets, he must be protected to that extent and this involves some careful consideration. After much reflection I agree with the disposition of the case set out in the judgment of Mr. Justice Perdue.

RICHARDS, J. A.—The learned trial Judge found, as a fact, that the defendant executed the instrument sued on, under an agreement with the plaintiffs that it was not to become operative until signed by certain other parties, including Mr. C. L. Chase.

The evidence, as it appears in type, is not as clear on this point as could be wished. But there was evidence upon which he could find as he did. It is patent that he gave the matter most careful consideration. As he saw and heard the witnesses, he was in a better position than this Court can be, to decide the weight to be given to their respective testimony, and to draw conclusions of fact. I do not think that there is against his view such a weight of probability as would justify us in reversing it.

[173] Mr. Chase did not sign the instrument. Therefore, following the learned Judge's conclusion of fact, it never became operative.

I would dismiss the appeal with costs.

PERDUE, J. A.—The defendant, amongst other defences, sets up (paragraph 21 of amended statement of defence) that the guaranty, if entered into by him, was entered into upon the representation of the plaintiff that one Chase would become a coguarantor with him, Kneeland, and would execute the same and, if the defendant did execute the guaranty, he executed it upon faith in the said representation and not otherwise, and that the plaintiff in breach of its said agreement neglected to secure the signature and execution of the guaranty by said Chase.

If the facts above alleged were established by the evidence, it would afford a complete defence to the action; *Bonser v. Cox*, 4 Beav. (Eng.) 379; *Ward v. National Bank*, 8 A. C. (Eng.) 755, 764. The learned trial Judge finds that Kneeland was allowed to sign the guaranty under the bona fide belief that Chase would sign also, and that, if the truth had been disclosed as to Chase's refusal to sign, Kneeland would, in the trial Judge's opinion, have refused to sign the guaranty at all. The finding does not appear to me to go the length of establishing that the representation that Chase would also sign was made by the plaintiff and that the plaintiff suppressed the fact of Chase's refusal to sign. With respect, I am not at all satisfied that the defence raised by paragraph 21 has been established. The evidence upon this point is contradictory and the defendant's own statements as to what occurred at the time, taken along with his subsequent conduct, do not appear to me to prove this defence with the clearness that would be expected and required.

The guaranty in question, which is set out in full in [174] the trial Judge's reasons for judgment, was the subject of much discussion on the argument, it being claimed on behalf of the plaintiff to be a several undertaking on the part of each of the persons signing it, while it is argued for the defendant that it is a joint guaranty or, at the most, joint and several.

If the document be interpreted according to the law of this Province, I am of opinion that it constitutes a joint liability. The document in effect says:

"We, the undersigned, do hereby guarantee . . . the payment at maturity of any and all sums of money owing, etc., to the said Bank by the said company."

In *White v. Tyndall*, 13 A. C. (Eng.) 263, Lord Halsbury, L. C., dealing with the question of construction of a covenant, as to whether it was joint or several, said as follows:

"The late Mr. Platt, on page 117 of his work on Covenants, published more than half a century ago, puts the proposition in words that have never been questioned, as far as I am aware, since his time. With respect to the form, he says: 'No particular words are necessary to constitute a covenant of either kind (that is to say either joint or several). If two covenant generally for themselves, without any word of severance, or that they or one of them shall do such a thing, a joint charge is created; which shows the necessity of adding words of severality where the covenantor's liability is to be confined to his own acts.'"

In the present case the parties signing the instrument guarantee payment of certain indebtedness to the Bank. The undertaking is joint but each one limits his liability to a certain amount. This limitation does not imply that each severally guarantees to the extent of the sum set opposite his name, but that, when he has contributed towards the joint liability the amount set opposite his signature, he is not to be called upon for more. The last clause provides that the guaranty shall be binding [175] on each of the undersigned until he shall revoke the same in writing. The effect of this clause, it appears to me, is to leave the undertaking joint as to all until one withdraws. The party withdrawing would be jointly liable with the others up to the withdrawal, and after that the others would remain jointly bound as between themselves.

Examples of joint and several guaranties with different limits of liability fixed for each of the guarantors, and the manner of working out the same amongst them, are found in *Ellis v. Emmanuel*, 1 Ex. D. (Eng.) 157, 34 L. T. N. S. 553, and *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. (Eng.) 75, and in the cases there referred to.

In an action upon the guaranty in this Province the formal validity and interpretation of the contract should be determined in accordance with the laws of Minnesota, the country where it was made and was to be performed: *Dacey, Conflict of Laws*, 2d ed. pp. 540, 556. By the laws of Minnesota (section 4282 of the Revised Laws of Minnesota, 1905), it is declared that parties to a joint obligation shall be severally liable and may be sued either jointly, or separate actions may be brought against each, and judgment rendered in each, without barring an action against one not included in the judgment, or releasing those not sued: provided that the Court may require the plaintiff to bring in as defendants all parties jointly liable.

The plaintiff in 1910 commenced a suit on the guaranty against Berge, one of the guarantors, in the State of Minnesota, and afterwards released him in consideration of a payment of \$3,000. This release was given

under the plaintiff's seal, and contained no reservation of rights against the cosureties. The defendant claims that the effect of this release was to discharge the cosureties of Berge, on the ground that the contract of suretyship was joint, or joint and several, and that a [176] discharge of one by the principle creditor operated as a discharge of all, the joint obligation of the others being part of the consideration of the contract of each; relying upon *Ward v. National Bank*, 8 A. C. (Eng.) 755, 764; *Mercantile Bank v. Taylor* [1893] A. C. (Eng.) 317. This contention turns altogether upon the question whether the contract is to be regarded as joint, joint and several, or several only. If it is several only, the defendant's contention cannot apply. Now, if the contract is to be interpreted according to the laws of Minnesota, the parties, even if the contract is joint in form, shall be severally liable and separate actions may be brought against each without releasing the others. Also, by section 4283 of the same Revised Laws, a creditor may discharge one of several joint obligors without impairing his right to recover the residue from the others.

In the provisions of the Minnesota Laws above referred to, there is much relating to procedure only, which is closely involved with the portions relating to interpretation and the declaration of substantive legal rights. In fact, much may be said in favor of holding these sections to be procedure only and therefore not to be applicable in this Province. I have, however, come to the conclusion, after much doubt, that we must take the meaning placed upon the contract in question by the proper law of the contract which must be presumed to be that of the State of Minnesota. In this view the contract must be regarded as several and the release of one of the co-sureties will not operate as a release of the others or of any one of them.

In the year 1910 the plaintiff took from Hedwall a promissory note made by him for \$5,000 in payment of his liability on the guaranty. At the same time the plaintiff delivered to Hedwall two promissory notes made by the principal debtor, the T. M. Roberts [177] Company, and Richardson, one for \$2,000 and the other for \$3,000. Hedwall proved for that amount against the estate of the principal debtor and received dividends as a creditor from the assignee. The notes which were so delivered to Hedwall are two of the notes now sued upon in this action. It is quite clear that, when this action was commenced, the plaintiff had parted with these notes for value, was not the holder of them, and was not entitled to sue upon a guaranty given to the plaintiff to secure payment to the plaintiff of all sums of money owing to the plaintiff by the T. M. Roberts

Company. The amount of these two notes, with the interest upon them, should be deducted from the plaintiff's claim.

I think the appeal should be allowed with costs and judgment entered for the plaintiff for the amount due after deducting the notes delivered to Hedwall. An account of the amount due to the plaintiff should, if necessary, be taken by the Registrar of the Court and the amount entered in the judgment. The plaintiff will be entitled to the ordinary costs of suit in the Court of King's Bench.

CAMERON, J. A.—This is an action on a guaranty given to the plaintiff Bank by the defendant and three others, directors and shareholders of the T. M. Roberts Co-operative Supply Company, a corporation doing business in the City of Minneapolis, in the State of Minnesota. The Bank is incorporated under the laws of the United States as a National Bank and carries on its business in the same city.

The action was tried before Mr. Justice Curran, who, in his judgment, sets forth the instrument sued upon and the facts and circumstances connected with its signing and delivery to the plaintiff Bank. The learned trial Judge dismissed the plaintiff's action.

The guaranty in question was signed by the defendant, September 27, 1909. The T. M. Roberts Company, for [178] whose benefit it was given, was adjudicated insolvent on April 8, 1910. The action was commenced May 21, 1912. The defendant was examined November 9, 1912. The case was brought on for trial January 10, 1913. A few days before the trial certain amendments to the defence were made, amongst them that set out in paragraph 21, stating in effect that there was an agreement between the defendant and the Bank that one Chase should be a co-guarantor with the defendant, that the defendant signed the guaranty upon the faith of that agreement and that the Bank failed to secure the signature of the said Chase. This statement was treated throughout the trial as equivalent to a defence setting forth that it was agreed between the Bank and the defendant that all the parties mentioned, including the defendant, Berge, Richardson, Hedwall and Chase, should sign the guaranty, otherwise, it was further agreed, the said guaranty should be wholly ineffective and void. The evidence on this issue was gone into at length before the learned trial Judge, who found in favor of the defendant.

Here we have a transaction where a banking instrument was formally signed by the parties and delivered by them to the plaintiff Bank in September, 1909, and was acted on by the Bank (there can be no dispute as to that); where the principal debtor became in default within a short time after the guar-

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anty was given, and where the defendant was guarantor to the extent of \$40,000 or of the instrument, was advised of the Action was brought in May, 1912, the defendant was examined in November and brought on for trial the following. Yet it was not until the near approach of trial, within a few days before it came, that this defence of the most material importance was placed on the record.

Two important letters written by the defendant shortly [179] after the incorporation of the company were placed in evidence. The first, dated May 14, 1910, written in a letter from the Vice-President of the company, urging payment, contains not one word referring to this important matter. That that is apparently made most prominent in this letter is the defendant's liability at the time of writing, but no mention is made of Chase.

In the second letter, dated June 1, 1910, the only reference to Chase is in the following passage:

"Furthermore, we signed the guaranty on the understanding that Mr. Chase would become a guarantor, and he agreed to contract on guaranty that afternoon, and we are informed that the reason he refused to make good his word and sign the guaranty was on account of the fact that you refused to increase the line up to \$50,000 and to the original understanding."

Now, it is possible to read this extracting the words "with the Bank" and the word "understanding" where it first appears. But that cannot fairly be done as I have extracted. To my mind it means this: That we, who signed the guaranty, signed it on the understanding that we, with Chase, had agreed to sign it on the original understanding that you would increase the line of credit up to \$50,000, which you refused to do and it was on account of this that Chase refused to sign."

There is here no direct statement that there was an agreement with the Bank that the defendant signed the guaranty, together with Chase, should sign before the agreement should become operative. The grievance, it is alleged, is that the Bank had failed to implement its promise to increase the company's credit to \$50,000.

I have read the portions of the defendant's examination put in at the trial and I am unable to discover therein any definite and definite statement that the Bank had agreed to procure the signatures of all the parties mentioned to the guaranty before it could be made [180] effective, as is alleged by the defendant in his evidence at the trial. In one of his examinations he says, with reference to such an alleged agreement:

"The Bank must have taken it into consideration. I do not recall it."

under the plaintiff's seal, and contained no reservation of rights against the cosureties. The defendant claims that the effect of this release was to discharge the cosureties of Berge, on the ground that the contract of suretyship was joint, or joint and several, and that a [176] discharge of one by the principle creditor operated as a discharge of all, the joint obligation of the others being part of the consideration of the contract of each; relying upon *Ward v. National Bank*, 8 A. C. (Eng.) 755, 764; *Mercantile Bank v. Taylor* [1893] A. C. (Eng.) 317. This contention turns altogether upon the question whether the contract is to be regarded as joint, joint and several, or several only. If it is several only, the defendant's contention cannot apply. Now, if the contract is to be interpreted according to the laws of Minnesota, the parties, even if the contract is joint in form, shall be severally liable and separate actions may be brought against each without releasing the others. Also, by section 4283 of the same Revised Laws, a creditor may discharge one of several joint obligors without impairing his right to recover the residue from the others.

In the provisions of the Minnesota Laws above referred to, there is much relating to procedure only, which is closely involved with the portions relating to interpretation and the declaration of substantive legal rights. In fact, much may be said in favor of holding these sections to be procedure only and therefore not to be applicable in this Province. I have, however, come to the conclusion, after much doubt, that we must take the meaning placed upon the contract in question by the proper law of the contract which must be presumed to be that of the State of Minnesota. In this view the contract must be regarded as several and the release of one of the co-sureties will not operate as a release of the others or of any one of them.

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I think the appeal should be allowed with costs and judgment entered for the plaintiff for the amount due after deducting the notes delivered to Hedwall. An account of the amount due to the plaintiff should, if necessary, be taken by the Registrar of the Court and the amount entered in the judgment. The plaintiff will be entitled to the ordinary costs of suit in the Court of King's Bench.

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The action was tried before Mr. Justice Curren, who, in his judgment, sets forth the instrument sued upon and the facts and circumstances connected with its signing and delivery to the plaintiff Bank. The learned trial Judge dismissed the plaintiff's action.

The guaranty in question was signed by the defendant, September 27, 1909. The T. M. Roberts Company, for [178] whose benefit it was given, was adjudicated insolvent on April 8, 1910. The action was commenced May 21, 1912. The defendant was examined November 9, 1912. The case was brought on for trial January 10, 1913. A few days before the trial certain amendments to the defence were made, amongst them that set out in paragraph 21, stating in effect that there was an agreement between the defendant and the Bank that one Chase should be a co-guarantor with the defendant, that the defendant signed the guaranty upon the faith of that agreement and that the Bank failed to secure the signature of the said Chase. This statement was treated throughout the trial as equivalent to a defence setting forth that it was agreed between the Bank and the defendant that all the parties mentioned, including the defendant, Berge, Richardson, Hedwall and Chase, should sign the guaranty, otherwise, it was further agreed, the said guaranty should be wholly ineffective and void. The evidence on this issue was gone into at length before the learned trial Judge, who found in favor of the defendant.

Here we have a transaction where a banking instrument was formally signed by the parties and delivered by them to the plaintiff Bank in September, 1909, and was acted on by the Bank (there can be no dispute as to that); where the principal debtor became in default within a short time after the guar-

anty was given, and where the defendant, a guarantor to the extent of \$40,000 on the face of the instrument, was advised of the facts. Action was brought in May, 1912, the defendant was examined in November and the cause brought on for trial the following January. Yet it was not until the near approach of the trial, within a few days before it commenced, that this defence of the most material importance was placed on the record.

Two important letters written by the defendant shortly [179] after the insolvency of the company were placed in evidence. The first, dated May 14, 1910, written in reply to a letter from the Vice-President of the Bank, urging payment, contains not one word referring to this important matter. The point that is apparently made most prominent in this letter is the defendant's liability to pay at the time of writing, but no mention is made of Chase.

In the second letter, dated June 5, 1910, the only reference to Chase is in the following passage:

"Furthermore, we signed the guaranty with the understanding that Mr. Chase was to become a guarantor, and he agreed to sign the contract or guaranty that afternoon, and we are informed that the reason he refused to make good his word and sign the guaranty was on account of the fact that you refused to increase the line up to \$50,000 according to the original understanding."

Now, it is possible to read this extract, supplying the words "with the Bank" after the word "understanding" where it first occurs. But that cannot fairly be done as I read the extract. To my mind it means this: "We, who signed the guaranty, signed it because we, with Chase, had agreed to sign it on the original understanding that you were to increase the line of credit up to \$50,000, which you refused to do and it was on account of this that Chase refused to sign."

There is here no direct statement that there was an agreement with the Bank that all who signed the guaranty, together with Chase, should sign before the agreement should become operative. The grievance, is, rather, that the Bank had failed to implement its promise to increase the company's line of credit to \$50,000.

I have read the portions of the defendant's examination put in at the trial and I find it impossible to discover therein any positive and definite statement that the Bank agreed to procure the signatures of all the parties mentioned to the guaranty before it became [180] effective, as is alleged by the defendant in his evidence at the trial. In one part of his examination he says, with reference to such an alleged agreement:

"The Bank must have taken into consideration. I do not recall it."

His subsequent answer (Q. No. 257) "I went down there to the Bank and I said 'I will go on this guaranty if the others do,' and the others said they would," must be contrasted with the above answer and with his statements as set out in the notes of evidence at pp. 289, 290, and following.

The defendant says in his evidence at the trial that he did not become aware that Chase had not signed until after the bankruptcy of the company, April 6, 1910, but it was certainly some time before his letter of June 6, 1910.

In view of the foregoing and of other considerations that arise on a perusal of the evidence, we must surely call for clear and convincing evidence before we give effect to this defence. Had it been put forward from the first, and referred to throughout in the correspondence, interviews and pleadings, then the position might be wholly different. And it cannot be denied that it is quite possible that the facts were as stated by the defendant, and that, in the press of business matters, they were overlooked and did not recur to memory until the trial was imminent. But, as I have said, we are here dealing with a document, one of a class common in banking transactions, delivered to a bank in circumstances such as not infrequently call for a document of its character, and acted upon in due course by the Bank. Yet the very existence of that document is for the first time challenged by a pleading, and by evidence in support of that pleading, brought forward at the trial more than three years after it had been signed and delivered.

[181] On the other hand, Hedwall declares he knew of no agreement with the defendant making the signing of one contingent upon the signing of all, p. 430. Hedwall witnessed the defendant's signature, but knew of no such statement by the defendant on this matter to Grandin as was alleged at the trial. Grandin also enters a positive denial. He says he never took a guaranty from any one in his life under those conditions. I refer to his evidence, p. 154, and at p. 491, when recalled.

Upon my best consideration of the matters involved, I feel compelled to hold that the defendant has not satisfactorily discharged the onus placed upon him by reason of the circumstances constituting and surrounding this case in so far as this particular defence is considered. I must add that it is not without some degree of hesitancy that I thus undertake to differ from the view taken by the learned trial Judge.

As for the defence that the guaranty was signed on the understanding that the company's line of credit was to be extended to \$50,000, it is to be said that that is not in ac-

cordance with the written document. Moreover, the defendant's evidence at pp. 309, 310 is at variance with his statement in the letter of June 6, that the line of credit was to be increased "as soon as you had increased your capital stock."

The defendant in his evidence at the trial states that, at the meeting in the T. M. Roberts Co.'s store on the morning of September 27th, it was represented by Hedwall that the Bank "would advance up to \$50,000," and that nobody stated in his presence that this advance was conditional on the Bank's increase of capital. Now the explicit provisions on this subject of the National Banking Law of the United States must necessarily be familiar to bank officials and directors in that country as well as to those, or to a large proportion of those, having dealings with them. It involves a matter that [182] must be coming before them continually. It is difficult to imagine that an unconditional promise that an advance would be given to a customer, beyond the sum allowed by law, could or would be made in any circumstances whatever with the authority of the Bank, or by any official of the Bank. The probabilities are strongly against anything of the kind and, to support the defendant's evidence on this branch as given at the trial, we must seek for corroboration. But, in point of fact, so far from corroboration being available, his evidence at the trial on this point is positively contradicted by that of Hedwall, Grandin and Chase and differs from the statement in his letter of June 6, as I have pointed out above.

This defence also was not originally set up but only at the latest possible stage, and the considerations which apply to the defence with which I have already dealt apply substantially to this; and, with reference to it, I have come to the same conclusion. Even if the defence were established, it would appear to me that it is not a matter that goes to the consideration; it would rather be a matter constituting a breach of contract for which the Bank might be liable. But in such an action it would strike me as impossible for the defendant to succeed.

This contract was made in the State of Minnesota and was to be performed there. That being so, the rights and obligations of the parties are to be determined in accordance with the laws of Minnesota, which must be taken to be the laws by which the parties intended the contract to be governed. See Dicey, *Conflict of Laws*, p. 558, where the general rule is thus stated:

"The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract." ("Proper law" is defined at p. 529).

"The rights of the parties to a contract are to be [183] judged of by that law by which they intended (to bind) or rather by which they may justly be presumed to have bound themselves." *Lloyd v. Guibert*, L. R. 1 Q. B. (Eng.) 115, 123. And see the other cases cited by Dicey, p. 557.

"You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract," per Lord Halsbury, *In re Missouri Steamship Co.* 42 Ch. D. (Eng.) 321, 336.

"The essential validity of a contract (as distinguished from its formal validity) as well as its interpretation and effect and the rights and obligations of the parties to it are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they may be presumed to have intended. This law is generally known as the proper law of the contract." Halsbury, *Laws of England*, VI. 238.

Wharton on the *Conflict of Laws* has this at p. 936:

"It has been held that the question as to what acts or omissions will release the surety pertains to the remedy, and is therefore governed by the law of the forum; but the better view seems to be that the matter relates to the substance of the contract, rather than to the remedy, and is therefore to be governed by the law of the place where the contract is made and performable, rather than the law of the forum."

I consider the judgment of the Court in *Tenant v. Tenant*, 110 Pa. St. 485, 1 Atl. 532, as sound and in point here.

The case of *Leroux v. Brown*, 12 C. B. 801, 74 E. C. L. 801, holding that section 4 of the Statute of Frauds relates to procedure has been subjected to criticism. See *Williams v. Wheeler*, 8 C. B. N. S. 299, 98 E. C. L. 299, per Willes, J., and *Piggott on Foreign Judgments*, p. 82.

The law is stated and the cases cited by Mr. Justice Swinfen Eady in *British South Africa Co. v. DeBeers* [1910] 1 Ch. (Eng.) 381.

I quote also from *Brandt on Suretyship*, section 162:

"As a general rule, the liability of sureties and guarantors depends upon and is governed by the law of the place of their contract. Thus, in an action against a [184] surety on a note in New Hampshire, the note having been executed and made payable in Vermont, the law relating to sureties in the latter State is to be applied and by that law they are governed."

The non-discharge of one joint surety by reason of the discharge of another is not merely a matter relating to the remedy but is part of the law relating to the substance of the contract and therefore part of the contract. The section of the Minnesota statutes quoted

is an alteration of the Common Law, making the obligation of each joint obligor absolute irrespective of the release or discharge by the creditor of any other. It is a different matter from the defences involved in the Statutes of Limitations and the Statute of Frauds prohibiting the use of the process of the courts after a certain period, or without compliance with certain conditions. The right of a creditor to hold one of several joint sureties notwithstanding the discharge of another or others of them is a matter affecting the obligation of the contract, altering it in one of its essential elements, and such right must therefore be ascertained and determined in accordance with the law of the place of the contract.

The above considerations apply if the contract in question be taken as joint. If it be taken as several the defence is inapplicable. Either may I consider the plaintiff Bank entitled to recover on the notes sued on, excepting the two notes, No. 1957 for \$2,000 and No. 2142 for \$3,000 (referred to in Mr. Grandin's evidence at p. 166-168), transferred by the plaintiff Bank to Hedwall. It appears from the evidence of Hedwall, p. 482-485, that he proved in bankruptcy against the Roberts Co. on these notes, received dividends on his claim and, according to his evidence, held the notes all the time of the trial. The notes appear to have been endorsed by the plaintiff Bank "without recourse." There is no plausible reason advanced to show why these [185] notes were included in the plaintiff's claim, filed as Exhibit "B," stated as correct by Judge Neland, p. 194. On these two notes I think the plaintiff must fail. Otherwise I hold the appeal must be allowed and the judgment entered for the plaintiff as set forth in the judgment of Mr. Justice Perdue.

Haggart, J. A., concurred with Richards, J. A.

Appeal allowed.

NOTE.

Effect on Liability of Surety of Release of Cosurety.

Release by Act or Default of Creditor:

Generally, 1183.

Under Statute, 1185.

Failure to Sue Principal, 1186.

Sureties Bound by Separate Instruments, 1188.

Release by Judicial Order or by Operation of Law, 1188.

Release by Act or Default of Creditor.

GENERALLY.

The present state of the law respecting the effect of a discharge of a surety on the liability of a cosurety results from a historical

development whereby the ancient strictness of the common law was by the interposition of equity so modified as to grant a release from liability only to the extent to which actual prejudice was suffered. That equitable doctrine has been generally accepted and is now the established rule of law in most jurisdictions. By the common law, which regarded the liability of a surety as strictissimi juris and released him in case of the slightest change in his obligation, the release by a creditor of one surety discharged his cosureties. *Cheetham v. Ward*, 1 B. & P. (Eng.) 630; *Nicholson v. Revill*, 4 Ad. & El. 675, 31 E. C. C. 166; *Thompson v. Lack*, 3 C. B. 540, 54 E. C. L. 540; *Done v. Walley*, 2 Exch. (Eng.) 198; *Evans v. Bremridge*, 2 Kay & J. (Eng.) 174, 25 L. J. Ch. 102, 2 Jur. (N. S.) 311, 4 W. R. 161 *affirmed* in 8 De G. M. & G. 100, 44 Eng. Rep. (Reprint) 327, 2 Jur. (N. S.) 311, 25 L. J. Ch. 334, 4 W. R. 350; *Hodgson v. Hodgson*, 2 Keen (Eng.) 704, 7 L. J. Ch. 5; *Ex p. Slater*, 6 Ves. Jr. (Eng.) 146; *Mercantile Bank v. Taylor* [1893] A. C. (Eng.) 317; *Gold Medal Furniture Co. v. Stephenson*, 23 Manitoba 159; *Stockton v. Stockton*, 40 Ind. 225; *Hunter v. Ft. Wayne First Nat. Bank*, 172 Ind. 62, 87 N. E. 734; *Frederick v. Moore*, 13 B. Mon. (Ky.) 470; *Sulphur Deposit Bank v. Peak*, 110 Ky. 579, 62 S. W. 268, 96 Am. St. Rep. 466, 23 Ky. L. Rep. 19; *Smith v. State*, 46 Md. 617; *McKim v. Demmon*, 130 Mass. 404; *Wright v. Stockton*, 5 Leigh (Va.) 153. *Compare* *Ex p. Gifford*, 6 Ves. Jr. (Eng.) 805, 6 Rev. Rep. 53; *State v. Van Pelt*, 1 Ind. 304. In *Cheetham v. Ward*, *supra*, the court said: "The very point in issue was however decided in the year-book: and Brian there gives a satisfactory reason for the decision. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one, or satisfaction made by one, is a discharge of both. This puts an end to the argument that the action is not necessarily suspended as to both; for it is the effect of the suspension as to one that releases, discharges, and distinguishes the action as to both. This case, therefore, must be decided by the year-book, and the principle there laid down, which has never been doubted since, whether founded in reason or not." So in *Smith v. State*, 46 Md. 617, the court stated the rule as follows: "It seems . . . to be well settled that the release of one or more sureties without the assent of the cosureties will operate at law to discharge the latter, because it is a cardinal principle of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it."

It was however recognized by the common-law courts that the only prejudice suffered by

a surety from the release of a cosurety was the loss of his right of contribution from the cosurety for any sum in excess of his aliquot part which he was compelled to pay. *Ward v. National Bank*, 8 App. Cas. (Eng.) 755, 52 L. J. P. C. 65, 49 L. T. N. S. 315. Basing their holdings on that consideration, the courts of equity discharged the cosurety only to the extent of his damage, holding him liable for his proportion of the liability but exonerating him to the extent to which he could have claimed contribution from his cosurety had the latter not been released. *State Bank v. Bozeman*, 13 Ark. 631; *Garey v. Hignutt*, 32 Md. 552; *Smith v. State*, 46 Md. 617; *Thompson v. Adams*, 1 Freem. Ch. (Miss.) 225; *Routon v. Lacy*, 17 Mo. 399; *State v. Matson*, 44 Mo. 305; *Wright v. Stockton*, 5 Leigh (Va.) 153; *Trabing v. Albany County*, 1 Wyo. 301. See also *Jones v. Whitehead*, 4 Ga. 397; *Morgan v. Smith*, 70 N. Y. 537. In *Smith v. State*, supra, the court said: "It seems to be well settled that the release of one or more sureties without the assent of the cosureties will operate at law to discharge the latter, because it is a cardinal principle of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it. In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the cosureties to an increased risk or liability. Accordingly, it has been held that where the creditor releases one surety, reserving his remedy against the others, the effect of such release operates only to discharge the cosureties from the ratable proportion which the surety thus released ought to have contributed, and such further proportion as he ought to have borne arising from the insolvency of any of the other sureties. It is difficult to imagine on what principle it can be maintained in equity, that the mere release of one surety discharges the other sureties from liability. As between themselves, the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion. If, then, the release of one surety discharges the other from the payment of the proportion of the debt, which such surety ought to have contributed, and discharges them also from the proportion which he ought to bear in the loss arising from the insolvency of any of the other sureties, it is clear that such release can in no manner prejudice or subject the cosureties to an increased risk. It follows then from what we have said, that the payment of Payne's proportion of the judgment, and in the subsequent entry of satisfaction as against his executors, could

not in any manner affect the rights of the cosureties, or subject them to an increased liability. The effect of that entry so far as they are concerned is to release them from the payment of Payne's proportion of the judgment, and should any of the cosureties prove insolvent, to release them from the payment of Payne's proportion of the loss arising from such insolvency."

The modern rule is in accord with the doctrine of the equity courts that the release of a surety discharges his cosureties from liability only to the extent of the proportion for which the discharged surety could have been held to contribute to them. *Jemison v. Governor*, 47 Ala. 390; *Saint v. Wheeler*, etc. Mfg. Co. 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Thomason v. Clark*, 31 Ill. App. 404; *Myers v. Farmer*, 52 Ia. 20, 2 N. W. 572; *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 732; *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Benedict v. Rea*, 35 Hun (N.Y.) 34; *Hood v. Hayward*, 48 Hun 330, 1 N. Y. S. 566; *Morgan v. Smith*, 70 N. Y. 537; *Wanamaker v. Powers*, 102 App. Div. 485, 93 N. Y. S. 19, *affirming* 186 N. Y. 562, 79 N. E. 1118; *Schock v. Miller*, 10 Pa. St. 402; *Klingensmith v. Klingensmith*, 31 Pa. St. 460; *Ulrich v. Hoefling*, 23 Tex. Civ. App. 289, 56 S. W. 199; *Bolton v. Gifford*, 45 Tex. Civ. App. 140, 100 S. W. 210; *Lane v. Moon*, 46 Tex. Civ. App. 625, 103 S. W. 211; *Carlton v. Krueger*, 54 Tex. Civ. App. 48, 115 S. W. 619, 1178; *Ware v. Milligan* (Tex.) 30 S. W. 728; *Sorrel v. Gifford* (Tex.) 100 S. W. 212; *Seeligson v. Gifford* (Tex.) 100 S. W. 213; *Munoz v. Brasel* (Tex.) 108 S. W. 417; *Hallock v. Yankcy*, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861.

The reasons underlying the foregoing rule were well stated in *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, wherein the court said: "The right of a surety compelled to pay a debt as against his cosurety is not exoneration of the burden. It is his as much as his fellow's. It is the right of contribution, the right to recover from his cosurety just so much as will make both equal in the loss. It is obvious that by the discharge of one surety the others are injured (or would be) just to the extent of their right of contribution. . . . This mode of adjustment injures no one. Its plain, common sense equity commends itself to every man's sense of right, and is harmonious with the well-settled rule, that the release of the principal discharges the surety altogether, because it takes away the right to exoneration. When the relief goes beyond the injury it becomes technical and arbitrary."

So in *Schock v. Miller*, 10 Pa. St. 402, it was said: "Whatever, then, may be the effect of a release at law, it, in equity (and equity

is part of our law), is a discharge pro tanto. And why should the law be otherwise? For this, no rational reason has or can be given. In this case it is clear that the act of the creditor, so far from being an injury, is a benefit to the cosurety, for it relieves him from the payment of a moiety of the debt, the whole of which he might otherwise be compelled to pay. If it be a prejudice to anyone, it is the creditor; but of this, surely, the cosurety has no right to complain. Why the creditor agreed to release one of the sureties upon payment of his share of the debt, we are not informed; nor is it material, as we are satisfied he had the right without the consent, or against the consent, of the cosurety, to do so, without affecting or impairing his claim, except to the extent of one moiety of the debt. The executors of Hertzler cannot be compelled to pay more than they are equitably bound to pay on the solvency of the principal debtor, viz., a moiety of the debt. To that extent, and to that extent only, have they a defense to the action."

In *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 31 Am. St. Rep. 534, the court said: "Did the discharge of two sureties release the defendant, another surety? No. The defendant was one of six sureties, who bound themselves severally and not jointly, each in the sum of \$5,000. Their relations to each other are precisely the same as if each one had executed a separate bond. They are neither necessarily joint debtors nor joint sureties. Had the principal executed the bond, he would have bound himself in the sum of \$30,000. The sureties, instead of standing in jointly for that amount, divided it equally among them, and each one became severally bound for his aliquot share. . . .

In the case at bar, the attempted discharge of some of the sureties is not pretended to have been by a sealed instrument. Had it been, it would have worked a discharge of all the sureties, for they stand in the relation to each other of joint debtors, being cosureties for the payment of the same debt. Nor does it pretend to have discharged the whole debt, as provided for by statute. It simply presumes to discharge some sureties from a liability or debt that was to remain outstanding, and, therefore, not being upon sufficient consideration that would have paid the debt, or so much of it as they had engaged to pay by their covenant, nor evidenced by a sealed instrument, it was ineffectual to discharge any one."

UNDER STATUTE.

The *California* statute was stated and applied in *Wristen v. Curtiss*, 76 Cal. 6, 18 Pac. 81, wherein the court said: "The code provides that 'a release of one of two or more

joint debtors does not extinguish the obligation of any of the others unless they are mere guarantors; nor does it affect their right to contribution from him.' (Civ. Code, sec. 1543.) That the plaintiff, Harris, and Forman were, upon the face of the notes which they executed to the defendant, joint debtors is too clear to admit of doubt, and unless the plaintiff was a mere guarantor, his obligation was not extinguished by the release of Forman. But the court, by request of plaintiff, instructed the jury that 'a release of one of two or more sureties without the consent of the other cosureties is a release of all the sureties.' This is clearly contrary to the provision of the code relating to the same subject, and 'the code establishes the law of this state respecting the subjects to which it relates.'" *Compare* *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679 (decided prior to statute). An early statute in California relating to the release of sureties on official bonds (*Woods Digest*, art. 232, § 6) provided that the release of a surety thereunder should not affect the previously accrued liability of the other sureties. *People v. Buster*, 11 Cal. 215. Under a later statute (*Pol. Code*, sec. 977) the release or discharge of a surety on an official bond "does not affect the bond as to the remaining sureties thereon or alter or change their liability in any respect." *People v. Otto*, 77 Cal. 45, 18 Pac. 869.

In *Georgia* a statute (*Civ. Code* 1910, § 3542) provides that "the release of or compounding with one surety discharges a cosurety." *Williams-Thompson Co. v. Williams*, 10 Ga. App. 251, 63 S. E. 409; *Wilkinson v. Conley*, 133 Ga. 518, 66 S. E. 372. *Compare* *Lewis v. Armstrong*, 80 Ga. 402, 7 S. E. 114 (decided prior to statute). It has been held that a failure to prove the claim against the bankrupt estate of a surety does not discharge a cosurety. *Armstrong v. Citizen's etc. Bank*, 145 Ga. 861, 90 S. E. 44. Prior to the statute it was held that a failure to sue the principal on demand of one surety discharged all the sureties. *Jones v. Whitehead*, 4 Ga. 397. See also, *infra*, the subdivision *Failure to Sue Principal*.

The *Missouri* statute was stated and applied in *Schneider v. Maney*, 242 Mo. 36, 145 S. W. 823, wherein the court said: "It is immaterial, however, so far as the plaintiff's right of action against this defendant is concerned, whether the other sureties were released or not, because by force of our statute, section 2769, Revised Statutes 1909, contracts that were by common law joint are joint and several and under section 2772 the creditor may sue any one or more of the joint obligors. Defendant would be liable, therefore, for the balance due on those judgments after deducting the amounts paid by the other sureties for their release." In *Singleton v. Shep-*

herd (Mo.) 183 S. W. 1077, it was said: "Plaintiff places reliance on section 2777, R. S. 1909, which authorizes a creditor of two or more debtors, joint or several, to compound with either for such sum as he may see fit, and release him 'without impairing his right to demand and collect the balance of such indebtedness from the other debtors not so released: Provided, that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his codebtors, as is by law now secured to him.' The creditor's act, releasing defendant, released plaintiff also in so far as he was liable as a joint obligor for defendant's part, but left him still liable for his own part, and when he settled that part, he did not pay 'more than his due portion of the original demand;' he merely settled his own single obligation and paid nothing in 'excess' of his own debt." In *Routon v. Lacy*, 17 Mo. 399, decided prior to the statute the rule in equity as stated in the preceding subdivision of this note was declared and applied. See also *Dodd v. Winn*, 27 Mo. 501; *State v. Atherton*, 40 Mo. 209; *State v. Hatson*, 44 Mo. 305.

The *Montana* statutes were stated in *Lay v. Nixon*, 14 Mont. 64, 35 Pac. 458, as follows: "By virtue of the statute of this state (Comp. Stats. div. 5, c. 76), one joint debtor, or more, may make a compromise or composition with the creditor of the joint debtors, and such compromise or composition shall be a full and effectual discharge to the debtor, or debtors, making the same, and to them only, of all liability to the creditor. Such compromise or composition with one joint debtor, or more, shall not discharge the other debtor or debtors, but shall be deemed to be a payment to the creditor, equal to the proportionate interest of the joint debtor or debtors so discharged; but the provisions of that chapter do not apply to any 'debtor or debtors who, by the express terms of the contract upon which the indebtedness exists or arose, was the principal debtor while the other joint debtor or debtors were sureties.' (Comp. Stats. div. 5, c. 76, § 1292.) The following section then provides 'that upon the rendition of any judgment in any court in this state, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendant are sureties of such principal debtor or debtors, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make

the same out of the property, personal or real, of the judgment debtor who was surety.' (Comp. Stats. sec 1293.)"

In *Ohio* the court held in *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. 381, that a statute providing that a compromise with and release of one of several joint debtors does not release the others, applies to sureties. In that case it was said: "It was urged in argument, that the term 'joint debtors' in the statute, must be limited to principal debtors, because it is used in such connection with the word 'partners,' as shows that intention. We do not think so. A surety, as well as a principal, may be a debtor, although a right of action on the obligation has not matured: and the phrase 'other joint debtors' is broad enough to embrace all persons who are jointly indebted, except partners with respect to whom special provision is made by the preceding sections. We find nothing in the statute indicating an intention to deprive sureties of the benefit of its provisions."

In *Vermont* a statute providing that the discharge of one joint debtor shall not release the others has been held to be applicable to sureties. *Alford v. Baxter*, 36 Vt. 158.

FAILURE TO SUE PRINCIPAL.

It is provided by statute in many jurisdictions that where an obligation for which another is bound as surety is due and owing the surety may by notice require the creditor to sue the principal debtor therefor, and if he does not do so within a reasonable time the surety is discharged. By the weight of authority such a discharge of a surety does not discharge his cosureties. *Wilson v. Tebbetts*, 29 Ark. 579, 21 Am. Rep. 165; *School Trustees v. Southard*, 31 Ill. App. 359; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 Ind. 491; *Letcher v. Yantis*, 3 Dana (Ky.) 160; *Ruff v. Montgomery*, 83 Miss. 185, 36 So. 67; *Routon v. Lacy*, 17 Mo. 399; *Klingensmith v. Klingensmith*, 31 Pa. St. 460. Compare *Towns v. Riddle*, 2 Ala. 694; *Wright v. Stockton*, 5 Leigh (Va.) 153. And see *Jones v. Whitehead*, 4 Ga. 397, cited, *supra*, in the subdivision *Under Statute*.

In *Ramey v. Purvis*, 38 Miss. 499, it was said: "The statute authorizes 'any surety' to give the notice, and provides that if the creditors shall fail to bring suit as required 'the surety who shall have given such notice shall be discharged from liability, and the creditor shall be barred of all recovery against him.' It appears to be plain, from this phraseology, that the notice was intended to be a privilege to the surety who might see fit to give it, and to operate to his sole benefit. The rule established by the statute is, that a surety desiring and requiring suit to be brought should be discharged

upon the failure of the creditor to sue accordingly. This might be the case with one of two cosureties, while the other might desire that suit should not be brought. The reason as well as the language of the statute applies to the former case, but not to the latter; and there is nothing in it which can be justly construed to compel a creditor to sue a surety, under penalty of losing his debt against him, unless he desires to be sued, and gives accordingly. But it is contended that the discharge of one surety must work a discharge of the other, because the claim for contribution which the latter, in case of payment of the debt by him, had against the former, by virtue of the original obligation, is thereby destroyed. If this be conceded to be true, it does not show that the surety, failing to avail himself of the privilege authorized by the statute, is discharged by the act of his cosurety. For the statute provides how one surety may be discharged. It authorizes the discharge of one surety in a particular manner, and is silent as to the liability of others; and it is, in respect to the objection under consideration tantamount to authority given to the creditor to release one of two sureties in a specified mode. It was, then, a part of the law in relation to the rights of sureties, and the contract of suretyship must be considered as having been entered into with reference to it, and the rights of the parties to it be governed by it; for the statute incorporated into the Revised Code, and which thereby appears to be subsequent date to this note, is in substance but a re-enactment of the Statute of 1864, ch. 27. Hence, if the effect of the discharge of the surety Thompson, be to leave his cosurety, who is not discharged from the plaintiff's claim, without remedy for contribution against him, it is a result produced by the statute, allowing one surety to be discharged without affecting the creditor's claim against his cosurety. The contract of the sureties was entered into subject to the rule established by the statute, which governs both their liabilities and their rights; and the statute cannot be held to prejudice the rights of the creditor further than its positive provisions require."

In *Wilson v. Tebbetts*, 20 Ark. 579, 21 Am. Rep. 165, it was held that the discharge of one surety where the creditor had failed to bring suit within thirty days after notice, the time prescribed by the statute, did not affect the liabilities of the cosureties. The court said: "The question now to be considered is, Does the discharge of one of the sureties who gives the required notice, also discharge those who have not given notice? The counsel for Tebbetts contend that such is the effect of the discharge of one surety who has given notice, upon the liabilities of

the cosureties who failed to do so, and to sustain them in this position, have cited several adjudicated cases. That most strongly in point, and which would seem most fully to sustain them, is the case of *Wright v. Stockton*, 5 Leigh (Va.) 153. Under a statute of Virginia, substantially like our own, three out of four sureties gave notice to the creditor to sue; suit was brought upon the bond and the three were discharged. Suit was then brought against the estate of Wright, the surety who had not given notice. When considering the case thus presented, Carr, J., said: 'In this case the creditor was required to sue by three of the sureties, and delayed to do so for an unreasonable time, in consequence of which delay the three sureties who joined in the requisition have been discharged by a judgment from all liability. It is contended that this does not discharge the defendant, because his intestate did not join in the requisition to sue. If we take the statute literally, it would seem to require that when there were more sureties than one, all shall join in the requisition, for the words are: "Where any person or persons are the surety or sureties in a bond, etc., it shall be lawful for such surety or sureties to give notice etc." Yet this construction would in a great measure defeat the remedy, as it would put it out of the power of one, where there are many sureties, to prevent the notice by refusing to join. If we look at the reason and object of the law, it would seem that a notice to sue by a part of the sureties would be as effectual as one given by them all . . . Again, we know that there is a principle of the common law attaching to all joint obligations by which a discharge of one obligor is a discharge of all.' It is upon this construction of the statute and upon the announcement of a common-law principle with regard to joint obligations, which can have no application in this case, because we have a statute which makes all contracts joint and several, that the court in that case held a notice by one surety who gave notice, to be a discharge of all. With due respect for the conclusions which the court seemed to have reached, we think that neither the intent of the legislature nor the language of the statute sustains the court in its decision. Certainly it would not be a fair construction of a statute, such as ours, which says: 'Any person bound as security, etc., may by notice require suit to be commenced, etc., and that if suit is brought, such security shall be exonerated.' Thus we see the right is given to 'any surety to give notice to sue,' and if suit is not brought, it discharges the surety who gives it. By the first section the right to give such notice is given to any person bound as surety, and it clearly gives the right to give notice to one or more who may

feel themselves insecure by reason of the failing circumstances of the principal debtor, whilst the right to be discharged is clearly limited to such surety as has given the notice. Thus considering this decision and the course of reasoning upon which it was reached, we can give it no controlling influence in the consideration of the case before us."

So in *Klingensmith v. Klingensmith*, 31 Pa. St. 460, the court said: "The action is against one of two sureties. The other had been discharged, by the neglect of the plaintiff to sue the principal after due notice. This does not discharge both, where by law a several action may be brought. The surety not discharged may be sued for his proportion of the amount."

In *Martin v. Orr*, 96 Ind. 491, wherein it appeared that a creditor did not take out execution for some time after judgment on notice from a surety requiring him to institute action, it was held that such conduct discharged the surety giving notice but not the other. The court said: "A surety, bound in writing for the payment of money or the performance of any contract, may, when the right of action accrues, require by notice in writing the creditor or obligee forthwith to institute an action upon the contract. And if the creditor or obligee does not, within a reasonable time after such notice, bring his action upon such contract and prosecute the same to judgment and execution, the surety will be discharged from all liability. . . . Each paragraph of Martin's answer alleged that he was surety on the note on which the judgment was rendered; that he gave the creditor notice as required by the statute; and that the creditor after prosecuting his action to judgment did not take out an execution for fifty-two days thereafter. Many decisions of this court make it obvious that the delay in taking out execution after the rendition of the judgment was unreasonable."

The act of the creditor in allowing his claim against one surety to become barred by the statute of limitations does not release the other sureties. *Montgomery v. Boyd* (Tex.) 171 S. W. 273. In *Davis v. Auxier*, 41 S. W. 767, 19 Ky. L. Rep. 719, it was said: "It is . . . contended that Davis ought to be released because appellee allowed the action to become barred as to the other surety, Kelley. As to the latter contention, it is sufficient to say that, if Davis or his administrator desired to hold Kelley bound for contribution, the same could have been done by the payment of the note before the same was barred by the statute."

On the same principle a failure to present a claim against the estate of a deceased surety does not release cosureties. *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669.

SURETIES BOUND BY SEPARATE INSTRUMENTS.

Where sureties are bound by separate instruments a release of one will not discharge the other. *Clymer v. State*, 59 Ind. App. 364, 109 N. E. 431; *Wanamaker v. Powers*, 102 App. Div. 485, 93 N. Y. S. 19, *affirmed* 186 N. Y. 562, 79 N. E. 1118; *Jamison v. Cosby*, 11 Humph. (Tenn.) 273. See also *Poor v. Merrill*, 68 Ia. 436, 27 N. W. 367; *Com. v. Berry*, 95 Ky. 443, 26 S. W. 7, 15 Ky. L. Rep. 833; *McCloskey v. Wingfield*, 32 La. Ann. 38; *London Corp. v. Citizens Ins. Co.* 13 Ont. 713. In *Clymer v. State*, *supra*, it was said: "It is further argued that the release of Ziba F. Little, as surety on the original bond, as shown in the special finding, operated as a release of this appellant from the bond being considered, upon the theory that they were cosureties, and the release of one discharged all cosureties. Appellant's contention would have much force if the parties had signed the same bond, but since they did not, the discharge of Little did not release appellant." In *Poor v. Merrill*, *supra*, the court said: "It is averred in the amendment that in January, 1882, Merrill, with other sureties, filed a bond as security for deposits which should be made by the county treasurer; that deposits were made, and that, while Merrill owed the same, the bond in suit was given as an additional bond; that the first bond was surrendered and canceled, and that the cancellation of that bond had the effect to release the bond in suit, because it deprived these sureties of the right to look to the sureties upon the first bond for contribution. But the bond in suit does not purport to be an additional bond, and there is no averment in the amendment demurred to which shows that it was ever regarded as an additional security for the deposit in question. The deposit secured by the first bond was paid, and the makers of the bond had a right then, and before another deposit was made, to take it up."

Release by Judicial Order or by Operation of Law.

The distinction between a release of a surety by operation of law and one by the act of the creditor, with respect to the effect on the liability of a cosurety, was pointed out in *Staples v. Gokey*, 34 Hun (N. Y.) 289, wherein the court said: "When, by operation of law, one of the sureties becomes released from that obligation, the burden rests upon the remainder. (*Comins v. Pottle*, 22 Hun 287; *Davis v. Van Buren*, 72 N. Y. 587; *Risley v. Brown*, 67 N. Y. 160; *Randall v. Sackett*, 77 N. Y. 480; *Wood v. Fisk*, 63 N. Y. 245.) It is plain that when two persons become surety for a third, the right of contribution may be lost to one by the death or

bankruptcy of the other, or by the statute of limitations running as to one and not as to the other, and this contingency must be presumed to be present to the minds of the sureties when they assume their obligation. The creditor has nothing to do with the right of the sureties to contribution among themselves, except that he must not affirmatively do any act tending to impair it. In other words, he must not, by his action, destroy or impair the rights of the sureties as between themselves. If he does, to the extent that he impairs the right of any one surety, to that extent he diminishes the amount of his recovery against him."

If an official bond is so informally taken that some of the sureties are not bound, the others are thereby released on the ground that the nature of the obligation which they agreed to assume has been changed. *Com. v. Berry*, 95 Ky. 443, 26 S. W. 7, 15 Ky. L. Rep. 833; *Wilson v. Linville*, 96 Ky. 50, 27 S. W. 857. On the same principle in *State v. McGonigle*, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L.R.A. 735, it was held that the discharge of a surety because of the erasure of his name from the bond released every other surety thereon. See also *Canada Furniture Co. v. Stephenson*, 19 Manitoba 618; *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093, 24 L.R.A. 795. *Compare Cass County v. American Exch. State Bank*, 11 N. D. 238, 91 N. W. 59. And in *Hess v. Schaffner* (Tex.) 139 S. W. 1024, the court said: "If appellee had notice, before taking the note and parting with the consideration, that Damek's name had been erased without the consent of Viereck, and that he was not to be bound, unless Damek was, he would be released. If Koy and Roesler signed after the name of Damek had been erased, such erasure would not of itself affect their liability; but if the effect of such erasure under the principles above stated was to release Viereck, and it was agreed that Koy and Roesler would only be bound at all on condition that Viereck remained, and appellee had notice of this fact, at or before it took the paper and parted with the consideration, then such release of Viereck also operated to release Koy and Roesler." So in *Mitchell v. Burton*, 2 Head. (Tenn.) 613, it was held that though the discharge of a surety an account of the erasure of his name from the bond without the knowledge or consent of cosureties discharged them from liability, it did not discharge other sureties who signed the bond after such erasure although ignorant of the same. *Compare Metcalfe County v. Scott*, 1 Ky. L. Rep. (abstract) 422. In *Hilleboe v. Warner*, 17 N. D. 594, 118 N. W. 1047, the court said: "It is not seriously disputed by the appellant on this appeal that the erasure of the name of Woods from the bond

is a complete defense to the other sureties who signed the bond after said Woods had signed the same and before his name was erased."

The distinction between the mere release of a surety and a change in the obligation was pointed out in *Ide v. Churchill*, 14 Ohio St. 386, wherein the court said: "Where the agreement to which the surety acceded has been changed, his obligation is annihilated and gone, and there is no power, either in courts of law or in equity, to revive it against him, or to make him a party to the substituted agreement concluded between the principal parties; and in such case, his entire discharge necessarily ensues. But where no such change has been made, and he remains bound to his original stipulations, and has been injured by the act of the creditor only in respect to the means of satisfying the debt, or of reimbursing himself after making payment, he is entitled to have deducted from the debt an amount equal to his injury, and no more." See to the same effect *Schock v. Miller*, 10 Pa. St. 402.

A discharge of a surety on an official bond by order of court does not release the other sureties. *State v. Bongard*, 89 Minn. 426, 94 N. W. 1093, wherein it was said: "No question is here made by either party as to the authority of the court to make the order as to the release of the three sureties before any action on the recognizance had been commenced, and we assume, for the purposes of this decision, that the jurisdiction of the court in the premises was the same as it would have been if the action had been pending. Now, it appears from the allegations of the complaint that the court did not assume to remit the whole of the penalty of the bond in excess of \$842.47. On the contrary, its order deals with the three sureties personally, and provides for their release from further liability on the recognizance upon the payment of the sum named, and expressly provided that their release should not affect the right of the state to recover from the defendant one-fourth of the amount of the recognizance; that is, his proportionate share thereof as between him and his cosureties. The case stands, then, as to the defendant, precisely as if the state had released his cosureties on payment of three-fourths of the amount due on the recognizance, and had brought this action to recover his proportionate share of the original amount of the recognizance. We therefore hold that the release of the defendant's cosureties did not affect his liability for such proportionate share."

So in *Frederick v. Moore*, 13 B. Mon. (Ky.) 470, it was said: "The Act of 1790 (1 Stat. Laws, 766) authorized any surety of a guardian, who might apprehend danger of suffering by his suretyship, to petition the

court before whom he was bound, to be relieved. Authority is given to the court to relieve none except those who apply. None except Kellar did apply for relief, and none except him apprehended danger from aught that appears in the record. The sureties with Kellar in the first bond are not, as we have seen, released by operation of law, and not having been released by the county court through any order applicable to them, they are still responsible upon their bond. The sureties in the first bond have no right to complain that one from whom they could have claimed contribution has been released while they are held bound, because they ought to have known when they entered into the bond that such might be the result, as any one of them had the right by law to apply to be discharged; and because they might have availed themselves of the same privilege."

However in *McKim v. Demmon*, 130 Mass. 404, the court said: "It being agreed in the case stated that Lowry, one of the sureties upon the bond sued on, was discharged from all further responsibility thereon by a decree of the probate court made pursuant to the provisions of the statute, it must be assumed that the decree was made after due notice to all persons interested, as required by the St. of 1843, c. 56, § 1; and, if such notice was given, the validity of the decree is not affected by the defendant's having had no actual knowledge of it. But the legal effect of that decree was to discharge Lowry's co-sureties as well as himself. This is evident from the concluding provision of section 1, which does not speak of an additional bond or additional sureties, but requires the principal to 'give a new bond, with such surety or sureties as the court shall judge sufficient,' as well as from the provision of section 3, that, 'when a new bond shall be required, as above provided, the sureties' (not merely the surety who has been discharged) 'in the prior bond shall nevertheless be liable for all breaches of the condition committed before the new bond shall be approved by the judge of probate'—clearly implying that none of the sureties upon the first bond shall be responsible for any breach of trust committed after the second bond has been given and approved."

That one surety is competent by reason of coverture does not discharge the others. *Warren v. Louisville Leaf Tobacco Exch. (Ky.)* 55 S. W. 912.

Where an action has been commenced against all the sureties, a dismissal as to some for want of jurisdiction does not release the others. *Monroe v. Richmond, Man. Unrep. Cas. (La.)* 278.

The discharge of a surety in insolvency proceedings does not discharge his co-sureties. *Sacramento County v. Bird*, 31 Cal. 66.

In *Myers v. Farmer*, 52 Ia. 20, 2 N. W. 572, wherein it appeared that judgment had been taken against a surety, the court said that he was discharged from liability by the successful termination of an appeal in the same matter by his co-surety.

In *Roberson v. Tonn*, 76 Tex. 535, 13 S. W. 385, wherein it appeared that a surety became subsequently a coprincipal, it was held that his co-surety was released from liability. The court said: "B. H. Bassett became primarily liable to the ward—as to his co-surety a principal—having through the firm of which he was a member borrowed and had the benefit of the ward's money, for which both sureties were liable. Having thus become a principal debtor, if he has been released, then his co-surety is as clearly released as would he be had appellee in some way voluntarily released the guardian whose sureties both were."

And in *Britnell v. Smith*, 189 Ala. 440, 66 So. 569, wherein it appeared that two of three sureties on a note transferred to them, assigned the same to a third person without recourse on them either in law or equity it was held that the third surety was discharged. The court said: "The effect of their indorsement was, . . . to destroy their liability on the note, and, when they so indorsed it, they also released their co-surety Yarbrough from liability on the note. Yarbrough was entitled to the right, upon the payment of the note by him, against his co-sureties to contribution. The right of contribution was destroyed when the transfer was made without recourse. The character of the obligation, in so far as Yarbrough is concerned, was materially changed, and, upon every principle of law, Yarbrough was discharged."

McGINNIS

v.

STUDEBAKER CORPORATION OF AMERICA.

Oregon Supreme Court—March 9, 1915.

75 Oregon 519; 146 Pac. 825;
147 Pac. 525.

Damages — Breach of Contract — Loss of Profits.

Recovery may be had for loss of profits occasioned by breach of contract, where the business of which plaintiff was deprived was contemplated or can reasonably be presumed to have been contemplated by parties when the contract was made, and it is reasonably

certain that gain or profit would have been derived therefrom, although the amount of such gain may be uncertain.

[See 8 R. C. L. tit. *Damages*, p. 501 et seq.]

Agency — Breach of Contract — Recovery for Loss of Profits.

In an action for the breach of a contract, in which plaintiff acted as sales agent for defendant's automobiles on commission, but which gave no exclusive agency for a definite period, the profits derived by the plaintiff from such sales were clearly contemplated by the parties; but where the only proof of damage was that defendant discharged plaintiff before he could consummate sales to his prospective customers, and there was nothing to show that sales were made or could have been made to more than four customers, a verdict for plaintiff for commissions on the amount of sales to all the prospective customers is properly set aside by the trial court.

[See note at end of this case.]

Same.

Alleged loss of opportunity to sell to prospective purchasers listed by plaintiff is held to be the pith of his complaint for termination of his employment to sell defendant's automobiles on commission.

[See note at end of this case.]

Appeal from Circuit Court, Multnomah county: DAVIS, Judge.

Action by F. E. McGinnis, administrator, plaintiff, against Studebaker Corporation of America, defendant. From judgment rendered, plaintiff appeals. **AFFIRMED.**

[519] This is an action by Clinton D. Phelps against the Studebaker Corporation of America, in which F. E. McGinnis, administrator, was substituted as plaintiff after the death of the original plaintiff.

The defendant, an automobile manufacturer, maintained a retail sales department in Portland, Oregon. The plaintiff was employed by defendant on January [520] 21, 1913, as a retail salesman. Thereafter the defendant transferred its retail business to the Oregon Motor Car Company, and for that reason on April 8, 1913, the employment of plaintiff was terminated. Claiming that his services had been engaged until December 31, 1913, and that defendant had agreed to pay a commission of 5 per cent on each car sold, the plaintiff commenced this action for the recovery of damages and obtained a verdict of \$1,200. The jury awarded \$300, of the amount recovered, as damages suffered between January 21, 1913, and April 8th following, on account of the failure of defendant to comply with its agreement to keep a sufficient number of cars to demonstrate with; and, after deducting earnings received while in the employ of others, plaintiff was allowed \$900 on account of the loss of commissions, which he would have earned

on the sale of cars between April 8th and December 31st, if defendant had not terminated the employment. On the motion of defendant, a new trial was granted, and the plaintiff appeals.

Arthur I. Moulton for appellant.

Veazie, McCourt & Veazie for respondent.

HARRIS, J. (*after stating the facts*).—In substance the complaint alleged that plaintiff could have sold more cars between January 21, 1913, and April 8th, if defendant had provided cars for demonstrating [521] purposes; that it was agreed that the early portion of the year for which plaintiff was employed should be devoted by plaintiff to securing lists of prospective purchasers and interesting them in the cars sold by defendant; that plaintiff did devote about ten weeks of his time securing names of prospective purchasers, and by April 8th had turned over to defendant a large list of prospective purchasers, which list defendant delivered to other parties, who then negotiated with the persons, whose names appeared on such list; and that, if plaintiff had been permitted to continue in his employment, he would have made sales to the persons listed and other prospective purchasers sufficient to have brought him \$1,500 in commissions.

The defendant manufactured three types of automobiles, which were priced at \$1,650, \$1,290, and \$885. When the plaintiff entered the service of defendant, he was without experience in the sale of automobiles. He sold eight cars between January 21st and April 8th. The company employed three or more salesmen, whose compensation and duties were the same as plaintiff's. It was the duty of each salesman to make a daily report showing the names of persons who might become interested in the purchase of an automobile, and the persons thus reported were known as "prospects." The plaintiff had seen five or six of his "prospects" driving Studebaker cars after April 8th, and for that reason assumed that these cars had been purchased. The plaintiff testified that he had worked up a lot of cases, so that a demonstration was all that was necessary to effect a sale, because he had been led to believe that purchases would be made if the car was demonstrated and proved to be satisfactory. There was no evidence tending to show that any of plaintiff's "prospects" purchased a Studebaker car, except W. W. Graybeal [522] and John P. Miller, each of whom purchased a \$1,290 car, and except Harvey O'Brien and W. W. Graves, who bought \$885 cars. The Oregon Motor Car Company received from the defendant a list of plaintiff's "prospects." It appears also from the evidence that names of persons on the Studebaker prospect list

might also be on the prospect list of concerns selling other makes of automobiles.

The pith of plaintiff's complaint is that the termination of his employment deprived him of the opportunity of selling to the prospective purchasers listed by him, and the evidence is largely directed to that phase of the case.

1. The theory of the law is to award compensation for gains prevented and for losses sustained when a contract is broken; and a person breaking a contract is liable for the direct, natural and proximate result of his act. The party damaged is not precluded from recovering anticipated profits merely because they are such, since the loss of anticipated profits is a damage that should be compensated for just as much as is the destruction of property. Repeated decisions of this court, as well as the announcements made by courts in other jurisdictions, have firmly established the doctrine that if the business of which the complaining party was deprived was contemplated or could reasonably be presumed to have been contemplated by the parties at the time of making the contract, and if it is reasonably certain that a gain or benefit would have been derived, then damages may be recovered. Uncertainty as to the amount of damages does not prevent recovery, but uncertainty as to whether any benefit or gain would have been derived at all does bar a claim for damages. If it is reasonably certain that a gain or benefit has been prevented, then plaintiff is entitled to damages for the [523] amount of that gain or benefit: *Blagen v. Thompson*, 23 Ore. 239, 31 Pac. 647, 18 L.R.A. 315; *Hoskins v. Scott*, 52 Ore. 271, 96 Pac. 1112; *Bredemeier v. Pacific Supply Co.* 64 Ore. 576, 131 Pac. 312; *Fields v. Western Union Tel. Co.* 68 Ore. 217, 137 Pac. 200; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hichhorn v. Bradley*, 117 Ia. 130, 90 N. W. 592; *Wakeman v. Wheeler*, etc. Mfg. Co. 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Wells v. National L. Assoc.* 99 Fed. 222, 39 C. C. A. 476, 53 L.R.A. 34; *Emerson v. Pacific Coast, etc. Packing Co.* 96 Minn. 1, 104 N. W. 573, 113 Am. St. Rep. 603, 6 Ann. Cas. 973, 1 L.R.A. (N.S.) 445; *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785; *Rice v. Caudle*, 71 Ga. 605; *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125; *Goldman v. Wolff*, 6 Mo. App. 490.

2. It will be observed that the rule as stated embraces two elements: (1) The business or benefit of which the complaining party was deprived must have been contemplated by the parties, or reasonably presumed to have been contemplated; and (2) it must be reasonably certain that a gain or benefit was prevented. The very nature of the agree-

ment between the parties supplies the first element, because it was the commission on each sale, and therefore the benefit and profit which plaintiff contracted for. The second essential of the rule has produced much perplexity and led to some confusion; but the difficulty lies not so much in a statement of the rule of law as in the application of the governing principle: *Hichhorn v. Bradley*, 117 Ia. 130, 90 N. W. 592; *Emerson v. Pacific Coast, etc. Packing Co.* 96 Minn. 1, 104 N. W. 573, 113 Am. St. Rep. 603, 6 Ann. Cas. 973, 1 L.R.A. (N.S.) 445. If reasonable certainty is not attained, and if it is speculative or doubtful whether a benefit would have been derived, [524] then a complaining party must fail because adequate proof is lacking: *Wakeman v. Wheeler*, etc. Co. 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. It should be remembered that the instant case is not analogous to that class of cases where there was an exclusive agency for a definite period, or where the agency covered a certain percentage of the entire output, because in such cases subsequent events generally afford an opportunity of knowing whether sales would have been made: *Emerson v. Pacific Coast, etc. Packing Co.* 96 Minn. 1, 104 N. W. 573, 113 Am. St. Rep. 603, 6 Ann. Cas. 973, 1 L.R.A. (N.S.) 445; *Rice v. Caudle*, 71 Ga. 605; *Goldman v. Wolff*, 6 Mo. App. 490; *Hichhorn v. Bradley*, 117 Ia. 130, 90 N. W. 592; *Wakeman v. Wheeler*, etc. Mfg. Co. 101 N. Y. 205, 4 N. E. 264; *Bredemeier v. Pacific Supply Co.* 64 Ore. 576, 131 Pac. 312; *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70; *Carlson v. Stone-Ordean-Wells Co.* 40 Mont. 437, 107 Pac. 419. The facts also easily differentiate *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125, where the salesman had for two years sold the goods of his employer; nor does a parallel exist between the case at bar and *Fields v. Western Union Tel. Co.* 68 Ore. 217, 137 Pac. 200.

The grievance emphasized by Phelps is that he was damaged by reason of the refusal of the defendant to permit him to consummate sales to his list of "prospects." Aside from the four "prospects" mentioned, it is pure speculation as to whether a sale would have been made to any of the "prospects." Whether any of the persons listed by plaintiff would have purchased a Studebaker automobile or even a car of any make is conjectural and doubtful: *Hoskins v. Scott*, 52 Ore. 271, 96 Pac. 1112.

[525] "Mere expectations, doubtful offers, or other vague or indefinite assurances of intention to purchase, without expression of quantity or value, must be classed as speculative, and hence not recoverable." *Beck v. West*, 87 Ala. 213, 6 So. 70.

See also *Brigham v. Carlisle*, 78 Ala. 243 (56 Am. Rep. 28).

Regardless of the reasons assigned in the motion for a new trial, the court was empowered to grant a new trial and properly exercised his authority: *Smith, etc. Type-writer Co. v. McGeorge*, 72 Ore. 523, 143 Pac. 905; *Frederick v. Bard*, 74 Ore. 457, 145 Pac. 671; *Pullen v. Eugene*, 77 Ore. 320, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474.

The order granting a new trial is affirmed. Affirmed.

Moore, C.J., and McBride and Bean, JJ., concur.

ON PETITION FOR REHEARING.

(April 6, 1915.)

HARRIS, J.—The plaintiff has filed a petition for a rehearing, and he contends that the court misapprehended the issue presented by the pleadings. We made the statement, advisedly, that:

"The pith of plaintiff's complaint is that the termination of his employment deprived him of the opportunity of selling to the prospective purchasers listed by him, and the evidence is largely directed to that phase of the case."

[526] The complaint alleges that:

"It is understood and agreed that the early portion of said year for which plaintiff was employed should be by plaintiff devoted to securing lists of prospective purchasers of said cars and in interesting prospective purchasers thereof in the types and models of cars manufactured by defendant, and said defendant therein and thereby agreed not to terminate plaintiff's said employment until the end of said year, and to give plaintiff a reasonable opportunity to consummate sales to all such persons whose names were put on said list as might be desirous of purchasing any of the types of automobiles manufactured by defendant; that, in consideration of plaintiff's services in securing purchasers of said output of defendant, said defendant promised and agreed to pay plaintiff 5 per cent of the factory list price of all automobiles for which plaintiff should secure orders and which plaintiff should sell from the output of said defendant, including automobiles manufactured by other firms and corporations, and which were acquired and offered for sale by defendant."

"That plaintiff, on or about the said 21st day of January, 1913, began work under said employment, and for a period of about ten weeks thereafter devoted his time exclusively to securing lists of prospective purchasers of the various types and models of automobiles offered for sale by defendant, and to demonstrating such automobiles to said purchasers, and inducing said prospective purchasers to

purchase automobiles of and from defendant; that, in violation of the contract and agreement aforesaid, said defendant during the said ten weeks failed and neglected to supply plaintiff with or keep on hand for plaintiff's use any automobiles of the aforesaid types, known as Studebaker 35 and Studebaker 6, and plaintiff was thereby wholly prevented from making any demonstrations of said classes, although plaintiff had secured names of and entered into negotiations with many prospective purchasers, said persons being named in Schedule A annexed hereto."

[527] And then plaintiff details his grievance on account of the failure to supply sufficient cars for demonstrating purposes. Continuing the complaint asserts:

"That on or about the 8th day of April, 1913, plaintiff had secured and turned over to defendant, for the purpose of permitting defendant to keep a record thereof, a large list of the names of prospective purchasers of the various types of automobiles offered for sale by defendant, which list is hereto annexed and marked Schedule A, and plaintiff had expended a great deal of time and labor in securing said lists and in negotiating with said purchasers for the sale of each thereof of the various types of automobiles manufactured by defendant, and, had plaintiff been permitted to continue in his said employment for defendant, and had defendant kept and performed the said agreement of employment on its part, and supplied plaintiff with a sufficient number of demonstrating cars to enable plaintiff to demonstrate the merits thereof to the persons named in said lists and other prospective purchasers of automobiles, and supplied plaintiff with a sufficient number of automobiles to enable him to consummate sales to said prospective purchasers, plaintiff would have been able to realize as his commission under said contract on sales to be made by him during said year of his employment and from and after the said 8th day of April, 1913, the sum of \$1,500."

The remainder of the complaint, as we find it in the printed abstract, occupies about three pages, and, with the exception of the three clauses "or to any other persons," "or to anyone," "to any persons," the listed prospective purchasers constitute the subject matter of such remainder of the complaint.

The alleged loss of opportunity to sell to prospective purchasers listed by plaintiff is the pith of the complaint [528] as plaintiff has told the story of his grievance in his written pleading.

The petition for a rehearing is denied.

Affirmed. Rehearing denied.

Moore, C.J., and McBride and Bean, JJ., concur.

NOTE.**Recovery of Profits as Damages for Breach of Contract to Sell on Commission.**

Profits from Sales Anticipated in Future, 1194.

Profits from Sales in Process of Negotiation, 1197.

Profits from Sales Perfected, 1197.

Profits from Sales Anticipated in Future.

The reported case recognizes the general principle laid down in *Emerson v. Pacific Coast, etc. Packing Co.* 96 Minn. 1, 6 Ann. Cas. 973, that the loss of profits reasonably supposed to be within the contemplation of the parties to a contract to sell on commission is a proximate and natural consequence of the breach of such a contract, and that such profits are recoverable as damages though uncertainty may exist as to the amount thereof. To the same effect are the following recent cases: *Bredemeier v. Pacific Supply Co.* 64 Ore. 576, 131 Pac. 312; *Oklahoma F. Ins. Co. v. Ross (Tex.)* 170 S. W. 1062. See also *Church v. Wilkeson-Tripp Co.* 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059, wherein the court said: "When the direct purpose of the contract is to enable one of the parties to earn commissions or profits, he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to a recovery of damages for loss of contemplated profits, it must, as a general rule, appear that such loss was reasonably certain and not a fictitious or imaginary one; that fact being established, the damages are to be ascertained by the jury, although not always capable of being precisely measured by exact methods of computation."

However in other of the recent decisions a view is taken in accord with that expressed in *Wilson v. Wernwag*, 217 Pa. St. 82, 10 Ann. Cas. 649, that while it is necessary to show with reasonable certainty that damage from loss of prospective profits had resulted from a breach of a contract to sell on commission, there must in addition be evidence forming a fairly safe and reliable basis on which to estimate the amount of damages in order to permit a recovery. In other words it seems that more room for speculation and conjecture is allowed in the one class of cases than in the other. See *U. S. Fidelity, etc. Co. v. Ridge (Mo.)* 179 S. W. 791; *Laishley v. Goold Bicycle Co.* 6 Ont. L. Rep. 319. See also *Schiffman v. Peerless Motor Car Co.* 13 Cal. App. 600, 110 Pac. 460.

Data as to the amount of the commissions actually earned during the time a contract or agreement was in force and being carried out, or for the executed term of a like contract are generally looked on as a safe and reliable basis on which to calculate future profits. *U. S. Fidelity, etc. Co. v. Ridge (Mo.)* 179 S. W. 791. See also *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 99 N. E. 221; *Isbell v. Anderson Carriage Co.* 170 Mich. 304, 136 N. W. 457; *Richey v. Union Cent. L. Ins. Co.* 140 Wis. 486, 122 N. W. 1030.

The general rules heretofore stated are of slight value in determining the right to recover in a particular case for loss of profits, each case depending largely on its own facts. In a number of recent cases, a recovery has been allowed. Thus, in *Blumenthal v. Bridges*, 91 Ark. 212, 120 S. W. 974, 24 L.R.A.(N.S.) 279, it appeared that a real estate broker was given the right for a definite period to sell a tract of land, and to be paid as commissions all he received over two dollars an acre. The property in question having been sold by the owner before the termination of the time for which the agreement was to run, the broker brought an action for damages based upon lost profits. In holding that the trial court's instruction, that the broker could recover only on offering proof that he had found a purchaser and tendered the price to the owner before revocation, was not correct, the court said: "Even if he had not produced a purchaser before the revocation, he would have been entitled to recover by proving by competent testimony that he could, within the remaining time of the contract, have sold the land at an advance over the price named in the contract. This he might have shown by proving that the lands were of sufficient value in the market, and that his opportunities for finding a purchaser were such that he could have found a purchaser at an advanced price if he had been permitted to do so."

In *Schiffman v. Peerless Motor Car Co.* 13 Cal. App. 600, 110 Pac. 460, the profits that an agent would have derived from sales of automobiles and supplies made by his principal contrary to the terms of a contract not to sell in the territory given to an agent were held to be recoverable as damages by the agent. The court therein said: "The profits which plaintiff here complains that he was deprived of are those which he would have made from the sale of these machines had the defendant either refused to invade the exclusive territory granted to him or have referred the inquiries of the purchasers to him, as it agreed to do in the contract. There is nothing speculative or uncertain as to the amount of profits of which plaintiff was thus deprived, and their loss is so close-

ly connected with the breach of the obligation by defendant, that it is difficult to see any ground upon which it can be said that plaintiff's injury is too remote either in nature or origin."

It was held in *Meglemry v. Gebhardt Chili Powder Co.* 187 Ill. App. 14, that where an agent, employed for a specified term to introduce food products in a certain territory, who was to pay his own expenses, maintain an office, employ men and receive his compensation from commissions on goods sold, was wrongfully prevented from carrying out his contract, future profits which he might have earned during the unexpired term of the contract were recoverable as damages.

In *U. S. Fidelity, etc. Co. v. Ridge* (Mo.) 179 S. W. 791, it was held that expected profits were recoverable on the wrongful termination of an insurance agency, for such damages "were not too remote, since there were actual data upon which a reasonable estimate could be based." While just what was intended by the "actual data" referred to is not expressly stated it seems that the plaintiff having been the defendant's agent for some years before, the court had in mind the amount of the past commissions. The court in *Oklahoma F. Ins. Co. v. Ross* (Tex.) 710 S. W. 1062, in holding that an agent of an insurance company could recover as damages the profits which he would have realized from commissions on premiums under a contract, for the breach of which he was suing, said: "In the very nature of things, the amount of such profits is, to a considerable extent, speculative, but the authorities hold that that fact will not prevent a recovery. In this case it was shown that after the insurance company had discharged the plaintiff it ceased to do business in Texas on the ground that it was not profitable so to do. But there was testimony tending to show that Ross and Beasley were building up a business at the time the former was discharged; that it was largely through his efforts that the business referred to had been obtained, and we cannot say that the jury was not justified in reaching the conclusion that, if the plaintiff had not been discharged, the business would probably have been successful and attained such proportions as that during the remaining four years the plaintiff would have earned as commissions the amount awarded him as actual damages."

It was held in *Richey v. Union Cent. L. Ins. Co.* 140 Wis. 486, 122 N. W. 1030, that future profits were properly allowed as damages for the breach of a ten-year contract to solicit insurance and to collect premiums on all insurance effected, where there was evidence showing "the amount of business respondent did during the first two years of the contract period; that he had organized

it with a view to enlarging and increasing it for the eight remaining years, and to this end he invested his money in the business; that he was very successful as an insurance solicitor and business promoter; that the prospects for doing a future business, with the enterprise so established, were favorable; that in all reasonable probability he would do an increased business; and that he was prevented from reaping the benefits therefrom only by appellant's termination of his agency."

In *Bredemeier v. Pacific Supply Co.* 64 Ore. 576, 131 Pac. 312, a recovery of future profits was had for the breach of a contract by the terms of which the plaintiffs were to have the exclusive agency in the state of Oregon for a period of ten years of a certain washing compound to be furnished in any quantity at a stipulated price, which contract the defendants broke after the plaintiffs had begun to carry it out by placing demonstrators in stores, by placing salesmen and advertising men on the road, and by making sales thereunder.

In *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 99 N. E. 221, the plaintiff was allowed prospective profits as damages for the breach of a contract by the terms of which it was provided that he was to be the exclusive agent on a commission basis for the sale of the defendant's automobile in the New England states for the period of one year. He showed that the contract was broken during the first month of its existence; that he was to pay practically all expenses of the agency; that the business of selling automobiles though then somewhat new was not uncertain since he had sold four Peerless cars the previous year; that he was intimately acquainted with that branch of the trade; that he had subagents working or ready to work in soliciting orders; and that the defendant had sold thirty-seven cars during that year.

In *Laishley v. Goold Bicycle Co.* 6 Ont. L. Rep. 319, it appearing that the plaintiff's three-year agency for the sale of bicycles in an exclusive territory was broken after he had served for almost two-thirds of the period, it was held that his anticipated profits for the remaining period should be allowed him as damages, the court saying that the evidence of the past earnings under the agreement and of the amount of business done in the continuation of the business for the remaining period that the contract would have run constituted a sufficiently safe basis of calculation.

In *Merrimac Mfg. Co. v. Bibb*, 119 Ark. 443, 178 S. W. 403, a traveling salesman selling on commission was not allowed to recover future profits as damages for the reason that previous to the breaking of the

contract by his employer by failing to make payments as specified he had himself violated the agreement. But it was said that had he been free from fault: he might have treated the refusal of the defendants to pay him the commissions provided for in the contract as a manifestation of an intention on their part not to perform the contract according to its terms, and sued, not only for the commissions already earned by him under the contract, but also for such commissions as he would have earned thereafter."

In *Carlson v. Stone-Ordean-Wells Co.* 40 Mont. 434, 107 Pac. 419, wherein the action was for the breach of a contract giving the exclusive right to sell a certain brand of matches in specified territory, it was said: "It is urged that the evidence is insufficient to show that the plaintiff would have sold the 823 cases of matches if the defendant had not done so. There is some evidence in the record tending to prove that prior to March, 1908, plaintiff, at considerable trouble and expense to himself, had built up an extensive and profitable business in these matches in Butte in selling the same to the retail trade; that when Draper and Casey, agents for the defendant company, came to Butte in March, 1908, and called upon plaintiff to solicit a further carload order from him, they found plaintiff with a quantity of the goods on hand, and, in order to assist in disposing of the goods then in stock that the new order might be received, these agents of the defendant proposed to assist the plaintiff's salesman in soliciting orders from the merchants in Butte, and plaintiff sent his salesman with these agents among the plaintiff's customers and others; and the result of the work was the sale of 200 or more cases of matches which the plaintiff had on hand, and also the sale of 823 cases of matches of the 'Tip Toe' and 'Stay Lit' brands. The plaintiff having demanded that he be allowed his commission on the sale of these 823 cases, and his demand having been refused, a controversy arose, resulting in the defendant company distributing these matches, when they arrived in Butte, through another merchant there. There is some evidence that with one exception, or possibly two exceptions, the persons to whom these 823 cases were sold had been customers of plaintiff theretofore, and were such thereafter; that, as soon as these 823 cases were received and distributed among the retail dealers in Butte, plaintiff's business in the sale of matches was practically suspended for some six months, until those matches had been sold and consumed, when his business was again restored. While it may have been impossible to prove that the plaintiff would have sold precisely 823 cases of these matches if defendant had not done so, still,

in view of the fact that plaintiff was in equally as good position to make the sales as the agents of the defendant, who were strangers in Butte, apparently, and in view of the further fact that plaintiff did contribute to make these sales, to the extent at least that his own salesman assisted them by going with them and introducing them to the Butte merchants; and in view of the further fact that the amount of the sales actually made by defendant is not in dispute, and that the jury had before them the percentage of profit which plaintiff was making upon his sales of matches—we think there is in this record sufficient evidence upon which the jury could estimate with reasonable certainty the damages which the plaintiff sustained by the wrongful act of the defendant, basing such damages upon the profits which he lost on the sale of the goods which it is reasonably certain he would have made, but for the sale by the defendant."

However, in other recent cases, future profits have not been allowed to be recovered as damages. Thus, in *Crawford v. Cicotte*, 186 Mich. 269, 152 N. W. 1065, the plaintiff sought to recover the profits he would have made under a contract giving him, for a valuable consideration, an option to sell real estate which provided the price which the property should bring and the commissions to be paid. The evidence showed that the property had been sold by the owner before the expiration of the contract. It was held that since the contract specified that compensation was to be paid only on the making of a sale, and up to the time the sale was made no purchaser willing to pay the price had been secured, it was entirely problematical whether the broker would have been able to secure such a purchaser within the time limit, and no recovery could be had.

In *Isbell v. Anderson Carriage Co.* 176 Mich. 304, 136 N. W. 457, prospective profits as damages for the breach of a five-year contract of agency for automobiles manufactured by the defendant were held to have been improperly allowed. It was shown that the car proposed to be sold, being new and untried, had no market at the beginning of the term of the agency, and that none had been established at the time of the breach. The court said too much conjecture was involved in allowing the jury to say that the plaintiffs would have worked as zealously to effect sales as the defendant did after the breach, and that the defendant would not have availed itself of its right provided by the contract to terminate the contract on sixty days' notice.

In *Church v. Wilkeson Tripp Co.* 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059, it appearing that the plaintiffs had entered into an agreement with the de-

defendant to sell on commission bonds to the amount of \$300,000, the only security for which was property valued at and bought for \$65,000, which agreement was broken, only damages on sales actually made were allowed to be recovered, since, the court said, to assume that investors would have purchased all or any considerable portion of the bonds under the conditions stated involved "considerable credulity."

In *Oberfelder v. J. G. Mattingly Co. (Ky.)* 120 S. W. 352, it appeared that the plaintiff and the defendant had entered into a contract making the plaintiff the exclusive agent to sell on commission certain liquors in the New England states and New York city for a period of one year. It was further provided that if the first year sales exceeded a specified amount the contract should continue for five years with the defendant having the option to terminate it at the end of any year. The agreement having been wrongfully terminated before the end of the first year it was held that in addition to recovering profits on sales already made, profits on all sales made by the defendant or anyone else in the specified territory subsequent to the breach and before the end of the year should be allowed, but any damages for sales made after that time would be too remote.

Profits from Sales in Process of Negotiation.

Since the authority of an agent engaged to sell on commission, even though not for a definite term, cannot be revoked in bad faith in the midst of negotiations for a sale in order to escape the payment of commissions, it has been held in several cases, in the majority of which the agency was for the sale of real estate, that the profits or commissions that would have been derived from the sale were recoverable as damages for the wrongful termination of the contract. *Green-span v. Miller*, 111 Ark. 190, 163 S. W. 776 (agency for phonographs); *Howard v. Street*, 125 Md. 289, 93 Atl. 923; *O'Connell v. Casey*, 206 Mass. 520, 92 N. E. 804; *Weisels-Gerhart Real Estate Co. v. Epstein*, 157 Mo. App. 101, 137 S. W. 326; *Dodge v. Childers*, 167 Mo. App. 448, 151 S. W. 749; *Anderson v. Crow (Tex.)* 151 S. W. 1080. See also *Handley v. Shaffer*, 177 Ala. 636, 59 So. 286; *Laux v. Hogl*, 45 Mont. 445, 123 Pac. 949 (agency for sale of stock in brewing company, and real estate); *Newton v. Conness (Tex.)* 106 S. W. 892; *Schnack v. Montano*, 16 Hawaii 805. "But if the [seller] acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a

bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor." *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 104 Am. St. Rep. 543, 66 L.R.A. 982.

In *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.* 117 Va. 495, 85 S. E. 479, it appeared that an exclusive agency for a certain automobile truck had been given by a contract which could be terminated on ten days' notice. The employer before any notice of termination was given negotiated the sale of a truck to a person within the agent's territory whom the agent had originally interested in the truck. Subsequently the employer having given notice of the termination of the contract delivered the truck to the purchaser before the expiration of the ten-day period. It was held that the agent was entitled to the commission he would have realized from the sale, the trial court properly charging the jury that if the letter notifying the agent of the termination of the contract was solely for the purpose of depriving him of his commission on the sale of the truck he should have a recovery.

But in *J. I. Case Threshing Mach. Co. v. Decatur First Nat. Bank (Tex.)* 160 S. W. 662, wherein it appeared that an agent engaged in a certain county under an agreement, apparently not exclusive in character, to sell farm machinery on commission "to be calculated and allowed only on the basis of the list price" sought to recover a commission on machinery sold by his principal for less than the list price to a person whom he had interested therein, it was held that proof that the customer would have purchased at the list price was essential to a recovery of the profits he might have derived from the sale.

Profits from Sales Perfected.

The self-evident rule that a person employed for a definite period to sell on commission on being wrongfully prohibited from carrying out his contract is entitled to recover the profits on sales completed at the time of the breach, is supported by the following recent cases: *Oberfelder v. J. G. Mattingly Co. (Ky.)* 120 S. W. 352; *Church v. Wilkeson-Tripp Co.* 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059. See also *Merrimac Mfg. Co. v. Bibb*, 119 Ark. 443, 178 S. W. 403.

IN RE BAILEY.

Montana Supreme Court—March 1, 1915.

50 Mont. 365; 146 Pac. 1101.

Attorneys — Unauthorized Practice as Contempt.

Under Rev. Codes, § 6388, providing that if any person practice law in any court, except a justice's court or a police court, without having received a license as attorney, he is guilty of a contempt of court, where respondent advised clients as to legal matters pending or to be brought before courts of record, and prepared pleadings and proceedings for use in such courts, and appeared before courts of record by his partner, he "practices law" in such a sense as to render him guilty of contempt when without a license.

[See note at end of this case.]

Same.

Under Rev. Codes, § 7309, subd. 6, providing that assuming to be an officer, attorney, or counsel of a court, and acting as such without authorization, shall constitute contempt of court, where respondent employed all customary methods to advertise himself as an attorney, when without a license, he is guilty of contempt.

[See note at end of this case.]

Right to Practice — Nature of Right.

The practice of law is not an inherent right, but a privilege subject entirely to state control.

[See 2 R. C. L. tit. *Attorneys at Law*, p. 942.]

Original contempt proceeding against Wendell Bailey for practicing law without license. The facts are stated in the opinion. RESPONDENT ADJUDGED GUILTY.

C. B. Nolan for respondent.

D. M. Kelly, J. H. Alvord and F. P. Leiper for State.

[365] SANNER, J.—On January 19, 1915, the attorney general of this state filed in this court an accusation charging one Wendell Bailey, of Sidney, Richland county, Montana, with a contempt of this [366] court, in that said Bailey "is holding himself out as an attorney at law, by advertisement and otherwise, and is practicing the profession of an attorney and counselor at law in courts of record in the said town and county, without having first been admitted so to do by this court." Upon this accusation, which was supported in detail by the affidavit of F. J. Matoushek, Herbert H. Hoar and Carl L. Brattin, all regularly licensed attorneys residing at Sidney, a citation was issued requiring the respondent to appear and show cause why he should not be punished. He appeared and entered his plea of not guilty

and filed a detailed answer consisting of denials, admissions and matters in avoidance. A hearing was duly had before this court, testimony being taken both in support of and against said accusation, and thereafter the matter was duly submitted for judgment and decision.

No good purpose would be served by reciting the evidence at length. Suffice it to say, the following facts were made to appear without substantial contradiction: The respondent has never been admitted to practice law in this state; but on February 16, 1914, he opened a law office at Sidney, from which time and until June 1, 1914, he maintained and conducted said office in his individual name, displayed at the entrance thereof a sign reading, "Wendell Bailey, Attorney at Law," caused a card to be published in the telephone directory commonly used at Sidney, and in four newspapers of general circulation in Richland county, to the effect that he was an "attorney and counselor at law," procured and used stationery proclaiming him to be an "attorney and counselor at law," received, advised and acted for clients in legal matters pending in court and otherwise, represented them in proceedings cognizable only by the courts of record of this state, and charged and accepted compensation for such services; that on or about June 1, 1914, he associated himself in partnership with one R. O. Lunke, a licensed attorney of this court, said partnership being formed for the general practice of law, including practice in the courts of record of this state, particularly the district courts of Richland and Dawson counties; that said partnership continued in existence up [367] to the time of the hearing herein, proclaimed itself by signs, cards, stationery and indorsements upon pleadings as a firm of attorneys at law, prepared, signed and filed pleadings as such in the district court of Richland county, received, advised and acted for clients in legal matters pending in court and otherwise, appeared for clients in proceedings before said court, and charged and accepted compensation for services in that behalf; that the respondent actively participated in the business and operations of said firm, and prior to October 28, 1914, appeared in person before the district court of Richland county as a member of said firm, claiming to represent and representing parties to actions or proceedings before said court: that after October 28, 1914, and up to the time of the hearing herein, he prepared, signed and filed pleadings in said court for and on behalf of said firm and as a member thereof, formulated briefs, advised clients touching legal matters, consulted with his associate concerning the business intrusted by clients to said firm, and claimed a share in the revenues derived from its professional activities.

It is not contested that the foregoing acts, if they constitute contempt at all, are a contempt of this court. Indeed, this could scarcely be questioned, in view of the provisions of Title V, Part I, Code of Civil Procedure, whereby the authority to admit attorneys to the practice is vested solely in this court. The contention is that these acts do not constitute contempt at all under any statutory provision of this state.

The Revised Codes (section 6388) provide: "If any person practice law in any court, except a justice's court or a police court, without having received a license as attorney and counselor, he is guilty of a contempt of court." The distinguished counsel for respondent seeks the exoneration of his client upon the ground that the record does not show that respondent practiced law in any court other than a justice or police court. We cannot assent to this. A person who makes it his business to act and who does act for and by the warrant of others in legal formalities, negotiations or proceedings, practices law (*National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *In re Duncan*, 83 [368] S. C. 186, 18 Ann. Cas. 657, 24 L.R.A. (N.S.) 750, 65 S. E. 210; and when his acts consist in advising clients touching legal matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record. (*Chautauqua County Bank v. Risley*, 6 Hill (N. Y.) 376; *Abercrombie v. Jordan*, 8 Q. B. D. (Eng.) 187; *In re Simmons*, 15 Q. B. D. (Eng.) 348.) The respondent seems to think that, so far as his activities prior to October 28, 1914, are concerned, a plenary absolution was granted him at that time by two of the members of this court—one of them being the writer—on condition that he refrain thereafter from practicing in the district court. No such thing occurred; but, had it occurred, the condition assumed was not observed. After October 28, 1914, the respondent continued as a member of the firm of Lunke & Bailey to do all the things which constitute practice in the district court, save only the personal conduct of causes therein, which was confided to Mr. Lunke.

But section 6388 is not the only statutory provision applicable to the conduct of the respondent. Subdivision 6 of section 7309 provides: "The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: . . . Assuming to be an officer, attorney or counsel of a court, and acting as such without authority." From February 16 to June 1, 1914, the respondent

employed all the customary methods to advertise himself as an attorney and counselor at law, capable and authorized to do any business in any court which a duly licensed attorney might do; and from June 1, 1914, up to the time of the hearing herein, he and his associate, as the firm of Lunke & Bailey, presented themselves to the public in a similar manner and aspect. As to this there was no ostensible change after October 28, 1914. The only attorneys and counselors known to the law of this state are attorneys and counselors of this court, licensed and authorized as such to practice law within this state; and, if by his conduct the respondent did not assume to be an [369] attorney and counselor of this court, then such an assumption is impossible, and subdivision 6 of section 7309 has no meaning at all. (*State v. Richardson*, 125 La. 645, 51 So. 673; *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349; *Edmonson v. Davis*, 4 Esp. (Eng.) 14; *Abercrombie v. Jordan*, supra.)

When we consider the relationship of attorney and client and its consequences to the client, as well as to his possible adversary, it becomes manifest that insistence upon due authorization of the persons acting as attorneys is of vital importance. People do not ordinarily demand an inspection of the license of one who proclaims himself an attorney at law; they take it for granted, as they may do, that he is what he assumes to be. The law says who may and who may not practice as an attorney, who may and who may not assume to be such. The people have a right to presume that the law in this respect is being enforced; if it is not enforced, such persons as intrust their business to an unchallenged pretender are permitted, in matters of life, of liberty and of property, to lean upon a broken reed. For this reason it is universally held that the practice of law is not an inherent right but a privilege, subject entirely to state control.

From the evidence presented we find that the respondent, Wendell Bailey, is guilty of contempt, as charged in the accusation of the attorney general; and it is ordered and adjudged that for such contempt he pay a fine of \$250, or stand committed to the custody of the sheriff of Lewis and Clark county, Montana, until the same be paid.

Holloway, J., concurs.

BRANTLY, C. J.—I was not present at the hearing, and therefore did not observe the witness who testified thereat. But having informed myself by an examination of the stenographic report made at the time, and having found that there is no substantial conflict in the evidence, I feel that I may with propriety concur in the result reached by Mr. Justice Sanner.

NOTE.**Practicing Law without License as Contempt of Court.**

It would seem on general principles that the act of an unlicensed person in assuming to act as an attorney with respect to actual litigation would constitute such an interference with the administration of justice as to be a common-law contempt, but the question has apparently never been passed on. In some jurisdictions it is provided by statute that the unauthorized practice of law shall constitute a contempt of court, and in a few cases those statutes have been applied. In *re Ainsworth* [1905] 2 K. B. (Eng.) 103, 74 L. J. K. B. 462, 92 L. T. N. S. 462, 53 W. R. 533; *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349; *People v. Ellis*, 44 Colo. 176, 96 Pac. 783; *People v. Taylor*, 56 Colo. 441, 138 Pac. 762. And see the reported case. See also *Incorporated Law Soc.* 5 Rep. (Eng.) 525, 69 L. T. N. S. 385; *Davies v. Davies*, 57 Sol. J. (Eng.) 534, 29 Times L. Rep. 513; *Abercrombie v. Jordan*, 8 Q. B. D. (Eng.) 187; *Anderson v. Coolin*, 27 Idaho 334, 149 Pac. 286. Thus in *Davies v. Davies*, supra, wherein it appeared that an unqualified person acted in obtaining a decree nisi for divorce made absolute, and asked for and obtained from the petitioner a larger sum than was really payable as the necessary fee, the court holding that he had been guilty of contempt made an order that he should be committed to prison for six weeks and pay the costs of the proceedings against him.

In *People v. Taylor*, 56 Colo. 441, 138 Pac. 762, an information was filed against the respondent, alleging that he was advertising and holding himself out to the public as an attorney, when as a matter of fact he was not licensed to practice law in the state, and asking that he be judged guilty of contempt. The respondent admitted that he had not been licensed by the court to practice law and that he had advertised as being a lawyer but contended that the statute did not apply to him for the reason that he had only advertised as a "lawyer," and that the statute only embraced those who advertised, represented, or held themselves out as an "attorney, attorney at law, or counselor at law." Holding that these terms were synonymous and that the respondent was guilty of contempt the court said: "Chapter 9 of the Revised Statutes of 1908 provides in substance that no person shall be permitted to practice as an attorney, or commence, defend, or conduct any action in which he is not a party concerned in any court of record within this state, without having previously obtained a license for that purpose from the supreme court, which license shall constitute the person receiving the same an attorney at

law, and shall authorize him to appear in all courts of record in this state, and there to practice in that capacity during his good behavior. It further provides that he shall take and subscribe an oath or affirmation that he will support the Constitution of the United States and of the state of Colorado, and that he will faithfully execute the duties of an attorney and counselor at law according to the best of his understanding and abilities. It also provides that no person, with certain exceptions not involved in this case, shall be entitled to receive a license to practice as an attorney until the supreme court is satisfied by an examination, either in open court or by members of the bar to be designated by the court, that the applicant is of good moral character, and possesses the requisite education and knowledge of the law to justify his admission to the bar. By virtue of these provisions this court has adopted rules providing for a committee of law examiners, the period which applicants must have studied, either in the office of a practicing attorney or attendance at a law school approved by the committee, and other general educational qualifications of applicants for admission to the bar, that they must be of good moral character, and that such applicants must pass an approved examination by the committee, and satisfy the committee that their moral character is good, before they will be admitted to practice law in this state. These rules are in effect an order of this court that no person shall practice law in this state except upon a compliance with such rules and the laws governing the admission of attorneys, the main purpose of which is to protect the public from being damaged through intrusting their legal business to incompetent and improper persons claiming to be licensed attorneys who in fact are not. Any person engaging in the practice of the law in this state is bound to take notice of this order, and, if he violates it by failure to comply with the prescribed requirements which must be complied with before he is entitled to hold himself out to the public as licensed to engage in the general practice of the law, he is guilty of contempt, the same as any other person violating an order of court of which he is bound to take notice."

In the case of *In re Ainsworth* [1905] 2 K. B. (Eng.) 103, 74 L. J. K. B. 462, 92 L. T. N. S. 462, 53 W. R. 533, a motion was made on behalf of the incorporated law society for a writ of attachment against the respondent for contempt of court in having acted as a solicitor without being duly qualified so to act, contrary to the provisions of the Solicitors Act. Lord Alverstone, C.J., saying that an offense had been committed, although it might be little more than a tech-

nical one and that under the circumstances it would be sufficient to accept the respondent's expression of regret, holding him to pay the costs of the application, said: "The rule clearly contemplates that giving notice of appearance shall be a step in the action. The document sent as a notice of appearance by Mr. Ainsworth to the plaintiff's solicitors states that he, Henry Ainsworth, has this day entered an appearance for the defendant Greenhalgh, and that he requires delivery of a statement of claim, and the document is signed by Henry Ainsworth, 'agent for Joseph Greenhalgh.' I am of opinion that it was intended by rule 9 that the notice should be given either by the defendant himself or by his solicitor, and the intervention of a third person acting for the defendant, and purporting to do that which is taking a step in the action—a step which, where the defendant does not take it himself, could properly only be taken by a solicitor—is, in my view, a contravention of the statute."

In *People v. Ellis*, 44 Colo. 176, 96 Pac. 783, the information charged that the respondent, notwithstanding he had no license or authority to practice law in Colorado, had been advertising, representing and holding himself out as an attorney, appearing in courts of record to conduct suits, actions and proceedings for other persons, as an attorney, and had practiced law in violation of the statutes of the state; and prayed that the respondent should be brought before the court and punished for contempt, as provided by the statute (Sessions Laws 1905, p. 157). The respondent admitted that he had practiced law in Colorado, notwithstanding the prohibition of the statute, but disclaimed any intentional violation of the law. He pleaded guilty to the charge preferred in the information, and set forth in mitigation of the offense that he was admitted to practice in the courts of Kentucky in the year 1881, and continued in the active practice of law in that state for a period of more than twenty years; that he was admitted to practice before the courts of the territory of New Mexico in January, 1905, and was admitted to practice before the department of the interior in the year 1907; that no charges had ever been preferred against him, and that he was now entitled to practice law in the state of Kentucky, the territory of New Mexico, and before the interior department; that he removed to Montezuma county, in Colorado, for the purpose of locating there, and secured from the clerk of the court a copy of the rules, and attempted to comply therewith, made application to practice, and provided and forwarded to the proper authority certificates of his admission to practice in New Mexico, and, being unable to find his certificate, made affidavit that he was admitted to

Ann. Cas. 1917B.—76.

practice in the state of Kentucky; that believing he had done all that was required to entitle him to practice, he accepted employment as an attorney at law, but before doing so advised with the district judge of the district wherein he resided as to his right to appear in a court of record, and was informed by the judge that, under the circumstances, he should be allowed to appear in court; that expecting daily to receive his license to practice, he accepted other employment; that on different occasions he had furnished the board of law examiners further credentials, and had sent the board his certificate of admission to practice in Kentucky, and letters from prominent members of the bar of that state and from officers of the district wherein he resided recommending his admission to the bar; that the board of law examiners had requested letters certifying to his good moral character from citizens of the place of his last residence in New Mexico, and that he had written for such letters and expected to be able to furnish them; that he did not know of the law of 1905 until he learned through the public press that information had been filed against him, and that he immediately on receiving a copy of the information stopped all manner of practice; and he stated that he would immediately advise his clients that he was not entitled to practice, and that he would no longer hold himself out as an attorney at law. He further stated that no charge could be truthfully made against his honor and integrity as an attorney and as a man. The court said that the statements in his answer not having been controverted they would accept them as truthful, and although the respondent had violated the statute they thought he had not done so intentionally, and under the circumstances disclosed, their duty did not require his punishment and they would discharge him.

STATE

v.

GREAT NORTHERN RAILWAY COMPANY.

Minnesota Supreme Court—June 11, 1915.

130 Minn. 57; 153 N. W. 247.

Public Service Commissions — Reasonableness of Order — Judicial Review.

The question whether an order of the state railroad and warehouse commission is reasonable is a judicial question.

Same.

Under our statute the district court on appeal from an order of the commission does not put itself in the place of the commission and substitute its findings for those of the commission, nor does it set aside such an order on its own conception of its wisdom. The court reviews the order only so far as to determine whether or not it is unlawful and unreasonable.

Test of Reasonableness of Order.

There is no test of reasonableness that will fit all cases, but an order is unreasonable if contrary to federal or state constitution or laws, or if beyond the power of the commission, or if based on mistake of law, or if without evidence to support it, or if so arbitrary as to be beyond the exercise of reasonable discretion and judgment.

Same.

Pecuniary loss or profit to the carrier is important, but not the only criterion. The question of reasonableness is to be determined by a consideration of the interests both of the carrier and of the public.

Railroads — Order Requiring Sunday Train Service — Validity.

The order of the commission reviewed in this case is an order compelling the operation of a Sunday local day passenger train. The trial court declined to pass upon the question of pecuniary loss or profit. The order of the commission being by statute *prima facie* reasonable, and the burden being on the appellant upon all issues raised by the appeal, we are obliged to assume that the order did not impose a financial burden, but, the compulsion of Sunday labor and of the operation of Sunday local passenger trains is contrary to the legislative policy of the state, and while under some circumstances the operation of Sunday trains may be made compulsory, under the facts of this case the judgment of the trial court holding this order to be unreasonable and void must be sustained.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Ramsey county: DICKSON, Judge.

Matter of appeal of Great Northern Railway Company from order of State Railroad and Warehouse Commission. From judgment rendered, State appeals. The facts are stated in the opinion. **AFFIRMED.**

Lyndon A. Smith and Alonzo J. Edgerton for appellant.

M. L. Countryman and A. L. Janes for respondent.

[58] HALLAM, J.—For some years past the defendant railroad company has operated a line of railroad between Grand Forks, North Dakota, and Duluth, Minnesota. Up to November 22, 1914, it operated upon that line, daily including Sunday, two trains each way,

one a day train and the other a night train. On the day last mentioned the defendant discontinued the operation of its Sunday day trains on this line, leaving all week day trains and the Sunday night trains operated as theretofore. The state Railroad and Warehouse Commission, after hearing, ordered the Sunday day trains restored. Defendant appealed to the district court. That court, after trial, found that the order of the commission restoring the Sunday trains was "unlawful and unreasonable and not justified by public necessity or convenience," and adjudged that the same be vacated and set aside. The state appeals.

The statute provides that:

"Whenever, in the judgment of the commission . . . any . . . change (by a common carrier) in the mode of operating its road or conducting its business, will promote the security or convenience of the public, the commission, by a written order . . . shall require . . . the making of such . . . change." G. S. 1913, § 4178.

The statute further provides for an appeal from the order of the commission to the district court. G. S. 1913, § 4191. The appeal [59] is "tried . . . according to the rules relating to the trial of civil actions, so far as the same are applicable." Upon such trial the commission's "findings of fact" are "*prima facie* evidence of the matters therein stated," and the order is "*prima facie* reasonable, and the burden of proof upon all issues raised by the appeal" is upon the appellant. If the court determines "that the order appealed from is lawful and reasonable," it is affirmed. If it determines "that the order is unlawful or unreasonable" it is "vacated and set aside." G. S. 1913, § 4192.

1. The statute in terms makes the reasonableness of the order of the commission a question for the court to determine on appeal. This is a valid statutory provision. The reasonableness of the order is properly a judicial question. Argument of that proposition was foreclosed by the decision of the Federal Supreme Court more than a quarter of a century ago. In the first case decided by that court involving the powers of the Railroad and Warehouse Commission of this state, it was held that "the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." *Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 418, 458, 10 S. Ct. 462, 467, 702, 33 U. S. (L. ed.) 970, 982.

2. The principles on which the court acts in determining whether or not an order of the commission is reasonable, have been the

subject of much controversy, but the law on that subject is now pretty well settled. The legislature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of nonjudicial powers. *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 375, 72 N. W. 713; *Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, 226, 29 S. Ct. 67, 53 U. S. (L. ed.) 150, 159; *Washington v. Fairchild*, 224 U. S. 510, 527, 32 S. Ct. 535, 56 U. S. (L. ed.) 863, 869; *Bacon v. Rutland R. Co.* 232 U. S. 134, 34 S. Ct. 283, 58 U. S. (L. ed.) 538; *Detroit, etc. R. Co. v. [60] Michigan R. Commission*, 235 U. S. 402, 35 S. Ct. 126, 59 U. S. (L. ed.) 288. The making of regulations which require a carrier to afford proper transportation facilities to the public, is legislative or administrative and not judicial in its nature. *State v. Great Northern R. Co.* 123 Minn. 463, 144 N. W. 155. The courts must not usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom. *Interstate Commerce Commission v. Illinois Cent. R. Co.* 215 U. S. 452, 470, 30 S. Ct. 155, 54 U. S. (L. ed.) 280, 288. In *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 375, 72 N. W. 713, 716, a rate case, this court, in construing the statute then in force, which was broader than the one now in force, held that it was the intention of the legislature that the court on appeal should "review the findings of the commission in the same manner as the appellate court reviews the findings of the jury on a trial in the court below. And for this purpose the court may 'examine the whole matter in controversy, including matters of fact, as well as questions of law,' " but that the district court can review the findings of the commission only so far as to determine whether or not the rates fixed by the commission are reasonable. This presents a situation somewhat anomalous in that the court may receive evidence in order to determine whether findings of fact are sustainable, but we can conceive of no other fair construction of this statute that will at the same time confine the court within its constitutional powers. The court, on appeal from the order of the commission, must distinguish, then, between the legislative power to establish regulations and the judicial power to determine upon the reasonableness of regulations already established.

3. We address ourselves, then, to this question: Can the decision of the trial court that the order of the Railroad and Warehouse Commission was unreasonable be sustained? No court or commentator has yet undertaken

to lay down a rule which shall furnish a test of what is reasonable that will fit every case. "Indeed," as said by Brewer, J., in *Ames v. Union Pac. Ry. Co.* 64 Fed. 165, 177, "it is doubtful whether any single rule can be laid down, applicable to all cases." 2 *Elliott, Railroads*, § 692. Some things, however, are [61] definitely settled. The order may be vacated as unreasonable if it is contrary to some provision of the Federal or state constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment. *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 547, 32 S. Ct. 108, 56 U. S. (L. ed.) 308, 311; *State v. Minneapolis, etc. R. Co.* 76 Minn. 469, 79 N. W. 510.

4. The pecuniary loss or profit to the carrier in executing the particular order is an important criterion in determining the reasonableness of the order, but it is not the only one. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 27, 27 S. Ct. 585, 51 U. S. (L. ed.) 933, 945, 11 Ann. Cas. 398; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 279, 30 S. Ct. 330, 54 U. S. (L. ed.) 472, 480. The question of reasonableness is to be determined by a consideration of the interests both of the carrier and of the public. *Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 418, 458, 10 S. Ct. 462, 702, 33 U. S. (L. ed.) 970, 982; *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 296, 21 S. Ct. 115, 45 U. S. (L. ed.) 194, 199.

5. In this case there is no finding upon the question whether the order of the commission imposed a financial burden upon the defendant. The court declined to consider that question, apparently deeming it unnecessary in view of his opinion upon the question of public necessity. The statute having provided that the order of the commission is *prima facie* reasonable, and having imposed upon the appellant "the burden of proof upon all issues raised by the appeal" (G. S. 1913, § 4192), the burden to show the order of the commission unreasonable, was on the defendant carrier at every stage of the trial, in respect to all matters affecting the reasonableness and validity of the order. *State v. Minneapolis, etc. R. Co.* 80 Minn. 191, 197, 83 N. W. 60, 89 Am. St. Rep. 514. We are accordingly obliged to assume that the order of the commission imposes no pecuniary burden on defendant.

6. The finding of the commission is not explicit upon the subject of public necessity of this service. The most that is found is

that [62] "the public as well as business institutions have come to depend upon the passenger service which has been given it by these trains upon Sunday . . . [and] that the removal of said trains . . . leaves the communities along said line . . . without necessary Sunday day service." The evidence shows that the Sunday day passenger traffic was mostly a traffic of pleasure or convenience, with few instances of necessary travel and that it rendered the incidental service of distribution of Sunday newspapers.

Still the showing is such that, if this were a week day train, we should have trouble in sustaining the decision of the court setting aside the order of the commission. But it is not a week day train. It is a Sunday train and in the last analysis this case really involves the question of the reasonableness of an order of the commission compelling the operation of a Sunday local day train where no particular necessity therefor exists save the convenience of travelers desiring to travel for the most part for pleasure, and when for business then not in most cases for business of any urgent character, coupled with the performance of the incidental service of distribution of news. So far as we can find no such question has ever before arisen. No case has been called to our attention where the railroad commission of any state has ever before sought to compel the operation of ordinary local day passenger trains on Sunday. In one reported case in Missouri the state legislature by statute imposed such a duty and the statute was sustained by a divided court (*State v. Chicago, etc. R. Co.* 239 Mo. 196, 143 S. W. 785), three out of seven of the judges participating being of the opinion that the legislature had no constitutional power to compel such Sunday operation, and this although no specific provision is found in the Missouri Constitution purporting to forbid it.

We have not before us an act of the legislature. We have an order of an administrative commission. Whatever may be the powers of that commission they are surely circumscribed by the laws of the state and the public policy of the state as manifested by its laws. Our statutes forbid Sunday labor except in cases of necessity or charity. G. S. 1913, § 8753. Under some statutes not dissimilar to ours it has been held that the operation of passenger trains on Sunday is [63] unlawful. *Schenectady First Baptist Church v. Schenectady, etc. R. Co.* 5 Barb. (N. Y.) 79; *Read v. Boston, etc. R. Co.* 140 Mass. 199, 4 N. E. 227. We need not adopt that extreme view. The defendant in this case does not urge it, and after operating trains on this line for Sunday for many years it is in no position to urge it. It may be conceded that the operation of these Sunday trains would not be unlawful. Clear it

is, however, that the public policy of this state, as manifested by its statutes extending over its whole history as a state, has been in the direction of the restriction and against the compulsion of Sunday activities. Sunday is recognized as a day of rest. Many public activities, as well as work and labor not necessary, are forbidden. No statute of the state has ever commanded Sunday labor or Sunday activities of any sort. The operation of Sunday local passenger trains is the exception in Minnesota. Some roads operate no local Sunday trains at all on any of their lines. No statute has ever required it. There might arise a state of facts that would justify an order making compulsory the operation of a Sunday passenger train. The trial court was of the opinion that the facts do not make this such a case. The court's decision involved the determination of questions both of law and fact. To the extent that it involved questions of fact it must, like any other determination of fact by a trial court, be sustained, unless clearly and palpably wrong. We are of the opinion that the judgment of the trial court must be sustained. *Walsh v. Chicago, etc. R. Co.* 42 Wis. 23, 24 Am. Rep. 376, decided before the days of railroad commissions, tends to sustain this position. In that case it was held that a common carrier is bound to transport passengers upon being paid a reasonable rate of fare, unless it has a valid excuse for not performing that duty, but that the Sunday labor laws of that state, which are substantially the same as ours, furnished to the defendant "a perfectly valid excuse for not running its passenger trains on Sunday."

Judgment affirmed.

On June 28, 1915, the following opinion was filed:

PER CURIAM.—The opinion in this case contains the statement that "the finding [64] of the commission is not explicit upon the subject of public necessity of this service," and the opinion quotes one section of the commission's order as containing all that the order contains on that subject. The above statement is erroneous. A section other than the one quoted is explicit upon this subject. This fact could not, however, change the result. We did not wish to be understood as saying that the language of the order of the commission does not constitute a finding on the subject of public necessity. The opinion clearly assumes that it does, for it expressly states that on the trial of the appeal in district court the burden was on the defendant "at every stage of the trial in respect to all matters affecting the reasonableness and validity of the order."

We see no occasion for a reargument of this case, and the motion for reargument is denied.

NOTE.**Validity of Order of Public Service Commission Requiring Running of Sunday Train.**

As a matter of practical railroad operation there is ordinarily less passenger travel on Sunday than on week days, and carriers are habitually desirous of reducing the train service on that day because the service is less profitable. It is well settled that the fact that a particular train service must be rendered at a loss to the carrier does not prevent a public service commission from requiring it, if it is demanded by the reasonable needs of the community. See the note to the case of *In re Minneapolis, etc. R. Co.* reported immediately following this note. But since a Sunday train service necessarily involves labor on the part of a number of railroad employees, a few cases have discussed the validity of such an order with respect to its conflict with a state policy contemplating the observance of Sunday as a day of rest. In the reported case an order is held to be unreasonable which requires the operation of a Sunday local day train where no particular necessity therefor exists save the convenience of persons desiring to travel for the most part for pleasure, and, even when for business, in most cases not for business of any urgent character, coupled with the performance of the incidental service of the distribution of news. In *Atchison, etc. R. Co. v. Miller*, 28 Okla. 109, 114 Pac. 1104, the contrary view was maintained. Upholding an order of the public service commission requiring the operation of at least one passenger train each way on every day of the week the court said: "It is suggested in the brief of counsel for appellant that it is the general policy of the state, as expressed in article 4, chapter 25 of the Compiled Laws of 1909, sections 2049 to 2073, inclusive, that Sunday labor be performed only when required by necessity or charity. That is true, and if that rule would justify the appellant in not operating at least one passenger train on said line of railroad on Sundays, it would also prevent appellant from operating passenger trains on its other lines in the state on Sundays. This, we apprehend, they would not accede to be the policy of the law. The fact that the railway is operated during the week days and is depended on during such periods by the patronizing public for transportation for means of necessity and charity, as well as the other affairs of life, on Sundays the public would also depend on it for transportation for means of necessity or charity. It would be unreasonable to say that, under the charter provisions granted by sovereignty, the railroad company could perform

this transportation for matters of necessity and charity, as well as matters of business, on week days, but as to Sundays the patronizing public must make other arrangements. If this order commanded the installing of a second Sunday train, the question might be different."

In *Ocean Grove Camp Meeting Assoc. v. Board of Public Utility Com'rs*, 82 N. J. L. 309, 92 Atl. 306, the court, while not passing on the power to order a Sunday train service, held that if a train is run on that day its stopping places are subject to regulation by a public service commission. In that case it was said: "The camp meeting association rests its objection upon the Vice and Immorality Act, which forbids the running of more than one train on Sunday, but this order does not compel the running of any trains on Sundays. It simply orders that if trains are run on Sunday no discrimination shall be made between stations of similar importance, in the matter of stopping trains. It is not the stopping of trains at any given station that is forbidden, but the running of trains, and that this order does not direct. If the company runs but one train on Sunday an order that it stop at the main station in Asbury Park would hardly be questioned, and if more trains are run on Sunday than the law permits, that can be dealt with in a proper proceeding having that object in view. The order complained of is, not that trains must be run, but that such trains as are run shall stop at the main station in Asbury Park."

In *State v. Chicago, etc. R. Co.* 239 Mo. 196, 143 S. W. 785, in an exhaustive discussion of the entire question of the relation of the operation of a railroad to state Sunday laws a statute requiring the operation of Sunday trains was sustained.

IN RE APPEAL OF MINNEAPOLIS, ST. PAUL, AND SAULT STE. MARIE RAILROAD COMPANY.

North Dakota Supreme Court—April 23, 1915.

30 N. Dak. 221; 152 N. W. 513.

Public Service Commissions — Appeal from Order.

The board of commissioners of railroads of this state ordered a separate daily passenger service to be installed on the Ambrose-Flaxton branch of the appellant railway company, which appealed to the district court where the board's decision was affirmed, and it appeals to this court, alleging that the findings

are insufficient to support the judgment of the district court. The board's order was a denial of the railroad's application to be relieved under chap. 200, Sess. Laws 1907, Comp. Laws 1913, §§ 4789-4795, from running a daily passenger service, which had been ordered by the board. The board denies the right of the railroad to appeal, asserting that its order is final and that a statute granting a right of appeal would be unconstitutional because administrative, instead of judicial, functions are concerned. Since the decision below was made, this branch line has been extended into Montana. Both parties request a decision on the merits and that the case not be treated as moot. Held:—Though chap. 200, Sess. Laws 1907, Comp. Laws 1913, §§ 4789-4795, did not expressly grant an appeal to the courts, yet as it is *in pari materia* with similar earlier statutes in themselves granting and contemplating generally a right of appeal from decisions of the board to the courts, a right of appeal exists as to the matters embraced in the statute in question.

Same.

That the subject-matter is legislative or administrative does not render a statute unconstitutional authorizing a review of the action of the board in the courts on an appeal to them.

Same.

That the right of the railroad to apply to the commission to be relieved from maintaining a separate daily passenger service (by installation of a daily mixed passenger and freight service on branch lines) is permissive in language, and not a positive direction to the board, and vests in it a discretion, does not negative a right of appeal.

Regulation of Railroad by Commission — Extent of Train Service.

In determining whether such relief shall be granted, the earnings and cost of operation of branch line service must be determined as near as possible, and where it plainly appears that the cost of operating the branch line with separate daily passenger service installed greatly exceeds the railroad's earnings and revenues derivable from the operation of such branch line, the carrier is *prima facie* within the statutory exception, and *prima facie* is entitled to be permitted to operate a daily mixed passenger and freight train.

[See note at end of this case.]

Same.

The statute granting such relief has particular application to branch lines, and the revenues from service and cost of branch line service only must be considered. The petitioner cannot be compelled to operate a separate daily passenger service on this branch line at a great loss, and be compelled to make up such loss from its main line revenues. The intent of the statute is that the revenues from branch lines shall justify a daily passenger service independent of whether the railroad as a whole within the state is returning a fair dividend on its investment.

[See note at end of this case.]

Same.

The proof discloses that the G. N. Crosby-Berthold line furnishes ample passenger service for four-fifths of the length of this Soo branch line. A separate passenger service should not be forced for the convenience alone of the town of Ambrose and vicinity, when to do so will cause an additional annual expenditure of \$14,000, added to a loss already sustained under mixed train service, the revenues being inadequate to meet even the expenses of a mixed train service.

[See note at end of this case.]

Order of Commission Reversed.

The order and judgment appealed from are reversed. Since trial, this line has been extended into Montana, and questions of interstate commerce may now be involved, which conditions will be taken into consideration in future proceedings had herein.

(Syllabus by court.)

Appeal from District Court, Burke county:
FISK, Judge.

Matter of appeal of Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, from order of State Board of Railway Commissioners. From judgment rendered, Railroad Company appeals. The facts are stated in the opinion. REVERSED.

Palda, Aaker & Greene, John L. Erdall and Alfred H. Bright for appellant.

W. H. Stutsman and Henry J. Linde for respondents.

[223] Goss, J.—This appeal is from the decision of the district court, wherein trial was had on testimony taken relating to an application by the railroad company to the State Board of Railway Commissioners, made under chap. 200 of Sess. Laws of 1907, Comp. Laws 1913, §§ 4789-4795. Mixed train service was given on the Ambrose-Flaxton Soo branch line. In November, 1910, residents of Ambrose petitioned the Board of Railway Commissioners to order installation of separate daily passenger and freight service. On hearing had the petition was granted. The railroad immediately applied to be relieved therefrom, and upon a second hearing had the application of the railroad was denied and an order was entered June 24, 1911, directing installation of a separate daily passenger service. From this order the railroad appealed to the district court of Burke county. The matter came on [224] for trial as an issue of fact and law on May 30, 1912, and a decision was rendered adverse to the railroad company. It appeals, assigning as error that the evidence is insufficient to justify certain findings entered, and that the findings are insufficient to support the judgment rendered.

This opinion is written after a rehearing had. Prior to rehearing it was held that the

order made by the Board of Railway Commissioners, and upon which the appeal was taken to the district court, was nonappealable in that it was merely an order denying the carrier's application to be relieved from the general statutory requirement to run a daily passenger train, instead of an order directing or compelling action in the matter; and for the further reason that no right of appeal was considered as granted by chap. 200 of the Session Laws of 1907, Comp. Laws 1913, §§ 4789-4795, concerning the matters there mentioned, and that the intent of that particular statute was to leave the Board vested with a discretion as to said matters, uncontrolled by resort to the courts by appeal. It was also mentioned in said opinion that the case was moot, inasmuch as this Ambrose branch had been extended into Montana, pending the appeal, and now accommodates a much greater territory.

Undoubtedly this case might be disposed of as moot and the decision be within the law. However, the Board and the corporation desire a decision as precedent for future action.

The legislature has seen fit to declare that both a daily passenger and daily freight train shall be run each way over every railroad within this state, "provided, however, that, if any railroad corporation shall make it appear to the Board of Railroad Commissioners of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for, and said Board shall so order, said company may operate one mixed train on such line each way on every business day in the year for such time as said Board may direct." The order made is appealable, and a review of the action of the Board may be had in the courts and in this court on appeal. Whether the order be merely negative, or on the contrary affirmative action, does not affect the right of appeal. To hold otherwise would allow the right to an appeal to be dependent on the caprice of the Board in the framing of its order. The right is [225] absolute if granted by the statute, and it is plainly apparent from the codification of the laws pertaining to the powers and duties of the Railroad Commissioners, as codified in chap. 115 of the Session Laws of 1907, that it was the legislative intent that as to all enactments, past and future, unless the contrary was clearly apparent from the future act itself, a right of appeal, retrial, and review should be allowed from the decision of that body to the courts. As nothing contained in chapter 200 of the Session Laws of 1907, Comp. Laws 1913, §§ 4789-4795, manifests a contrary intention, it must be taken as *in pari materia* with similar existing enactment and as having been enacted subject to an under-

stood and generally applicable right of appeal in this as in all other similar and related matters. Lewis's Sutherland, Stat. Constr. 2d ed. §§ 443-448; 36 Cyc. 1147.

The Board of Railroad Commissioners urges that it is a part of the executive department of the state, with functions purely administrative; that the courts have universally established and maintained a sharp distinction between purely administrative acts and those which are purely judicial, relegating one to the executive and the other as belonging to the judicial departments of government respectively. It urges that such distinction here exists pertaining to the acts under review, and that "the judicial department is powerless to control or review the executive department so long as it does not exceed its legal authority;" that if its acts are reviewable at all by the courts, it is only when they are in palpable excess of jurisdiction or power, and that then they are reviewable only on certiorari if at all; and if the power to review by appeal has been granted, the statute attempting to confer it is unconstitutional "for the reason that the courts have no power over a commission belonging to the executive department acting within the scope of its authority." It next contends that certiorari will not lie for a mere excess of jurisdiction exercised, and finally arrives at the conclusion that its acts, because administrative and it constituting a branch of the executive arm of government, are practically wholly beyond judicial review.

The powers and duties of this constitutional Board are not prescribed by the Constitution, but are left to the legislature to create and define. Section 83 of the state Constitution declares that they "shall be as prescribed by law." As well observed in *Kermott v. Bagley*, 19 N. D. [226] 345, 124 N. W. 397, the powers of government, although divided generally into three distinct departments, legislative, executive, and judicial, are otherwise undistributed. In other words, our Constitution contains no distributing clause specifically apportioning the three different classes of governmental power. Merely because the duty is administrative, strictly speaking, and nonjudicial in the broad sense of the term, does not bar the legislature from requiring its exercise, nevertheless, by a district court, the constitutional court of general original jurisdiction. *Kermott v. Bagley*, supra, following *Com. v. Collier*, 213 Pa. St. 138, 62 Atl. 567. The Constitution does not prevent the legislature (upon which it has imposed the duty of prescribing the powers and duties of the Railroad Commission) from saying that such powers or duties even though administrative in character, may be reviewable in the district court on appeal, and in which tribunal

a trial *de novo* of even administrative issues may be had.

It is immaterial whether the duties of the Board of Railroad Commissioners may be technically legislative or judicial. There is nothing in the Federal Constitution to hinder a state from uniting "legislative and judicial powers in a single hand." *Prentis v. Atlantic Coast Line Co.* 211 U. S. 210-225, 53 U. S. (L. ed.) 150-158, 29 S. Ct. 67; *Dreyer v. Illinois*, 187 U. S. 71-84, 47 U. S. (L. ed.) 79-85, 23 S. Ct. 28, 15 Am. Crim. Rep. 253; *Winchester, etc. R. Co. v. Com.* 106 Va. 264-268, 55 S. E. 692; 6 R. C. L. 147; and though in our state Constitution the three departments of government, executive, legislative, and judicial, are primarily separately invested with powers to be so classified respectively, "it is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Story, Const. 5th ed. 393. "Again, 'indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim [separation of the powers of government to be administered by the three arms of government separately], and at the same time some admixture of powers constituting an exception to it.' [227] Story, Const. 395." *Winchester, etc. R. Co. v. Com.* 106 Va. 264-270, 55 S. E. 692.

The duties of this Board relative to granting permission to discontinue operation of this daily train are legislative. 6 R. C. L. 159. The order made will be prospective in operation, and relate not to past, but to future, matters. It is analogous to the establishing of rates. The inquiry preliminary to determining the rule to be made concerning it is but such as might, with propriety, have been made by a legislative committee. That the inquiry may be reviewed on appeal in court proceedings matters not, as "that question depends not upon the character of the body, but upon the character of the proceedings." *Ex parte Virginia*, 100 U. S. 339-348, 25 U. S. (L. ed.) 676-680, 3 Am. Crim. Rep. 547; also *Prentis v. Atlantic Coast Line Co.* 211 U. S. 210-232, 53 U. S. (L. ed.) 150-161, 29 S. Ct. 67, wherein it is held that the fact that an appeal is taken from the Commission to the courts, and a decision given confirming a rate, does not render such decision judicial, instead of legislative, in character. "A state may permit appeals to its courts from the rate-making orders of its Railroad Commission, and upon the re-

view of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively." *Louisville, etc. R. Co. v. Garrett*, 231 U. S. 298, 314, 58 U. S. (L. ed.) 229, 243, 34 S. Ct. 48, citing *Prentis v. Atlantic Coast Line Co.* 211 U. S. 210-227, 53 U. S. (L. ed.) 150-159, 29 S. Ct. 67. Conceding the premise of the Commission, that its acts may be either legislative or administrative, it does not follow that an appeal to the courts from its decisions in such matters cannot constitutionally be granted. *Kermott v. Bagley*, 19 N. D. 345-350, 124 N. W. 397; *Com. v. Collier*, 213 Pa. St. 106, 62 Atl. 567. The original exercise of the power is left with the Commission for its administration, and until the appeal the whole legislative power is there, which suffices the test prescribed by constitutional provisions distributing generally the three powers of government to the three arms of government. *Winchester, etc. R. Co. v. Com.* 106 Va. 264, 55 S. E. 692. While duties cannot be imposed upon this court except such as are judicial, under § 96 of the state Constitution, the limitation does not apply to district court original jurisdiction (*Kermott v. Bagley*, supra); and it is true that the character of the act, as being [228] legislative or judicial, is determined by the nature of the final act under consideration, yet this proceeding on appeal is but an exercise of appellate jurisdiction, even though concerning administrative subject-matter. Though practically a retrial may be had in this court on the appeal, it does alter the fact that the jurisdiction exercised is appellate, and the trial in that manner is but one method of exercise of strictly appellate jurisdiction. *Christianson v. Farmers' Warehouse Assoc.* 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300; *In re Peterson*, 22 N. D. 480, 505, 134 N. W. 751. The legislature having the authority to vest the courts of general trial jurisdiction with the appellate jurisdiction of the subject-matter, though administrative or legislative in kind, could prescribe a further appellate jurisdiction therefor and vest this court therewith. The constitutional limitation on the supreme court is not on subject-matter, but instead is that the jurisdiction exercised or conferred shall be appellate jurisdiction only; except, of course, the instance prescribed by §§ 86, 87 of the state Constitution conferring original jurisdiction on this court. The question is rather one of the power the legislature to grant the right of trial and an appeal therefrom.

Along with nearly every power granted, this board is provided a right of appeal to the courts. It is declared that "the district courts of this state shall have jurisdiction to

enforce, by proper decrees, injunctions, and orders" its "reasonable rulings, orders, and regulations, affecting public right." Comp. Laws, § 4732. Section 4736 not only grants the right of appeal to the district courts, but gives them general power to try and determine all issues, whether of a judicial, administrative, or legislative nature. "The district court shall, upon the hearing of such appeal, receive and consider such evidence as may be adduced by either party, and shall rescind, modify, or alter said order appealed from in such manner as may be equitable and just." Consult also §§ 4744, 4745, a part of the general scheme of review in the courts of such orders.

The weight of the finding of the Board originally made in the matter is a question different from that concerning the power of the courts over the issue on which such findings are offered as evidence. No doubt cases may arise where the findings of the Commission, as is said in *Puget Sound Electric Ry. v. Washington R. Commission*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B 763, reiterated in *State [229] v. Public Service Commission*, 76 Wash. 625, 137 Pac. 132, 136, may necessarily be of an expert character and because thereof entitled to great weight, yet the same is not true in the instant case. Courts can satisfactorily determine the issue presented by the reasonableness or unreasonableness of the order made in the light of all the circumstances.

It may be conceded that the legislature could have passed this statute without the proviso, and required daily passenger train service. It had the power to declare such to be the public policy. But it also had the power to declare an exception to be the public policy to be observed, and has done so. Had no exception been made, but a daily train been required, it would not only have been within the power but it would have been the duty, of the Commission to compel a daily service. With the exception made, however, it is the duty of the Commission to likewise comply with the law and observe the exception. What the Commission might have done had the statute not contained the proviso can furnish no basis for disregard of the proviso, nor make it any less the statute. That the exception is granted in permissive, rather than in mandatory, language, is immaterial, as it does not signify that it is not its declared policy that, when the facts bring the carrier within the exception, it should enjoy its benefits; nor because it is framed in permissive language does it place the ruling of the Commission beyond appeal and court review.

Now as to merits. The branch line from Flaxton to Ambrose was 51 miles long. Tabulations of receipts and expenditures made, allotted, or apportioned to this line for

the three years ending respectively June 30, 1909, 1910, and 1911 are in evidence. During this period mixed train service was given. From freight, passenger, mail, and express, apportioned on a mileage basis, the earnings of this branch show \$50,030, \$51,818, and \$49,147 per year respectively. It is urged that the apportionment made of these earnings is improper, and does not truly reflect the benefit of the branch to the railroad system as a whole. But of all known methods of apportionment, that on the mileage basis seems most equitable, and has met generally with the approval of the courts. Against these earnings must be charged approximately \$22,000 per year for strictly transportation expenses alone, an expense unquestionably disbursed on the branch line in producing its earnings. To this [230] there must necessarily be added \$14,000 per year for taxes of this branch line, another expense equally certain, making a total definite expense from these two items alone of \$36,000, which includes no overhead charge, such as maintenance of way and structures, maintenance of equipment, traffic, and general expenses of the general railway system, a proper proportion of all of which upon an equitable basis must be allotted to or charged against this branch line under the holding in *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 59 U. S. (L. ed.) 735, Ann. Cas. 1916A 1, 35 S. Ct. 429, just decided by the Supreme Court of the United States, or what is commonly known as the *North Dakota Lignite Coal Rate Cases*. The Federal court reversed this court partially upon the very proposition now under consideration. Our holding was that "out of pocket costs" in effect constituted the real and actual cost of transportation of the particular commodity in fixing a commodity rate, inasmuch the overhead charges would continue regardless of any or all business done. The Federal Supreme Court, however, has announced the rule applicable to a commodity (and necessarily applicable as well to the total earnings of a branch line), that in calculating the cost of carriage there must be a proper allocation or apportionment of all overhead charge made and added to the out of pocket costs. The portion of such general overhead charge to this branch line is in excess of \$20,000 per year, or about the amount of the local branch line operating expense. This may be, and probably is, somewhat excessive, as ordinarily the ratio of operating "out of pocket" expense to overhead charge is as 60 to 40. Figured on this basis the total expense apportionable to this branch line, exclusive of taxes, will reach between \$37,000 and \$38,000 per year. When taxes are added in the sum of \$14,000 per annum, the total expense exceeds by approximately \$2,000

the total revenues of the branch. And these figures are the result of a three-year test, during all of which time mixed passenger and freight service only was given. The testimony is that the addition of daily passenger service, as ordered installed by the Commission, will increase the yearly operating expense \$14,000. This would increase the actual deficit or expenses over receipts to about \$16,000 per annum. These are our deductions. The railroad's figures are that the deficit will be much greater, approximately \$40,000 annually. It is apparent that, if the train service [231] ordered be installed, it will be at an actual outlay in expense over receipts of at least \$1,000 a month. There can be no escape from this fact, any more than there can be any from the further conclusion that the people, the patrons of the road elsewhere, must make good this needless deficit if the order is enforced. And the carrier's property right to a reasonable rate of return on its money invested has been wholly omitted from the foregoing calculations. It has been held that, in prescribing the carrier's duties to the public, a matter that the public may to an extent control, the public may compel a daily passenger service to be rendered wholly independent of expense to the company. This requirement is held valid on the basis of it being a requirement concerning the public service, and a mere incident to the railroad business as a whole. However, the statute in question contains a proviso in effect excusing the company from operating a separate daily passenger and freight service when it "shall make it appear to the Board that the business on any link of its road will not justify its operating both the passenger and freight train herein provided for." The statute has reference to a portion, i. e., branch lines, and not the entire railroad system. Whether any particular part of the main line of the system may be segregated and come within the statute is unnecessary to determine. It is certain that the statute has particular reference to branch line service. The portion of this road to be taken in this case for the purpose of placing total earnings against total cost of earnings, to determine whether the traffic will or "will not justify its operating both passenger and freight" service, must be this branch line only. In other words, the statute speaks of the business on branch lines, and hence as to this case contemplates that this branch as the one in question shall be considered separate and independent from the receipts and disbursements necessary elsewhere on the system. When the receipts will not "justify its operating both the passenger and the freight train" daily, mixed trains may be run. The receipts must justify, in a business way, the

disbursements occasioned by a daily service. It was but another way of stating that the receipts must be sufficient or nearly so to bear the expense of a daily service. Necessarily some reasonable latitude for judgment and discretion on the part of the Board must be allowed. And such is allowed by the language used. The measure is the "business" done on the particular line. The railroad cannot, as [232] a matter of strict legal right, refuse to install daily passenger service on the sole ground that to do so would run the total expense above the total income from the branch, as the element of public service which the road is chartered to perform enters into consideration. But in the absence of some strong reason to the contrary, proof that the necessary expense is in excess of total receipts should control the situation, and authorize the conclusion being drawn that the business will not justify such daily service. On proof of these facts the company *prima facie* justified its failure to install a separate daily passenger service or exonerate itself from so doing.

Of course, this court, like the Board of Railroad Commissioners, has the right to take judicial notice of and consider with the evidence many outside matters throwing light upon the situation. In so doing it is to be observed that, shortly after this branch was built to Ambrose, a rival and competing branch of the Great Northern Railroad was built from Crosby to Berthold. This Flaxton-Ambrose branch parallels the international boundary, running east and west from 3 to 10 miles south of it. For about four fifths of its entire length, or from Crosby down, it is closely paralleled on the south by the Great Northern Berthold branch line. The only territory left solely tributary to this Soo line is that portion between Crosby and Ambrose, and not exceeding 9 miles. A daily passenger service from Crosby to Minot and return via Berthold has been maintained, affording all residents in this territory very convenient passenger service on the Great Northern, the only way to meet which by the Soo would necessitate installing a similar return service from Ambrose to Minot and return. The receipts from this branch show that such competition could but result in added useless expense under conditions as they were when this trial was had. The long and short of the whole proposition is that in a territory capable of sustaining but one line of railroad two have been built, and one or both must suffer the consequences of competition for territory. The reason for the deficit then on this branch is as self-evident as is the fact that the branch will sustain or justify but a mixed freight and passenger service. And the fact, too, that the public as a result of such competitive service is

having its wants supplied by the Berthold branch is also inconsistent with any claim of justification that might otherwise be urged for a daily Soo passenger service. This does not apply to Ambrose or the territory [233] immediately tributary thereto. But it would be unjust to say that an unprofitable passenger service over 50 miles of branch line railroad should be compelled merely to suit the convenience of a town of 500 people and surrounding community, at the most not exceeding in the aggregate 1,000 people, while all other towns on the line are otherwise adequately served, and then, too, when the particular town complaining has the benefits already of a mixed passenger and freight service. To enforce the order made would be to compel an additional expenditure of \$14,000 per annum over receipts, where the traffic now will not return the expense it causes, all to suit the convenience of a single small community. Such an order is not "justified," to use the statutory term.

It is easy to understand how the opposite conclusion was reached by the Board of Railway Commissioners and the district court. It is explained by the fifth finding of fact, wherein the court found that the entire mileage of this railroad company in this state is 1,110 miles, producing annual earnings of \$4,000,000, and that "there is no evidence that the total mileage of the company in the state is operated at a loss as a whole, or that the earnings of that portion of the mileage of the company within this state are not sufficient to pay a reasonable income upon the sum of money invested in the property and rolling stock of the company within the state." The only purpose of such finding was to allow the court to reason along lines parallel with those heretofore followed by this court in the Lignite Coal Rate Cases, but as this reasoning was recently condemned by the Federal Supreme Court when applied to a commodity or a classification, it must be equally untenable when used as a basis for determining whether or not the income of a branch line is to be treated with reference to the earnings of the whole system within the state. The Federal Supreme Court negatives any such conclusion, and by analogous reasoning we must determine the question as one of receipts and expenditures of the branch line alone. To quote from the recent Federal decision, "The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return, as to the sufficiency of which in the aggregate it is not entitled to complain." In

the West Virginia rate case, [234] Norfolk, etc. R. Co. v. Conley, 236 U. S. 605, 59 U. S. (L. ed.) 745, 35 S. Ct. 437, decided at the same time as the North Dakota Lignite Coal Rate Cases, Northern Pac. R. Co. v. North Dakota, 236 U. S. 585, 59 U. S. (L. ed.) 735, Ann. Cas. 1916A 1, 35 S. Ct. 429, the same principle was enforced as to different classes of traffic and freight. By analogy the precedent applies. This branch should not be compelled to operate in a particular manner at a great increase of loss over present cost of operation, because forsooth the railroad can afford to suffer this loss by recouping itself from increased rates of revenue obtained elsewhere, or on its other lines within the state. Nor is such the intent of the statute, as has been observed, it providing that the character of the branch service to be given shall be determined from the proceeds of that branch line, and not from the proceeds of all of the system within the state.

Judicial notice is taken of the fact that this branch has been extended into Montana, and present conditions may warrant a daily passenger service. Questions of interstate commerce may now arise. Suitable allowance will be made for possible changed conditions in any judgment and order to be entered herein. The judgment appealed from is ordered vacated, and the District Court will direct the Board of Railway Commissioners of this state to vacate its order of June 24, 1911, as an order erroneously made, and also direct that said Board may either dismiss these proceedings, or may enter such further order, after full hearing afforded the railway company, as present conditions may in its judgment require and the law permit in the matter herein litigated.

Christianson, J., did not participate; Burr, District Judge, sitting in his stead.

BRUCE, J. (*dissenting*).—I am compelled to dissent from the opinion of the majority. The province of this court, as I understand it, is to construe the law, and not to administer it, nor to legislate. This court has no right to ignore the plain and unequivocal language of a valid legislative enactment.

The legislature of North Dakota has ordered (as it had a right to do, and with the wisdom of the enactment we are not concerned) that [235] daily passenger trains shall be run on the branch as well as on the main lines of the railroads within the state, "provided, however, that if any railroad corporation shall make it appear to the Board of Railroad Commissioners of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for, and said Board shall so order, such company may

operate one mixed train on such line each way on every business day in the year for such time as said Board may direct." Laws of 1907, chap. 200, Comp. Laws 1913, §§ 4789-4795. The statute expressly provides that such train shall be run and that the running of daily passenger trains shall be the uniform *public policy* of the state unless the Board of Railroad Commissioners (which is an administrative agency intrusted with the general supervision of railroad matters in North Dakota) shall order otherwise. But the majority of this court holds that it, and not the Board of Railroad Commissioners, may issue such order or grant such excuse. The statute expressly provides that such general policy of daily passenger trains shall prevail unless the railroad corporation "shall make it appear to the Board of Railroad Commissioners of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for." The majority, however, holds that if a railroad company makes it appear, not to the Board of Railroad Commissioners, but to the district court, upon a trial *de novo* and upon evidence totally different from that produced before the commissioners, that such district court must grant the excuse. It holds in short that, where the legislature says that a matter shall be made to appear to the Board of Railroad Commissioners, it means that it shall be made to appear to the district court upon a trial *de novo* and upon totally different evidence.

Not only this, but it holds that in case the district court happens to be of the same opinion as the Board of Railroad Commissioners, an appeal even can be taken from its decision, and that if it shall be made to appear to the supreme court that such excuse from the operation of daily passenger trains should be granted, the supreme court may grant the same. It holds in short that when the legislature provides that a fact or condition must be made to appear to the Board of Railroad Commissioners, it really means that this fact or condition must be made [236] to appear to the supreme court. It would be hard, indeed, to find any other case where a clear legislative enactment has been so distorted and perverted.

The only excuse for the holding of the majority is that an act, which was passed in 1897, and ten years before the enactment of the statute now under consideration, provided for an appeal from orders of the Board of Railroad Commissioners issued under "the act." The majority, however, absolutely ignores the fact that this prior act of 1897 nowhere made any provision for the running of passenger trains. It related almost entirely to the regulation of railroad rates and to the orders of the Board of Railroad Com-

missioners in relation thereto. It made it the duty, it is true, of the Railroad Commissioners to see that the railroads obeyed the laws of the state. It nowhere, however, provided that either the railroads or the Board of Railroad Commissioners could overrule the positive mandates of a future act, nor can it be contended that when it provided for an appeal from orders regulating rates it tied the hands of subsequent legislatures, and prevented them from establishing a public policy of daily passenger trains, and vesting the responsibility of its carrying out in the discretion of the Board of Railroad Commissioners.

The provision of the act of 1897 (chapter 115) which relates to appeals, is expressly limited in its application. It (§ 32) provides that "any railroad, railroad corporation, or common carrier, subject to the provisions of this act, or any other person interested in the order made by the Commissioner of Railroads, may appeal to the district court of the proper county in the judicial district of this state from which the complaint arose, and which is the subject and basis of the order made by the Commissioners of Railroads regulating or fixing its tariffs or rates, fares, charges, or classification, or by any other order made by said Commissioners under the provisions of this act." This limited clause, and in a statute which says nothing about the running of passenger trains and which is interested solely in tariff classifications and rates, and in the general details of railroad operation in relation thereto, is construed by the majority opinion to apply to a statute which is passed ten years later, which provides for a general policy of passenger service, and which provides that the only person or body which can grant an excuse from an observance of such policy is the Board of Railroad [237] Commissioners. See *Robinson v. Sunderland* [1899] 1 Q. B. (Eng.) 751, 68 L. J. Q. B. 330, 80 L. T. N. S. 262, 63 J. P. 341, 19 Cox C. C. 245, 15 Times L. Rep. 195.

When the discretion of granting such an excuse is, by chapter 200 of the Laws of 1907, Comp. Laws 1913, §§ 4789-4795, vested exclusively in the Board of Railroad Commissioners, and then only in case certain facts are made to appear to them, can it be said that it was the intention of the legislature that new evidence should be introduced in the district court, and that that court should be vested with the power to hold that that was made to appear to the Board of Commissioners, which did not in fact appear to them, and that in case of a holding of that court which was adverse to the railroad company an appeal could again be taken to this tribunal and that we could say the same thing? Is it not clear that the general policy of the state, as announced by chapter

200 of the Laws of 1907, Comp. Laws 1913, §§ 4789-4795, was a policy of daily passenger service, unless the Board of Railroad Commissioners (which is an administrative branch of the government and which is intrusted with the duty of subserving the interests of all parties concerned) should be satisfied that the business of the branch line did not justify the expense, and that in that event an excuse should be granted *for a limited time*? Does this court, we may now ask, assume the power to fix the limits of that time? Is it not also clear that the writer and subscribers to the majority opinion have confused the rights of the railway company which arise under statutes which regulate rates with those which arise under statutes which merely relate to the method of the operation of its lines? Are they not influenced in their decision by a feeling that the operation of a passenger train on the line in question would be an unprofitable venture, and that the railway company should by some means be protected against loss? Do they not absolutely ignore the fact that the railway company has its remedies, and that, even if it had not, they have no right to themselves usurp legislative functions? "There is," says the Supreme Court of the United States in *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 54 U. S. (L. ed.) 472, 30 S. Ct. 330, "a difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard and one compelling the corporation to render a [238] service which it is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due process of law, or a taking of private property for public use without compensation; nor is such an order an unreasonable exercise of governmental control."

The reason for this rule is that the charter of every railroad corporation must be deemed to have been granted upon the theory of public service, and that the road will really serve the public. On no other theory, indeed, can the right of eminent domain, which is universally conceded to railroad companies, be justified. It lies also in the fact that the railroad corporation has a remedy against confiscation in the right and power to charge rates that will compensate it and guarantee to it a reasonable profit after meeting all of the requirements of the state in regard to service. Having this power to insist upon an adequate compensation, and to demand rates which will be commensurate to the duties imposed, it cannot complain if the

public, for reasons of basic convenience or of public safety, demands passenger, rather than mixed, trains.

Independently of statute and under its charter, it is the duty of the railroad company to carry passengers, as well as freight. Having this duty, and even in the absence of a statute, it is its duty to furnish reasonable conveniences and a reasonably safe method of transportation for such passengers. "It cannot be said that the carrier of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, as far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight, a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train." *People v. St. Louis, etc. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292.

This must be universally conceded. In fact it needs no evidence to [239] show that from the standpoint of public safety, to say nothing of speed or convenience, there is no parallel between a freight or mixed train and a strictly passenger train. Is not this the clear policy which is announced by the legislature? It is a self-evident fact that the interests of the railway companies and of the public are one. We have adopted the theory of quasi public corporations. We have given to the railway companies extraordinary rights, such as eminent domain. They are also essentially businesses which are "clothed with a public interest," which are to a greater or lesser extent monopolies, and which are, therefore, subject, even under the common law, to legislative control. *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. ed.) 77.

On the other hand, the constitutional provisions which forbid a deprivation of property without due process of law and the general spirit of fair play in the community, as well as the economic fact that no man or corporation can, for a long period of time, be induced or compelled to operate at a loss, have given rise to the rule that they can in all cases insist upon a fair return for the capital which is reasonably invested and on the reasonably economical administration of their property, and that this right cannot be taken from them by the legislature. This rule, of course, implies that, though the public may impose duties upon the railway company, and may insist that its needs be reasonably served, yet that when these re-

quirements impose an additional cost upon the corporation, it may reimburse itself in the form of added rates, so that the total result will be a reasonable profit on its enterprise. On this theory and as a last analysis, the public themselves pay for insisting upon added requirements or upon an obedience to the duties imposed in the first place by the charter of the company; for it is perfectly clear that every new expense which is imposed upon the railroad company, whether in the form of adequate service or in the form of taxes, is ultimately paid by the traveling and freight consuming public, as such expenses only tend to elevate the point which divides loss and profit, and to raise the point where a reasonable profit is exceeded and the public may insist upon a reduction of rates. *Northern Pac. R. Co. v. Richland County*, 28 N. D. 172, Ann. Cas. 1916E 574, L.R.A.1915A 129, 148 N. W. 545. The Board of Railroad Commissioners, therefore, are intrusted with the duties of subserving the interests of both the railroad companies and of the public. Among those duties (and imposed by chapter 200 of the [240] Laws of 1907, Comp. Laws 1913, §§ 4789-4795) is the duty to determine whether the business of a branch line really justifies the imposing upon the railway company, as well as upon the public, the increased cost of passenger service, or rather whether or not the loss is so apparent that they should excuse the railway company for a *limited period of time* from complying with the provisions of the general law, which require the running of such trains and the incurring of such expense. This is purely an administrative function, and is clearly made so by the act of 1907, and there is no justification nor excuse for attempting to limit that act by claiming that there is an appeal from the discretion of such Commission, which appeal is not provided for in the act in question, and which is sought to be based on the provisions of a statute which was passed ten years before and which has no connection whatever with the statute under consideration.

The plaintiff railway company is, as a matter of fact, entitled to but little consideration in this particular controversy, though of course, as the rule which is announced by the decision is far reaching, it and the general public are entitled to the fullest consideration of the questions involved. It at no time has complied with the provisions of the statute, and much of the confusion which is apparent in the record, and in the opinion of the majority, I believe is due to this fact. It has delayed for many years a decision in a matter which long ago should have been settled. The act of 1907 provides for a general policy of passenger service. It provides

that passenger trains shall be run unless an excuse is granted, and then that that excuse shall only be "for such time as said Board may direct." It presupposes the institution of that service in the first instance. I do not say that the railway company should necessarily have immediately instituted the service after the law became operative and applicable to it, but I do say that, if it did not do so, it *should have immediately applied to the Board of Railroad Commissioners for the excuse*. Instead of doing this, the railway company, however, has never attempted to comply with the statute, and it made no application to the Board of Railroad Commissioners to be excused from such compliance until the road had been in operation for some years and until the Board of Railroad Commissioners had been compelled to issue an order requiring it to comply with the provisions of the statute. It now seeks to avoid the provisions of the statute which vests the exclusive discretion [241] as to the granting of such permission or excuse in the Board of Railroad Commissioners by appealing from the order which requires it to obey the law, and which necessarily must be valid unless, in the first instance, it had obtained such excuse. It may be that such order is appealable, but on such appeal it can only be shown that the railway company was not actually within the state and subject to the jurisdiction of the Board, or that, as a matter of fact, the passenger train was in operation, or that the Board of Railroad Commissioners had, for some other reason, acted outside of its jurisdiction.

The railway company cannot, by appealing from such order, accomplish the same results as if it had appealed, and an appeal had been allowed by the statute, from the refusal of the Commissioners to grant the excuse. It, it is true, tried the two matters together, and the record is greatly confused, but the fundamental fact still remains that the only defense to the order was the alleged fact that the Board of Railroad Commissioners did not grant the excuse and should have done so. But this decision was not reviewable in the district court, and is not reviewable here.

I fully agree with the conclusion of the majority that it was the intention of the legislature that it was the business of the branch line, and not of the railway company as a whole within the state, that should justify the operation of the passenger train. In other words, that it was this criterion that should be adopted by the Board of Railroad Commissioners. The matter, however, with this general rule or criterion as a guide, was left to their discretion. I should also add that there is serious doubt in my mind as to whether the evidence offered by the railway company was in any way competent and

controlling. When I say that, in my opinion, it was the business of the branch line that should justify the incurring of the expense of the daily passenger service, I do not mean that in every instance a branch line should show a profit on the basis of its mileage, for in many instances a branch line is but a feeder, and though but a few miles in length may be the origin of hundreds of miles of long distance freight or passenger transportation, and become in this way the source of a large revenue, which is entirely disproportionate to its length. The proof of the railway company was defective in this respect. Instead of showing what the branch line really furnished in the way of business, it apportioned *its receipts* [242] *to the branch line on the basis of the mileage of that line*. If this theory be adopted, I believe I am safe in saying that there is hardly a paying branch line in North Dakota. It must, however, be clear to all that a branch line, though short in its mileage, may open up a pocket of grain or of coal, or other freight or passenger traffic. That grain or coal is carried for a few miles over the branch line and then is carried for many hundreds of miles over the main line for which service the company is compensated. A branch line, in short, may be a feeder and the basis of a large revenue, not because of its mileage, but because it furnishes the material for hundreds and even thousands of miles of through transportation. There is hardly a carload of wheat, for instance, that stops at the end of the branch line and does not go on to Duluth or to Minneapolis, or even to Chicago. In any view of the case the Railroad Commissioners can hardly be said to have abused their discretion when they failed to grant the excuse upon the proof that was furnished. It can hardly be said that it *must* have satisfactorily appeared to them that the branch line was not a paying line. I am of the opinion that the judgment of the district court should be affirmed.

BURR, D. J. (*dissenting*).—I reach the same conclusion as Justice Bruce. The issue involved is this: Has the railway company the right of appeal from the action of the Board of Railroad Commissioners in refusing permission to be relieved from the observance of the provisions of § 4789 of the Compiled Laws of 1913? The Board of Railroad Commissioners is a part of the executive department of this government; free from the control of the judiciary, unless such control is given by the Constitution and the law. It is true the powers and duties of the Board "shall be as prescribed by law" (Const. § 83); but this does not presuppose appeal to the courts. The right of appeal must be clearly defined,—there is no presumption in

its favor,—and unless jurisdiction to revise these acts is given to the courts, it does not exist. As Justice Bruce has pointed out, the section relied on as granting appeals from orders of the Board is not applicable. In addition to the fact that the matter involved here was not in the contemplation of the legislature when § 4736 was enacted, there is this feature,—the evidence of the action of the Board of Railroad Commissioners is not an order in that sense. The fact that an order is in the negative is not the question,—[243] there is no order here within the meaning contemplated, simply a refusal to grant permission. It is immaterial what it may be called. The Board is not requiring the railway company to do or not to do a certain thing,—the law requires the company to run the passenger trains. It is the duty of the company to do so. The legislature recognized that this may entail expense and loss which could only be compensated by an increase in rates, and made provision whereby one part of the executive department may waive compliance with this section, provided the railway company "makes it appear to the Board" that the business does not justify this expenditure *and the said Board shall so order*. There is no analogy between the provisions of this section and the control of rates. Primarily the carrier controls the rates. It is its road and its business. Only to prevent injustice does the state interfere. The so-called "Lignite Cases," in the United States Supreme Court, show this. But the requirement to run trains is an entirely different matter. It is conceded the state has the right, from the very first, to insist on this action, and has placed with the administrative department the power of waiving compliance. The duties prescribed and orders made pursuant to the provisions of § 4736 have no relation to this matter. This section is part of chap. 115 of the Session Laws of 1897, and is entitled, "An Act to Regulate the Transportation of Passengers and Property by Common Carriers; . . . to Provide for the Control thereof, in the Matter of Rates to be Charged for Such Transportation and the Manner thereof, to Define the Powers and Duties of the Commissioners of Railroads." The right to appeal, as given by the provisions of this chapter, is the right to appeal from any order "regulating or fixing tariffs of rates, fares, charges, or classifications, or from any other order made by said Commissioners under the provisions of this act." Section 4789 is part of chapter 200 of the Session Laws of 1907, entitled: "An Act to Regulate the Operation of Passenger and Freight Trains of Railway Lines in This State." This act in form is not an amendment to chapter 115 of the Session Laws of 1897, nor does it refer to such a

chapter or to the act therein stated. It is a separate and distinct act, and so far as the first section is concerned (§ 4789 of the Compiled Laws) it is an entirely different matter. The last paragraph of this new act of 1907 says: "Nothing in this act contained shall in any manner be construed as repealing or in any manner altering any other act, or part of act, heretofore [244] adopted by the legislature of this state, but the remedies herein provided shall be cumulative to all other remedies now existing." It is clear from this § 7 that chapter 200 is intended to be additional to chapter 115 of the Session Laws of 1907, Comp. Laws 1913, § 8729, and any control given therein, or declaration made, is additional to chapter 115 of the Session Laws of 1897. Therefore, the provisions of chapter 115 of 1897 Laws, with reference to appeals from the orders of the Commissioners, should not be extended to chapter 200 of Session Laws of 1907, Comp. Laws 1913, §§ 4789-4795, unless the nature of the subject-matter treated is so connected with chapter 115 of the Session Laws of 1907, Comp. Laws 1913, § 8729, as to be construed an amendment. The judicial does not control the other departments of the government, unless the power is given explicitly,—not by implication.

Then again the expression "made to appear to the Board of Railroad Commissioners" is broader than judicial discretion—it is analogous to personal satisfaction. The Board alone can say whether it is *made to appear* to the Board. The Legislature desired the opinion and judgment of the Board on the question whether it would be better in certain cases to permit a waiver of what the state has a right to insist on, or have the company raise its rates. It is not a question of arbitrary power, although this is always involved, even in the decision of cases. The number of times the question may be reviewed does tend to justice; but the final determination must be somewhere. The legislature has seen fit to confide to the Board the power of saying whether the state will waive its right to insist on running of daily passenger trains. It is a matter of grace on the part of the state, not a matter of right to which the road is entitled when it brings itself within the limit. The railway may present a strong showing why it should be permitted to substitute a mixed train, and I believe it has, but the Board may, in its judgment, think it better to require this service to the public even though it merely suits the convenience of a town of 500 inhabitants. This is a matter which appeals to the legislature, and it is the judgment of the Board the legislature desires. It must be made to appear to the Board, and not to the courts. It may be asked, What is to be done in case the

Board acts arbitrarily? The answer is found in *Worman v. Hagan*, 78 Md. 152, 21 L.R.A. 720, 27 Atl. 616, where the court says: "It would not be becoming in this court to suppose that such a contingency would [245] ever happen. The courtesy due to the executive department forbids us to entertain such conjecture. But if, unhappily, in future times, it ever should occur, assuredly a sufficient remedy will be found. The resources of a free government are ample and will always be found adequate to punish and redress offenses against its sovereignty." But the company is not injured in any way. The law does not compel the road to do business at a loss, and the facts and figures set forth appear to be beside the question, except so far as they appeal to the judgment of the Board in determining whether it be better to substitute mixed trains for a time and thus save expense, or have a readjustment of schedules with all of the attendant trouble and delay. This matter can be adjusted readily. Primarily, the carrier fixes its own rates. Laws fixing too low rates are frequently declared confiscatory, and therefore this element of hardship and injustice is not involved. As Justice Bruce has pointed out the state, as an incident to its sovereignty, has a right to require the service, and the company must accede. The company has the right to fix remunerative rates, however, and if the state, in insisting on its rights of adequate service to the public, requires action which increases expense, the added rate will not be controlled unless it is unreasonable. The legislature has seen fit to place this power with the Board, and, as after noted, did not contemplate appeal therefrom.

There are special features involved here. The railway company is asking a review of the judgment of the Board of Railroad Commissioners, but the review is based on matters not before the Board, if the contention of appellant be correct. How can it be said that the railroad "makes it to appear to the Board" when the Board denies the request on the showing before it? The courts may have new evidence regarding rates,—this is a matter where the state cannot interfere unless the railroad is guilty of injustice and the interference is aimed to secure justice. In this situation cited the Board is the first agency, and appeal to the courts is given; but the question at issue in that case is one where the company has the primary right to fix its own rates. In the case at bar we are concerned with a matter where the state has the absolute right to require the service. The company claims conditions have so changed, through the extension of the road, etc., that now the Board should relieve it. This contention comes with very poor grace. The [246] law was passed in 1907. Con-

cededly, it has never been complied with. The state has a right to require the service, and it is the duty of the company to obey. The company, without any attempt to comply and after years of violation, at a time when action was being taken to compel its compliance, asked to be excused. The Board of Railroad Commissioners in its wisdom, denied the request, and now, having extended its line and changed conditions, the appellant says the judgment of the Board should be overruled and permission given because the conditions existing at the time the Board acted have changed.

In *Robinson v. Sunderland* [1899] 1 Q. B. (Eng.) 751, the question before the court involved the judgment or decision of a local authority in regard to matters where the statute authorized such local authority to do certain things if it appeared too such authority necessary, and in that case, Channell, J. says: "The words, 'appear to such authority,' are obviously put in for the purpose of making the local authority the judges on the question. . . . It depends upon the opinion of the local authority, not upon the fact of sufficiency or insufficiency. It cannot possibly be a matter for the justices to decide; they can only inquire in this respect whether [or not] in the opinion of the local authority, there is a sufficient. . . . They may also inquire, I think, whether the local authority have taken the proper procedure—whether they have done everything which is made by the statute a condition precedent to the right to enter."

And in the same case, Lawrence, J., says: "The decision of that question rests with the local authority. When they have arrived at the conclusion that the premises are not in a proper condition, the justices have no power to interfere with it." It seems to me clear, therefore, that where the personal judgment of the Commission is involved, there can be no appeal therefrom, and this must have been the legislative intention.

The matter is far reaching. If the district courts and the supreme court may review the action of the Board in denying or granting requests to substitute mixed trains for passenger trains for such seasons as may be desired, then the statute involved is rendered practically nugatory. The long process to be used before final determination becomes, in effect, a bar. Of course, if this be the method prescribed by law, then the courts must give effect to it; but such a construction should not [247] be placed on this section unless it clearly appears to be the only proper one. The nature of the acts suggests this. The law contemplates merely a temporary suspension, speedily granted and speedily rescinded as the season of the year may justify, and the suspension must be for a definite time. From time to time the legislature prescribes

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the duties and powers of the Board, and states whether appeal to the courts lies. In enacting § 4789 the legislature could have readily provided for appeal. The fact that no appeal is provided for in this act is presumptive that none was intended, particularly when we view the nature and scope of the power vested in the Board. Had not power to relieve from the duties been vested in the Board, the company would be compelled to operate the trains in question, and would have no recourse to the courts in this matter. Why there should be appeal, in the absence of express provision, when the state says we will give the Board power to waive our rights when certain conditions are made to appear to the Board, does not appear clear, especially when we view the temporary nature of the permission to be granted. The construction given by the majority opinion will greatly cripple the effectiveness of the Board, and as the conditions which would guide the Board in granting or refusing permission are changeable and variable in their nature, by the time the courts have finally determined the judicial discretion of the Board in such requests, the judgment of the Board might vary the action first contemplated, and thus by appeals to the courts such delay may be occasioned that the very conditions justifying the Board in refusing permission may have so changed by the time the courts are through taking testimony that the Board itself, on a new application, may come to a different conclusion. The law recognizes the element of changing conditions, and places finally with the Board the power of adjusting the requirements to the conditions, in order that the public may be served and the company be uninjured. It may be claimed that this is one of the powers of the Board, and the powers are subject to review by virtue of the provisions of § 4736. Section 4789 is not a part of the article included in the language of § 4736, and the language of § 4736 should not be construed so as to control the acts of the administration, unless the legislature has explicitly shown such construction to be intended, and I respectfully suggest that this has not been done. I therefore believe the judgment of the district court should be affirmed.

NOTE.

Validity of Regulation of Extent of Train Service to Be Furnished by Railroad.

Regulatory Power in General, 1218.
Limitations on Power, 1220.

Illustrations:

Regulation Held Valid, 1221.
Regulation Held Invalid, 1223.

Regulatory Power in General.

It is unquestioned that a state may, either by direct legislative action or by the delegation of power to a public service commission, require any railroad operating within the state to furnish reasonably adequate train service to every station on its line. In so far as the regulation affects interstate trains, it is deemed a legitimate exercise of the police power of the state and as such is an exception to the exclusive power of Congress over interstate commerce, subject to the qualification that its exercise must not extend beyond the reasonable requirements of the occasion. See the notes to the following cases: *People v. Chicago*, etc. R. Co. 7 Ann. Cas. 1, at page 7; *State v. Northern Pacific R. Co.* 13 Ann. Cas. 144, at page 148; and *Seaboard Air-Line Ry. v. Blackwell*, Ann. Cas. 1917A 967, at page 982.

It is accordingly held that for the purpose of securing to any station an adequate train service the stopping of trains at that station, or, if necessary the running of additional trains, may be required. *Gladson v. Minnesota*, 166 U. S. 427, 17 S. Ct. 627, 41 U. S. (L. ed.) 1064, *affirming* 57 Minn. 390, 59 N. W. 487, 24 L.R.A. 502; *Lake Shore*, etc. R. Co. v. *Ohio*, 173 U. S. 285, 19 S. Ct. 465, 43 U. S. (L. ed.) 702; *Com. v. Louisville*, etc. R. Co. 120 Ky. 91, 85 S. W. 712; *Com. v. Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Southern Pac. R. Co. v. Oregon R. Commission*, 60 Ore. 400, 119 Pac. 727; *Texas R. Commission v. Galveston*, etc. R. Co. 51 Tex. Civ. App. 447, 112 S. W. 345. And see *State v. New Haven*, etc. R. Co. 43 Conn. 351, *affirmed* 104 U. S. 1, 26 U. S. (L. ed.) 629; *State v. Atlantic Coast Line R. Co.* 60 Fla. 465, 54 So. 394. See also the cases cited in the notes heretofore referred to. In *Railroad Com'r's v. Atlantic Coast Line R. Co.* 71 S. C. 130, 50 S. E. 641, it was said: "The legislature under the police power may require all regular passenger trains, not engaged in interstate commerce, to stop at certain stations. *Gladson v. Minnesota*, 166 U. S. 427 [17 S. Ct. 627, 41 U. S. (L. ed.) 1064.] It, therefore, necessarily follows that it has the power to compel a less number and may specify the particular trains required to stop at a station. In the case last mentioned the court says, page 430: 'A railroad corporation created by a state is, for all purposes of local government, a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character, for the government of the company, while operating its road in that jurisdiction. It may prescribe

the location and the plan of construction of the road, the rate of speed at which trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state.' See also *Minneapolis*, etc. R. Co. v. *Minnesota*, 193 U. S. 53 [24 S. Ct. 396, 48 U. S. (L. ed.) 614], and *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* [137 N. C. 1] 49 S. E. 191."

The reasonableness of the requirement is primarily a legislative question and the presumption is in favor of its validity. *Texas*, etc. R. Co. v. *Louisiana R. Commission*, 127 La. 387, 53 So. 660; *Atchison*, etc. R. Co. v. *State*, 28 Okla. 476, 114 Pac. 721; *State v. Public Service Commission*, 81 Wash. 275, 142 Pac. 684. Thus in *Chicago*, etc. R. Co. v. *Wisconsin R. Commission*, 152 Wis. 654, 140 N. W. 296, it was said: "That the legislature may prescribe reasonable regulations as to the stoppage of trains is admitted. Such admission, however, includes within it the further admission that within the field of its discretion the legislature is supreme, and its determination must control unless clearly unreasonable or unless it contravenes some specific or implied constitutional provision, state or federal. It is not for the court to square the act with its own judgment and declare it void if it fails to measure up to such standard. The court's duty is to sustain the statute unless it can be said that in its enactment the legislature exceeded its powers." So in *State v. Gladson*, 57 Minn. 385, 59 N. W. 487, 24 L.R.A. 502, *affirmed* 166 U. S. 427, 17 S. Ct. 627, 41 U. S. (L. ed.) 1064, in sustaining the validity of an act requiring all trains to stop at county seats, the court said: "It is contended by appellant that this law is so unreasonable and oppressive as against the railroad company that it is unconstitutional and void. We are not of that opinion. While it seems to us that it is rather drastic legislation to compel this train, which is designed only for through traffic, and stops at no other stations en route, to stop at this one station, while there are so many other trains to do the local business, still we cannot substitute our judgment for that of the legislature. There are reasons in support of the law on which the legislature had a right to come to the conclusion at which they arrived. Besides, this law does not apply alone to this train, this county seat, and this railroad, but to all railroads, all county seats, and, with a few exceptions, to all trains; and there are not the same reasons for assailing

such a general law merely because it works hardship or inconvenience in exceptional cases as if it worked such hardship or inconvenience in all cases to which it applied. It is a regulation of common carriers which the legislature has the power to impose, and it is certainly not so unjust and unreasonable that the courts should declare it void."

The fact that the required train service will not be profitable to the carrier is not conclusive against the reasonableness of the order. *State v. Chicago, etc. R. Co.* 239 Mo. 196, 143 S. W. 785; *Atchison, etc. R. Co. v. Miller*, 28 Okla. 109, 114 Pac. 1104. The true criterion is whether the public interest requires that the additional service shall be rendered, provided always that the loss to the railroad shall not be so great as to constitute a greater sacrifice on its part than the public would have the right to demand; or in other words so great as to reduce the earnings of the railroad in the state below a fair return on the capital invested. *Texas, etc. R. Co. v. Louisiana R. Commission*, 127 La. 387, 53 So. 660. As was said in *State v. Great Northern R. Co.* reported ante, this volume, at page 1201: "The pecuniary loss or profit to the carrier in executing the particular order is an important criterion in determining the reasonableness of the order, but it is not the only one. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 27, 27 S. Ct. 585, 51 U. S. (L. ed.) 933, 11 Ann. Cas. 398; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 279, 30 S. Ct. 330, 54 U. S. (L. ed.) 472. The question of reasonableness is to be determined by a consideration of the interests both of the carrier and of the public. *Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 418, 458, 10 S. Ct. 462, 702, 33 U. S. (L. ed.) 970; *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 296, 21 S. Ct. 115, 45 U. S. (L. ed.) 194." So it was said in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 11 Ann. Cas. 398, 27 S. Ct. 585, 51 U. S. (L. ed.) 933: "As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames*, 169 U. S. 466 [18 S. Ct. 418, 42 U. S. (L. ed.) 819], or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss

is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." Similarly in *Chicago, etc. R. Co. v. Wisconsin R. Commission*, 152 Wis. 654, 140 N. W. 296, the court said: "The evidence shows that to put on an extra local train each way daily would cost about \$7,000 per month and that the estimated receipts would not equal the expense. It is not shown, however, that the whole passenger revenue of the road in this state is not ample to meet the additional expense with a fair margin of profit. But if that were not so, if the service required is a reasonable one it is no answer to say that it would have to be performed at a financial loss. . . . In determining what is reasonably adequate service the paramount factor is public need and convenience, modified no doubt by many other considerations, such as the size of the station, the extent of the demand for transportation, as well as the reasonable cost of giving additional service."

A statute requiring a certain number of trains to be stopped daily at every town having more than a specified number of inhabitants rests on a permissible basis of classification. *Chicago, etc. R. Co. v. Wisconsin R. Commission*, 152 Wis. 654, 140 N. W. 296, wherein it was said: "It will be observed that as a basis for a minimum passenger service the population of a station and the number of passenger trains passing it each way daily are made the main tests. That such tests are germane to the subject of the act can scarcely be doubted. The population of a station is usually not only a fair index of the amount of business the station itself will furnish, but also of that of the population tributary thereto, while the number of passenger trains run daily past a station measures the amount of passenger business done over the road and, in a degree, its ability to furnish additional facilities to the station without financial loss or without undue interference with through traffic. The furnishing of adequate mail facilities for the residents of the village and of the surrounding country was also in the legislative mind, as is evidenced by the provision that the station must have a post office in order to enjoy the service provided for in the act. So it must be deemed that a proper basis of classification is made by the statute."

A statute requiring a certain number of trains to stop at towns having more than 200

inhabitants does not impair the right of the railroad commission to order a stopping of trains at a smaller place. *Chicago, etc. R. Co. v. Wisconsin R. Commission*, 157 Wis. 287, 146 N. W. 1129.

Limitations on Power.

As is stated in the preceding subdivision of this note, it is essential to the validity of an order for additional train service at a station that the requirement shall be reasonable. In other words, the obligation of the carrier is to furnish a service which is reasonably adequate under all the circumstances and it may not be subjected to the expense of anything in addition to this. *Delaware, etc. R. Co. v. Van Santwood*, 216 Fed. 252; *Alabama R. Commission v. Saline River R. Co.* 119 Ark. 239, 177 S. W. 896; *Illinois Cent. R. Co. v. Com.* 154 Ky. 332, 157 S. W. 687; *Missouri, etc. R. Co. v. Norfolk*, 25 Okla. 325, 107 Pac. 172, 29 L.R.A.(N.S.) 159. And see the cases cited *infra* in the subdivision *Illustrations—Regulation Held Invalid*. "The term 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression and has to be considered as calling for such facilities as might fairly be demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost." *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 S. Ct. 121, 52 U. S. (L. ed.) 230. In that case it was said further: "Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities, and the defendants in error, it may be conceded, make no such demand. No one would assert that one daily train each way between New York and Philadelphia would furnish adequate facilities for the transportation of passengers. Twenty times that number of trains would be necessary, and yet one through train a day, each way, through so small a place as Latta to New York or Tampa would in all probability easily transport all the passengers desiring transportation between these places. Nevertheless, the fair needs of the locality for transportation to other local points must be considered and provided for."

The distinction between "through" or "fast" trains and local trains is one essential to proper railroad management and the stopping of a "fast" train at a station of minor importance which is adequately served by local trains should not be ordered. *Cleveland, etc. R. Co. v. Illinois*, 177 U. S. 514, 20 S. Ct.

722, 44 U. S. (L. ed.) 868, *reversing* 175 Ill. 359, 51 N. E. 842; *Mississippi R. Commission v. Illinois Cent. R. Co.* 203 U. S. 335, 27 S. Ct. 90, 51 U. S. (L. ed.) 209; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 S. Ct. 121, 52 U. S. (L. ed.) 230, *reversing* 74 S. C. 80, 54 S. E. 224; *Herndon v. Chicago, etc. R. Co.* 218 U. S. 135, 30 S. Ct. 633, 54 U. S. (L. ed.) 970; *Roach v. Atchison, etc. R. Co.* 218 U. S. 159, 30 S. Ct. 639, 54 U. S. (L. ed.) 978; *St. Louis, etc. R. Co. v. Reynolds*, 26 Okla. 804, 110 Pac. 668, 138 Am. St. Rep. 1003. In *Cleveland, etc. R. Co. v. Illinois*, *supra*, it was said: "We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it." So in *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 S. Ct. 121, 52 U. S. (L. ed.) 230, it was said with reference to certain through trains: "To stop these trains at Latta, and other stations like it, which could bring equally strong reasons for the stoppage of the trains at their stations, would wholly change the character of the trains, rendering them no better in regard to speed than the other trains, 39 and 40, and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of their inability to pay expenses."

The fact that some inconvenience results to individuals is not conclusive as to the inadequacy of the train service. *St. Louis, etc. R. Co. v. State*, 85 Ark. 284, 107 S. W. 989, wherein it was said: "The principal reason urged as to the inadequacy of the facilities provided by the railroad company is that the only through train to St. Louis which stops at Arkadelphia reaches stations in this state north of Little Rock at an unreasonable hour in the night time for passengers to debark; and that a through northbound train should be provided which will land passengers from Arkadelphia at those stations at a more rea-

sonable hour. It is also earnestly argued that, as Arkadelphia is the county seat of Clark county, and as circuit court, when in session, usually convenes at 8:30 o'clock A. M., this train by which litigants and witnesses living south of that place could reach there at 6:18 A. M., ought to be required to stop there for their convenience, instead of requiring them to wait for train No. 24, due to reach Arkadelphia at 9:26 A. M. Now, it will be admitted that there is, at best, some inconvenience which must attend the traveler. A perfect system of railroad transportation, whereby the traveler can begin his journey at an hour which precisely suits his own convenience, progress with due speed and arrive at his destination, wherever that may be, at a reasonable hour of the day, is scarcely to be expected, however much it is to be desired. That would be Utopian. A train schedule could not be arranged so as to begin and end every journey in the day time. What the state may demand of a railroad company for the benefit of the people is reasonable service—facilities which are as near perfect as may reasonably be furnished, considering all the circumstances."

Where the service over part of a division is admittedly adequate, an order requiring additional trains on the whole division is unreasonable. *Gulf, etc. R. Co. v. State*, 23 Okla. 624, 101 Pac. 258.

Illustrations.

REGULATION HELD VALID.

A statute requiring every train to stop at a county seat has been sustained. *Gladson v. Minnesota*, 166 U. S. 427, 17 S. Ct. 627, 41 U. S. (L. ed.) 1064, *affirming* 57 Minn. 390, 59 N. W. 487, 24 L.R.A. 502. And see *Gulf, etc. R. Co. v. State (Tex.)* 169 S. W. 385. In the case first cited it was said: "In Minnesota, as in other states, the county seat of each county is the place appointed for holding the meetings of the county commissioners and the sessions of the district court, and for keeping the offices of the clerk of that court, the judge of probate, the county auditor, the county treasurer, the sheriff and the register of deeds. Minnesota Gen. Stat. 1878, c. 8, sections 102, 120, 148, 174, 195, 220, 227, 258. The legislature of the state may well treat it, as one important object of establishing a railroad within the state, that public officers, parties to actions, jurors, witnesses and citizens generally, should be enabled the more promptly to reach and leave the centers to which their duties or business may call them. To require every regular passenger train, running wholly within the limits of the state, to stop at all stations at county seats, directly in its course, for the few minutes, and at the trifling

expense, needed to take on and discharge passengers with safety, is a reasonable exercise of the police power of the state." In *Cleveland, etc. R. Co. v. Illinois*, 177 U. S. 514, 20 S. Ct. 722, 44 U. S. (L. ed.) 868, *reversing* 175 Ill. 359, 51 N. E. 842, a similar act was held to be invalid in so far as it required the stopping of through trains at a minor station having four local trains each way daily.

A requirement that three regular passenger trains each way, if so many are run, shall be stopped at every city or village of more than three thousand inhabitants is reasonable. *Lake Shore, etc. R. Co. v. Ohio*, 173 U. S. 285, 19 S. Ct. 465, 43 U. S. (L. ed.) 702.

In *State v. Public Service Commission*, 81 Wash. 275, 142 Pac. 684, it was said: "The question presented is one of fact. The testimony shows that the stopping of westbound train No. 3 at Krupp, in lieu of westbound train No. 43, will be to the advantage of the inhabitants of that town and vicinity. There is a population of approximately 1,500 people within a radius of nine miles from Krupp. These people, for the most part, do their business at Krupp. There are three to four jury terms of court held at Ephrata each year. The testimony shows that train No. 3 will best serve the convenience of jurors, witnesses, and litigants who attend court from Krupp and vicinity. It will also enable the people to go west to Ephrata or east to Spokane, transact their ordinary business, and return the same day. The passenger revenue at Krupp for the year preceding the filing of the complaint was \$4,311.65. The revenue derived from freight for the eleven months preceding the same date was \$22,512.08. On the other side of the question, the appellant showed that a compliance with the order may require an extra man, and that the train will be delayed from six to nine minutes. While these elements are to be considered, they are not controlling. 'Because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result.' *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1 [11 Ann. Cas. 398, 27 S. Ct. 585, 51 U. S. (L. ed.) 933]. This principle was reaffirmed in *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262 [30 S. Ct. 330, 54 U. S. (L. ed.) 472]."

In *St. Louis, etc. R. Co. v. Troy*, 25 Okla. 749, 108 Pac. 753, an order for additional train service was held to be reasonable, the evidence showing the following facts: "The town of Troy is a place of about 300 population, with one general store, two small stores. That Ragon is an inland town about four miles from Troy, and about the same size, and would do its railway business at

Troy if facilities were improved. Some cotton and a great many ties are shipped from Troy, and considerable cattle would be shipped from there if the accommodations were adequate for that purpose. That two passenger trains stop there, one of the north-bound trains, due between 7 and 8 o'clock A. M., and the southbound, due between 10 and 11 o'clock P. M. The trains that stop are local trains. The only through trains the company runs over this line are Nos. 9 and 10, between St. Louis, Mo., and Texas points, via Sherman, Denison, and Ft. Worth: the southbound being due at Troy at 11:05 A. M., and the northbound at 2:47 P. M."

In *State v. Washington R. Commission*, 60 Wash. 218, 110 Pac. 1075, it was said: "Anacortes is a town of 5,000 or 6,000 inhabitants, situated in Skagit county, at the western terminus of the Rockport branch of the railway company's lines, about 16 miles west of Burlington, where that branch crosses the main north and south coast line of the railway company. This main line connects the cities of Seattle, Everett, Bellingham, Vancouver, B. C. Mt. Vernon, the county seat of Skagit county, is also on this main line, about four miles south of Burlington. The total amount of business done by the railway company at Anacortes is about \$20,000 per month for freight, and about \$800 per month for passenger fares, the latter representing the same number of passengers. This is the only rail communication between Anacortes and Mt. Vernon. The evidence indicates that the travel by rail between Anacortes and the county seat would probably be considerably increased if the extra train service was furnished as ordered: a considerable part of that travel being at the present time by road vehicles on account of the inconvenient train service. At the time of the hearing the first train left Anacortes at 7:15 A. M., returning at 9:50 A. M. Another train left Anacortes at 5:45 P. M., returning at 8 P. M. A freight train, bringing mail and also passengers if they cared to ride thereon, arrives at Anacortes from Burlington generally about 5 P. M., though it is scheduled to arrive earlier. Through trains on the coast line arrive from both directions at Burlington about the noon hour, with which there is no close connection for Anacortes. The present train service has the effect of furnishing only a morning mail service to Anacortes so far as the arrival of mails is concerned; the afternoon and evening trains arriving too late for distribution until morning. Upon the showing of these facts, the commission announced that, unless a showing was made indicating that the running of a midday train from Anacortes to Burlington and return would result in loss to the railway company, such a service would

be ordered to be furnished. No such showing was attempted prior to the making of the formal order. However, the railway company put on an additional train leaving Anacortes at 10:45 A. M., arriving at Burlington about an hour later, and upon its return from Rockport arrived at Burlington at 9 P. M. and at Anacortes at 10 P. M. This train, it will be noticed, helped the passenger service to some extent by arriving at Burlington a short time before the noon hour, but not in returning, and did not have any material effect on the mail service so far as the arrival of mails at Anacortes is concerned. We think these facts show that the train service ordered by the commission would be a materially better service than that which the railway company is furnishing, even with the added train put on since the hearing, and we have seen that there is no showing that such train service as so ordered by the commission would be unreasonably burdensome upon the railway company by being operated at a loss."

In a number of Oklahoma cases orders requiring trains to stop on signal at particular stations have been sustained. *Missouri, etc. R. Co. v. Witcher*, 25 Okla. 536, 106 Pac. 852; *Missouri, etc. R. Co. v. State*, 28 Okla. 610, 115 Pac. 770; *Stepp v. Wichita Falls, etc. R. Co.* 29 Okla. 71, 115 Pac. 1012; *St. Louis, etc. R. Co. v. Langer*, 29 Okla. 691, 119 Pac. 126, 44 L.R.A.(N.S.) 478. A typical case of that kind was *Atchison, etc. R. Co. v. State*, 28 Okla. 476, 114 Pac. 721, wherein it was said: "Appellant's objections to this order, as they appear from the testimony of its vice-president, quoted supra, are: First, that the grade of its road at and near Belva is such that to stop these trains will cause one of them to lose a great deal more time than on the lighter grades. Second, if it is required to stop its trains at Belva, it ought to stop them at all the other small stations. While there is evidence that these trains are interstate trains and carry mail, there is no evidence that they are fast trains, or that the stopping of them at this station will interfere with their schedule or with their connection with other trains. Nor is there any evidence as to what the additional cost to the company of stopping these trains at the time required by the order will be. The evidence discloses that the passenger receipts for the months of July and August preceding the hearing before the commission were small; but whether these are the average monthly receipts of this station the evidence fails to disclose. That the stopping of these trains will entail some additional expense upon appellant is evident; but that such additional expense will operate as pecuniary loss to the appellant is not established. These trains are not required to stop

every time they pass this station, but only when there are passengers upon such trains to leave the trains at that point, or when there are passengers desiring to enter these trains at this point. Nor does the suggestion necessarily follow that if these trains are required to stop at Belva they would have to be stopped at all other stations of similar size, for the reason that at no other station on this road do the day trains meet each other. The farther any station is from Belva on this road the more time intervenes between the passing of the day trains going in opposite directions, and the more time is afforded to patrons on the road to embark upon one of these trains and transact business at other points upon the road and return upon the other train; but the patrons at Belva, with the present schedule and facilities afforded them, are without opportunity to go to any point upon the company's line of railway and return in less than 24 hours.

. . . In the case at bar, one of the beneficial purposes that will be accomplished by stopping these trains on flag will be to enable the patrons of appellant at that point to go to their county seat and transact their business and return within half the time they otherwise could. While the facts disclosed by the record supporting the order of the commission, as stated by the commission in its order, might not be sufficient to require additional trains to be run to furnish to these patrons the facility which they seek, in the absence of any showing by appellant that this order will entail pecuniary loss upon it or hamper these trains in making their interstate connections, we are unable to say that the *prima facie* presumption of the reasonableness and justness of the order of the commission has been overcome."

REGULATION HELD INVALID.

In *Texas, etc. R. Co. v. Louisiana R. Commission*, 127 La. 387, 53 So. 660, the issue was as to the reasonableness of an order for the operation of night trains on a branch road to and from the town of Natchitoches. The extent of the traffic and the expense of operating the trains were stated by the court as follows: "Another exhibit shows the distance that was traveled by the 16,890 passengers carried by plaintiff from Natchitoches during the year ending July, 1909, and shows that 94 per cent of these passengers went to points less than 100 miles from Natchitoches; that is to say, were presumably day passengers, since the day trains are ordinarily used for a short distance. This would leave 890 for the night trains, a number approximating the 792 shown by the other exhibit. If we adopt the higher of these figures, we find that about 1,800 passengers traveled to and from Natchitoches more than 100 miles, or

presumably on the night trains, during 1909. Doubling these figures, for greater safety of computation, we have 3,600 passengers using the night trains, or an average of about 10 a day—5 in, 5 out. The average fare from Natchitoches to Cypress is 25 cents. The total revenues, then, from the 3,600 passengers would be \$900. The evidence shows that the expense of this additional service would be \$11,349.95 a year; that, therefore, the plaintiff company would carry each passenger at a net loss of \$2.90, and would furnish the service at a net yearly loss of \$10,549.95." Holding the order to be unreasonable the court said: "A night service upon this branch would, no doubt, be a great convenience to the people of Natchitoches, and especially to the young lady students of the Normal school located in that town; but so would a night service upon every branch line in the state be a great convenience to the people of the towns along the line. We discover no special reason why there should be this night service upon this branch to accommodate so few people."

In *Yazoo, etc. R. Co. v. Louisiana R. Commission*, 130 La. 1012, 58 So. 862, an order requiring that on a branch line leading to a town of about 900 inhabitants trains should be run to connect with every train on the main line was held to be unreasonable. The court said: "Clinton is a town of 918 souls, according to the last census. It is on the decline, for its population, according to the census of 1900, was 960, and, according to that of 1890, was 974. Its present passenger facilities consist of a train which does service between Baton Rouge, Ethel, Wilson, and Clinton. It leaves Baton Rouge daily at 9 A. M., reaching Ethel at 10:40 A. M., merely stopping at Ethel, and returns at once to Ethel, where it remains until 1:05 P. M., when it goes again to Clinton, and at once returns to Ethel. After making a stop at Ethel, it proceeds to Wilson, further north on the main line; and at 3:15 P. M. starts on its way back to Baton Rouge. This train on its trip from Baton Rouge to Clinton in the morning, and on its trip from Clinton to Wilson in the afternoon and thence back to Baton Rouge, is a mixed freight and passenger train. On the other trips, between Clinton and Ethel, it is a regular passenger train. By this train, morning passengers make close connection on the main line with the Vicksburg Express northbound, and approximately close connection with the 1 P. M. New Orleans Express southbound. There are two other trains daily on the main line: The Memphis Express, passing Ethel at 5:18 A. M., southbound, and at 6:20 P. M., northbound. It is to afford the people of Clinton close connection with the latter two trains that the said order has been made. Clinton would have then five trains daily to Ethel.

We think that to require such service for so small a place is unreasonable. The service would be out of proportion."

In *Missouri, etc. R. Co. v. Norfolk*, 25 Okla. 325, 107 Pac. 172, 29 L.R.A. (N.S.) 159, an order for additional train service to a town of 300 inhabitants was held to be unreasonable, it appearing that the town had two railways making practically the same points with trains stopping as follows: Northbound, 1:20 P. M., local freight carrying passengers and freight daily except Sunday, between 12:10 P. M. and 1:10 P. M.; southbound, 2:25 P. M., local freight carrying passengers and freight daily except Sundays, 9:55 A. M.

In *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 S. Ct. 121, 52 U. S. (L. ed.) 230, with respect to the reasonableness of stopping certain through trains at a small station, it was said: "In this case the company furnishes eleven different trains a day by which the people of Latta can leave that place, and among them are the daily through trains 39 and 40 for the South and North, respectively. That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more. Fault is found here with the character of some of the local trains, in that the appointments thereof are not up to a sufficiently high standard. It is true that included in these eleven trains were some which were a combination of freight and passenger, and others which only ran between Latta and Clio, and those are described as dirty and without proper closets and drinking tanks. These deficiencies are remediable by other means than the stoppage of the two trains in question. It is to be remembered that these two places, Latta and Clio, had together a population, by the last census, of about a thousand. Two ordinary modern trains of the usual passenger coaches would comfortably transport the total population of these places. The number of people who are inconvenienced by the nonstoppage of these trains is, of course, comparatively quite small. One witness, who was in the hotel and general merchandise business at Latta, said that he sent a man or two every week to meet the fast train at Dillon, because they could not take it at Latta. Other witnesses said that the demand for those particular trains, 32 and 35, was quite frequent, as many as four people a week, while others said that the inconvenience of the through trains, 39 and 40, was on account of their not being fast trains, and hence were not so pleasant as the others, 32 and 35, and did not get them into their destination as early as the latter trains did. The demand at Latta by people desiring to go to the ter-

mination of the road, either at New York or Tampa, would naturally be small. Some of the plaintiff's witnesses said that the demand for transportation at Latta was large, or quite large, and the inconvenience great, but a further examination of these witnesses showed that in specific details there was much lacking, and instances of inconvenience were really somewhat limited. But assuming that the number actually inconvenienced by the want of fast trains was 'quite large,' as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the state. To stop these trains at Latta, and other stations like it, which could bring equally strong reasons for the stoppage of the trains at their stations, would wholly change the character of the trains, rendering them no better in regard to speed than the other trains, 39 and 40, and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of their inability to pay expenses."

In *Alabama R. Commission v. St. Louis*, etc. R. Co. 195 Ala. 527, 70 So. 645, an order requiring the operation of an additional train daily for the accommodation of four towns, all of less than 2,000 population and having a train service consisting of three trains daily each way, was held to be unreasonable.

In *Delaware, etc. R. Co. v. Van Santwood*, 216 Fed. 252, the court said: "The true inquiry is whether or not the convenience and necessities of the people at South Granby, Lamson, Little Utica, and Lysander demand the restoration, running, and operation of the two trains in question (those discontinued and ordered restored). South Granby and Lamson are on the line, and the combined population is, in round numbers, 850. Lysander and Little Utica have a population combined of 400, and to serve the necessities and convenience of these 1,250 people, residing in an agricultural community, should the complainant, the Delaware, Lackawanna & Western Railroad Company, be compelled to operate four trains per day each way between Oswego and Syracuse at a large pecuniary loss to the company? Are not two trains each way on complainant's road sufficient for the convenience and necessities of the public? . . . If numerous nonpaying trains may be compelled in order to serve the convenience of a very few residing in small towns situated between two larger places on the line

of the road, it may be done at all points on the line, and the profits, if any, of the paying trains, including freight, will be eaten up; and, if there is to be a curtailment of service, where shall it be, and on what principal based? What is reasonable and what is reasonably necessary is not to be determined by the occasional wants and wishes and convenience of a very few people living at points along the line. It seems to me that when steam trains enough are run between the city of Oswego and the city of Syracuse to accommodate and serve the necessities of the people of those cities and the intervening city of Fulton, and two steam trains per day each way are run which reasonably serve the convenience and supply the reasonable necessities of the four small intervening points, and these people also have the convenience of the trolley line as described, the complainant has performed its whole duty to the public, and that to compel the running of the two additional trains between these points at a net loss of over \$3,000 per annum is unjust and unreasonable and in violation of the constitutional rights of the complainant."

In *State v. Washington R. Commission*, 62 Wash. 193, 113 Pac. 252, a requirement of a daily train service on a branch fourteen miles long was held to be unreasonable, the court saying: "During November and December, 1907, and January and February, 1908, the railway company maintained a daily train service on this line, and during that period the passenger travel on the line only produced an income of nine cents per mile per day in one direction, and eleven cents per mile per day in the opposite direction. That is, there was an average of between three and four passengers per day carried over the line in each direction at the usual fare of three cents per mile. There is no evidence in the record to warrant the conclusion that the passenger earnings would be greater than this at the present time and with a daily train service. The cost of operating a train over the line is not less than thirty cents per mile, not including maintenance expenses. The two trains per week now operated are entirely sufficient to render all necessary freight service to the people along the line. The entire receipts from freight and passengers, even as the train service is now operated, is not sufficient to prevent the line being operated at a financial loss to the railway company, and it is evident that that loss would be materially increased by the additional expense incident to a daily train service. The benefits to the public of a daily freight service over the present service would be insignificant. And while the additional passenger service would no doubt be of some convenience to the public, we do not think the necessities of the public for

such service is of enough consequence to warrant the forcing of the railway company to furnish such additional service at a financial loss in addition to the loss now being incurred by it in operating the line as at present. This branch line and the small community it serves are both relics of the memorable real estate boom of the early nineties. Nearly all of the business inducements which prompted the building of this branch line have vanished, and we believe the evidence in this record shows that the railway company is bearing all of the burdens required of it in furnishing to the public the present train service."

In *Illinois Cent. R. Co. v. Com.* 154 Ky. 332, 157 S. W. 687, it was said: "As Eddyville is a place of only about one thousand people and six trains stop there every day, three eastbound and three westbound, it cannot be said that the railroad company is failing to furnish reasonable facilities for the traveling public without also stopping two fast night trains at that point. Anyone wishing to take these trains can take them at Kuttawa which is only about a mile away, and under the rulings of the supreme court it must be held as a matter of law that the act requiring the two fast night trains to stop there is invalid."

FIREMEN'S INSURANCE COMPANY

v.

LAREY.

Arkansas Supreme Court—July 3, 1916.

125 Ark. 93; 188 S. W. 7.

Tenancy in Common — Nature of Title.

The title to tenants in common in land is separate, there being no unity in title, but only unity of possession.

Fire Insurance — Change in Title of Property — Sale of Interest by Joint Owner.

Where an insurance policy covering partnership property is voidable by change of title of insured, a sale of his interest by one partner to a third person affects the risk, because a new party is brought into contractual relations with the insurance company.

[See note at end of this case.]

Same.

Under such policy, covering property of tenants in common, a sale by a tenant in common of his interest to a stranger ends the contract of insurance as to him or his vendee.

[See note at end of this case.]

Same.

Under such policy, covering property of tenants in common, a sale by a tenant in common of his interest to a stranger does not affect the insurance as to the remaining tenant or tenants in common, since thereby no stranger is brought into contractual relation with the insurance company so far as concerns that part of the insurance which covers the interest of the tenant or tenants in common not selling.

[See note at end of this case.]

Appeal from Circuit Court, Miller county: HAYNIE, Judge.

Action by R. L. Larey, plaintiff, against Firemen's Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Webber & Webber for appellant.

J. M. Carter for appellee.

[95] HART, J.—R. L. Larey sued The Firemen's Insurance Company to recover upon a policy of fire insurance. The facts material to a determination of the issues raised by the appeal are as follows:

C. M. Blocker and R. L. Larey were tenants in common of certain lots in the town of Fouke, Miller County, Arkansas, each owning an undivided one-half interest therein. There were two store buildings located on the lots. On the 1st day of April, 1915, C. M. Blocker applied to the Firemen's Insurance Company for a policy on said buildings in the sum of \$600 for the period of one year. The policy was issued to C. M. Blocker and R. L. Larey and among other conditions provided that the policy should be void "If any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise, etc." Blocker had no authority from Larey to insure his interest in the property but as soon as Larey found that the insurance had been taken on the property, he ratified the act of Blocker and agreed to pay his part of the premium. The policy was issued on a credit but the agent who issued it had authority to issue policies on a credit and both Blocker and Larey were well known to him. Blocker sold his interest in the property to Mrs. F. L. Duke and on the 15th day of May, 1915, the

agent cancelled the policy. The property was destroyed by fire on June 12, 1915. Larey did not know that Blocker had sold his interest in the property until after the fire occurred and had not authorized him to make a sale thereof.

The court directed the jury to return a verdict for Larey in the sum of \$300 being one-half of the policy and from the judgment rendered the insurance company has appealed.

[96] It is contended by counsel for the defendant that the contract for insurance was an indivisible one and that the policy became void when Blocker sold his interest to Mrs. Duke. They claim that this act violated the provision of the policy quoted in the statement of facts against a sale of change of title of the subject of the insurance. In the first place they contend that this necessarily results from the principles laid down in *McQueeney v. Phoenix Ins. Co.* 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L.R.A. 744, and *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959. In the first mentioned case the policy was issued upon a residence and frame house which was used for rental property. A gross sum was named in the policy as the premium and the amount of the policy was apportioned as follows: \$600 upon the residence and \$400 upon the frame house held to let. The same person owned both houses. The court held that the contract was entire and that the effect of the apportionment of the amount of insurance on the different subjects insured was to limit the extent of the insurers' risk, upon each item, to the amount named. In the last case the policy stipulated for a single premium and covered the contents of a livery stable. The insurance was separately apportioned to three classes, the horses, the vehicles, and the harness, etc. It was held that the contract was entire, the contract and risk being indivisible, and that if the policy was rendered void as to part of the carriages by reason of the insured's misrepresentation of his title, the entire policy was avoided. We do not think the rule laid down in those cases is controlling here. In giving effect to language, regard must be had to its purposes. The generality of the language employed must be restricted to the reason and object of its use by the parties. In the cases referred to the same person owned all the property insured. The premium was gross and there was not only no apportionment between the different items of property insured but the title to the insured property was in the same person. The two houses in the *McQueeney* case were situated at a distance from each other and a separate valuation of the houses was placed in the policy to apportion [97] the loss in case one of the houses burned and the other did not during the life of the policy.

The title to tenants in common in lands is separate. There is no unity in title but only unity of possession. In the instant case it is conceded that the agent who wrote the policy had the authority to issue policies and to issue them on a credit. He lived in the same county with Blocker and Larey and knew them both personally. The policy was not issued to Blocker and Larey as partners but as tenants in common. Hence the agent must have known that they did not occupy the premises themselves but were renting them out. The contract was one in its nature and purpose susceptible of apportionment and when the intention of the parties are gathered from the language of the contract and the subject matter of the insurance is considered, we think there is nothing in the nature or the terms of the contract which makes it indivisible. There is considerable conflict of authority as to the question whether the change in the personnel of a partnership, or the assignment of one partner's interest, is within the meaning of fire insurance policies which provide that the policy shall be void in case of any sale or transfer of the property, or change of title or possession. A much greater number of decisions hold that the transfer by one partner of his interest in the property insured to another member of the firm, is not such a change in the title thereto as would violate conditions in a policy against transfer, change, or alienation of the property or interests therein. See case note to 21 L.R.A. (N.S.) 422; *Pierce v. Nashua F. Ins. Co.* 50 N. H. 297, 9 Am. Rep. 235; *Lockwood v. Middlesex Mut. Assur. Co.* 47 Conn. 553; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337. The reason given is that such a condition is inserted in the policy for the benefit and protection of the company against the risks of having careless or improvident persons substituted in the place of the original parties with whom they contracted. An assignment by one partner to another is obviously not within the principle or motive on which the condition is founded. Such a change does not affect the risk because no new party is brought in contractual [98] relations with the insurers. The rule is different where a sale is made by one partner to a third person. In such cases a new person is brought into contractual relation with the insurance company. This is so because every partner owns the whole partnership property subject to the equal ownership of every other partner. When one partner sells his interest to a third person such purchaser does not become a tenant in common with the other partners in any specific goods but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including debts due from the firm to a partner. 30 Cyc. 605. Again

the same author says that the interest of a partner in the firm's assets is not that of a tenant in common, or of a joint tenant at common law. It is the share to which he is entitled under the partnership contract, after the firm's debts and the partners' equities are adjudged. 30 Cyc. 444. See also *Parsons on Partnership*, 4th ed. p. 137. Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty and therefore they all occupy promiscuously. *Cooley's Blackstone*, 4th ed. Vol. 1, Book 2, * p. 191. On the other hand as Lord Hardwicke said, each member of a partnership is seized *per my et per tout* of the common stock and effects.

It follows that when one partner sells his interest to a third person, a new party with whom the insurance company did not contract is introduced. Such a change affects the risk because a new party is brought into contractual relations with the insurance company. In the case of a sale by a tenant in common of his interest to a stranger, the contract of insurance as to him or his vendee is at an end. Under a contract of insurance containing a provision like the one in question as to change of title, the contract as to the remaining tenant in common however, is not affected by the sale. This is so because under the sale no stranger is brought into contractual relation with the company. There is no unity of title whatever between tenants in common and a contract made by an insurance company with them is necessarily subject to [99] apportionment and is therefore a divisible contract. We think this rule is in accordance with reason and justice. To illustrate: in the present case, Blocker sold his interest in the property insured to Mrs. Duke. Under the clause of the policy under consideration there was a change in his title to the property and the contract was ended as to him. Mrs. Duke could not be brought into contractual relationship with the company without its consent and under the clause in question there was not only no consent but the insurance was avoided as to her. All this, however, had nothing to do with the contract in regard to the interest of Larey. His interest was not in any way affected by the sale of Blocker's interest to Mrs. Duke. In case of a loss by fire, neither he nor Mrs. Duke could share with Larey in the insurance collected by him. There would be no temptation to Mrs. Duke to destroy the property, not only because she could not share in any recovery had by Larey but she also lost her undivided one-half interest in the property insured.

The judgment will be affirmed.

MCCULLOUGH, C. J. (*dissenting*).—The ownership of the insured property was sepa-

rate, Blocker and appellee, Larey, being equal tenants in common, but the contract of insurance was joint and indivisible. The stipulation in the policy was that "if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance, or if the policy be assigned before a loss, unless otherwise provided by agreement indorsed hereon or added hereto, the entire policy shall be void." It is undisputed that Blocker sold his individual interest in the property to Mrs. Duke without obtaining the consent of the insurance company.

There is a sharp conflict in the authorities on the question of the divisibility of a policy of insurance which provides for the payment of a gross sum as premium but insures different items of property. This court has held that such a contract is indivisible and that a breach of a portion of the contract avoids the entire policy. *McQueeney* [100] v. *Phoenix Ins. Co.* 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L.R.A. 744; *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959.

In the opinion in the *McQueeney* case, the conflict in the authorities on the subject was distinctly recognized, and after a full discussion of the question and a review of the authorities, the court deliberately took the position that the contract was indivisible, and many cases were cited in support of that rule. In concluding the discussion the learned judge who wrote the opinion said: "We can see no good reason why a contract which, if made between individuals, would be entire, should be divisible if made between an individual and an insurance company."

The same rule was announced in the latter case of *Phoenix Ins. Co. v. Public Parks Amusement Co.* supra, where the policy was on different items of personal property but reciting an entire consideration, and Judge Battle, speaking for the court, said: "The contract of insurance was entire and indivisible. Being void as to a part of the property insured, it is void as to all. It was all exposed to one risk, and the consideration for the policy was a specified sum. The fact that separate amounts of insurance were apportioned to separate items or classes of property did not make the policy divisible. The contract and risk being indivisible, the contract is entire, and any breach which renders it void as to a part of the property affects it in the same manner as to the remainder."

The authorities on this question are still irreconcilably in conflict, but as our court has deliberately taken a position on the question it ought not to be changed except by the law-makers. If the policies in the two cases just referred to were entire, it would seem for a stronger reason, that the policy involved in

the present controversy is entire and indivisible. There was a single premium and the contract was to pay a gross sum to both of the beneficiaries jointly in the event of the destruction of the property. It makes really a stronger case of indivisibility of the contract than where the policy apportions a separate sum on each item of the property insured. There is not a single feature of this policy which separates it into parts, for it mentions the two beneficiaries jointly, provides [101] for a gross premium and for a gross sum to be paid in case of loss. There is nothing upon which the idea of divisibility can rest. The fact that the two beneficiaries owned separate interests does not, it seems to me, at all affect the entirety of the contract.

It will be observed also that the language of this contract, which is a standard form of policy, is unusually emphatic in providing that the entire contract should be void. Many of the authorities lay down the rule that that particular language renders every portion of the contract void even though it be treated as a divisible contract, and in those states where the contrary view is taken from that this court has decided upon the question of the divisibility of the contract, hold that where the stipulation is that the entire policy shall be void, it renders the contract indivisible so as to make it void in the case of a breach of the terms with respect to any part of the contract. 2 *Cooley's Briefs*, on the Law of Insurance, p. 1913; *Germania F. Ins. Co. v. Schild*, 69 Ohio St. 136, 68 N. E. 706, 100 Am. St. Rep. 663; *Home Ins. Co. v. Connelly*, 104 Tenn. 93, 56 S. W. 828; *Germier v. Springfield F. etc. Ins. Co.* 109 La. 341, 33 So. 361; *McWilliams v. Cascade F. etc. Ins. Co.* 7 Wash. 48, 34 Pac. 140; *Martin v. Insurance Co. of North America*, 57 N. J. L. 623, 31 Atl. 213.

It seems to me, however, that this case is entirely controlled by the two decisions of this court referred to, and that we are making a radical departure from the doctrine announced in those cases in holding that this contract was divisible and that one of the beneficiaries could recover for his separate interest.

Mr. Justice Wood concurs in the views here expressed.

NOTE.

The reported case holds that where insured property is owned by two persons as tenants in common, a transfer by one of them to a third person avoids the insurance as to him under a provision in the policy for avoidance by a change of ownership but does not avoid it as to his co-owner. The holding is apparently unique, the court applying the

principle applicable to transfers by co-owners inter sese and holding to be inapplicable the rule relating to the transfer to a third person of an undivided interest whereby a new party is introduced into the insurance contract and the risk assumed is materially altered. The cases relating to the effect of an alienation by or to a partner or joint owner as a change in title or interest within the meaning of a fire insurance policy are reviewed in the note to *Hamburg-Bremen F. Ins. Co. v. Ohio Valley Dry Goods Co.* Ann. Cas. 1916B 944.

THE KING

v.

ROBINSON.

England—Court of Appeal—March 15, 1915.

[1915] 2 K. B. 342.

False Pretences — Attempt — What Constitutes.

The acts of a person whose property is insured against loss by burglary in secreting the property and making complaint to the police that it had been stolen are merely preparation for the commission of the offense of obtaining money from the insurer by false pretences and do not constitute an attempt to commit the offense.

[See note at end of this case.]

[342] Appeal to the Court of Criminal Appeal.

The appellant, who was a jeweller at Oldham, was convicted at the Manchester Assizes of having attempted to obtain money from certain underwriters at Lloyd's by false pretences.

On November 5, 1914, he insured his stock of jewellery at Lloyd's against burglary for twelve months for 1200*l*. By the terms of the policy it was provided that "The assured, in case of loss or damage, shall, as a condition precedent to his right to be indemnified in respect thereof, give to the underwriters such information and evidence as to the property lost or damaged, and the circumstances of the loss or damage, as the underwriters may reasonably require and as may be in the assured's power."

On the morning of December 11 a policeman who was passing the appellant's shop heard some one inside shout out "I am bound and gagged. Open the door." The policeman whistled for assistance, some other policemen came up, and they burst open the door. In-

side they found the appellant with his legs and one hand tied with cords. He told them that on the previous night after locking the door of the shop he put his [343] jewellery in his safe and was going upstairs when he was knocked on the head and stunned. On his regaining consciousness he found himself in the condition in which they saw him. He looked into the safe and said: "They have cleared me out." The safe was open and empty. The police, who were not inclined to accept his statement, took him to the police station to give a more detailed account. They then went back to the shop and searched the premises, where they found the jewellery concealed in a recess at the back of the safe. They returned to the station and asked the appellant how he accounted for the jewellery being where they had found it. He replied "I am very sorry, but the times have been bad through the war. I am a long way behind last year's takings. Being inspired by the insurance I got from the last robbery at my shop I did it to get more money from them." He was then arrested and charged. At the trial Lawrence, J. directed the jury that if they thought the prisoner intended to obtain the 1200*l*. from the underwriters by falsely pretending that he had been the victim of a burglary, and that if he had not been arrested he would have gone on to make a claim against the underwriters, they might find him guilty of an attempt to obtain the money by false pretences. The jury convicted the prisoner, who appealed.

Gordon Hewart, K. C. and *McCleary* for appellant.

Bodkin and *Jordan* for prosecution.

Magson & Nicholson, Oldham, solicitors for appellant.

Director of Public Prosecutions, solicitor for prosecution.

[347] LORD READING, C.J.—This is an appeal against a conviction for an attempt to obtain money by false pretences from certain underwriters, the appeal being upon a question of law. There is little room for dispute about the facts. The prisoner was a jeweller carrying on business at Oldham. In November, 1914, he insured his stock of jewellery with underwriters at Lloyd's against burglary and theft, and a policy was issued to him covering those risks. On the morning of December 11 some policemen when passing the appellant's shop heard a shout inside from some one calling to them to open the door. They burst open the door and found the appellant bound with cords. He said that on the previous night he had put the jewellery in his safe, and was going upstairs when he was knocked down and lost consciousness. The safe was found by the police to be open and

empty. The police were not satisfied with his story and took him to the police station for the purpose of his making a more definite statement; they then went back to the shop and searched the premises with the result that they found the jewellery hidden underneath the safe. When they told him of the discovery he made a confession and said [348] "Being inspired by the insurance I got from the last robbery at my shop I did it to get more money from them;" and when asked where he was insured he said "Lloyd's." On those facts it was not disputed that the appellant had arranged a fraudulent scheme with the object of its being used to obtain money on the policy from the underwriters, and the only question was whether, the police having intervened and prevented its execution, the offence of attempting to obtain the money had been committed. If he had made a claim of the money from the underwriters, or had communicated to them the facts of the pretended burglary upon which a claim was to be subsequently based, he clearly could have been convicted of an attempt to obtain the money. It seems to the Court upon consideration of the authorities that there is no real difficulty in formulating the principle of law which is applicable to cases of this kind. A safe guide is to be found in the statement of the law which is laid down by Parke, B. in *Reg. v. Eagleton*, Dears. 515, at p. 538. "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." The difficulty lies in the application of that principle to the facts of the particular case. In some cases it is a difficult matter to determine whether an act is immediately or remotely connected with the offence of which it is alleged to be an attempt. In other cases the question is easier of solution, as for instance in *Reg. v. Button* [1900] 2 Q. B. 597. There upon the evidence there was a false pretence made directly to the race authorities with the intent to make them part with the prize, and one which, but for the fact of the fraud being discovered, would necessarily have had that effect. In the present case the real difficulty lies in the fact that there is no evidence of any act done by the appellant in the nature of a false pretence which ever reached the minds of the underwriters, though they were the persons who were to be induced to part with the money. The evidence falls short of any communication of such a pretence to the underwriters or to any agent of theirs. The police were [349] not acting on behalf of the underwriters. In truth what the appellant did was preparation for the commission

of a crime, not a step in the commission of it. It consisted in the preparation of evidence which might indirectly induce the underwriters to pay; for if the police had made a report that a burglary had taken place,—and that was presumably what the appellant intended,—it may very well be that the underwriters would have paid without further inquiry. But there must be some act beyond mere preparation if a person is to be charged with an attempt. Applying the rule laid down by Parke, B., we think that the appellant's act was only remotely connected with the commission of the full offence, and not immediately connected with it. If we were to hold otherwise we should be going further than any case has ever yet gone, and should be opening the door to convictions for acts which are not at present criminal offences. We think the conviction must be quashed, not on the technical ground that no information or evidence as to the property lost was given to the underwriters as required by the policy, but upon the broad ground that no communication of any kind of the false pretence was made to them.

Appeal allowed.

NOTE.

What Constitutes Attempt to Obtain Money by False Pretences.

Generally, 1230.

Illustrations:

In General, 1231.

Fraud on Municipality, 1232.

Fraud on Bank, 1235.

Fraud on Insurer, 1235.

Fraud on Pawnbroker, 1236.

Generally.

An attempt to commit a crime is an overt act which, but for the interference of some cause preventing the carrying out of the intent, would result in the commission of the crime. 8 R. C. L. tit. *Criminal Law*, p. 277. In order to constitute an attempt it is essential that the accused shall, with the intent to commit a crime, do some overt act which in the ordinary course of things would result in the commission thereof. The act must reach far enough toward the accomplishment of the desired result to amount to the commencement of its consummation. In other words, while it need not be the last proximate act to the consummation of the offense, it must be sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense. Mere preparation, i. e., the devising or arranging of the means or measures

necessary for the commission of the offense, is not enough. There must be a direct movement toward the commission of the crime after the preparation is made. 8 R. C. L. tit. *Criminal Law*, p. 278.

The application of the foregoing principles to the crime of attempting to obtain money by false pretenses necessarily depends on the particular facts of each case, and the cases so applying them are accordingly set out specifically in the following subdivision of this note.

Illustrations.

IN GENERAL.

In *People v. Spolasco*, 33 Misc. 22, 15 N. Y. Crim. 184, 67 N. Y. S. 1114, it appeared that the defendants, acting together, made certain representations to the complainant, and demanded the payment of a certain sum of money with which they alleged they had arranged to bribe a judge and the district attorney, and thereby secure the release of the complainant, who was a prisoner under indictment and awaiting trial. The indictment was demurred to on the ground that the facts as set forth did not constitute a crime. Overruling the demurrer the court said that an attempt was a separate and distinct crime and its essence was "an act done with intent to commit a crime."

In *Rex v. Laitwood* [1910] W. N. (Eng.) 122, the defendant was convicted of attempting to obtain money by false pretenses from two persons. He represented to them that he was interested in an advertising company and wished to engage a person to act as its representative who would receive very substantial remuneration. They would, however, have to invest a stated sum in shares of the company, and he suggested that they apply for the appointment. He produced to them a balance sheet purporting to show a considerable profit of the company for the preceding year. The court dismissed his appeal.

In *Reg. v. Button* [1900] 2 Q. B. (Eng.) 597, 69 L. J. Q. B. 901, it appeared that at an athletic contest at which prizes were given of the value of ten guineas for certain foot races the prisoner pretended to be a man by the name of Sims. On the basis of their past performances the runners were given handicaps. Sims was only a moderate runner and as a result the supposed Sims was given by the handicapper a substantial start. Sims in fact was ill at the time of the race and the prisoner who was a fine performer won the races easily. The suspicion of the handicapper was aroused and he asked the prisoner whether he was really Sims to which he answered that he was, that the performances were his own and that he had never won a race. In summing up the case to the jury the recorder told them that if the prisoner did it

for "a lark," without any criminal intent and without intending to get the prizes, they ought to find him not guilty; but that if he made the false representations wilfully, intentionally, and fraudulently, with intent to obtain the prizes, they ought to find him guilty of attempting to obtain them by false pretenses. The jury found a verdict of guilty. Holding that the conviction was good the court said: "If nothing more had been shown than that the defendant had entered for the races in a false name, the case would have been different. If he did not run or claim the prize it would be difficult to say that there was an actual attempt to obtain it. But here in effect he did claim the prize."

In *Reg. v. Rigby*, 7 Cox C. C. (Eng.) 507, it appeared that the prisoner was employed at a colliery. In order to ascertain the amount of wages to which each workman was entitled the "tally system" was used. Each workman was, on going to his work, supplied with a certain number of tallies, each marked with a number corresponding with that marked against his name in the employers' books. In each tub of coal mined by a workman he placed one of his tallies, and the tubs with the tallies in them were then sent by rail to the canal and the tubs emptied. The tallies were all put in one tub and sent back to the pit's mouth, where they were removed by the "tally-man" and hung on the "tally-board," over the number on that board corresponding with the number on the tally, and so showing the amount of work for which each man was entitled to be paid. These tallies were then counted by the bookkeeper and that number was booked to the credit of the workman. The evidence showed that the prisoner was seen to place three tallies in a tub, containing other tallies, which was just about to be sent back to the pit from the canal, by which means these three tallies would, in due course, have been placed on the tally-board in the usual manner. They were, however, never actually placed on the tally-board, as the witness who observed the act of the prisoner removed the tallies from the tub and gave immediate information to the employer. The court said: "These facts, . . . constitute the offense charged, the placing of the tally in the tub by the prisoner being an act done for the purpose of obtaining money which was not due to him, and with the intent that the person whose duty it was to do so should place the tally on the board whereby he would have obtained credit for work which he had not done." See to the same effect *Reg. v. Holloway*, 1 Den. C. C. (Eng.) 370, T. & M. 40, 3 N. Sess. Cas. 410, 2 C. & K. 942, 61 E. C. L. 942, 18 L. J. M. C. 60, 13 Jur. 86, 3 Cox. C. C. 241.

In *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411, it appeared that the defendant stated to the aunt of one Muscio in the

presence of another that Muscio had a valvular disease of the heart from which he might drop dead at any moment, but that he could cure him for the sum of \$200. The aunt then left the defendant's office under pretense of getting the money, but never returned. Muscio was thereafter examined by several physicians and they found that he had no valvular trouble of the heart. It was held that the defendant was guilty of the crime of attempting to obtain money by false pretenses although at the time the defendant could not have obtained any money from the aunt for the reason that she had none.

In *Reg. v. Hensler*, 11 Cox C. C. (Eng.) 570, 22 L. T. N. S. 691, 19 W. R. 108, it appeared that a prisoner wrote a begging letter to a prosecutor attempting to obtain money by false statements. Although the prosecutor knew the statements were false he sent the money. It was held that the defendant might be convicted of attempting to obtain money by false pretenses. The court said: "This is an attempt by the prisoner to obtain money by false pretenses which might have been so obtained. The money was not so obtained because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post the offense was committed." See to the same effect *Arthur Dennison Light*, 11 Crim. App. 111.

In *Graham v. People*, 181 Ill. 477, 55 N. E. 179, 47 L.R.A. 731, it was held that a person who persuaded another by false statements to withdraw his money from the bank and purchase a "gold brick" could not be prosecuted under the statute for attempting to obtain money by a confidence game, the money having been actually obtained, even though the sale was consummated in another county from which the prosecution was brought and where the statements inducing the fraud were made. The court said: "The jury may have believed that the plaintiff in error had the intention of obtaining Bowlin's money by means of the confidence game in Alexander county, where Cairo is located, and that he did an act towards obtaining money by means of the confidence game in Alexander county, but that his failure only was in Perry county. The proof shows that the crime was consummated in Alexander county. The crime, of which the plaintiff in error was guilty, if he was guilty at all, was the obtaining of Bowlin's money; and he obtained it in Alexander county, and not in Perry county. The state cannot split up one crime, and prosecute it in parts. . . . A consummated crime may involve an attempt—a successful attempt—to commit it, but such attempt is merely a part of the completed offense."

FRAUD ON MUNICIPALITY.

In *Reg. v. Eagleton, Dears.* (Eng.) 515, 3 C. L. R. 1145, 24 L. J. M. C. 158, 1 Jur. N. S. 940, 4 W. R. 17, 6 Cox C. C. 559, it appeared that a person had engaged with the guardians of a poor-law union to deliver loaves of bread of a certain weight to any poor person bringing a ticket from the relieving officer. The tickets were to be returned by him at each week end, with a statement of their number, for which he would be credited and paid at the time agreed on. He delivered to certain persons bringing tickets loaves of less than the weight contracted for and obtained credit therefor. It was held that he was guilty of an attempt to obtain money by false pretenses. The court said: "Acts remotely leading towards the commission of the offense are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account of producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt."

In *State v. Peebles*, 93 Minn. 311, 101 N. W. 306, the evidence showed that the defendant was the chairman of a board of town supervisors, and had been such for three years prior to the transaction in question. The board of commissioners of the county appropriated the sum of \$1,000 to be expended in the repair of certain highways in the county, and the amount was placed in the hands of the defendant to expend in that behalf. The defendant superintended the work under contract with the county, and incurred an indebtedness of \$1,080.75, which was \$80.75 in excess of the amount appropriated, and which he was authorized to expend. He then sought to have the board of commissioners pay that excess, which they declined to do, whereupon he induced the clerk of the town into and through which the improved highway extended, to draw two town orders, amounting in the aggregate to the sum of \$80.75, to enable him to pay fully the indebtedness he had thus incurred. The orders were issued to two different persons who had been employed in and about the work of repairing the roads, but the defendant took and presented the same to the town treasurer, who indorsed thereon, "Not paid for the want of

funds." He then negotiated them at a bank, receiving the money, and subsequently paid it to the payees named in the orders. The orders were afterwards paid by the town treasurer. No itemized statement of any account against the town for the amount of the alleged indebtedness was prior to this time presented to the board of supervisors for their action, and the board had in no manner authorized the town clerk or defendant to draw the orders on the town treasury. Affirming an order denying the defendant a new trial the court said: "It is urged by defendant that the evidence is insufficient to show that by his act he intended to defraud the town of Blaine, or that he presented a false or fraudulent claim for payment. We think the evidence sufficient to sustain the verdict of the jury on this subject. Defendant's intention in the premises must be determined from his acts. He knew that payment of the claim for which he caused the orders to be issued had never been authorized by the town board of supervisors, and he knew also that the town had not authorized him to incur the debt. That he intended to obtain the money from the town upon this claim, there is no doubt. That it was a false claim is equally clear, for it had never been allowed by the town board of supervisors, and was not incurred under a contract with the town. That his act in causing the orders to be issued, signed by himself as chairman of the board of supervisors, procuring the town clerk to attest the same in his official capacity, and presenting the same to the town treasurer for payment, constituted the presentation of a false and fraudulent claim for payment, within the meaning of the statute . . . is the only conclusion that the evidence will warrant. Whether the claim would have been allowed by the board of supervisors, had it been properly presented to that body, is wholly immaterial. It was not a proper charge against the town, for it had been incurred by defendant under a contract with the county. Defendant offered to prove on the trial that the board of supervisors, acting as an auditing body of the township of Blaine, at a regular meeting, audited and allowed this identical claim, and, on objection of the state, the testimony was excluded. We find no error in this ruling. The board of supervisors, acting as an auditing body, had no authority to audit or allow the claim. They may have approved the accounts of the treasurer and town clerk, including this item, but that fact would not relieve defendant from the consequences of his wrongful conduct."

In *State v. Adams*, 10 Idaho 591, 79 Pac. 398, it appeared that the defendant came before his brother-in-law, who was a justice of the peace, on the twelfth day of June, 1902, Ann. Cas. 1917B.—78.

with a box claimed to contain the ears of one hundred and fifty-eight coyotes, and the defendant's written claim against the county for the sum of \$237 as bounty was prepared by the justice of the peace, and subscribed and sworn to by the defendant. The justice then gave to him the bill or claim and the box of ears and told him to send them to the clerk of the court of Fremont county. The defendant then left, taking the box and bill, and some person presented a box to the postmaster at Market Lake and requested him to register the same as coming from J. W. Ayres, Market Lake, to A. M. Carter, St. Anthony, Carter being clerk of the court of Fremont county. The bill and a box of ears were received by Carter as clerk of the court and ex officio auditor at St. Anthony, on the thirteenth day of June, 1902. He received the bill in a letter which showed that it was from Adams and in his favor, for bounty on one hundred and fifty-eight coyotes. As a matter of fact, the ears were manufactured and spurious. It also appeared that a man by the name of Short and the defendant were operating together in the coyote business; that Short manufactured coyote ears; and that the defendant took from Short a cigar-box full of spurious ears. The evidence further showed that the defendant requested a man by the name of Price to turn into the county some ears for him, but Price refused to do it and told the defendant that they were spurious ears, and the defendant thereupon assured him that there was no danger, that he had turned in several batches of them and had come out all right and had not been caught, and that he would stand the expense if Price was caught. The defendant had a conversation with the deputy sheriff on the day that he was arrested for the crime, and said that inasmuch as he had received no money for the scalps he had sent up, he wanted to know if the matter could not be fixed up by his relinquishing any claim for the money from the county, and that if it could be fixed up that way he would relinquish any claim and have the matter dropped. He asked what the penalty would be if he pleaded guilty to the charge. Holding that after a careful examination of the evidence they were fully satisfied that it supported fully the verdict against the defendant of presenting a false and fraudulent claim against the county, the court said: "In the case before us, the end in view, to wit, the presenting of the claim, was attained. The means adopted involved several steps, all of which were established by direct proof, except that it was not proven who presented the box of ears to the postmaster in order to have it registered and sent to the clerk of the board and mailed the letter to the clerk of the court. However, the admissions of the defendant to the deputy sheriff as

above set forth shows beyond a reasonable doubt that he was instrumental in having said claim presented for allowance with intent to defraud the county. It is urged that the ears admitted in evidence were spurious; that the fraud was detected by the county commissioners, and that the bill was not allowed and was never paid, and for that reason the defendant is not guilty. It is not requisite under the provisions of section 6385 that the fraudulent bill be allowed or paid before a conviction can be had. It is there provided that every person 'who with intent to defraud, presents for allowance . . . any false or fraudulent claim, bill, account, voucher or writing, is guilty of a felony.' It is the presenting of a false or fraudulent claim with intent to defraud that constitutes the crime. The offense is consummated when that is done."

In *People v. Howard*, 135 Cal. 266, 67 Pac. 148, the defendant was convicted of the crime of attempting to obtain money under false pretenses. It appeared that in January, 1899, the board of supervisors of Tulare county passed an ordinance offering a bounty of three cents for any squirrel killed or destroyed within that county. The ordinance required the claims to be supported by affidavit of certain facts, and also provided how and when the claims should be paid. The affidavit was to be accompanied by the tails of the squirrels claimed to have been killed. It was conceded that the ordinance was invalid, by reason of some necessary formality in its passage being omitted. The information charged the defendant with having brought into Tulare county from without that county a large number of squirrel-tails, taken from squirrels elsewhere killed, and having falsely represented the animals to have been killed in Tulare county, and that the defendant attempted to effect his purpose by procuring one Clarkson, a resident of that county, to make the necessary affidavit, present the claims, collect the money, and divide with the defendant. It was alleged in the information, and appeared by the evidence, that from and after February 1, 1899, claims were allowed and paid by the board of supervisors under the supposition that the ordinance was valid, and so continued to be allowed and paid up to the time Clarkson presented the claim in question, and the fact that such claims were being allowed and paid was known to the defendant and to Clarkson. Clarkson's claim was allowed, and a warrant was ordered by the board and was drawn by the auditor, and Clarkson endeavored to obtain the warrant. The evidence tended to show that the defendant brought about twelve thousand squirrel-tails from Alameda county to Visalia, with the intention of getting the bounty offered by Tulare county; that the squirrels from which they were taken were not killed in Tulare

county; and that the defendant, the better to conceal the crime and his own connection with it, procured Clarkson, who had been engaged in killing squirrels in Tulare county, to make up and present a claim for part of the animals, and to find some person or persons to present claims for the balance. The point chiefly relied on by the defendant was, that the crime was not made out because the ordinance was invalid. Holding that the judgment and order should be affirmed the court said: "It is urged that the officers are charged with knowledge of the law; that on its face the claim showed it to be illegal and its payment not warranted by law, and therefore no pretense or representation could be made to the board which could be the basis of a claim; that the false pretenses intended by the statute are such as assert the existence of some fact calculated to impose upon a man of ordinary caution, and which create the credit given the accused; that it being the duty of the board to reject all illegal claims, no crime can be predicated of pretenses which could by no possibility create a credit; that as the claims showed on their face that they were not entitled to allowance, it must be assumed the officers would do their duty and reject them, and hence there could be no crime, because no one could be injured or deceived. Section 72, 532, and 664 of the Penal Code are brought into the discussion. Section 72 declares: 'Every person who, with intent to defraud, presents for allowance . . . to any . . . county, board, or officer, authorized to allow or pay the same if genuine, any false . . . claim . . . is guilty of a felony.' The ordinance being void, and the board, therefore not being authorized to allow the claim, this section does not apply. Section 532 declares: 'Every person who knowingly, . . . by false . . . representations or pretenses, defrauds any other person of money or property, . . . and by this imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable,' etc. Section 664 declares: 'Every person who attempts to commit a crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable,' etc. Defendant takes the position that neither of these last two sections reaches the case, for the reason that, whether or not he succeeded in collecting the claim, he could not be punished, because the board had no authority to allow it. He puts an illustration, thus: Suppose defendant had made a claim for killing cattle, and had presented their tails as evidence. Could it be said he was seeking to obtain money by false pretenses, when the board would at once perceive the absurdity of the claim and reject it? The illustration does not meet this case. The board had the power to offer and pay the bounty, by ordinance legal-

ly adopted, the purpose being to rid the county of a destructive pest. The ordinance was believed to be valid, and claims were then being paid under it. That the board failed to observe the formalities necessary to a valid exercise of the power, does not relieve defendant from the criminal intent in seeking to take advantage of the invalid ordinance. The same presumption of knowledge of the law which he seeks to place upon the board attaches also to him, and he must be presumed to have known that he was attempting to obtain money from the county to which the law gave him no right. But this was not the crime with which he was charged and of which he was found guilty. His crime was in falsely and fraudulently procuring Clarkson to represent that he had killed the squirrels in Tulare county, believing that the supervisors would allow his claim if he succeeded in deceiving them, knowing at the time that they would not do so if he told the truth as to where the squirrels were killed. Clarkson had collected claims under the ordinance for killing squirrels in Tulare county, and although the board exceeded its authority in allowing them, Clarkson was innocent of criminal intent since he made no false representations. When, however, he attempted, on his own and on defendant's behalf, to obtain money from the county by false and fraudulent pretenses, with intent to defraud the county, believing that his claim would be paid, he and defendant were both guilty under section 664, although they failed in their attempt, and they would have been guilty under section 532 if they had succeeded. In this latter case each of them would clearly come within the statute as a 'person who knowingly . . . by false . . . representations or pretenses, defrauds any other person of money or property, . . . and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property.' By attempting to violate section 532, defendant brought himself within section 664. The supervisors were deceived, as is evidenced by the fact that they allowed the claim and ordered a warrant drawn for it. That the ordinance was found to be illegal, in time to prevent the consummation of the crime intended, is immaterial, since there was, in fact, another crime committed. Defendant might be convicted of the lesser offense."

In *State v. Lawrence*, 178 Mo. 350, 77 S. W. 497, wherein it appeared that the directors of a school district had no power to issue a warrant for the purchase of books, it was held that to attempt to procure the warrant by false pretenses was not a crime.

FRAUD ON BANK.

In *State v. Riddell*, 33 Wash. 325, 74 Pac. 477, it appeared that the appellant attempted to obtain money from a bank by falsely pre-

tending ownership of a certificate of deposit, intending to defraud one Gower to whom the certificate had been issued and by him indorsed. The court affirming the judgment said: "It is urged, . . . that it is not averred that appellant was in possession of the certificate of deposit, and that the false pretenses are not charged to have been made while it was in his possession, or when he was attempting to cash it. We think the allegation that the false pretenses were made in an effort to procure the payment of the \$3,000 represented by the certificate sufficiently shows that they were made when he was attempting to cash it. The mere fact that it is not alleged in so many words that he was in actual possession of the certificate at the time, we think, is not material, since it is alleged that he falsely pretended that he was the owner and its bona fide purchaser for value, and that by means of such false pretense he sought to obtain the money. It being alleged that he claimed to be the bona fide purchaser and owner, the law implies that he at least controlled the certificate, which fact is inseparable from that of actual possession as far as it relates to the effort to procure the money represented by it."

In *State v. Woodward*, 156 Mo. 143, 56 S. W. 880, it appeared that the defendant Woodward with intent to defraud a banking corporation, representing that a signature attached to a promissory note was that of his stepmother, attempted to obtain from it a small amount of money. Overruling a demurrer of the defendant based on the ground that the indictment stated "no offense under the law", the court said: "The section of the statute under which the indictment is drawn (section 3826, R. S. 1899) reads as follows: 'Every person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any other person or persons any money, property or valuable thing whatever, by means or use of any trick or deception, or false and fraudulent representation or statement or pretense . . . shall be deemed guilty of a felony.' The constituent elements of a crime under this statute are the intent to cheat and defraud, the attempt to obtain from another person or persons money or property by means or use of some trick or deception, or false and fraudulent representations or statements, or pretenses, and the failure in the perpetration of the offense; and, while the indictment is inartificially drawn, and contains much verbiage, it contains all the essential and necessary averments."

FRAUD ON INSURER.

In *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728, it appeared that a woman procured a policy of insurance against loss by fire covering her household furniture, wearing apparel, jewelry, books, etc., to the amount of \$1,250,

said to be contained in a certain frame building occupied by her as a family residence. Seventeen days after the issuance of the policy, and during its life, the building was totally destroyed by fire. Promptly thereafter she personally gave written notice to the agent of the insurance company, and filed itemized proofs of loss, verified by her affidavit as required by the rules of the company, wherein she claimed that she had lost by the fire substantially all the property covered by the policy, to the value of about \$1,900; and thereupon she demanded of the company payment of \$1,250, the full amount covered by the policy. In response to the notification of the company, she also appeared before an insurance examiner and deposed that she owned the property set out in her proof of loss, that it was contained in the building covered by the policy, and destroyed by the fire. Having complied with all the requirements of the policy, and taken all formal steps necessary to entitle her to the full sum of \$1,250, if the loss and her claim of value were bona fide, and the company still refusing to settle or make payment, she filed her bill in the chancery court, three months and a half after the occurrence of the fire, to compel the insurance company to indemnify her according to its undertaking in the policy. Thereafter certain articles to the value of several hundred dollars which she had described and enumerated in her proofs of loss, etc., as destroyed by fire were found by persons investigating the case for the insurance company and evidence was also offered to show that she had had thirteen different fires in as many different cities within a period of three years, and under different names. The court affirmed a judgment of the court sentencing her to two years imprisonment in the penitentiary for attempting to obtain money under false pretenses.

In *State v. Fraker*, 148 Mo. 143, 49 S. W. 1017, an indictment for an attempt to defraud a life insurance company by simulating the drowning of the insured was held not to aver an overt act "which, but for the intervention of superior and exterior forces, would have resulted in the money being obtained."

In the reported case certain acts of the accused in furtherance of a design to make a false claim on a policy of burglary insurance are held to constitute mere preparation and not an attempt.

FRAUD ON PAWNBROKER.

In *Reg. v. Francis*, 12 Cox C. C. (Eng.) 612, it appeared that the prisoner went to the shop of a pawnbroker and asked for an advance of money on the pledge of a hoop ring which he represented to be a diamond

ring. The pawnbroker examined the ring, and declared it was not a diamond ring. He refused to advance anything on it. The prisoner left the shop and proceeded immediately to the shop of another pawnbroker and repeated his request for an advance on the same property. He was then taken into custody and the ring was found to be practically worthless. The jury found the prisoner guilty of attempting to obtain money by false pretenses and affirming the conviction the court said: "It seems clear upon principle that, when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he had been pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive; for a man may be many times under a similar mistake or may be many times the dupe of another. But it is less likely he should be so oftener than once, and every circumstance which shows that he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last."

In *Reg. v. Roebuck*, 7 Cox. C. C. (Eng.) 126, Dears. & B. 24, 25 L. J. M. C. 101, 2 Jur. N. S. 597, the evidence showed that the prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver, and the prisoner replied that it was. The pawnbroker then examined it and tested it with an acid. The chain resembled in appearance greasy silver, and withstood the test as if it were silver. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid the money, relying on his own examination and test of the chain, and without placing any reliance on the statement of the prisoner. Evidence was admitted to prove that the prisoner, a few days afterwards, offered a chain, similar in appearance, to another pawnbroker, requesting him to advance ten shillings upon it. Objection was made to the admission of this evidence. Twenty-six similar chains were found on the person of the prisoner when he was apprehended. An assayer proved that these chains were not silver, and that the chain pledged was not silver, but that they were all made of a composition worth about a farthing an ounce, and that each chain was of much less value than ten shillings. The jury were told, that, as the money had not been obtained by the prisoner's statement, the completion of the offense charged in the indictment was not proved; but that, if they were satisfied of the fraudulent intent of the prisoner, and that

his design was to obtain the money by means of his false statement, they might convict the prisoner of an attempt to commit the misdemeanor charged against him in the indictment. The jury accordingly found the prisoner not guilty of the misdemeanor charged in the indictment, but guilty of an attempt to commit the same. The conviction was confirmed.

In *Reg. v. Ball*, 1 C. & M. 249, 41 E. C. L. 140, it appeared that the prisoner went into a pawnbroker's shop and endeavored to obtain money on some thimbles which he claimed were silver. On testing them it was found that they were not as represented and the prisoner was taken into custody. The jury found the prisoner guilty of attempting to obtain money by false pretenses and the conviction was sustained.

COTTINGHAM

v.

MARYLAND MOTOR CAR INSURANCE COMPANY.

North Carolina Supreme Court—February 17, 1915.

168 N. Car. 259; 84 S. E. 274.

Fire Insurance — Avoidance by Incumbrance — Effect of Subsequent Satisfaction.

Under a policy of insurance on an automobile providing that it shall be void if the property should become incumbered by a chattel mortgage, or if any change other than by the death of insured should take place in the interest or title of the property, a chattel mortgage subsequently given merely suspends the insurance, and, where it is paid and canceled before a loss, the insurance revives.

[See note at end of this case.]

Insurance — Construction against Insurer — Standard Policy.

The terms of a policy of insurance are construed against the insurer and in favor of insured, even though a standard form of policy has been adopted under legislative enactment.

[See Ann. Cas. 1913E 287.]

Appeal from Superior Court, Mecklenburg county: SHAW, Judge.

Action by L. T. Cottingham, plaintiff, against Maryland Motor Car Insurance Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Stewart & McRae for appellant.

Cameron Morrison and *J. M. McLain* for appellee.

[259] CLARK, C. J.—On 11 June, 1913, the defendant insured the automobile of the plaintiff against loss by fire for the term of one year, and the plaintiff paid the premium of \$25 therefor.

On 19 September, 1913, the plaintiff executed a deed of trust on a number of horses, wagons, and other property, including the automobile. The deed of trust was paid off and canceled of record, on 22 September, only three days after its execution. On 28 September, four days thereafter, the automobile was destroyed by fire. The defendant filed an answer, but when the case was called for trial demurred to the complaint on the ground that the policy contained this provision: "This policy, unless otherwise provided by agreement indorsed hereon in writing by [260] an authorized agent of the company, shall be void if the interest of the assured be other than unconditional and sole ownership, or if the property hereby insured be or become encumbered by a chattel mortgage, or if any change, other than by death of the assured, take place in the interest or title of the property hereby insured, whether by legal process or judgment or by voluntary act of the assured or otherwise."

The court sustained the demurrer and the plaintiff appealed. The loss occurred as above stated, after the deed of trust was paid off and canceled.

2 Cooley Ins. 1780, citing many cases, says: "The general rule that a breach of the condition against encumbrance is ground for forfeiture must be modified where the encumbrance is merely temporary and is not in existence at the time of the loss. It may be regarded as settled by the weight of authority that the effect of the encumbrance is merely to suspend the risk, and on cancellation or discharge of the encumbrance the policy is revived."

Elliott on Insurance, sec. 205, collating the authorities, also says: "The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the policy, and the violation was such that the company could, had it known of it at the time, have declared a forfeiture therefor." To same purport, Phillips on Insurance, sec. 975, and 1 May Insurance (3 ed.), sec. 101; 2 A. and E. 288, and note.

A case almost exactly in point is *Strause v. Palatine Ins. Co.* 128 N. C. 64, 38 S. E. 256, where the defendant set up a defense that the mill was operated at night, contrary to the provisions of the policy, and this Court said: "The fire occurred more than three months thereafter and was in no wise traceable, so far as the evidence shows, to the work at night, which had long ceased."

Revisal, 4806, provides: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein; and all contracts of insurance, the application for which is taken within the State, shall be deemed to have been made within this State and shall be subject to the laws thereof."

Revisal, 4808, is as follows: "All statements or descriptions in any application for a policy of insurance or in the policy itself shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

[261] The purpose of Revisal, 4808, was to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts.

In construing these sections in *McCarty v. Imperial Ins. Co.* 126 N. C. 820, 36 S. E. 284, where at the time of issuance of policy there was a deed in trust to secure a debt of which the insurance company did not have notice and where the policy provided that it should be void if the interests of the insured be not truly stated, this Court quoted with approval from *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693, as follows: "This law applies to all policies of insurance, both of fire and life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premiums, they do not vitiate the policy. Ordinarily, these are questions of fact for the jury and not for the court."

In the present case the deed of trust given by the plaintiff embraced horses, wagons, and other property besides the automobile. This mortgage was paid off before the loss and was not material to the risk or fraudulent. The title of the plaintiff at the time of the loss was the same as at the time of the delivery of the policy. The deed in trust in no wise contributed to the loss or in any way affected the risk. *Weddington v. Piedmont F. Ins. Co.* 141 N. C. 244, 8 Ann. Cas. 497, 54 S. E. 271; *Watson v. North Carolina Home Ins. Co.* 159 N. C. 638, 75 S. E. 1105, and *Roper v. National F. Ins. Co.* 161 N. C. 151, 76 S. E. 869, differ from this case vitally. In them the breach of the condition existed at the time of the loss. The law laid down in those cases had reference to the facts therein and has no bearing on this case.

In *Born v. Home Ins. Co.* 110 Ia. 379, 81 N. W. 676, 80 Am. St. Rep. 300, it is held that giving a mortgage under the circumstances of the present case is a temporary breach of the policy, and when the breach was removed the policy was revived. In that case the mortgage given on the property was paid off and the fire occurred afterwards, the Court said: "The theory upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it increases the risk. . . . As the time of the loss the personal property in question was in the possession and ownership of the plaintiff, free from the encumbrance of the mortgage and covered by his valid policy of insurance. Therefore he is entitled to recover for the loss thereof," citing *Wilkins v. Tobacco Ins. Co.* 30 Ohio St. 317, 27 Am. Rep. 455.

On the rehearing of *Born v. Home Ins. Co.* 120 Ia. 299, 94 N. W. 849, the Court reaffirmed its former ruling. The *Born* case is reported 80 Am. St. Rep. 300, with full annotations, and the editor reaches this conclusion: "The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the violation, and that if such violation is discontinued during the life of the policy and is nonexistent at [262] the time of the loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor."

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, holds that a breach of condition suspends the policy during the existence of the breach, and the removal of the breach revives the policy. In that case the policy contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The house did become vacant, but was reoccupied before the loss occurred.

It is thus declared by *Cooley on Insurance*, *Elliott on Insurance*, and the notes to the 80 Am. St. Rep. p. 305, that the "weight of authority" is as above stated, and an examination of the authorities sustains that view, though *Vance on Insurance*, 433, says that the weight of authority is otherwise.

Among many cases, besides the above, sustaining the proposition that the removal of the breach revives the policy when it is removed previous to the loss and has in no wise contributed to it, are *Lounsbury v. Pre-*

tection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686; Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Joyce v. Maine Ins. Co. 45 Me. 168, 71 Am. Dec. 536; U. S. F. etc. Ins. Co. v. Kimberly, 34 Md. 234, 6 Am. Rep. 325; Garrison v. Farmers' Mut. F. Ins. Co. 56 N. J. L. 235, 28 Atl. 8; Mutual F. Ins. Co. v. Coateville Shoe Factory, 80 Pa. St. 407; Hinckley v. Germania F. Ins. Co. 140 Mass. 47, 1 N. E. 737, 54 Am. Rep. 445; McKibban v. Des Moines Ins. Co. 114 Ia. 41, 86 N. W. 38; Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L.R.A. 595.

The contrary view in Vance on Insurance, *supra*, is largely based upon Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 U. S. (L. ed.) 231. But that case has no application here. There the policy contained a provision that it should become void if without notice and permission "mechanics are employed in building, altering, or repairing the premises." It was found that such building and repairing increased the risk, and though the work was completed before the fire occurred and in no wise contributed to the fire, yet the alterations were very material and were in existence at the time of the fire. In that case there was a forbidden physical alteration made, which continued down to the fire. In the present case there was simply a mortgage, in no wise affecting the physical condition of the property, and which was canceled of record within three days and before the fire.

There are many other cases which support those which we have already cited that when such temporary encumbrance was removed before the fire it did not invalidate the risk, as there was no mortgage outstanding at the time of the fire. In Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, above cited, the Court, summing up the authorities, says: "The common people [263] who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy. . . . So much for the authorities in support of the position announced by this Court. We are also very clear that this position is more in consonance with justice and sound reasoning. . . . It would be a harsh and unjust rule to hold that a condition which in no wise contributes to the loss should work a forfeiture of insurance. The principle of the old legal maxim, '*Cessante ratione legis, cessat ipsa lex*,' would seem to be applicable. . . . No maxim of construction of contracts is better established or has been more generally approved than that of Lord Coke, 'He who considers merely the letter of an instrument goes but skin deep into the meaning,' and too minute a stress should not be laid on the strict and precise

signification of words, to the destruction of the intention of the parties and the spirit of the contract." To this quotation of the Court from Lord Coke the counsel for the plaintiff in this case adds this citation from St. Paul: "The letter killeth, but the spirit giveth life." II. Cor. ch. 3, v. 6.

In Thompson v. Hartford F. Ins. Co., 22 App. Div. 380, 49 N. Y. S. 184, where the policy provided that it should be entirely void if the property became mortgaged, and where the property was mortgaged, but the mortgage was paid off before the loss, the New York Court says: "The defendant contends that the policy was voided by the giving of the first mortgage. The court below found and we have held that the second mortgage extinguished the first. Even if the policy would have been void and inoperative during the life of the first mortgage, it revived on the death of that mortgage. This principle is well settled in the analogous case of a marine policy, which contains a limit of the waters within which the vessel is insured. If the vessel leaves the limited waters and is lost, the insurer is not liable, but the liability reattaches on the return of the vessel to limits. Hennessey v. Manhattan F. Ins. Co. 28 Hun 98. So here, although the policy was suspended during the existence of the first mortgage, it was revived when that mortgage ceased to exist, by the substitution of the second mortgage."

In Hinckley v. Germania F. Ins. Co. 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, where the defense was that the insured property was temporarily put to an illegal use, contrary to the terms of the policy, the court in construing the word "void," says: "But, irrespective of this consideration, it is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run. But the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being."

It will be noted that this is the standard form of policy established by statute, and Phillips on Insurance, sec. 975, says: "After the policy has begun to run so the premium has become due it assuredly is but equitable [264] that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it."

In Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. 76 S. C. 76, 11 Ann. Cas. 780, 56 S. E. 654, 121 Am. St. Rep. 941, 10 L.R.A. (N. S.) 737, where the defense was that the hazard was increased contrary to the terms of the policy which made it void, the Court

says: "The contract of insurance must, like other contracts, be enforced according to its terms. In construing such contracts, however, courts should endeavor to ascertain from the language used, in the light of the surrounding circumstances and the nature of the business, the safeguards which the parties intended to place around themselves. It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy, even on a temporary increase of hazard, if known to it at the time, because such change might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of the temporary increase of hazard which has come to an end without loss, and from which it could not possibly suffer detriment. Hence there may be ground for holding a temporary increase of hazard forbidden by the policy to avoid insurance without action or even knowledge on the part of the company, when the loss resulted from that cause. But there is no ground for such an inference when the increase of hazard came to an end without loss. The greater weight of authority supports this conclusion."

The last line in the above quotation reiterates what is said above by Cooley, Phillips, May, and Elliott in their works on insurance, and is a correct statement.

Silver v. London Assur. Corp. 61 Wash. 503, 112 Pac. 666, also sustains the proposition that the removal of the temporary breach of the condition revives the policy. Also *Ins. Co. of North America v. Pitts*, 88 Miss. 587, 9 Ann. Cas. 54, 41 So. 5, 117 Am. St. Rep. 756, 7 L.R.A. (N.S.) 627.

In Nebraska, where a policy contained a provision making it void if the property should be mortgaged, it was held that the payment of the mortgage revived the policy. *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L.R.A. 524; *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866.

McClure v. Mutual F. Ins. Co. 242 Pa. St. 59, 88 Atl. 921, 48 L.R.A. (N.S.) 1221, holds the same general principles as the authorities above cited. In that case the defense was that certain prohibited articles were kept upon the premises. The policy provided that it should be void if they were. The Court held that if they were removed before the fire and in no wise contributed to the loss, the policy was revived.

Independent of the overwhelming weight of authority, there can be no reason to release the insurance company from liability for a loss [265] which accrued after the forbidden mortgage was canceled, the mortgage having in no wise any connection with the loss.

The terms of a policy of insurance are construed against the insurer and in favor of the insured, and this is true although a standard form of policy has been adopted under legislative enactment. *Gazzam v. German Union F. Ins. Co.* 155 N. C. 330, Ann. Cas. 1912C 362, 71 S. E. 434.

The stipulation that the policy shall be void if the property "be or become encumbered by chattel mortgage" was inserted for the benefit of the insurer upon the idea that if the owner of the property was permitted to insure and then mortgage the property that it would be an inducement to him to destroy the property by fire, and if the stipulation is given effect so that this purpose and intent of the parties can be carried out, there is no reason for extending it further. In other words, it was the intent of the parties to prevent an increase of the risk to the insurer, and this can be simply protected by holding that the policy is only void if the mortgage is in force at the time of the loss. Instead of increasing the risk, this interpretation of the contract decreases it, because while the mortgage is in existence there is no liability on the part of the insurance company, and if a loss then ensues there can be no recovery, and when the mortgage is canceled the insurer assumes no responsibility that it was not liable for when the policy was first issued.

Nor is this construction against public policy as offering an inducement to the insured to destroy his property, because if destroyed while the mortgage is in force the total loss falls on him. See also 9 Ann. Cas. 54, 11 Ann. Cas. 780, and cases cited.

Our cases on the subject, which are collected in *Roper v. National F. Ins. Co.* 161 N. C. 151, 76 S. E. 869, were decided correctly, because in them the stipulation was violated at the time of loss and it was properly decided that the policy was void.

Nor is this construction in conflict with the cases of *Fishblate v. Fidelity, etc. Co.* 140 N. C. 589, 53 S. E. 354; *Bryant v. Metropolitan L. Ins. Co.* 147 N. C. 181, 60 S. E. 983; *Alexander v. Metropolitan L. Ins. Co.* 150 N. C. 536, 64 S. E. 432; *Gardner v. North State Mut. L. Ins. Co.* 163 N. C. 367, Ann. Cas. 1915B 652, 79 S. E. 806, 48 L.R.A. (N.S.) 714, and *Schas v. Equitable L. Ins. Co.* 166 N. C. 55, 81 S. E. 1014, where a representation, actually false and material, was held to vitiate the policy, although the misrepresented fact may not have contributed to the loss, for the insurance company is entitled to know the facts about which inquiry is made, in order to decide whether it will enter into the contract or not, and those things are material for it to know, which would naturally affect its judgment or decision as to making the contract, or which, by its inquiries, it has made material, the company being

the judge of what it should know in order to determine whether or not it will issue the policy. The demurrer should have been overruled.

Reversed.

NOTE.

Revival of Fire Insurance Policy after Satisfaction of Lien or Incumbrance Attaching to Property in Violation of Policy.

View that Policy Is Revived.

It may be stated as a general rule that though there may have been a change in the risk at some time during the life of a fire insurance policy by reason of an increased hazard which would be sufficient to avoid the policy, yet where the company has not declared the policy forfeited on that account, and the increase of hazard has ceased to exist and has in no way affected the loss ultimately occurring, the policy will be enforced as if there had been no such increase of risk. See the note to Sumter Tobacco Warehouse Co. v. Phoenix Assur Co. 11 Ann. Cas. 780. And following the rule of construction that of two parties to a fire insurance policy, the insured is always to be favored in determining whether there has been a compliance with the terms of the policy, it is held by perhaps a majority of the cases that the vacancy of insured premises during the term for which the policy is issued merely operates to suspend the policy, and a subsequent occupancy of the premises revives the policy and puts it in full force again. See the notes to Insurance Co. of North America v. Pitts, 9 Ann. Cas. 54, and Dolliver v. Granite State F. Ins. Co. Ann. Cas. 1916C 765.

On the same principle the rule obtaining in some jurisdictions is that the satisfaction of a lien or incumbrance attaching to the insured property in violation of the policy before a loss occurs has the effect of reviving the policy. Weigen v. Council Bluffs Ins. Co. 104 Ia. 410, 73 N. W. 862; Born v. Home Ins. Co. 110 Ia. 379, 81 N. W. 676, 80 Am. St. Rep. 300; McKibban v. Des Moines Ins. Co. 114 Ia. 41, 86 N. W. 38; State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L.R.A. 524; Omaha F. Ins. Co. v. Dierke, 43 Neb. 473, 61 N. W. 740; Johansen v. Home F. Ins. Co. 54 Neb. 548, 74 N. W. 866; Home F. Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047. See also Meech v. Citizens' Ins. Co. 147 Mich. 343, 110 N. W. 1078. And see the reported case. Thus in Weigen v. Council Bluffs Ins. Co. supra, it appeared that a mortgage of insured personal property was executed under an agree-

ment whereby the mortgagee was to furnish money to take up a prior mortgage given by the mortgagor or in the event of his failure to do so he was to cancel the second mortgage. The mortgagee was unable to raise the necessary means and the second mortgage was canceled in pursuance of the agreement. It was held that the transaction did not invalidate a policy containing a clause avoiding it in case an incumbrance was placed on the property.

In McKibban v. Des Moines Ins. Co. 114 Ia. 41, 86 N. W. 38, it was held that property was not encumbered in excess of the amount allowed under an insurance policy where it appeared that although mortgages on the property had at one time exceeded the amount permitted by the policy, enough had been paid on one of them at the time of the loss of the property to reduce the amount of the incumbrance below the amount permitted.

So in State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L.R.A. 524, it appeared that buildings and personal property were insured at one time, the policy limiting the amount of the loss recoverable for the destruction of each of the buildings and the various kinds of personal property. Some of the personal property was afterwards mortgaged in violation of the policy, but the mortgage was satisfied before any loss occurred. In holding that the policy was not avoided as to the personal property the court said: "An examination of the language . . . satisfies us that it was not the intention of the parties to the contract to require that the same personal property should remain upon the farm for the whole term of the policy, but that, as hereinbefore indicated, it was upon certain kinds of property upon the premises. . . . Had the property destroyed been sold, and the legal title transferred to the purchaser, defendant in error could recover nothing for his loss. Had it been mortgaged and the legal title so transferred, he could still recover nothing. But, under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be no doubt of plaintiff's liability in case of loss. Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned, during the time of the existence of the title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense."

In *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866, it was held that a verbal release of a chattel mortgage was a sufficient satisfaction of the mortgage to revive an insurance policy covering the mortgaged property.

In *Meech v. Citizens' Ins. Co.* 147 Mich. 343, 110 N. W. 1078, it appeared that at the time of the issuance of the policy sued on there was a mortgage on the insured property to secure a note given by the grantor. The policy contained a clause avoiding it if the property "be or become encumbered" by a mortgage. The insurer did not have knowledge of the existence of the mortgage. Subsequently the insured gave another note to the mortgagee and the first note was canceled and marked paid, but no agreement was made concerning the mortgage. The appellate court said in reversing a judgment of the trial court against the insurer: "We do not hold that the agreement for the acceptance of the second security may not have been in terms which would exclude the idea of a continuance of the security of the bill of sale. If such was the fact, however, it was not found or made the basis of the judgment. The case is not so clear as to justify entering final judgment for defendant in this court. The judgment is reversed, and a new trial ordered."

View that Policy Is Not Revived.

The rule obtains in some jurisdictions that where a lien or incumbrance has attached to property in violation of a fire insurance policy, the subsequent satisfaction or discharge of the lien does not revive the policy. *McKernan v. North River Ins. Co.* 206 Fed. 984; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Jones v. Michigan F. etc. Ins. Co.* 132 La. 847, 61 So. 846; *Gray v. Guardian Assur. Co.* 82 Hun 380, 31 N. Y. S. 237; *Insurance Co. of North America v. Wicker*, 93 Tex. 390, 55 S. W. 740, *affirming* 54 S. W. 300. *Compare* *Tompkins v. Hartford F. Ins. Co.* 22 App. Div. 380, 49 N. Y. S. 184. Thus in *German-American Ins. Co. v. Humphrey*, *supra*, it appeared that personal property was insured against fire by a policy which provided that if the property "be or become encumbered by a chattel mortgage" the policy should be void. The property was mortgaged after the issuance of the policy but the mortgage was discharged before the property was destroyed by fire. The court said in answering a contention that the policy was only suspended during the continuance of the mortgage, and was revived by the discharge of the mortgage before the loss occurred: "The proposition that the incumbrance, while it existed, only suspended the policy, con-

travenes the unambiguous terms of the contract, which the parties themselves have made. The language of the clause quoted *supra*, in its plain, ordinary, and popular sense, indicates a total extinction of the policy if the property be encumbered, and not a suspended animation thereof, subject to be revived upon payment of the mortgage debt. . . . The insurer has the right to contract against any possible risk of loss or embarrassment incident to encumbering the property insured. If it be said that, where the mortgage is paid off, there is no longer an incumbrance and increase of risk, still as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately, all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration. The clause is reasonable and clear, and the parties had the right to thus contract."

In *Jones v. Michigan F. etc. Ins. Co.* 132 La. 847, 61 So. 846, it appeared that property was insured by a policy containing a proviso that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the . . . hazard be increased by any means within the control or knowledge of the insured; . . . or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice of sale of any property covered by this policy by virtue of any mortgage or trust deed." The evidence showed that the property insured was seized under foreclosure proceedings, with the knowledge of the insured; but that the proceedings were discontinued by the seizing creditor on payment to him of the debt due by the insured, and that subsequent to the release of the seizure the fire occurred which destroyed the property described in the policy. It was held that the violation of the policy terminated the contract of the insurer and that it could not thereafter be made liable on the contract without having waived the condition merely because the seizure may not have increased the risk.

But in *Tompkins v. Hartford F. Ins. Co.* 22 App. Div. 380, 49 N. Y. S. 184, it appeared that insurance was taken out on some live stock, the policy fixing a valuation on each class of animals. The insured executed a chattel mortgage on some of the animals in violation of the policy but another mortgage

on other of the insured animals was afterwards given in place of the first mortgage. It was held that the second mortgage extinguished the first mortgage and revived the policy as to the animals covered by the first mortgage.

In *Secrest v. Hartford F. Ins. Co.* 68 S. C. 378, 47 S. E. 680, it appeared that personal property was mortgaged in violation of a fire insurance policy covering the property. In a suit instituted on the same day as the destruction of the property by fire, but prior thereto, to set aside the mortgage as a fraudulent and voluntary conveyance, the mortgage was declared null and void. In holding that no action would lie on the policy the court said: "We conclude that at the time of the fire, the stock of goods of Hilton & Co. was covered by a mortgage valid between the mortgagor and mortgagee, and that the policy, by its terms, was annulled by this incumbrance."

PATTERSON'S ESTATE.

Pennsylvania Supreme Court—January 2, 1915.

247 Pa. St. 529; 93 Atl. 608.

Wills — Taking by Representation — Gift of Remainder to "Children."

A will provided: "I give and devise . . . to my son [naming him] for . . . life, and at his death I devise the same to his child or children . . . and in default of such, then to my other children [naming three] in equal parts in fee." All of testator's children survived him. The life tenant died without children, being predeceased by his sister, one of the three children named. It is held that the two children of testator surviving the life tenant were each entitled to one-third of the fund, and that the remaining one-third should be divided among the children of their deceased sister.

[See note at end of this case.]

Appeal from Orphans' Court, Allegheny county: TRIMBLE, Judge.

Matter of estate of Joseph Patterson, deceased. From decree of distribution, Robert W. Patterson et al., appeal. **AFFIRMED.**

OPINION OF COURT BELOW.

[530] TRIMBLE, J.—Joseph Patterson died March 25th, 1868, testate, and by his will made the following devise, inter alia:—

"Seventh. I give and devise . . . to my son, Joseph N. Patterson, for and during

his natural life, and at his death, I devise the same to his child or children in equal parts in fee, and in default of such, then to my other children, Elizabeth H. Hazeltine, Thomas H. Patterson and Robert W. Patterson, in equal parts in fee."

By three other devises, similar in expression, he gave to his daughter, Elizabeth H. Hazeltine, and to his other two sons, Thomas H. Patterson and Robert W. Patterson, other portions of his estate.

The testator left to survive him the following:

First. (a) Hetty H. Patterson, his wife, who died April 9th, 1909;

(b) Elizabeth H. Hazeltine, daughter, who was born September . . . 1840, and died March 29th, 1891;

(c) Joseph N. Patterson, a son, who was born December 24th, 1843, and died April 5th, 1913, without issue;

(d) Thomas H. Patterson, a son, who was born March 1st, 1849, and is still living;

[531] (e) Robert W. Patterson, a son, who was born December 28th, 1850, and is still living.

Second. Elizabeth H. Hazeltine had three children and died intestate, leaving two children and her husband surviving as follows:

(a) Her husband, Charles F. Hazeltine, who is still living;

(b) Esther H. Hazeltine, born April — 1864, and who married Charles S. Carstairs, from whom she was subsequently divorced, and thereafter married Felix F. Tuckerman, and who died January 15th, 1907, leaving to survive her husband, Felix L. Tuckerman, who is still living, and the following children, viz.: Charles Hazeltine Carstairs, Carroll C. Carstairs, James Stewart Carstairs and Elizabeth Holmes Carstairs, who are living and of full age.

(c) Miss L. S. Hazeltine, born December 29th, 1867, and died February —, 1882;

(d) Caroline M. Hazeltine, born September —, 1873 (now Caroline H. Valentine), who intermarried with Abram S. Valentine, and is still living.

A petition was presented to this court under the Price Act for the sale of a portion of the land devised by the seventh paragraph of the testator's will to Joseph N. Patterson, for his life, and after all the interested parties were brought upon the record, the trustee, who was appointed to make the sale, consummated it. Joseph N. Patterson the devisee of the life estate having died on the 5th of April, 1913, the trustee filed its account, and one-half of the balance of said account is now before the court for its determination of the ownership thereof.

The question involved is whether a fee vested in Elizabeth H. Hazeltine, Thomas H. Patterson and Robert W. Patterson at the death of the testator under said paragraph

their heirs was held to indicate an intention to substitute the heirs in place of their ancestors in case the latter died before the estate vested.

If an intent to make a gift of a remainder to a class is clearly indicated, as by the use of words of survivorship, the estate will go to those surviving at the time fixed for the distribution or vesting in possession of the property. In *Burlet v. Burlet*, 246 Ill. 563, 92 N. E. 965, the court construed a devise of a remainder to "my beloved children, share and share, or the survivor or survivors of them and their heirs." Holding that only those children who were living at the death of the life tenant took under the will the court said: "The decisions in regard to determining when, in cases such as this, the survivorship is referred to the time of the death of the testator and when to the death of the person to whom has been given an intervening interest are not in entire harmony. The rule now prevailing, and which we follow, is, that where a gift to survivors is preceded by a life or other prior interest it takes effect in favor of those who survive the period of distribution, and those only, unless a special contrary intent is found in the will. This is the rule now generally accepted." So in *Brewick v. Anderson*, 267 Ill. 169, 107 N. E. 878, it was said: "Where there is a devise to a class, as to the children of the testator, and the gift is postponed, pending the termination of a particular estate which intervenes between the death of the testator and the period of distribution of the estate devised to the class, those members of the class, and those only, take who are in existence at the arrival of the time for distribution, as at the death of a life tenant, unless there is particular language in the will showing a different intention."

The issue of a member of a class who predeceases the testator will not ordinarily take his share in a gift of a remainder. In *re Cochrane* (Del.) 85 Atl. 1070, wherein it was said: "Where a testator refers to a class he cannot be held to have intended to include in it dead persons. *Gowling v. Thompson*, L. R. 11 Eq. (Eng.) 366, note; *Grover v. Musther*, L. R. 43 Ch. D. (Eng.) 569 (1889). Gifts by substitution are permitted to children of legatees who were dead at the date of the will, but distinctly on the ground that such legatees took by name and not as a class. It is otherwise if the original gift is to a class which is not determinable until the death of the testator, such as a gift to such of his children as shall survive the testator."

In *Kentucky* it is provided by statute as follows: "When a devise is made to several as a class or as tenants in common, or as joint tenants, and one or more of the devisees

shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser." In *Barnhill v. Sharon*, 135 Ky. 70, 121 S. W. 983, that statute was applied, the court holding that under a gift of a remainder to "brothers and sister" the issue of a sister who predeceased the testator took the share of their mother.

DINNEEN

v.

AMERICAN INSURANCE COMPANY.

DINNEEN

v.

DELAWARE INSURANCE COMPANY.

Nebraska Supreme Court—April 3, 1915.

98 Neb. 97; 152 N. W. 307.

Fire Insurance — Local Regulations as Part of Policy.

When writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy.

[See note at end of this case.]

Total Loss — What Constitutes — Building Incapable of Repair.

When an insured building is injured by fire to such an extent as to destroy its use as a building and require it to be demolished or removed, the insured will be entitled to recover as for a total loss. Such construction of the valued policy law does not deprive the insurance company of its property without due process of law.

Valued Policy — Provision for Payment of Less than Face of Policy — Validity.

In such case any condition in the policy providing for the payment of a less sum than the amount of the insurance as written therein is void under the provisions of the valued policy law. Rev. St. 1913, § 3210.

New Trial — Time for Filing Motion.

On the trial the jury made special findings of fact without rendering a general verdict. The court discharged the jury, with consent of the parties, and took the case under advisement. The plaintiff excepted to the special findings, and immediately filed a motion to set them aside and for a new trial. After considering the matters of law for some days, the court rendered a judgment in substance

as requested by the defendant. Plaintiff within three days filed a motion for a new trial. Held, that such motion was in time, and was a sufficient compliance with the rule. (Syllabus by court.)

Appeal from District Court, Douglas county: DAY, Judge.

Actions by John J. Dinneen, administrator, plaintiff, against American Insurance Company and Delaware Insurance Company, defendants. Judgments for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

James B. Kelkenney and John E. Quinn for appellant.

Baldrige, Keller & Keller for appellees.

[98] BARNES, J.—John Kennelly brought two suits in the district court for Douglas county on separate fire insurance policies, but died before the cases were tried. The actions were revived in the name of John J. Dinneen, administrator, and were subsequently consolidated.

It appears that each of the two defendants insured Kennelly against loss by fire to the extent of \$1,500 on a three-story frame building situated within the fire limits of the city of Omaha. The insured property was damaged by fire on March 19, 1908. The city of Omaha, pursuant to an ordinance, prevented the repair of the building, and the owner was required to demolish it. Out of what remained after the fire, insured realized \$210. Allowing credit for that sum, he demanded from each of the defendants \$1,395. Before the loss occurred the value of the building was \$5,000. The fire damaged the insured property to the extent [99] of \$1,200. Each of the policies contained the following provisions: "This company shall not be liable for loss caused . . . by order of any civil authority." "This company shall not be liable . . . for loss . . . beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings." In giving effect to these provisions of the policy, the district court rendered judgment against each of the defendants for \$640.81, and from those judgments the plaintiff has appealed, claiming that, within the meaning of the contract of insurance and the valued policy act, the property was wholly destroyed, and that he was entitled to recover as for a total loss. Rev. St. 1913, sec. 3210.

Plaintiff contends that, where the property insured is realty, and is wholly destroyed without criminal fault on the part of the owner, the amount of the insurance written in the policy should be taken conclusively to be the true value of the property insured and

the true amount and measure of damages. He argues that the statute eliminates from the insurance contract in controversy the conditions of the policies relating to loss occasioned by city ordinances regulating the construction or repair of buildings. It is also argued that existing laws and ordinances are parts of the insurance policies; that the building was damaged by fire beyond repair; and that as a result the insured property was totally destroyed. There is a stipulation in the record which recites, among other things, the following:

"That on the 19th day of March, 1908, while said contracts of insurance were in full force and effect, said building was burned and damaged by fire to such an extent as to require that it should be repaired before being fit for habitation; that said building was located within the fire limits of the city of Omaha; that Charles H. Withnell, building inspector of the city of Omaha, refused to grant plaintiff's application for a permit to repair said building, because, by reason of said fire, he claimed said building had depreciated in value to an extent greater than 50 per cent of its original value, said building being a frame [100] structure and within the fire limits of the city of Omaha; that the said building inspector recommended to the city council of the city of Omaha that said building be torn down, and on the 17th day of July, 1908, upon a hearing on said recommendation, said building was condemned and ordered torn down by said city council because, in its opinion, said building was in bad condition and depreciated in value to an extent greater than 50 per cent of value of similar buildings above foundation by reason of said fire; that plaintiff obeyed the order of the council, and notified defendants of this fact; that plaintiff notified defendants of the refusal of the building inspector to grant a permit to repair said building, and of the condemnation proceedings of the city council."

It was further stipulated, in substance, that the city ordinances pertaining to buildings within fire limits, as published in Thomas' Revised Ordinances 1905, were in effect at the time of the issuance of the policies herein, at the time of the said fire, at the time of the building inspector's refusal to grant said permit to repair and the condemnation proceedings of the city council. It is a well-established rule that a policy insuring against loss or damages by fire covers loss occasioned by a law prohibiting the repair of a building partially destroyed by fire. *Hewins v. London Assur. Corp.* 184 Mass. 177, 68 N. E. 62; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286; *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 18 So. 472, 56 L.R.A. 784;

Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; Palatine Ins. Co. v. Nunn, 99 Miss. 493, 55 So. 44.

In *Larkin v. Glens Falls Ins. Co.* supra, it was said: "The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. 4 Joyce Insurance, sec. 3170."

In *Hamburg-Bremen F. Ins. Co. v. Garlington*, supra, it was held: "That the parties having contracted in view [101] of the ordinance, the fire must be deemed the proximate cause of the loss, and the loss total."

In *Palatine Ins. Co. v. Nunn*, 55 So. 44, 99 Miss. 493, it was said: "A building insured against fire is a 'total loss' where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction."

In the note to *Monteleone v. Royal Ins. Co.* supra, as reported in 56 L.R.A. 784, 793, it is said: "Whenever, by reason of the existence of local ordinances or regulations, it is rendered impossible to repair a partially destroyed building, the insured is liable as for a total loss."

Such is the rule in this state. *German Ins. Co. v. Eddy*, 36 Neb. 461, 54 N. W. 856, 19 L.R.A. 707; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911. In the two cases last cited it was said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced."

The principal question in dispute in this case is whether an insurance company may embody provisions in the policy which provide that it shall not be liable for loss occurring by reason of any ordinance regulating the construction or repair of buildings. This precise point was considered and determined in *New Orleans Real Estate Mortg. etc. Co. v. Teutonia Ins. Co.* 128 La. 45, 54 So. 466, and in *Palatine Ins. Co. v. Nunn*, supra, and it was held that such provisions were invalid under a valued policy law. Considering the effect of our former decisions as to what constitutes a total loss, and also giving the valued policy law the weight and effect it seems to us that the legislature intended it to have, we must hold that the conditions of the policy limiting the amount of loss are invalid, and that the building was a total loss to the insured. The *Massachusetts* case (*Hewins*

v. London Assur. Corp. supra), relied upon is not based upon a valued policy law, and is not applicable.

[102] It appears that a jury was impaneled to try the case, and at the conclusion of the testimony the plaintiff requested the court to direct a verdict in his favor for the amounts prayed for in his petitions. The court refused the request, and thereupon the jury were required to answer the following interrogatories: (1) To what extent was the property in dispute injured or damaged by reason of the fire itself on March 19, 1908? The jury answered: \$1,200. (2) What was the value of the building insured immediately prior to the fire of March 19, 1908? The jury answered: \$5,000. Thereupon they were discharged without having rendered a general verdict. The parties then agreed that the legal questions should be reserved for the decision of the court. The plaintiff at once filed a motion to set aside the findings of the jury and for a new trial, and the court took the case under advisement. On May 27, 1912, the court rendered the judgments of which the plaintiff complains. On the 29th day of May a motion for a new trial was filed and overruled, and the plaintiff thereupon perfected his appeal. As we view the record, the court erred in refusing plaintiff's request for a directed verdict as prayed for in his petitions, and defendants' contention that plaintiff failed to file his motion for a new trial within the time provided by statute cannot be sustained.

Finally, it is contended by the defendants that they were not brought before the building inspector or the city council at the time the orders were made refusing the plaintiff the right to repair the building and requiring the same to be demolished. Therefore to require them to pay the amount of the insurance named in the policies is, in effect, taking their property without due process of law. The stipulation shows that defendants had knowledge of the proceedings, but it is true that no summons or other written notice was ever served upon them requiring them to appear and defend against said finding and order. The ordinance contains no provisions for the service of such a notice. At most, the findings and order were mere ministerial or administrative acts, and were within the reasonable [103] discretion of the city authorities. If the injury to the building by the fire was so slight, and the repairs necessary so trifling that the action of the authorities in condemning the property was beyond all reason, they might have been restrained by a court of equity. Therefore this contention is not well founded.

It follows from what has been said that the conditions contained in the policies limiting the recovery to an amount less than is pro-

vided by the valued policy law are void. The trial court should have rendered judgment for the amounts claimed in plaintiff's petitions.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

Reversed.

LETTON, J., (*concurring*).—We have held in this state repeatedly that it is not essential that a structure be totally destroyed in order to make the company liable for a total loss; it is enough that it be destroyed as a building. Other courts, upon good reason, have held that, when it was destroyed as a building by reason of the restrictions of building ordinances, it was a total loss. Our valued policy act provides: "The amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." Rev. St. 1913, sec. 3210. The insurance company had knowledge of this act when it made the contract, and might have adjusted, and perhaps did adjust, its premium rate to meet the liability. It seems to me that the provision written in the policy to the effect that the amount of insurance shall not be taken to be the true amount of loss violates this statute.

FAWCETT, J., (*dissenting*).—I have no quarrel with the rule announced in the first paragraph of the syllabus of the majority opinion, that, "when writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances [104] should be considered as a part of the policy," but I think the rule should work both ways, and hold that the owner of a building situated within such fire limits should also be bound by the ordinances of the city, and that such ordinances should be considered as a part of the policy he accepts from the insurance company. He knows, as well as the company, that, when a frame building situate within the fire limits is damaged 50 per cent of its value, it cannot be repaired, but will be ordered torn down and removed. But the insurance company and the assured, therefore, in entering into a contract of insurance, have the ordinance before them, and the simple question in this case is: May they enter into a contract, binding upon both, that the assured will assume the risk of having his building torn down after it has suffered a partial loss by fire, and that the insurance company will assume the risk of loss actually caused by the fire, but will not assume the risk of loss or damage to the building over and above that

Ann. Cas. 1917B.—79.

caused thereby, which may be occasioned by the action of the city authorities in ordering the building destroyed? Each of the contracting parties understands fully the part which fire may play in the destruction of such a building, and the part which the ordinance of the city may play in causing such destruction. The company assumes the risk of the former, and the assured of the latter. Is such a contract prohibited by the valued policy act? I think not. In such cases I think the rule is, and should be, that insurance against damage by fire protects the insured against loss resulting from the enforcement of an ordinance prohibiting the repair of his building after its partial destruction by fire, in the absence, and *only* in the absence, of an agreement to the contrary. *Hewins v. London Assur. Corp.* 184 Mass. 177, 182, 68 N. E. 62. The provision in controversy relates to the causes of loss and the character, as well as the extent, of the insurer's risk or liability. On these matters parties may make their own agreements, unless they are hampered by valid legislation. A statute restricting the right of contract, as the valued policy law, should not be extended by implication or construction [105] beyond its import and purposes as disclosed by the language of the lawmakers. The purpose of the valued policy act is to prevent insurance at an overvaluation, and to deter insurers from taking reckless risks, by prohibiting them, after a total loss, from claiming that, at the time of issuing the policy, the value of the insured property was not equal to the amount of the insurance. Here the value of the property when the policy was issued and when the fire started is not questioned. The question here is the character of the risk assumed by the company. The statute by its own terms applies to insurance on property wholly destroyed. Where there is only a partial loss by fire, and the damaged building is for that reason demolished under police ordinances, enacted to protect the public against future fires, the character of the risk to be assumed by an insurance company is a lawful subject of contract. If a property owner desires insurance, limited to fire alone, intending to carry his own risk in so far as a city may prevent him from repairing a building partially destroyed by fire, how can he procure such indemnity if he cannot make a lawful contract including those terms? They are not inconsistent with the valued policy act, and there is nothing in the policy indicating a purpose to violate the law or to mislead or defraud the insured. It is a plain, straightforward, honest contract, voluntarily entered into between the parties, and the district court was right in enforcing it as the parties had made it.

Rose, J., joins in dissent.

NOTE.**Effect of Local Ordinance or Regulation on Liability under Fire Insurance Policy.**

The parties to a fire insurance contract must make their contract with reference to the local laws affecting the property insured. *Brady v. Northwestern Ins. Co.* 11 Mich. 426; *Philadelphia F. Assoc. v. Rosenthal*, 108 Pa. St. 474, 1 Atl. 303. Speaking of city ordinances regulating buildings in fire districts, the court in *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286, said: "They are in the interests of the public welfare and within the police power, and we adopt the view that they become an integral part of all contracts of insurance upon property within the fire limits to which they apply."

Hence, an ordinance forbidding the use of wood in building within a certain district imposes on the insurer, electing to rebuild, the liability for the cost of the necessary material. *Philadelphia F. Assoc. v. Rosenthal*, 108 Pa. St. 474, 1 Atl. 303, wherein the court said: "The defendants' election imposed no particular obligation to build with wood, if for any reason wood could not be employed; the contract therefore involved no impossibility, it did involve a greater expense, perhaps, than was anticipated, but the plaintiff was in no way responsible for that; and the existence of a police regulation, prohibiting the use of wood, of which they may have had no knowledge, cannot any more relieve them from the obligation of their contract than would the rise of prices of materials in the market. They agreed to put the premises in repair, and they were bound to comply with their contract, using such materials as were suitable for the purpose and were allowed by law. The contract of insurance, and the election under it, were both made after the adoption of the city ordinance. The parties of course contracted with reference to the law, as it existed at the time, and consented to be bound by it; whether the city authorities would permit the building to be repaired in wood was, therefore, a risk which the insurers assumed, at the issuing of the policy, and which they reassumed at the making of the election."

And, as is held in the reported case, an ordinance which prohibits the reconstruction of a partially destroyed building throws on the insurer the liability for the total loss. *Brady v. Northwestern Ins. Co.* 11 Mich. 426; *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286; *Palatine Ins. Co. v. Nunn*, 99 Miss. 493, 55 So. 44; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613.

See also *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 18 So. 472, 56 L.R.A. 784. In *Brady v. Northwestern Ins. Co.* supra, the court said: "This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property, and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge, and to have estimated in renewing the policy. Whether, therefore, in case of damage or partial loss, the common council would permit a repair of the building, was a risk which the company took upon itself, because the loss and injury to the plaintiff might depend in amount upon such action of the council, while such loss and injury would be absolutely and actually the consequence of the fire; and because, by the terms of the policy, the company reserved the right to repair or not at option, thus taking the risk of the power to repair, and of all loss which should accrue if repairing should be impossible from any cause. To hold that for an injury to the property, which results, without the fault of the insured, in a total loss to him, so far as value and use are concerned, the insured can only receive compensation to the extent of the appraised damage to the materials of which the building was constructed, and which were destroyed, would establish a narrow, illiberal and illogical rule. The value of the building consisted in its adaptation to use, as well as in the materials of which it consisted; and if it could not be restored to use after the fire, the loss was total, less the value of the materials rescued. In the very pertinent language of the plaintiff's counsel, 'The contract was not simply an agreement to pay for so much material as might be damaged by fire—to pay such amount as the material might actually be worth. Fixed by the conditions of the policy as the most hazardous of all structures, and with a premium adjusted accordingly, the insurer took the risk upon a "three-story wood warehouse," actually in use as such. The risk was not taken upon a mere collection of beams, boards, and other materials, thrown together without purpose or special adaptation. It was upon a building for trade, situated within a particular locality, within the jurisdiction of municipal authorities vested with legislative powers for special purposes, and subject to the exercise of those powers;' and the parties must be regarded as contracting with a full knowledge of all the facts and the law, and the risk to which the property was thereby subjected."

Under a valued policy law, it has been held that a clause in the contract of insurance exempting the insurer from liability for loss occasioned by an ordinance or law regulating the repair of the building is invalid. *New*

Orleans Real Estate, Mortg. etc. Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466; Palatine Ins. Co. v. Nunn, 99 Miss. 493, 5 So. 44. And see the reported case. But without reference to a valued policy law, a clause releasing the insurer from liability from loss "occasioned by ordinance or law regulating construction," etc., was given effect in *Hewins v. London Assur. Corp.* 184 Mass. 177, 68 N. E. 62, wherein it appeared that the loss of the insured was enlarged on account of the building laws of Boston (Stat. 1892, c. 419; Stat. 1894, c. 443).

In *Pennsylvania Co. for Ins. on Lives, etc. v. Philadelphia Contributionship*, 201 Pa. St. 497, 51 Atl. 351, 57 L.R.A. 510, the question involved was the effect of a statute passed after the issuance of the policy. The court, extending its remarks to include municipal regulation, said: "A contract of insurance may need to be interpreted with regard to changed conditions for the purpose of arriving at a proper standard for estimating the extent of the liability of an insuring company at the time of loss. It is our judgment that the case in hand must fall under such a general classification. It has long been well recognized that building regulations and restrictions were matters properly within the scope of legislative and municipal authorities. This must have been known to the contracting parties at the time when the policy involved in this suit was issued. The defendant company did not, by the terms of the policy, become liable only for the loss which might accrue to the owner of the policy in case of fire to the extent of what it would cost to rebuild the premises injured according to the actual dimensions of the walls of the building as described in the survey. It did insure a building which corresponded to the description therein contained, but the insurance was against loss to the owner by reason of the destruction or injury of that building by fire, and if, in consequence of a state of the law existing at the time of the fire, the loss was increased above what it would have been by reason of regulations which required the rebuilding to be done in some other way, according to some different plan, for the protection of the community, it seems to us that there is nothing in good reason, or in law, why the insuring company would not be held liable for the actual loss thus incurred, up to the extent of the amount designated in the policy, provided the proportional amount of the loss falling upon the company reached that sum. Applying such a principle would not involve the insuring company in any loss greater in extent than that which it undertook to assume when the policy was made, and the method of arriving at the extent of the loss which we have adopted, appears to us a just, reasonable and lawful one. The decision in *Brown v. Royal Ins. Co. 1*

E. & E. 853 [102 E. C. L. 853] while not ruling the exact question involved in this case, yet may be regarded as in general harmony with the view already expressed, so far as the differing facts of the two cases would allow." But see *McCready v. Hartford F. Ins. Co.* 61 App. Div. 583, 70 N. Y. S. 778.

TITUS

v.

PENNSYLVANIA RAILROAD COMPANY.

New Jersey Court of Errors and Appeals—
January 27, 1915.

87 N. J. Law 157; 92 Atl. 944.

Fences — Division Fence — Prescriptive Duty to Maintain.

There was evidence to show that the defendant company, and its lessor before it, had maintained a certain fence along the whole line of its right of way past plaintiff's close from the very beginning, although it latterly protested that it was not liable to do so. These protests were inefficacious to discharge the company's liability, and the case was rightly submitted to the jury upon the question of defendant's liability through lack of maintaining a sufficient fence, there being no question of right or obligation on the part of plaintiff or defendant in reference to the fence in question under the provisions of the fence act.

Same.

When for a period of over 20 years the owner of one of two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of a division fence between them, a presumption arises that he or those under whom he derived title were, as owners of a servient tenement, bound to perpetually make and maintain the fence, the existence of a former and lost agreement to do so may be inferred.

[See note at end of this case.]

Negligence — Pleading Contributory Negligence — Necessity.

Defendant's answer not containing any statement of fact showing contributory negligence on the part of the plaintiff, and not pleading such a defense according to its legal effect, and such an issue not arising out of the complaint, the defense of contributory negligence was not put in issue; and, not being available on the trial, cannot be raised on appeal.

[See 15 Ann. Cas. 433; Ann. Cas. 1913B 845.]

Same.

Quaere: Where contributory negligence appears from the plaintiff's case upon the trial, being theretofore unknown to the de-

fendant, should not the rule of court, requiring contributory negligence to be pleaded, be relaxed, so that the defendant may have the advantage of that defense without having put it in issue?

(Syllabus by court.)

Appeal from Supreme Court.

Action by Frank R. Titus, plaintiff, against Pennsylvania Railroad Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AF- FIRMED.**

Theodore Strong for appellant.

H. Burdett Herr for respondent.

[158] WALKER, Ch.—This was an action in the Hunterdon Circuit Court for damages for the killing of two cows of the plaintiff by a locomotive engine of the defendant. The cows strayed upon the defendant's right of way by going through a defective fence between the plaintiff's close and the defendant's property, and the right to recover turned principally upon the question as to whose duty it was to maintain the fence—the plaintiff's or defendant's. This question was submitted to the jury as one of fact and the jury found a verdict for the plaintiff, and defendant appeals.

The right of way in question became the property of the defendant's lessor by condemnation of land of the plaintiff's [159] predecessor in title about sixty years ago, with no obligation imposed upon the defendant to build or maintain the fence through which the cows broke out of the plaintiff's close onto the defendant's right of way.

There was evidence to show that the defendant company, and its lessor before it, had maintained this fence along the whole line of its right of way past plaintiff's close from the very beginning, although it latterly protested that it was not liable to do so. These protests were inefficacious to discharge the company's liability, and the case was rightly submitted to the jury upon the question of defendant's liability through lack of maintaining a sufficient fence, there being no question of right or obligation on the part of plaintiff or defendant in reference to the fence in question under the provisions of the Fence act.

Motions to nonsuit and direct a verdict, based on the contention that there was no duty shown to exist on the part of the railroad company to maintain the fence, among other reasons, were properly denied. Among the reasons was that of contributory negligence, which will be treated of hereafter. The others entirely lacked substance.

On behalf of the defendant objection was made to that part of the trial judge's charge

which dealt with the common law as to the prescriptive obligation of the defendant to repair the fence and to the leaving it to the jury to decide whether, continuously and without interruption for over twenty years, the defendant maintained the fence, in which event the judge declared that the company would be liable. Upon this question the judge charged:

"That it is the law in this state that when for a period of over twenty years the owner of one of two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of the division fence, a presumption would arise that he or those under whom he derived the title were, as owners of a servient tenement, bound to perpetually make and maintain the fence. The existence of a former and lost agreement to do so may be inferred; and that, gentlemen, is the crucial question in [160] this case for you to decide; whether, notwithstanding the fact that the defendant was not obliged to maintain this fence under any statute or under its charter, it did, as a matter of fact, for a period of over twenty years, continuously, without interruption, and as a duty repair and maintain the whole of the fence along plaintiff's property. If you find from the evidence that it did, then the law would infer an agreement on the part of the company to perpetually make and maintain the fence, and if it failed to do so and by reason of such failure the plaintiff's cattle passed through the breaches in the fence upon the company's right of way and were killed or injured thereon by defendant's engine, then the defendant is liable in damages for the injury or destruction of such cattle."

The Supreme Court in *Castner v. Riegel*, 54 N. J. L. 498, 24 Atl. 484, said (at p. 500):

"That an obligation to maintain partition fences might arise by prescription which could be enforced by the writ *curia claudenda* at common law, does not admit of doubt. This right was said by Gale & Whatley to be a spurious kind of easement. Gale & W. Eas. 201, 202. The easement seems to be founded upon the duty which at common law required the owner of a close, at his peril, to keep his cattle thereon, and to prevent them from trespassing on an adjoining close, and when the owner of the latter erected a fence for his protection and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty and to have become bound to protect his own close by some grant or agreement, the evidence of which was lost by lapse of time. But in whatever way the right arose there can be no question that it did arise by prescription at common law."

And (at p. 503):

"When for a period of over twenty years the owner of one of two adjoining tracts had

continuously, without interruption and as of duty, repaired and maintained the whole of the division fence, in my judgment a presumption would arise that he or those under whom he derived title were, as [161] owners of a servient tenement, bound to perpetually make and maintain the fence. The existence of a former and lost agreement to do so may be inferred, and no other inference would be consistent with the circumstances."

It will be seen at a glance that the doctrine of *Castner v. Riegel* is dispositive of the concrete fact that the defendant company in the case at bar was liable by prescription to have imposed upon it the duty of maintaining the fence between its right of way and plaintiff's close, if, in fact, it had maintained the fence along the whole of the dividing line between their respective premises for the statutory period of twenty years or more, and, as already remarked, there was evidence justifying the finding of the jury that the railroad company had in fact so maintained the fence.

The defendant requested the court to charge that if the plaintiff were aware that the fence was not in a secure condition and nevertheless pastured his cattle in the field bounded by it, he was guilty of contributory negligence and could not recover. This the court declined to do, and defendant now urges this refusal as one of the grounds of appeal. The question thus raised is not, however, necessary to be considered, because it was not pleaded as a defence.

The Practice act (1912) in section 3 provides that the pleadings in all actions shall be according to rules of court. Rule 40 in Schedule A annexed to the act provides that the answer must specifically state any defence which is consistent with the truth of the material allegations of the complaint, and any defence which, if not stated, would raise issues not arising out of the complaint, for instance, contributory negligence. Rule 21 provides that acts may be stated according to their legal effect, but in so doing the pleading should fairly apprise the adverse party of the state of facts which it is intended to prove. These same rules are now rules 35 and 58, Supreme Court, 1913.

Now, in the answer filed by the defendant company there is no statement of fact showing contributory negligence on the part of the plaintiff, nor any pleading of such a defence according to its legal effect, nor does such an issue arise [162] out of the complaint in this case. Therefore, by the terms of the Practice act and rules of court under which this suit was instituted and tried, the defence of contributory negligence was not put in issue and could not be availed of by the defendant on the trial, and, upon familiar principles, it cannot be raised here.

It may well be observed in this connection that by rule 5 annexed to the Practice act, now rule 218 of the Supreme Court, it is provided that the rules may be relaxed or dispensed with by the court in any case where it shall be manifest that strict adherence to them will work surprise or injustice; and the query naturally arises whether, where contributory negligence appears from the plaintiff's case upon the trial, being theretofore unknown to the defendant, the rule of pleading ought not to be relaxed, so that the defendant may have the advantage of that defence without having put it in issue, as that was impossible. This question, however, is not pressing for solution, because the facts constituting contributory negligence, if there were such negligence in this case, were known to the defendant before the trial.

The other matters assigned for error and urged upon our attention we deem to be without merit. The judgment, therefore, will be affirmed, with costs.

For affirmance: The Chancellor, Chief Justice, Garrison, Swayze, Trenchard, Parker, Bergen, Minturn, Kaliach, Black, Bogert, Vredenburg, Heppenheimer, Williams, JJ. —14.

For reversal: None.

NOTE.

Prescriptive Obligation to Maintain Division Fence.

Generally.

Statutes in most jurisdictions now provide for the construction of partition or division fences by equal contribution of the owners of adjacent land and for the adjustment by a public officer of conflicting rights growing out of that construction. See 11 R. C. L. tit. *Fences* p. 883. A statute of that kind does not affect a prescriptive obligation of one of the owners to maintain such a fence. *Barber v. Whiteley*, 11 Jur. N. S. (Eng.) 822, 13 L. T. N. S. 319, 13 W. R. 774, 34 L. J. Q. B. 212; *Binney v. Hull Common, etc. Lands*, 5 Pick. (Mass.) 503; *Castner Riegel*, 54 N. J. L. 498, 24 Atl. 484. Thus in *Binney v. Hull Common, etc. Lands*, supra, it was said: "If he who is bound prescriptively to maintain a fence, builds it and brings his action under the statute, he will fail, because the statute was not made to relieve him from an obligation created perhaps with his title to the land, and proved by prescription." In *Glidden v. Towle*, 31 N. H. 169, the court said that prescriptive duty to maintain a fence must have originated before the enactment of the statute in order to prevent the fence viewers from having jurisdiction. See

also *Chase v. Jefts*, 58 N. H. 43. But in *Gibson v. Heyward*, 67 N. H. 265, 30 Atl. 407, the court indicated that this was changed by the Act of 1862 so that an obligation might exist by prescription, unimpaired by the statute.

Accordingly the common-law rule that the obligation to erect or repair a division fence may be created by prescription seems to be generally in force. *Nowel v. Smith*, Cro. Eliz. (Eng.) 709; *Star v. Rookesby*, 1 Salk. (Eng.) 335; *Boyle v. Tamlyn*, 6 B. & C. 329, 13 E. C. L. 191; *Barber v. Whiteley*, 11 Jur. N. S. (Eng.) 822, 13 L. T. N. S. 319, 13 W. R. 774, 34 L. J. Q. B. 212; *Lawrence v. Jenkins*, L. R. 8 Q. B. (Eng.) 274; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Harlow v. Stinson*, 60 Me. 347; *Binney v. Hull Common*, etc. Lands, 5 Pick. (Mass.) 503; *Rust v. Low*, 6 Mass. 90; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, affirming 118 Mass. 156; *Castner v. Riegel*, 54 N. J. L. 498, 24 Atl. 484; *Adams v. Van Alstyne*, 25 N. Y. 232. And see the reported case. See also *Heath v. Ricker*, 2 Greenl. (Me.) 72; *Little v. Lathrop*, 5 Greenl. (Me.) 360; *Thayer v. Arnold*, 45 Mass. 589; *Kennedy v. Owen*, 136 Mass. 199; *Canebox v. Crenshaw*, 24 Mo. 199, 69 Am. Dec. 427.

Thus in *Kennedy v. Owen*, 136 Mass. 199, the court said that it was the law of the commonwealth "that an obligation of an owner of land to fence against land adjoining might be established by prescription, and, if so established, would be a charge upon his land; and the corresponding right of the owner of the adjoining land to have the fence maintained was recognized as in the nature of an easement."

In *Lawrence v. Jenkins*, L. R. 8 Q. B. (Eng.) 274, it appeared that the plaintiff and the defendant occupied adjoining lands separated by a fence. Two cows of the plaintiff got through a gap in the fence and fed on the leaves of a yew tree from the effects of which they died. It was held that the defendant was liable in damages for the loss of the cows notwithstanding he had no knowledge of the injury done to the fence for the reason that by prescription the defendant was bound at his own risk to have a sufficient fence always existing. The court said: "By prescription, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described by Gale in his work on Easements as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence."

So in *Rust v. Low*, 6 Mass. 90, it was said: "Prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time; and it is reasonable that the

agreement produced should be as effectual as a presumption that it once existed, but is lost, arising from ancient usage. The country has now been settled long enough to allow of the time necessary to prove a prescription, and ancient assignments by fence-viewers made under the late provincial laws, and also ancient agreement made by the parties, may have once existed, and be now lost by the lapse of time."

In *Binney v. Hull Common*, etc. Lands, 5 Pick. (Mass.) 503, it was held that a prescriptive obligation of an owner of land to maintain a division fence was not destroyed by the owner's becoming a tenant in common of the adjoining land. The court said: "The rights to the two parcels of land are distinct, and the proprietors are distinct. If there would be a difficulty, the defendants being mere tenants in common with the plaintiff, that difficulty is cured by the incorporation of the defendants. They are now distinct parties. And even if they now were merely tenants in common, the difficulty would be on the plaintiff's side, from an incapacity to sue himself with others. The authorities cited go to show, that where there is a union of titles and possession, an easement does not exist; but that principle is inapplicable to the present case. Here the land and the titles are distinct, and the defendants may well prescribe for an easement in the plaintiff's land, or against his right to a contribution in building and repairing fences." See also *Gibson v. Heyward*, 67 N. H. 265, 30 Atl. 407. But in *Boyle v. Tamlyn*, 6 B. & C. 329, 13 E. C. L. 191, the court said that where a person became the owner of an entirety, afterwards parting with one of the two closes, a prescriptive obligation to maintain a division fence would not be revived unless expressly so done in a deed or conveyance.

In *Carpenter v. Cook*, 71 Vt. 110, 41 Atl. 1038, it appeared that a fence which the plaintiff had at times maintained between his doorway and a pent road was wholly on his own land. The defendant claimed that she was entitled by prescription to have the plaintiff maintain and keep up the fence and gate. The court holding that the defendant had no prescriptive right in regard to the fence and gate said: "Conceding that if the plaintiff had so kept and maintained this fence and gate for fifteen years continuously, the defendant would be entitled to the right by prescription to have it kept up and maintained thereafter, a question upon which we express no opinion, it does not appear that it was kept up and maintained except 'at occasional intervals,' 'occasionally,' and the referee finds the gate was open 'much of the time during the year,' and the report does not show that the fence was kept up for fifteen years prior to the fall of 1871."

As to Portion of Fence.

A prescriptive obligation on the part of the owners of adjoining land to maintain each a certain portion of a division fence may exist. *Heath v. Ricker*, 2 Greenl. (Me.) 72; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Harlow v. Stinson*, 60 Me. 347. See also *Sturtevant v. Merrill*, 33 Me. 62. Compare *Castner v. Riegel*, 54 N. J. L. 498, 24 Atl. 484; *Adams v. Van Alstyne*, 25 N. Y. 232. Thus in *Knox v. Tucker*, supra, it appeared that about thirty years before the action was brought one Forbes owned the plaintiff's lot, and one Roberts owned the adjoining lot, and at that time, while they were occupying and improving their lots, Forbes built a certain portion of the fence, and Roberts a certain other portion of it, and that the fence had ever since been recognized as the division fence. It was never a joint fence on any part of the line. It was, from the time it was first erected, a fence built by the respective owners, each building a distinct portion. The part of the fence built by Forbes was rebuilt by the occupant of his lot some years after. The court holding that they could safely presume some original grant or agreement between the parties by which a legal division of the fence was established said: "This occupation con-

tinued undisturbed and unquestioned for, at least, twenty-five years. When the plaintiff rebuilt his part in 1853, he made no claim on the owner of the adjacent lot to build it as a joint fence, although he built it for a line fence. He took no steps to call on fence-viewers. The tendency of modern decisions and statutes has been to diminish the length of time required to establish or limit rights by prescription or by statutes of limitation." But in *Castner v. Riegel*, 54 N. J. L. 498, 24 Atl. 484, the court said that the prescriptive right to have a division fence maintained ran only where it appeared that the person to be charged with the duty had maintained the entire fence and not a portion of it for the prescriptive period. See also *Adams v. Van Alstyne*, 25 N. Y. 232. In *Gibson v. Heyward*, 67 N. H. 265, 30 Atl. 407, it was held that under a statute the division of a partition fence between the owners of adjoining closes might be determined by usage and acquiescence. See also *Chase v. Jefts*, 58 N. H. 43. In *Webber v. Clowson*, 35 Me. 28, wherein it appeared that the owners of adjoining lands maintained a division fence jointly, it was held that neither of them was bound to maintain any separate and distinct portion of it as the result of a prescriptive obligation.

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